



MEMORANDUM

Date: September 21, 2016

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator *CHH*

Re: **Ballot Scanning and Disclosure Litigation; Superior Court Case No. C20163926**

Attached is Pima County's response regarding this matter filed with the Superior Court on August 29, 2016. A Motion to Dismiss Hearing has been set for October 14, 2016.

As you can see, it is our position that disclosure of ballot images violates the Arizona Constitution, and scanned ballot images are not records subject to disclosure under public records law. Further, neither the Arizona Legislature or the Arizona Secretary of State have provided any guidance regarding scanned ballot images and their use.

CHH/lab

Attachment

c: Chair and Members, Pima County Election Integrity Commission
Ellen Wheeler, Assistant County Administrator
Brad Nelson, Director, Elections

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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF PIMA**

13 **RICHARD HERNANDEZ,**

14 Plaintiff,

15 vs.

16 **PIMA COUNTY, a body politic and**
17 **corporate,**

18 Defendant.

No. C20163926

**PIMA COUNTY'S RESPONSE
TO PLAINTIFF'S APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND MOTION TO DISMISS**

Assigned to: Hon. Richard Gordon
(Civil - Election)

19
20 Defendant, Pima County, responds to Plaintiff's Application for Temporary
21 Restraining Order and moves to dismiss the Complaint, pursuant to Ariz. R. Civ. P.
22 12(b)(6), for the following reasons:

23
24 **I. Disclosure of ballot images would violate the Arizona Constitution,**
25 **Arizona criminal law, and public policy.**

26 ///

1 Public records may be withheld from a public records request where the best
2 interests of the government and the people justify nondisclosure.¹ Arizona has a
3 clearly expressed public interest in allowing voters the security of a secret ballot. In
4 fact, the first provision in the Arizona Constitution dealing with voting reads, “All
5 elections by the people shall be by ballot, or by such other method as may be
6 prescribed by law; Provided, that secrecy in voting shall be preserved.”² The
7 Arizona Legislature has even criminalized the showing of a voted ballot to any
8 person so as to reveal the contents.³ All voted ballots are securely retained
9 “unopened and unaltered” for a specific period of time after an election.⁴ Ballots
10 may only be brought out in public upon a court order in the specific context of a
11 mandatory recount or election contest under A.R.S. § 16-624(D). If a ballot image
12 copy were released to the public, it would accomplish the same thing as showing the
13 voted ballot as to reveal the contents and could potentially subject Pima County
14 employees to criminal liability. While it is true that a ballot does not directly identify
15 the voter, there are scenarios that can lead to identification of the voter and enable
16 election fraud and intimidation. A voter could intentionally mark a ballot in such a
17 way as to identify themselves to facilitate vote buying. A voter could also be coerced
18 into marking a ballot in such a way as to identify themselves. This would defeat the
19 clear public policy of a secure secret ballot.

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21 ///

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23 ¹ *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9 (1998).

24 ² Ariz. Const. art. VII, § 1 (emphasis added). *See also Miller v. Picacho Elementary*
25 *Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994).

26 ³ A.R.S. § 16-1018(4).

⁴ A.R.S. § 16-624(A).

1 During the colonial period, many government officials were elected by
2 the *viva voce* method or by the showing of hands, as was the custom in
3 most parts of Europe. That voting scheme was not a private affair, but
4 an open, public decision, witnessed by all and improperly influenced by
5 some. The opportunities that the *viva voce* system gave for bribery and
6 intimidation gradually led to its repeal. See generally E. Evans, *A*
7 *History of the Australian Ballot System in the United States* 1–6 (1917)
(Evans); J. Harris, *Election Administration in the United States* 15–16
(1934) (Harris); J. Rusk, *The Effect of the Australian Ballot Reform on*
Split Ticket Voting: 1876–1908, pp. 8–11 (1968) (Rusk).

8 Within 20 years of the formation of the Union, most States had
9 incorporated the paper ballot into their electoral system. Initially, this
10 paper ballot was a vast improvement. Individual voters made their own
11 handwritten ballots, marked them in the privacy of their homes, and
12 then brought them to the polls for counting. But the effort of making
13 out such a ballot became increasingly more complex and cumbersome.
14 See generally S. Albright, *The American Ballot* 14–19 (1942)
15 (Albright); Evans 5; Rusk 9–14.

16 Wishing to gain influence, political parties began to produce their own
17 ballots for voters. These ballots were often printed with flamboyant
18 colors, distinctive designs, and emblems so that they could be
19 recognized at a distance. State attempts to standardize the ballots were
20 easily thwarted—the vote buyer could simply place a ballot in the hands
21 of the bribed voter and watch until he placed it in the polling box. Thus,
22 the evils associated with the earlier *viva voce* system reinfected the
23 election process; the failure of the law to secure secrecy opened the door
24 to bribery and intimidation. See generally Albright 19–20; Evans 7, 11;
25 Harris 17, 151–152; V. Key, *Politics, Parties, and Pressure Groups* 649
26 (1952); J. Reynolds, *Testing Democracy: Electoral Behavior and*
Progressive Reform in New Jersey, 1880–1920, p. 36 (1988); Rusk 14–
23.

Approaching the polling place under this system was akin to entering an
open auction place. As the elector started his journey to the polls, he
was met by various party ticket peddlers “who were only too anxious to
supply him with their party tickets.” Evans 9. Often the competition
became heated when several such peddlers found an uncommitted or
wavering voter. See L. Fredman, *The Australian Ballot: The Story of an*

1 American Reform 24 (1968) (Fredman); Rusk 17. Sham battles were
2 frequently engaged in to keep away elderly and timid voters of the
3 opposition. See Fredman 24, 26–27; 143 North American Review 628–
4 629 (1886) (cited in Evans 16). In short, these early elections “were not
5 a very pleasant spectacle for those who believed in democratic
6 government.” *Id.*, at 10.

6 *Burson v. Freeman*, 504 U.S. 191, 200–02 (1992).

7
8 The secret ballot is thus a fundamental protection of modern democracy. “In
9 sum, an examination of the history of election regulation in this country reveals a
10 persistent battle against two evils: voter intimidation and election fraud. After an
11 unsuccessful experiment with an unofficial ballot system, all 50 States, together with
12 numerous other Western democracies, settled on the same solution: a secret ballot
13 secured in part by a restricted zone around the voting compartments.” *Id.* at 206.

14
15 **II. Ballot images do not qualify as records subject to retention and do not**
16 **serve a legal purpose.**

17 Mr. Hernandez asserts that ballot images are records under A.R.S. § 41-151 *et*
18 *seq.* However, this is simply not so. The ballot image is merely the equivalent of a
19 photocopy of the actual record, the voted ballot. Ballot images do not currently serve
20 any legal purpose, nor is their creation expressly authorized under Arizona election
21 law. Pima County has only limited authority in its conduct of elections. Generally,
22 “[t]he only powers possessed by boards of supervisors are those expressly conferred
23 by statute or necessarily implied therefrom.”⁵ While there is no express authority to
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26 ⁵ *Bd. of Supervisors of Apache County v. Udall*, 38 Ariz. 497, 506 (1931); *Hounshell v. White*, 220 Ariz. 1, 5, ¶ 19 (App. 2008).

1 create ballot images, it can be argued that the authority to create them is necessarily
2 implied, as the Arizona Secretary of State has approved the use of the ballot scanner
3 under A.R.S. § 16-442. However, the ballot scanner is set to delete the images once
4 the voting data is uploaded to the mainframe. As it is not “necessary” to retain the
5 ballot images for the process authorized by the Arizona Secretary of State, arguably,
6 Pima County lacks the legal authority to do so.

7
8 Further, A.R.S. § 41-151.18 defines a “record” as something “...made or
9 received by any governmental agency in pursuance of law...” “Extra copies” of
10 documents are expressly excluded from the definition of “record.” *Id.* The ballot
11 images are merely an extra copy of the voted ballot and, therefore, need not be
12 retained or disclosed as they do not qualify as records under Title 41. Similarly, they
13 would not qualify as records under 52 U.S.C. § 20701. Even, if they did, only the
14 U.S. Attorney General has authority to invoke the federal statute, not Plaintiff. 52
15 U.S.C. § 20703.

16
17 **III. The Arizona Legislature has already provided election integrity and**
18 **verification mechanisms. There is no legal justification to retain ballot**
19 **images.**

20 Arizona law is replete with provisions that the Arizona Legislature has
21 deemed appropriate to safeguard the integrity of elections. These include numerous
22 criminal statutes,⁶ automatic recounts,⁷ election contests,⁸ oversight by the Arizona
23

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25 ⁶ *E.g.* A.R.S. § 16-1001 *et seq.*

26 ⁷ A.R.S. § 16-661 *et seq.*

⁸ A.R.S. § 16-671 *et seq.*

1 Secretary of State,⁹ oversight by candidates and political parties,¹⁰ and hand count
2 audits in conjunction with a vote count verification committee.¹¹ The statutory
3 provisions are the only authorized means for election oversight,¹² and there is a legal
4 presumption that public officials carry out their election duties in good faith.¹³ In the
5 past, the Arizona Legislature has contemplated scanning ballots to be part of an
6 election verification effort,¹⁴ but it has not yet chosen to include it. Ballot images
7 are, therefore, not currently involved in any election integrity statutory provision and,
8 accordingly, there is no legal reason why they should be retained.

9
10 Plaintiff cannot meet the standard under Ariz. R. Civ. P. 65(d) for a temporary
11 restraining order. There is no immediate or irreparable injury, loss, or damage to
12 Plaintiff. All paper ballots will be retained according to Arizona law and all election
13 integrity verification mechanisms will be available. Plaintiff also cannot meet the
14 standard for a preliminary injunction. Plaintiff must show a strong likelihood of
15 success on the merits, the possibility of irreparable injury to himself, a balance of
16 hardships in his favor, and public policy in favor of the injunction.¹⁵ Plaintiff has no
17 legally cognizable injury, no hardship as all statutorily provided election integrity
18 verification mechanisms will be in place, and public policy clearly favors a secret
19 ballot.

20
21 ⁹ *E.g.* A.R.S. § 16-445.

22 ¹⁰ *E.g.* A.R.S. § 16-621.

23 ¹¹ A.R.S. § 16-602.

24 ¹² *Barrera v. Superior Court*, 117 Ariz. 528 (App. 1977).

25 ¹³ *Hunt v. Campbell*, 19 Ariz. 254 (1917).

26 ¹⁴ 2011 Ariz. Sess. Laws, ch. 332, § 28. The section was repealed as of March 19, 2015.

¹⁵ *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 64, ¶ 9 (App. 2011).

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IV. C20072073 is not at issue or relevant.

Mr. Hernandez was not a party to C20072073 and does not have standing to enforce any provisions of Judge Miller's order. At most that decision could be persuasive authority to cite to the Court, but certainly not binding in this proceeding. Regardless, Judge Miller's order, dated May 23, 2008, does not require the disclosure of ballot images. Such capability did not even exist in 2008 and was not contemplated by the Court. Judge Miller ordered the release of "election database files." These are the files on the mainframe computer that include the vote totals among other data. Election database files do not include data tied to a specific ballot and disclosure of election database files does not run afoul of either the constitutional or statutory provisions referenced above.

WHEREFORE, Pima County requests that the Court:

1. Deny Plaintiff's request for a temporary restraining order and preliminary injunction;
2. Dismiss the Complaint pursuant to Ariz. R. Civ. P. 12(b)(6);
3. Grant Pima County its attorney fees and costs pursuant to A.R.S. § 12-349(A)(1).
4. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED August 29, 2016.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

By: /s/ Daniel Jurkowitz
Daniel Jurkowitz
Deputy County Attorney

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The foregoing was e-filed with the
Clerk of the Superior Court of Pima
County on August 29, 2016

Copies were mailed/e-served
August 29, 2016, to:

Honorable Richard Gordon
Arizona Superior Court in Pima County
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