

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JAMES E MARNER
JUDGE

CASE NO. C20126655

DATE: November 5, 2012

BILL BEARD, ET AL.
Plaintiff(s)

VS.

ANN DAY, ET AL.
Defendant(s)

RULING

IN CHAMBERS UNDER ADVISEMENT RULING RE PLAINTIFFS' REQUEST FOR SPECIAL ACTION, MANDAMUS AND INJUNCTIVE RELIEF

This Court has been asked to consider Plaintiffs' Request for Special Action, Mandamus and Injunctive Relief. The Court received a copy of the Request (which was dated October 25, 2012) on October 26, 2012. The Court subsequently received a copy of the "Memorandum and Support of Special Action" (dated October 26, 2012), on Monday October 29, 2012. Finally, late in the afternoon of October 31, 2012/early morning November 1, 2012 the Court received from the Plaintiffs a pleading labeled "Order to Show Case [sic]". Also on October 31, 2012 the Court received an Objection to Hearing/Motion to Dismiss from Defendants. No reply brief was received by this Court and, as revealed during the November 1, 2012 hearing, none was filed.

Several matters have been raised by the parties in their pleadings and at the November 1, 2012 hearing. In the hope of providing clarity, the Court will, when possible, [individually] address the distinct issues.

A. Defendants' Objection to November 1, 2012 Hearing

In both their pleading and at the November 1, 2012 hearing, Defendants objected to the hearing going forward on the basis that Rule 4(c) of the Rules of Procedure for Special Actions provides that an accelerated pleading schedule will not be followed by the Court when the request for relief is not accompanied with an Order to Cause. Here, while no such Order was filed with the initial pleading, Plaintiffs did remedy this by filing an Order to Show Cause earlier this week. Given the relatively short time period between initial filing and the remedial action taken by Plaintiffs, as well as the rapidly approaching election date, the Court finds that an accelerated hearing schedule should be implemented and overrules Defendants' objection to the November 1, 2012 hearing.

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B. Lack of Jurisdiction

Defendants argue that this Court lacks jurisdiction to hear this case. Among other things, Defendants indicate in a Ruling dated May 4, 2012 by the Hon. Kyle Bryson, Judge Bryson ruled that he, as a Pima County Superior Court judge, lacked jurisdiction to hear a challenge by the Pima County Libertarian party where the Party was challenging the process by which the ballots were scanned. However, a review of Judge Bryson's May 4, 2012 order by this Court reveals a different conclusion, i.e. Judge Bryson ultimately ruled that he did not have the jurisdiction to grant the relief that the Plaintiffs sought in that case. Judge Bryson's order does not find that he lacked jurisdiction to hear the challenge and, as evidenced by his detailed analysis of the arguments before him, he obviously accepted jurisdiction to hear the contest. However, as indicated below, the nature of the requested relief by the Plaintiff does raise a question of where this Court's jurisdiction ends.

C. Request for Mandamus

As noted by the *Arizona Supreme Court and Board of Education v. Scottsdale Education Association*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973):

"Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty. *Martin v. Whiting*, 65 Ariz. 391, 181 P.2d 819 (1947). It proceeds upon the assumption that the applicant has an immediate and complete legal right to the performance of an act which the law specifically enjoins as a duty arising out of an office. It does not lie if the public officer is not specifically required by law to perform the act. *Graham v. Moore*, 56 Ariz. 106, 109, 105 P.2d 962, 964 (1940).

The Arizona Supreme Court also noted in *Sines v. Holden*, 89 Ariz. 207, 209, 360 P.2d 218 220 (1961) that "[m]andamus is an extraordinary remedy based upon the premises that the petitioner has a clear right to the relief sought, that the respondent had a legal duty to do the thing which the petitioner seeks to compel and that there is an absence of another adequate remedy."

If this Court is to grant a writ of mandamus, any authority to do so must necessarily be based in the plain language of the applicable statute which, in this case, is A.R.S. § 16-602. Plaintiffs have not identified any requirement, provision, directive or clause in the statute that could be reasonably interpreted as **specifically** imposing a duty upon Defendants or their agents to take actions 1 through 3 requested on Page 6 of Plaintiffs' pleading. Mandamus relief simply is not available. Accordingly,

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Plaintiffs' request for mandamus relief is **DENIED**.¹

D. Equitable Injunctive Relief

Plaintiffs' request for relief is admittedly one based in equity. Because an action in mandamus is tried under equitable principles, (*Sines v. Holden, supra* at 210), this request for relief is, as noted above, unavailable. However, based on this Court's review of Plaintiffs' pleadings, Plaintiffs also are asking for a much broader equitable relief, i.e. not limited to a mandamus theory. In response, Defendants point out, correctly, that what Plaintiffs have put forth as a general equitable request is, in the end, a request that this Court substitute its' will for the deliberative process of the popularly elected Arizona legislature and the ratification decision of the popularly elected Chief Executive Officer, i.e. Governor of the State of Arizona. Ultimately, Plaintiffs' request that this Court, under the guise of equity, disregard the plain language of A.R.S. § 16-602 and impose an otherwise nonexistent duty on the Defendants. The Court concludes that granting this request **would** result in the exact type of injustice that Plaintiffs indicate **could** or **might** occur under the current law, i.e. a disenfranchisement of the will of the voters.

The Arizona Supreme Court has cautioned against using equitable remedies, be it mandamus or otherwise, as an alternative to statutory authorization for a court intervening in an election process. See *Time v. Brewer*, 219 Ariz. 207, 213-14, 196 P.3d 229, 235-36 (2008); *Katan v. City of Prescott*, 223 Ariz. 179, 182, 221 P.3d 370 (App. 2009) footnote 4. While the argument and evidence presented by both parties at the November 1, 2012 hearing was educational, it was presented to the wrong audience. What Plaintiffs are asking this Court to do is to make election law. This is not a question of judicial interpretation of existing law. On the contrary, Plaintiffs are asking this Court to create legal requirements that otherwise do not exist. These are decisions that must be scrutinized, challenged and ultimately decided by the legislative body that is subject to the will of the electorate. These are decisions that cannot and should not be made by this Court. Accordingly,

IT IS ORDERED that Plaintiffs' request that this Court issue an injunction mandating that Defendants separate the vote-by-mail ballots by precinct is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' request that this Court issue an injunction mandating Pima County to conduct sufficiently random selected hand counts of the vote-by-mail ballots in county races is

¹ In addition to a failure by Plaintiffs to satisfy the required showing of a statute specifically imposing a duty, this Court also finds that Plaintiffs have failed to make showing that no other adequate remedy was or is available. As noted by this Court at the beginning

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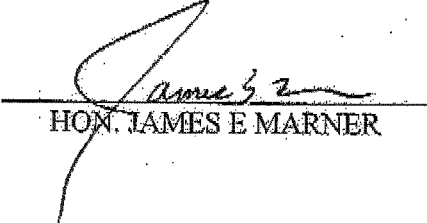
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DENIED.

IT IS FURTHER ORDERED that Plaintiffs' request for an injunction ordering Defendants to instruct poll workers to comply with the statutory requirements of A.R.S. § 16-615 is **DENIED**. This is essentially a request by Plaintiffs that this Court issue an order that Defendants "obey the law". As noted by the Court in *West Valley View Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 228, 165 P.3d 203, 206 (App. 2007), courts should generally be hesitant to order a defendant to obey the law in the future. See also *National Labor Relations Board v. Express Publishing Co.*, 312 US 426, 435-36, 61 S.Ct. 693, 85 L.Ed. 930 (1941). Defendant Pima County has indicated in its' pleadings that it intends to comply with the A.R.S. § 16-602 and this Court has no evidence before it to assume otherwise.

IT IS FURTHER ORDERED that Plaintiffs' request for costs and attorney's fees is **DENIED**.



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cc: Bradley K. Roach, Esq.
Daniel S. Jurkowitz, Esq.

of the November 1, 2012 hearing, the issues brought by Plaintiffs have obviously been existence for some time and Plaintiffs have not been prevented from attempting to promote legislation to address their concerns or even pursuc a remedy by way of public initiative.

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