

ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY,

Plaintiff/Appellant,

v.

**STEVEN RICHER, as Maricopa
County Recorder; and the
MARICOPA COUNTY BOARD OF
SUPERVISORS, by and through,
CLINT HICKMAN, JACK SELLERS,
THOMAS GALVIN, BILL GATES,
STEVE GALLARDO,**

Defendants/Appellees.

**ADRIAN FONTES, in his official
capacity as Arizona Secretary of
State; ARIZONA DEMOCRATIC
PARTY,**

Intervenors/Appellees.

**Arizona Supreme Court
No. CV-23-0208-PR**

**Court of Appeals
Division One
No. 1 CA-CV 21-0201**

**Maricopa County
Superior Court
No. CV2020-014553**

APPELLANTS' PETITION FOR REVIEW

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Appellants Arizona Republican Party, John Wilenchik, and Lee Miller, through undersigned counsel, file this Petition for Review pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure.

I. INTRODUCTION

This case concerns the rights of persons to petition courts for a redress of their grievances in the political context. The Court of Appeals held that bringing a case for “political reasons” constitutes “bad faith” under [A.R.S. § 12-349](#), justifying a sanction of attorney’s fees. Under this opinion, whenever a person brings a case in a politically charged context, it risks sanctions because the public interest in the case grants the person political reasons, as happened here. This rule severely curtails the right to petition courts in the political context by discouraging litigation of political cases, lest the litigant be sanctioned for acting in “bad faith.” This rule is error because it is not given in the statute: [A.R.S. § 12-349](#) requires that (1) the suit be groundless and (2) in bad faith. The Court should clarify that political reasons do not in themselves constitute bad faith.

The Court of Appeals also held that it is “groundless” to challenge post-election procedures after an election, requiring they be brought before an election. But none of the cases cited by the Court of Appeals so hold. Instead, this rule was the Court of Appeals’ own extension of the caselaw requiring challenges to pre-elections procedures and actual elections be brought prior to the elections. This suit was not groundless when brought.

The case underlying this appeal challenged a clear statutory violation of a regulation issued by the Secretary of State. The Arizona Republican Party requests

this Court to reverse the sanctions imposed on it and its counsel under [A.R.S. § 12-349](#).

II. STATEMENT OF ISSUES

1. Whether “political reasons” constitute “bad faith” under [A.R.S. § 12-349](#) justifying a sanction of attorney’s fees. *See infra* Part V.A.1.
2. Whether a rule that “political reasons” constitute “bad faith” violates the First Amendment to the Federal Constitution. *See infra* Part V.A.2.
3. Whether a post-election challenge to post-election procedures is “groundless” because it was not brought prior to the elections. *See infra* Part V.B.1.
4. Whether a provision in the Secretary of State’s elections manual that conflicts with a statute is void. *See infra* Part V.B.2.
5. Whether the Court of Appeals’ opinion should be depublished. *See infra* Part V.C.

III. JURISDICTION

This Court has jurisdiction pursuant to [Ariz. Const. art. 6 § 5\(3\)](#) and [A.R.S. § 12-102\(A\)](#).

IV. MATERIAL FACTS AND PROCEDURAL HISTORY

The Arizona Republican Party (“ARP”) brought the underlying lawsuit on November 12, 2020, shortly after the November 3 general election. Opinion of the Court ¶¶ 8–9 (July 11, 2023) (the “Opinion”). The complaint sought to compel the Maricopa County Recorder and Board to conduct the post-election audit in compliance with A.R.S. § 16-602 and requested the court declare that a contrary

procedure established by the Secretary of State violated the statute. *See* Opinion ¶ 9.

Arizona law requires elections officials to verify the accuracy of electronic vote counts by conducting a hand count of samples of votes. *See* [A.R.S. § 16-602\(B\)](#). Historically, Arizona has conducted elections by organizing counties into “precincts.” *See* Opinion ¶ 4. Each county’s board of supervisors would establish “a convenient number” of precincts and then designate one polling place in each precinct for the voters who reside in that precinct. *Id.*; [A.R.S. § 16-411\(A\), \(B\)](#).

Consistent with that historic practice, Arizona law requires that the counties conduct the post-election hand count by sampling precincts: “The hand count shall be conducted in the following order: At least two percent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county.” [A.R.S. § 16-602\(B\)\(1\)](#).

In 2011, the legislature amended [A.R.S. § 16-411](#) to authorize the use of “voting centers” in place of or in addition to polling places. Opinion ¶ 5. “Voting centers” permit voters from anywhere in the county to vote at the center. [A.R.S. § 16-411\(B\)\(4\)](#). The legislature also amended [A.R.S. § 16-602\(B\)](#) to require the hand count “be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual [‘EPM’] adopted pursuant to [§ 16-452](#).” Opinion ¶ 5. The legislature, however, did not amend the requirement of [A.R.S. § 16-602\(B\)\(1\)](#) that the sampling be done by precincts. *Id.* Thus, the text of the statute, legislative history, and legislative intent all unequivocally reveal that whatever regulations the

SOS were to adopt in the EPM, the sampling for the hand count was to be by precinct.

Clearly, if an EPM provision conflicts with a statute, that provision is unenforceable. Opinion ¶ 7; [Leach v. Hobbs, 250 Ariz. 572, 576 ¶ 21 \(2021\)](#).

In 2012, the SOS adopted an EPM that permitted counties using vote centers to treat them precincts for purposes of the post-election audit. Opinion ¶ 6. This provision also existed in the 2014 version, and in the 2019 version of the EPM operative in this case. Because those EPM provisions conflict with the requirement of [A.R.S. § 16-602\(B\)\(1\)](#) that counties use precincts for the audit, they violate the statute and are unenforceable.

ARP sued on November 12, 2020, to have the EPM provision declared unenforceable and to require the Maricopa County Recorder and Board follow § 16-602(B)(1) in conducting the audit. At the time of the filing, ARP believed that the audit had not yet taken place. Decl. of John D. Wilenchik, Esq. in Support of Pl.’s Response to Motion for Sanctions ¶¶ 4–6 (Dec. 28, 2020), Appendix at p. 22.

The SOS and the Arizona Democratic Party intervened. Opinion ¶ 10.

The superior court did not address the merits of ARP’s suit. Instead, it dismissed the declaratory judgment count on the equitable affirmative defense of laches, because ARP had delayed in pursuing its claim. Opinion ¶ 19. It also invited the SOS to submit a motion for sanctions under [A.R.S. § 12-349](#). Opinion ¶ 17.

The superior court then granted the motion, and the Court of Appeals affirmed, on largely the same grounds. [A.R.S. § 12-349](#) requires that a court both find that (1) the claim is groundless and (2) brought in bad faith. *Id.* ¶ 32.

The Court of Appeals held that the suit was “groundless” because it was brought too late, in particular, that it was brought after the SOS regulation had existed for a period of around 10 years and after the elections took place in 2020. *Id.* ¶¶ 37–41. The court also stated that a writ of mandamus could not issue to the Maricopa County officials because they were required to follow the 2019 EPM. *Id.* ¶ 42.

The Court of Appeals then held that the suit was brought in bad faith because it was brought for “political reasons,” and “political reasons” constitute an “improper purpose.” *Id.* ¶ 46. The court repeated its earlier conclusion that the lawsuit was groundless. *Id.* ¶¶ 57–58. But groundlessness is already an element of the § 12-349 analysis. The court’s only novel analysis of the separate element of bad faith is its observation that “public mistrust” had motivated the lawsuit, and that ARP was concerned about voter fraud and protecting the integrity of the elections. *Id.* ¶¶ 50–51. The court concluded, quite extraordinarily, that ARP’s effort to protect the integrity of the elections constituted an “improper purpose” that conclusively established “bad faith” and justified an award of sanctions under [A.R.S. § 12-349](#). *See* Opinion. ¶¶ 45–59.

In this Petition, ARP challenges the Court of Appeals’ restrictive view of the people’s right to participate in the political process and the important role of the judiciary in the political process.

V. REASONS TO GRANT PETITION

The Court must grant review to protect the right to petition Arizona courts in political cases.

A. “Political reasons” do not constitute “bad faith” under A.R.S. § 12-349.

1. A.R.S. § 12-349(A)(1) is intended to discourage attorneys from filing lawsuits without “substantial justification,” not to bar political ones.

“Section 12-349 was enacted with the express purpose of reducing groundless lawsuits.” [Phoenix Newspapers, Inc. v. Dept. of Corrections, 188 Ariz. 237, 244 \(Ct. App. 1997\)](#). Subsection (A)(1), the provision at issue in this case, has two elements: that the lawsuit be groundless and that it not be made in good faith. [A.R.S. § 12-349\(A\)\(1\), \(F\)](#). The former element is objective, the latter subjective. [Goldman v. Sahl, 248 Ariz. 512, 531 \(Ct. App. 2020\)](#). In other words, Subsection (A)(1) provides for sanctions where a person brings a frivolous lawsuit knowing that the lawsuit is frivolous with the intent to abuse the judicial process. The caselaw supports this conclusion. *See, e.g., Greenbank v. Vanzant, 250 Ariz. 644 (Ct. App. 2021); Phoenix Newspapers, 188 Ariz. 237; Goldman, 248 Ariz. 512; Nienstedt v. Wetzel, 133 Ariz. 348 (Ct. App. 1982); Crackel v. Allstate Ins. Co., 208 Ariz. 252 (Ct. App. 2004); City of Sedona v. Devol, 196 Ariz. 178 (Ct. App. 1999)*. It also typically evinces an intentional attempt to harm the other side, such as by causing “excessive litigation expenses,” *e.g., Nienstedt v. Wetzel, 133 Ariz. 348, 354 (Ct. App. 1982)*, or increasing costs to coerce settlement, *e.g., Crackel, 208 Ariz. at 260*.

Regardless of the precise contours of “bad faith,” there can be no doubt that

“political reasons” do not constitute bad faith. Arizona courts have a long history of hearing political cases. *E.g.*, [Adams v. Bolin](#), 77 Ariz. 316 (1954); [Smith v. Ariz. Citizens Clean Elec. Comm’n](#), 212 Ariz. 407 (2006); [Arizona School Boards Assc’n, Inc. v. State](#), 252 Ariz. 219 (2022); [Kitt v. Holbert](#), 30 Ariz. 397 (1926); [Sherman v. City of Tempe](#), 202 Ariz. 339 (2002). These cases are brought for “political reasons,” just as a tort victim may bring a case to obtain money for health reasons, a shareholder brings a derivative suit for business reasons, a church may sue for religious reasons, etc. A person involved in politics brings a suit for political reasons.

By “political reasons,” the Court of Appeals meant motivated by political reasons, in this case, the public mistrust concerning the conduct of the elections. *See* Opinion ¶ 46 (“The court also concluded that ARP’s suit was motivated by ‘political reasons’ based on ‘[p]ublic mistrust,’ which is an improper purpose.”). The Court of Appeals did not hold that ARP intended to cause harm to the defendants or intervenors. Nor could it have. The record and the opinion are devoid of a single fact to support that conclusion. *See* Opinion ¶¶ 1–60.

Instead, the Court of Appeals held that ARP was motivated by the public mistrust regarding the elections and wanted to ensure they were conducted properly. Opinion ¶¶ 46, 50–51, 55. This is a laudable reason, not an improper one. Ensuring proper election procedures are followed puts to rest public concerns. The court also suggested that ARP had personal reasons for filing the lawsuit. *Id.* ¶ 44. But personal reasons—a unique injury in fact one seeks to redress—are a standing requirement to even bring suit. They do not mean the suit was brought in bad faith.

To the extent the Court of Appeals suggests a political reason is not a legal one, it conflates the two elements of [§ 12-349](#). ARP had a legal basis for its suit. A political reason may not be a legal one, but it is also not “bad faith.”

2. To say “political reasons” constitute “bad faith” would violate the First Amendment.

“The general proposition that freedom of expression upon public question is secured by the First Amendment has long been settled by our decisions.” [New York Times Co. v. Sullivan, 376 U.S. 254, 269 \(1974\)](#). “Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” [Whitney v. California, 274 U.S. 357, 375 \(1927\) \(Brandeis, J., concurring\)](#). “[P]olitical belief and association constitute the core of those activities protected by the First Amendment.” [Elrod v. Burns, 427 U.S. 347, 356 \(1976\)](#) (plurality opinion).

The First Amendment extends most particularly to debates on controversial matters. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” [West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 642 \(1943\)](#). “Compulsory unification of opinion achieves only the unanimity of the graveyard.” [Id. at 641](#).

The First Amendment’s Petition Clause—“among the most precious of the liberties safeguarded by the Bill of Rights,” [Mine Workers v. Illinois Bar Assn., 389](#)

[U.S. 217, 222 \(1967\)](#)—protects “the right of access to courts for redress of wrongs.” [Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–96 \(1984\)](#); *see also* [BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 525 \(2002\)](#).

The threat of sanctions sharply infringes on these rights: “[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . First Amendment freedoms need breathing space to survive” [NAACP v. Button, 371 U.S. 415, 433 \(1963\)](#). “[G]overnment may regulate in the area only with narrow specificity.” *Id.*

Here, ARP used its right to petition courts for a redress of grievances in a political context; this is the very core of First Amendment exercise. The Court of Appeals shockingly concluded this was an “improper purpose” that constituted “bad faith.” Far from regulating “with narrow specificity,” the Court of Appeals concluded that bringing a case motivated by political concerns—this core of First Amendment exercise—constitutes an “improper purpose,” period.

There is no question ARP’s suit was brought in a charged, controversial, political setting. Emotions ran high in the elections. But it is precisely in controversial settings that the First Amendment finds its greatest application. It is trite to protect expression of an idea on which everybody agrees. Parties need a guarantee they will not be accused of acting for an “improper purpose” or in “bad faith” merely for advancing a controversial political position. And lawyers who engage in controversial debates on behalf of their clients need to know that judges—third party neutrals who represent the government—will not sanction them for it.

Indeed, lawyers have a “responsibility” to “accept[] a fair share of unpopular matters or indigent or unpopular clients.” [ABA Model Rule of Professional Conduct 6.2 cmt. 1](#); *see also* [ER 6.2](#) (similar). Such guarantee already exists in the First Amendment. ARP requests the Court to reaffirm this principle.

Again conflating the two elements of § 12-349, the Court of Appeals noted (at ¶¶ 57–58) that the First Amendment does not immunize groundless lawsuits. But ARP never argued otherwise. ARP’s position is that the First Amendment protects “political reasons” from constituting an “improper purpose” and “bad faith.”

B. ARP’s lawsuit was not “groundless.”

1. A challenge to post-election procedures is not groundless for not having preceded the elections.

As explained in Part IV, *supra*, the Court of Appeals primarily relied on three reasons to hold that ARP’s suit was “groundless” as a legal matter: the EPM provision had existed for around 10 years, ARP brought suit after the elections, and a writ of mandamus could not issue to the Maricopa County officials because they were required to follow the EPM. “Groundless” means that no rational argument can support the claim. [Evergreen West, Inc. v. Boyd](#), 167 Ariz. 614, 621 (Ct. App. 1991).

The EPM provision permitting counties to treat “voting centers” as “precincts” violates [A.R.S. § 16-602](#), as revealed by the plain text of the statute and the legislative history and legislative intent behind it. The Court of Appeals cited no authority that a regulation that violates a statute is immunized from suit merely

because it has been on the books for a meager 10 years, or that a person with an interest in challenging it is precluded from doing so because it did not sue when the regulation was adopted; nor is Counsel aware of any such rule. To the extent a delay speaks to laches, the affirmative defense is an equitable one subject to a court's discretion; it does not make a lawsuit "groundless" *ab initio*.

Instead, the Court of Appeals' primary legal basis for its temporal ruling on groundlessness was its holding that a challenge to a post-election procedure must precede the elections. Yet all the cases the Court of Appeals cited pertain to contests to pre-election procedures, not post-election procedures. *See* Opinion ¶¶ 38–39. It was the Court of Appeals that extended this rule to post-election procedures. ARP's lawsuit was not groundless under existing law when filed.

Further, the Court of Appeals' assertion that the audit precedes the election because parties select their representatives to the audit prior to the elections does not withstand scrutiny. *See* Opinion ¶ 39. ARP is not challenging its ability to select representatives to attend the audit; it is challenging the substantive audit itself, as reflected in the EPM.¹

¹ The Court of Appeals also mistakenly relies on [Findley v. Sorenson, 35 Ariz. 265 \(1929\)](#). Opinion ¶ 41. That case stands for the proposition that small, typically executive, errors in elections do not void the elections unless they make the result uncertain: "[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain." *Findley*, 35 Ariz. at 269. But ARP was not challenging the outcome of the election in this case; rather, it sought to have the post-election audit conducted correctly. And *Findley* certainly does not stand for the proposition that the Court cannot issue

While the above suffices for this Court to reverse the temporal groundlessness determination below, ARP requests the Court grant review on whether a challenge to a post-election procedure must necessarily be brought prior to the elections, as the Court of Appeals held. This is an issue of statewide importance, and the published Court of Appeals opinion below that so held for the first time in the State could be in error. None of the cases the Court of Appeals cited contain analysis that justify its conclusion. Further, the court’s rule raises serious standing concerns: A person’s injury from post-election procedures prior to the elections is remote. This is so even if the procedure is on the books; its implementation is not immediate. With the court’s rule, a person could be left with no remedy at all. See [Bennett v. Brownlow, 211 Ariz. 193, 196 \(2005\)](#) (explaining that “remote” claims do “not allege harm of the nature required to achieve standing”).

2. An EPM provision that conflicts with a statute is void.

The Court of Appeals held that mandamus could not issue to the Maricopa County officials because they were required to follow the EPM notwithstanding any conflict with statute. Opinion ¶ 42. But this Court has already twice held that an EPM provision that conflicts with statute is void. [Leach v. Hobbs, 250 Ariz. 572, 576 ¶ 21 \(2021\)](#); [McKenna v. Soto, 250 Ariz. 469, 473 ¶ 20 \(2021\)](#). The county officials did indeed have no discretion, Opinion ¶ 42: They were obligated to follow

mandamus to correct the way in which an election is being conducted unless it can be shown that it might result in a different outcome. Put simply, election officials must conduct an election in accordance of the law no matter what the potential outcome *vel non* on the election may be.

§ 16-602, not the EPM. The superior court could have so clarified and issued the writ.

C. **At a minimum, the Court of Appeals' opinion should be depublished.**

This Court should grant review and vacate the opinion of the Court of Appeals. If the Court does not grant review, it should depublish the opinion to reduce its chilling impact on controversial cases of political significance. *See* Ariz. R. Sup. Ct. 111(g).

VI. **CONCLUSION**

For the foregoing reasons, the Arizona Republican Party requests that the Court accept review of this case and protect the right of persons to petition Arizona courts in cases of political significance.

VII. **REQUEST FOR COSTS**

The Arizona Republican Party requests costs pursuant to [A.R.S. § 12-342\(A\)](#).

RESPECTFULLY SUBMITTED on September 11, 2023.

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APPENDIX

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AMENDED

CLERK OF THE SUPERIOR COURT
FILED

11-20-22 9:06a

J. Patrick, Deputy

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1.	VERIFIED COMPLAINT	Nov. 12, 2020
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3.	CERTIFICATE REGARDING COMPULSORY ARBITRATION	Nov. 12, 2020
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10.	[PART 1 OF 2] MARICOPA COUNTY DEFENDANTS' MOTION TO DISMISS	Nov. 16, 2020
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34.	ARIZONA DEMOCRATIC PARTY'S REQUEST FOR COURT REPORTER AT THE NOVEMBER 18, 2020 ORAL ARGUMENT	Nov. 17, 2020
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36.	RESPONSE IN OPPOSITION TO ARIZONA REPUBLICAN PARTY'S APPLICATION FOR TEMPORARY RESTRAINING ORDER	Nov. 17, 2020
37.	[PART 1 OF 2] PLAINTIFF'S RESPONSE TO DEFENDANT/INTERVENORS' MOTIONS TO DISMISS	Nov. 17, 2020
38.	[PART 2 OF 2] PLAINTIFF'S RESPONSE TO DEFENDANT/INTERVENORS' MOTIONS TO DISMISS	Nov. 17, 2020
39.	[PART 1 OF 2] MARICOPA COUNTY DEFENDANTS' RESPONSE TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION	Nov. 17, 2020
40.	[PART 2 OF 2] MARICOPA COUNTY DEFENDANTS' RESPONSE TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION	Nov. 17, 2020



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No.	Document Name	Filed Date
41.	ME: ORDER ENTERED BY COURT [11/17/2020]	Nov. 18, 2020
42.	PLAINTIFF'S REPLY RE: INJUNCTIVE RELIEF	Nov. 18, 2020
43.	ME: HEARING [11/18/2020]	Nov. 19, 2020
44.	[PART 1 OF 2] ARIZONA SECRETARY OF STATE KATIE HOBBS' APPLICATION FOR ATTORNEYS' FEES	Dec. 7, 2020
45.	[PART 2 OF 2] ARIZONA SECRETARY OF STATE KATIE HOBBS' APPLICATION FOR ATTORNEYS' FEES	Dec. 7, 2020
46.	ME: RULING [12/21/2020]	Dec. 21, 2020
47.	[PART 1 OF 2] PLAINTIFF'S RESPONSE TO MOTION FOR SANCTIONS	Dec. 28, 2020
48.	[PART 2 OF 2] PLAINTIFF'S RESPONSE TO MOTION FOR SANCTIONS	Dec. 28, 2020
49.	[PART 1 OF 2] ARIZONA SECRETARY OF STATE KATIE HOBBS' REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES	Jan. 11, 2021
50.	[PART 2 OF 2] ARIZONA SECRETARY OF STATE KATIE HOBBS' REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES	Jan. 11, 2021
51.	ME: RULING [03/12/2021]	Mar. 15, 2021
52.	NOTICE OF APPEAL	Mar. 15, 2021
53.	MOTION TO SET SUPERSEDEAS BOND	Mar. 24, 2021
54.	PLAINTIFF'S/APPELLANTS' STATEMENT OF ISSUES ON APPEAL	Mar. 30, 2021
55.	MARICOPA COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO SET SUPERSEDEAS BOND	Mar. 30, 2021
56.	ARIZONA SECRETARY OF STATE KATIE HOBBS' RESPONSE TO MOTION TO SET SUPERSEDEAS BOND	Apr. 5, 2021
Record amended on Friday, September 10, 2021 @ 10:39 AM		
57.	REPELY(SIC) IN SUPPORT OF MOTION TO SET SUPERSEDEAS BOND	Apr. 12, 2021
58.	ELECTRONIC INDEX OF RECORD	Apr. 13, 2021
59.	COURT OF APPEALS RECEIPT	Apr. 13, 2021



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No.	Document Name	Filed Date
Record amended on Friday, September 10, 2021 @ 10:39 AM		
60.	COURT OF APPEALS APPELLATE CLERK NOTICE	Apr. 13, 2021
61.	ORDER SETTING SUPERSEDEAS BOND	Apr. 22, 2021
62.	NOTICE OF DEPOSIT WITH THE COURT	May. 3, 2021
63.	COURT OF APPEALS MEMORANDUM DATED 09/01/2021	Sep. 1, 2021
Record amended on Monday, June 13, 2022 @ 1:07 PM		
64.	COURT OF APPEALS RECEIPT	Sep. 14, 2021
65.	AMENDED ELECTRONIC INDEX OF RECORD	Sep. 14, 2021
66.	[PART 1 OF 2] MOTION TO DISQUALIFY JUDICIAL OFFICER FOR CAUSE	Jan. 26, 2022
67.	[PART 2 OF 2] MOTION TO DISQUALIFY JUDICIAL OFFICER FOR CAUSE	Jan. 26, 2022
68.	ME: CASE REASSIGNED [02/01/2022]	Feb. 2, 2022
69.	ME: DISQUALIFICATION [02/01/2022]	Feb. 2, 2022
70.	MARICOPA COUNTY DEFENDANTS' RESPONSE OPPOSING PLAINTIFF'S MOTION TO DISQUALIFY JUDICIAL OFFICER FOR CAUSE	Feb. 2, 2022
71.	ME: NUNC PRO TUNC ORDER [02/02/2022]	Feb. 4, 2022
72.	ME: RULING [02/03/2022]	Feb. 7, 2022
73.	ME: ORDER ENTERED BY COURT [02/08/2022]	Feb. 9, 2022
74.	COURT OF APPEALS ORDER STAYING APPEAL	Apr. 5, 2022
75.	ARIZONA SECRETARY OF STATE KATIE HOBBS' NOTICE OF COURT OF APPEALS FILING RELEVANT TO PENDING MOTION	Apr. 11, 2022
76.	PLAINTIFF'S NOTICE OF COURT OF APPEALS FILINGS RELEVANT TO MOTION TO DISQUALIFY	Apr. 13, 2022
77.	NOTICE OF WITHDRAWAL OF COUNSEL	Apr. 27, 2022
78.	ME: ORDER ENTERED BY COURT [06/01/2022]	Jun. 3, 2022
79.	ME: RULING [06/03/2022]	Jun. 6, 2022



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No.	Document Name	Filed Date
Record amended on Monday, June 13, 2022 @ 1:07 PM		
80.	MOTION FOR RECONSIDERATION RE: MINUTE ENTRY DATED JUNE 6, 2022	Jun. 9, 2022

APPEAL COUNT: 1

RE: CASE: 1 CA-CV 21-0201

DUE DATE: 04/14/2021

CAPTION: AZ REPUBLICAN PARTY VS MARICOPA COUNTY ET AL

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: patrickj002 on June 13, 2022; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375



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Attorneys for Plaintiff

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

**ARIZONA REPUBLICAN PARTY,
Plaintiff;**

vs.

**MARICOPA COUNTY BOARD OF
SUPERVISORS, et al.
Defendants.**

Case No. CV2020-014553

**DECLARATION OF
JOHN D. WILENCHIK, ESQ.
IN SUPPORT OF PLAINTIFF’S
RESPONSE TO MOTION
FOR SANCTIONS**

**(Assigned to the Honorable
John R. Hannah, Jr.)**

I, John D. Wilenchik, Esq., make this Declaration of my own knowledge, and I am competent to testify to the matters contained herein.

1. I was first contacted by the Arizona Republican Party very late in the day on Wednesday, November 11, 2020 about the issues identified in this matter and about filing suit – at around 6 PM, according to my records (my emails and timesheet).
2. I prepared the Verified Complaint and Application for Order to Show Cause that same night, being mindful of the need for immediate action in an elections case.

- 1 3. As of Wednesday November 11, 2020, the Secretary of State’s website showed that
2 the Secretary’s Office had received hand-count audit reports from various counties;
3 however for Maricopa County, the website only stated “Not Yet Received from
4 County.” A true and accurate copy of the website as of November 11, 2020 is
5 attached hereto (as Exhibit “1”).¹
- 6 4. As of November 11, 2020, Maricopa County was still in the process of counting
7 votes (which it did not finish until late on Friday November 13th, according to news
8 reports).
- 9 5. The “hand count” statute (A.R.S. § 16-602) provides that a hand count “shall not
10 begin” until all ballots have been delivered to the counting center, and until “[t]he
11 unofficial vote totals from all precincts” have been made public. 16-602(B)(1).
- 12 6. Because Maricopa County was still counting votes as of November 11th, and
13 because the statute appears to provide that a hand count “shall not” legally proceed
14 until all votes have been counted, I believed that a hand count would occur in the
15 days or week(s) following November 11th.
- 16 7. I emailed a draft of the Complaint and Application for Order to Show Cause to the
17 Arizona Republican Party that same night, on November 11, 2020. At around
18 midnight on that same night (November 11th at 12:10 AM), I emailed the draft
19 Complaint and Application for Order to Show Cause to my assistant Christine
20 Ferreira, to prepare it for filing first thing on the following day (on November 12th).
21 The Executive Director of the Arizona Republican Party approved filing the suit,
22 as-drafted, in the afternoon on that same day (November 12th).
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25 ¹ This is also available from the Internet “Wayback Machine”:
26 https://web.archive.org/web/*/https://azsos.gov/election/2020-general-election-hand-count-results

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8. My normal practice is to have my client (or client representative) sign the Verification to the Complaint. However, in order to avoid any further delay, I offered to sign the Verification myself and the Executive Director asked me to do so. I gave the Complaint to my assistant to have it run down to the Court and hand-filed that same day, November 12th (which it was).
9. As soon as the suit was filed (and we received conformed copies), I voluntarily emailed courtesy copies to the Maricopa County Attorney’s Office. I also informed them that I would notify them as soon as a judicial officer was assigned, and an Order to Show Cause was signed.
10. An Order to Show Cause was filed at 12:04 PM on Friday, November 13, 2020 setting a hearing for the next court day Monday November 16, 2020 at 10:30 AM, and I promptly advised the county’s counsel of the same.
11. As of the morning of November 13th, and according to news reports, the county had not yet finished counting the votes in Maricopa County, and so I assumed that no hand count had been performed.
12. On Friday November 13th, I first learned that a hand count had been performed (albeit by vote center and not by precinct), via an email from Joseph Larue at the Maricopa County Attorney’s Office. That same day (Friday), I began conversation(s) with Mr. Larue and Mr. Thomas Liddy about whether the county could feasibly perform a hand count by “precinct,” as demanded in the Complaint and as specified by statute. They informed me that they would check with the county staff on whether a hand count by precinct was still possible. As of the time of the hearing (on the morning of the next business day, Monday November 16th), I still had not received the answer to that question.

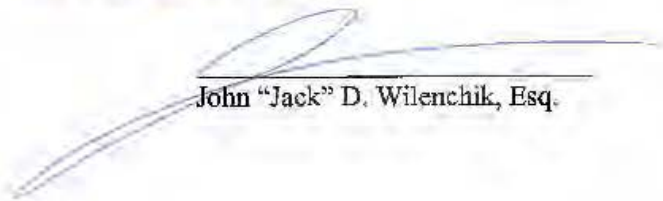
- 1 13. On the same morning of Friday November 13th, at around 10:30 AM, I also had a
2 call with the attorney for the Secretary of State (Roopali Desai) on an unrelated case.
3 I recall having a cordial discussion with her about the filing of this new suit, and
4 about the county's refusal to accept service of it. A few hours after the call, Ms.
5 Desai emailed me on behalf of the Secretary of State to ask if I would oppose the
6 Secretary's intervention, and I promptly emailed her back to say that I would not.
- 7 14. I first learned during the hearing on Monday, November 16, 2020 that the county
8 intended to certify its results on Thursday, November 19, 2020. And I first learned
9 during the initial hearing on this matter that this Division felt it would be unavailable
10 to conduct a hearing before Thursday. I had originally contemplated a quick
11 evidentiary hearing within days of filing the suit, as well as a quick hand count if
12 relief had been granted, which could have been performed before the county's
13 deadline for a canvass on Monday, November 23, 2020. I went out of my way to
14 offer solutions to this Court, including assigning this matter to another Division that
15 would be available to conduct a hearing; and I even crafted and filed a request for
16 alternative relief that could be granted without enjoining the canvass date.
- 17 15. My client and I had no intention of even trying to enjoin the canvass date when this
18 suit was filed. After the county disclosed that it was planning on certifying the
19 canvass "early," and the Court disclosed that it was unavailable for a hearing all
20 week, it was counsel for the *Secretary* who argued that the matter should be
21 dismissed because it could not be heard without the Court enjoining the canvass
22 (and because we had not asked the Court to do so); and it was the Court who then
23 suggested that a motion to enjoin the canvass be filed in writing. Only when
24 presented with a stark choice between dismissal and asking for an injunction did
25 Plaintiff do so, and even then Plaintiff went out its way to offer other solutions to
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this Court including assignment to another judge or granting alternative relief,
which the Court declined to do.

I declare under penalty of perjury under the laws of the State of Arizona that I have read
the above Declaration, am familiar with its contents, and know the same to be true and correct of
my own personal knowledge.

EXECUTED on: December 28, 2020



John "Jack" D. Wilenchik, Esq.

EXHIBIT 1



2020 General Election Hand Count Results

Summary of Hand Count Audits - 2020 General Election

In accordance with [A.R.S. § 16-602.3](#), county election officers are required to conduct a hand count of a sample of ballots to test the accuracy of the vote tabulation equipment if there is participation from the county political parties. Those counties that conduct the hand count are required by law to report the results to the Secretary of State.

Click the County name to view the full report.

Last Updated: 11/10/2020 at 12:40 pm

COUNTY	STATUS	RESULT
Apache	Not Yet Received from County	
Cochise	Not Yet Received from County	
Cocopah	Completed - Passed	Performed on November 4 and November 5, 2020; no discrepancies were found
Gila	Not Performed	Not performed as the County Chair of the Republican Party did not designate the required members for the Hand Count Election Board (A.R.S. § 16-602(B)(7))
Graham	Not Yet Received from County	
Greenlee	Not Yet Received from County	
La Paz	Not Performed	Not performed as the County Chairs of two political parties did not designate the required members for the Hand Count Election Board (A.R.S. § 16-602(B)(7))
Maricopa	Not Yet Received from County	
Mohave	Not Yet Received from County	
Navajo	Completed - Passed	Performed on November 4, 2020; no discrepancies were found



IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA REPUBLICAN PARTY, *Plaintiff/Appellant*,

v.

STEPHEN RICHER, as Maricopa County Recorder; and the
MARICOPA COUNTY BOARD OF SUPERVISORS, by and through,
CLINT HICKMAN, JACK SELLERS, THOMAS GALVIN,
BILL GATES, STEVE GALLARDO, *Defendants/Appellees*.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State;
ARIZONA DEMOCRATIC PARTY, *Intervenors/Appellees*.¹

No. 1 CA-CV 21-0201
FILED 7-11-2023

Appeal from the Superior Court in Maricopa County
No. CV2020-014553
The Honorable John R. Hannah, Jr., Judge

AFFIRMED

COUNSEL

Wilenchik & Bartness P.C., Phoenix
By Dennis Wilenchik, Lee Miller, John D. Wilenchik
Counsel for Plaintiff/Appellant

¹ The caption has been amended to include all parties in this litigation and to reflect the substitution of the public officers currently serving in the capacities listed. *See* ARCAP 27(c)(2).

ARIZONA REPUBLICAN PARTY v. RICHER, et al.
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Maricopa County Attorney's Office, Civil Services Division, Phoenix
By Thomas P. Liddy, Emily Craiger, Joseph I. Vigil, Joseph J. Branco,
Joseph E. LaRue
*Counsel for Defendants/Appellees, Maricopa County Recorder & Maricopa
County Board of Supervisors*

Law Offices of Sherman & Howard L.L.C., Phoenix
By Craig A. Morgan, Shayna Stuart, Jake Tyler Rapp
Counsel for Intervenor Defendant/Appellee, Arizona Secretary of State

OPINION

Judge Michael J. Brown delivered the opinion of the Court, in which
Presiding Judge Randall M. Howe and Judge Brian Y. Furuya joined.

BROWN, Judge:

¶1 The Arizona Republican Party (“ARP”) appeals the superior court’s dismissal of its complaint challenging the hand count audit process Maricopa County used for the 2020 general election. ARP also challenges the court’s decision to award attorneys’ fees in favor of Arizona’s Secretary of State (“Secretary”) under A.R.S. § 12-349. Because ARP has not shown the court erred in dismissing the complaint or abused its discretion in awarding fees, we affirm.

BACKGROUND

¶2 Arizona law requires election authorities from each of the 15 counties to verify the accuracy of electronic vote counts by manually counting random batches of ballots. *See* A.R.S. § 16-602(B). This process, known as the “hand count audit,” starts before election day when the county elections officer informs the county political party chairs of how many of the parties’ designees will be needed to perform the audit. A.R.S. § 16-602(B)(7). At least one week before election day, the party chairs name the individuals who will physically count the ballots. *Id.* After the polls close, the party chairs take turns randomly choosing a few polling places to be audited. A.R.S. § 16-602(B)(1). The party chairs also select the races to be audited, except that the presidential race is always included. A.R.S. § 16-602(B)(2), (5).

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¶3 If the hand count audit reveals evidence that the machine tabulation may have been inaccurate, the audit expands in stages. A.R.S. § 16-602(C). But if the initial audit matches the machine result for a given race, “the results of the electronic tabulation constitute the official count for that race.” *Id.* Regardless, the audit must be completed before the canvassing of a county’s election results. A.R.S. § 16-602(I).

¶4 The statutory provision at issue, A.R.S. § 16-602 (addressing selection of polling places for the hand count audit), reflects the longstanding practice of organizing elections based on precincts. When that practice is followed, a county’s board of supervisors establishes “a convenient number” of precincts before each election and then designates one polling place in each precinct for the voters who reside in that precinct. A.R.S. § 16-411(A), (B). Consistent with that approach, § 16-411(B) refers to sampling of “precincts.”

¶5 In 2011, however, the legislature amended § 16-411 to authorize “the use of *voting centers* in place of or in addition to specifically designated polling places.” 2011 Ariz. Sess. Laws. ch. 331, § 3 (1st Reg. Sess.) (H.B. 2303) (emphasis added). The legislature also amended § 16-602(B) to require that the “hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual [“EPM”] adopted pursuant to § 16-452.” 2011 Ariz. Sess. Laws. ch. 331, § 8 (1st Reg. Sess.) (H.B. 2303); *see* Ariz. Sec’y of State, 2019 Elections Procedures Manual (“2019 EPM”) (Dec. 2019). But the legislature did not change the procedures in § 16-602(B)(1), which outlines what each county must do in conducting a hand count, including the requirement that “[a]t least two percent of the *precincts* in that county, or two *precincts*, whichever is greater, shall be selected at random from a pool consisting of every *precinct* in that county.” (Emphasis added.)

¶6 The 2012 and 2014 versions of the EPM included a provision covering hand count auditing procedures that allowed counties using vote centers to treat them as precincts for purposes of the audit. In 2019, the Secretary adopted the version of the EPM at issue, which likewise allows “counties that utilize vote centers” to consider “each vote center . . . to be a precinct/polling location and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is greater.” 2019 EPM, at 215. As required by A.R.S. § 16-452(B), the 2019 EPM was approved by the governor and the attorney general.

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¶7 As stated by the legislature, the purpose of the EPM is to “achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). And as recognized by our supreme court, the “EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.” *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020). But if an EPM provision conflicts with a statute, that provision is unenforceable. *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021).

¶8 On September 16, 2020, the Maricopa County Board of Supervisors (“Board”) announced it would be using vote centers for the November 3, 2020 general election. The day after the polls closed, the “Maricopa County Chairs” of the Republican, Democratic, and Libertarian parties met to select the vote centers and early ballots subject to auditing. The physical hand count, which audited 2,917 ballots cast on voting machines and more than 5,000 ballots cast through mail-in ballots, started on Saturday, November 7 and concluded on Monday, November 9. The hand count audit showed that “[n]o discrepancies were found.”

¶9 On November 12, ARP sued the Maricopa County Recorder and the Board (collectively “County”). The complaint sought an order declaring that certain provisions of the 2019 EPM addressing hand counts conflict with state statutes. ARP also requested mandamus relief directing the County to conduct a hand count of the election results “in strict accordance” with § 16-602(B)(1), which requires a sampling of two percent of “precincts,” not “vote centers.” At the same time, ARP applied for an order to show cause, alleging that conducting a hand count based on precincts would result “in a different method of data analysis that is certain to produce different results.” ARP asserted that

if precincts are sampled instead of voting centers, then the data is much easier for [ARP] and/or members of the public to cross-reference or cross-check with other voter registration data, since voter registration data is already “sortable” by precinct (but not by “vote center”). In other words, whatever hardship *vel non* it may cause to the county to sample precincts instead of vote centers, such hardship is vastly outweighed by the benefit to the public in being able to analyze and sort (and organize, process) the sampling data, thereby creating transparency to the public and confidence in the integrity of our elections, which is clearly the point to this statute to begin with (and which has clearly taken on a special

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and obvious importance in this election, which cannot be understated).

¶10 On November 13, the Secretary and the Arizona Democratic Party moved to intervene as defendants. The next business day, the court held a show cause hearing and later that day issued a minute entry granting the motions to intervene and setting expedited briefing deadlines for all pending matters, including a potential request for injunctive relief from ARP.

¶11 The Secretary, the County, and the Democratic Party separately moved for dismissal. The Secretary argued in part that (1) ARP's lawsuit was barred by laches; (2) ARP was wrong as a matter of law because § 16-602(B) is silent on the procedures for counties that use vote centers and it expressly authorizes the Secretary to fill that gap; (3) the lawsuit suffered from procedural defects, including failure to request injunctive relief postponing the official canvass, which had to be completed no later than November 23; and (4) ballots would be treated arbitrarily because several other counties used vote centers to perform their hand count audits.

¶12 Addressing laches, the Secretary argued ARP had known for “nearly a decade” that the EPM authorizes hand count audits based on samples from vote centers, and the County followed that process in the March 2020 presidential preference election and the August 2020 primary election. Yet, ARP raised no challenge to the procedure the EPM authorized until after the County had completed the hand count for the 2020 general election, causing prejudice to the Secretary, the County, and “Arizona voters, who deserve finality.” The Secretary requested attorneys’ fees under § 12-349, which mandates a fee award if a claim is brought, among other reasons, “without substantial justification.”

¶13 After outlining the procedures and results of the hand count audit, and attaching a copy of the audit report, the County argued ARP had no basis to claim it was unaware that its county chair had participated in the audit, because no later than November 11, it had received a copy of the report in a different lawsuit. The County argued that ARP participated—through its county chair—in the process to select vote centers instead of precincts, and that the county chair’s participation in the hand count audit “shows [ARP’s] unreasonable delay without justification.”

¶14 The Democratic Party urged dismissal on similar grounds and referred to a November 12 letter from the Arizona Attorney General’s office to Republican legislative leaders in response to “a number of

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inquiries regarding the scope and nature of the manual hand count audit” given the County’s use of voting centers. Providing initial thoughts on the issue, the letter stated in part:

Some have asserted that the audit should be conducted only using precincts The statute [§ 16-602], however, is silent on how the hand count audit should be conducted when voting centers are used. Instead, the statute directs the Secretary of State to fill in that gap and establish additional hand count procedures with the approval of the Governor and Attorney General, which was done in 2019.

¶15 In its four-page response covering all three motions to dismiss, ARP briefly addressed its argument that the County failed to conduct the hand count in accordance with § 16-602(B). The majority of the response focused on ARP’s position that the delay in filing the suit was not unreasonable because there had never been a “real case or controversy” over the hand count procedure until the 2020 general election cycle and that no prejudice existed for the other parties because there was “plenty of time” to issue the canvass.

¶16 ARP also applied for a preliminary injunction to enjoin the Board from certifying the results of the votes and issuing an official canvass until the merits of the complaint could be litigated. After outlining its legal reasoning that a new hand count was required, ARP asserted:

Given the importance of this election, and of doing everything with respect to this election “by the book,” there are also powerful public-policy reasons to grant this preliminary injunction. If an injunction is not granted, *then there will be lingering questions about the legitimacy of [the election] results* which could otherwise be answered through a proper hand count. This is also the basic prejudice that [ARP] and the voting public will suffer if the Court declines to grant an injunction – *it will create a cloud over the legitimacy of this election and its results.*

(Emphasis added.)

¶17 Following a one-hour oral argument held on November 18, the superior court issued a minute entry denying the request for preliminary injunction and dismissing ARP’s complaint with prejudice. The court stated that a more detailed ruling would follow and set a deadline

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by which the Secretary could submit a motion for attorneys' fees under § 12-349.

¶18 In applying for fees, the Secretary outlined many reasons in support of the assertion that ARP's claim was groundless, including that the challenged EPM provision had been "on the books for nearly a decade" and ARP had not objected to it in previous elections, and that ARP failed to timely seek injunctive relief. The Secretary also argued the claim was made in bad faith, asserting ARP's motives in filing the suit were to "delay final election results and sow doubt about the integrity of Arizona's elections system."

¶19 The superior court issued a detailed ruling addressing the merits of ARP's case. The court found that ARP's request for declaratory relief could not succeed because of ARP's unreasonable delay in pursuing the claim. The court also concluded that ARP had no claim for mandamus relief because County election officials followed the 2019 EPM and they lacked discretion to vary from it when performing the hand count.

¶20 Responding to the Secretary's fee application, as well as addressing the court's merits ruling, ARP argued in part that its lawsuit was justified because it hinged on the plain language of § 16-602(B), and that because the 2019 EPM conflicts with the statute, the statute must control. ARP also asserted it was unaware the hand count had already occurred because the hand count results had not yet been published on the Secretary's website, and the County was still counting votes when the complaint was filed. ARP asserted its claims were not brought in bad faith because it did not initially seek to delay the canvass until becoming aware that the County intended to certify it, which the Secretary argued would have made its claims moot. ARP also asserted that by "even contemplating" awarding attorneys' fees the court would be "close to engaging in very serious interference with the First Amendment right to petition government for a redress of grievances." *See* U.S. Const. amend. I.

¶21 In another detailed ruling, the court granted the Secretary's fee request for attorneys' fees under § 12-349, ordering ARP and its counsel to pay the \$18,237.59 award, jointly and severally. ARP timely appealed, and we have jurisdiction under A.R.S. § 12-120.21(A)(1).

¶22 After briefing in this appeal was complete, ARP moved to stay the appeal and revest jurisdiction in the superior court to allow ARP to move to disqualify the judge who decided this case, based on newly discovered evidence of alleged bias and prejudice. We granted ARP's

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motion to stay the appeal. After a different judge denied the motion to disqualify in the superior court, ARP unsuccessfully sought special action relief in this court. ARP did not seek to amend the notice of appeal to include the superior court's order denying its motion to disqualify. Thus, that ruling is not at issue in this appeal.

DISCUSSION

¶23 Broadly stated, ARP argues the superior court erred by (1) rejecting the merits of its claim that state law requires hand counts to be conducted based on precincts, not vote centers; and (2) awarding attorneys' fees under § 12-349 on the grounds that ARP's lawsuit was brought without substantial justification. As an initial matter, we address two procedural factors that impact our resolution of these issues.

¶24 First, rather than summarizing the relevant facts and procedural history in the "statement of facts" section of its opening brief, ARP includes numerous reasons it believes the court's rulings were improper. This tactic violates our appellate rules and needlessly injects uncertainty into the briefing process by leaving opposing counsel and this court to sort through a muddled presentation to discern what arguments have been fairly presented. *See* ARCAP 13 (outlining how appellate briefs should be organized and what content is appropriate in each section). We could justifiably ignore each of the "arguments" that ARP improperly embedded in its statement of facts section; however, in our discretion we have considered all assertions of error.

¶25 Second, ARP has not provided transcripts of the show cause hearing or the oral arguments held in the superior court. *See Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal."); *see also* ARCAP 11(c) (explaining the appellant's duty to order transcripts). Without such transcripts, we generally presume that the matters discussed at those hearings support the court's rulings. *See Baker*, 183 Ariz. at 73 ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). We recognize that in some instances, transcripts of hearings involving primarily procedural matters or oral arguments on pending motions might not be "necessary" for our consideration of an appeal. But for certain matters, such as the § 12-349 fee award before us, statements made by counsel and the court during non-evidentiary hearings may be particularly relevant to our analysis, as shown below.

I. Dismissal of Claim for Declaratory Relief

¶26 ARP argues the superior court erred in dismissing its claim for declaratory relief, which sought a ruling that the hand count sampling must be based on “precincts,” under the “plain language” of § 16-602. We review de novo the grant of a motion to dismiss for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012). We “assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient.” *Id.* at ¶ 9.

¶27 The superior court dismissed ARP’s claim for declaratory relief on several grounds, including laches. “In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497, ¶ 10 (2006); see also *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009) (“Laches will generally bar a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party.”).

¶28 The superior court found that ARP unreasonably delayed pursuing its claim because it could have been filed much earlier. For example, ARP could have filed its claim earlier the same year in connection with the 2020 presidential preference and primary elections, or when the Board passed the resolution authorizing vote centers on September 16, 2020. Instead, ARP “waited until after the election, after the statutory deadline for commencing the hand count audit, and (as it turned out) *after the completion of the audit.*” The court found that ARP failed to acknowledge the prejudice to the County caused by the delay, including the tax dollars spent in conducting another audit under tight deadlines and disrupting an orderly administration of the election.

¶29 ARP contends that dismissal of its claim for declaratory relief was wrong because the court ignored the language of § 16-602(B). But in its opening brief, ARP states that it is not appealing the court’s laches ruling. Even if that statement does not reflect explicit waiver, ARP makes no attempt to challenge the court’s detailed analysis supporting the conclusion that the request for declaratory relief “was way too late.” Thus, ARP has waived any challenge to the court’s laches ruling. See *State v. Carver*, 160 Ariz. 167, 175 (1989) (explaining that failure to “present significant arguments, supported by authority,” in an opening brief on a particular claim usually results in waiver).

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¶30 Nonetheless, in its reply brief ARP asserts that the Secretary and the County misconstrued ARP's failure to address laches in the opening brief. According to ARP, the declaratory relief claim "is not even rationally susceptible to a 'laches' argument – the statute still says what it says, and there is no conceivable prejudice to talking about it now as opposed to months from now." We generally do not consider arguments raised for the first time in a reply brief. See *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91 (App. 2007). Even so, ARP does not inform us where this argument was raised in the superior court. See *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, 594–95, ¶ 25 (App. 2021) (explaining that arguments not presented to the trial court are waived on appeal). Nor does ARP point to any portion of the record suggesting that it conveyed to the court a desire to continue pursuit of the declaratory judgment claim as guidance for *future* elections. Instead, the court explained its understanding of ARP's claim:

It is telling that [ARP] lost interest in the declaratory judgment claim, and pivoted instead to the request for an injunction to stop the certification of the election and the canvass of the results, as soon as the defendants made clear that the hand count audit has been completed. [ARP] could have pursued the declaratory judgment claim to determine how to audit future voting center elections. That it did not do so demonstrates that its real interest was not the audit procedure as such.

¶31 On appeal, ARP does not challenge the court's reasoning that it apparently had no interest, for future elections, in litigating its claim that the 2019 EPM's hand count provision for vote centers is invalid because it conflicts with § 16-602(B). Thus, ARP has waived any argument that the court erred in dismissing its claim for declaratory relief. Similarly, ARP has waived any claim that the court erred in dismissing its claim for mandamus relief and denying the request for a preliminary injunction because ARP presents no challenges to those rulings in its opening brief. See *Carver*, 160 Ariz. at 175.

II. Award of Attorneys' Fees

¶32 "Except as otherwise provided by and not inconsistent with another statute," in any civil action a court "shall assess reasonable attorney fees" when an attorney or party "brings or defends a claim without substantial justification," which means "that the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(A)(1), (F). A fee award under § 12-349 must be supported by a preponderance of the

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evidence. *See Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244 (App. 1997) (construing an earlier, similar, version of § 12-349). We review the court's application of § 12-349 de novo, but we view the evidence in a manner most favorable to sustaining the decision, and we will affirm unless the court's findings are clearly erroneous. *Id.* at 243–44.

¶33 When awarding fees, a trial court “shall set forth the specific reasons for the award” and may consider various factors, A.R.S. § 12-350, but “the findings need only be specific enough to allow a reviewing court to test the validity of the judgment,” *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014). The following § 12-350 factors are relevant here: (1) the extent of efforts to determine a claim's validity before it was asserted; (2) the extent of post-filing efforts to eliminate invalid claims; (3) the availability of facts to help determine the validity of a claim; (4) “whether the action was prosecuted . . . , in whole or in part, in bad faith”; and (5) the extent to which the party prevailed. *See* A.R.S. § 12-350(1)–(3), (5), (7).

¶34 In addressing ARP's challenge to the superior court's fee ruling, we note that the two § 12-349 elements (groundless, lack of good faith) are not easily distinguishable, and other cases often analyze them jointly. We believe the better approach is to provide separate analysis, but we also recognize some overlap will exist given the breadth of each element.

A. Groundless Determination

¶35 Whether a claim is groundless involves an objective determination. *Rogone*, 236 Ariz. at 50, ¶ 22. A claim is groundless if the proponent is unable to present any rational argument, based on the law or the evidence, supporting the claim. *Id.*

¶36 In awarding fees to the Secretary under § 12-349, the court explained that it had “considered only those facts and circumstances” that both ARP and its counsel “have had a fair opportunity to address, either during the litigation on the merits or in response to [the Secretary's] fee application.” The court then stated, for several reasons, that ARP's claim was groundless.

¶37 First, the court found that “the relief sought was not legally available from the parties that were sued at the time the suit was filed. The other parties pointed out these procedural defects in their motions to dismiss, but [ARP]'s response to the motions barely addressed them.” Until ARP filed its lawsuit, it never objected to using vote centers or raised any issue about the hand count audit that would occur as part of the 2020

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general election even though the County used the same procedure twice in elections held earlier that year. As noted, ARP has not challenged the court's laches finding. Thus, ARP's inability to offer any viable legal rationale for waiting until after the 2020 election procedures were established, much less after the hand count audit was completed, supports the court's finding that ARP's attempt to require Maricopa County to perform a new audit was groundless.

¶38 Second, the court reasoned that even if it could have reasonably overlooked the laches problem as a matter of equity, election-law principles "unambiguously barred the claim after the election." ARP argues that its claim based on the alleged conflict between the 2019 EPM and § 16-602 was not groundless. However, the context and timing of a lawsuit challenging election procedures is critical. As the court explained, for decades Arizona courts have applied the principle that "if parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure." *Kerby v. Griffin*, 48 Ariz. 434, 444 (1936); see also *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 9 (2002) (stating that challenges for procedural violations must be brought before the election); *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) (holding that "procedures leading up to an election cannot be questioned after the people have voted, but . . . must be challenged before the election is held").

¶39 ARP argues the superior court's cited authority, see, e.g., *Tilson*, 153 Ariz. at 470, is irrelevant because those cases involved election contests holding that pre-election procedures must be challenged before an election. Thus, ARP seems to suggest that because an audit happens "after the election," ARP could delay challenging any aspect of the hand count until after it is completed. We reject ARP's assertion that the hand count audit occurs only *after* the election. Hand count procedures start no later than two weeks before election day, when the county official informs the county political party chairs how many of their respective members are needed to serve on the "Hand Count Boards." See 2019 EPM, at 213. Party chairs "must" designate their members at least seven days before election day. *Id.* The procedures continue until the County completes the audit report, in this case, on November 9, 2020.

¶40 We also disagree with ARP's contention that the superior court misapplied the law governing election challenges. The procedures of an election are set forth in detail in statutes and the EPM. See generally A.R.S. §§ 16-400 to -678; 2019 EPM. As the court explained, ARP's allegation of a "procedural violation" of election laws (utilizing vote centers for hand

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count audit) “resulted directly from pre-election decisions that were known, or should have been known,” to ARP. Those decisions included the adoption and implementation of election procedures governing hand count audits. *Supra* ¶¶ 6, 8. Notwithstanding those events, ARP waited to challenge the hand count procedure the EPM authorized until after the County had conducted its hand count, which supports the court’s conclusion that the time for testing whether the County’s procedure complied with the law was “before the election.”

¶41 The court also rejected ARP’s assertion that “every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity” after the fact through an election contest. Citing *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929), the court explained that an election challenge based on a procedural statute states a cause of action only if the plaintiff alleges that fraud has occurred or that the result would have been different had proper procedures been followed. *Id.* (“[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.”). The court added:

To say as [ARP] does that this case was “about auditing results, which by definition is simply checking them to ensure voter confidence and integrity,” . . . and that fraud was “not germane to the case,” . . . is to say that there was no colorable cause of action in the first place.

ARP has cited no authority suggesting that a specific election procedure, which the aggrieved party is or should be aware of, may be properly challenged as unlawful *after* an election. Instead, as the superior court properly concluded, in the absence of fraud or a specific showing that a different outcome would have occurred, a party lacks a legal basis to file a court action demanding that an alternative election procedure must be performed.

¶42 Third, the court found that ARP failed to address the principle that “a writ of mandamus cannot issue to public officials who have no legal discretion concerning the matter at issue.” *See Adams v. Bolin*, 77 Ariz. 316, 322-23 (1954). Applying that rule, County election officials were legally required to follow the 2019 EPM and had no discretion to vary from it for purposes of the hand count. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 61, ¶ 4 (“[W]hen public officials, in the middle of an election, change the law based on their own perceptions of what they think it *should* be, they undermine

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public confidence in our democratic system and destroy the integrity of the electoral process.”). And as the court had explained earlier, election officials who performed the hand count could have been charged with a crime if they chose to ignore the 2019 EPM. ARP has not challenged these findings.

¶43 Fourth, the court found that ARP’s declaratory relief claim was “misdirected” because it sued the wrong party. Without citing authority, ARP argues that it needed to name only the County because if ARP had merely included the Secretary in its lawsuit, then the County would not have been “bound by any judgment or rulings in the case.” The County, however, is bound by the statutory election procedures, the EPM, and pertinent case law, the same as any other county. *See id.* at 63, ¶ 16. Thus, ARP provides no reasonable justification for failing to sue the Secretary when one of the express purposes of the lawsuit was to invalidate a portion of the 2019 EPM.

¶44 In sum, ARP was or should have been aware of the well-established principles that the EPM has the force of law, and that the time to challenge election procedures is *before* an election. *See id.*; *see also Sherman*, 202 Ariz. at 342, ¶ 9. ARP makes no reasonable argument that it had any chance of success when it failed to continue pursuit of the declaratory action. If ARP was interested in obtaining a judicial decision on whether hand counts carried out in counties that have decided to use vote centers is legally impermissible, then ARP could have litigated that issue in due course so the issue would be clarified for future elections. As the superior court noted, ARP presumably had no interest in doing so. Thus, the record supports the court’s findings that ARP’s claims were groundless.

B. Bad Faith Determination

¶45 Whether a party or its attorney acted in bad faith in pursuing a claim or defense is a subjective inquiry. *See Rogone*, 236 Ariz. at 50, ¶ 22. The relevant case law has not defined what constitutes bad faith under § 12-349, but rather only “offers illustrations of that standard as the courts have applied it case by case.” *City of Sedona v. Devol*, 196 Ariz. 178, 182–83, ¶ 23 (App. 1999).

¶46 The superior court found that ARP’s claim was not made in good faith for several reasons. The court explained in part that ARP’s claim seemed to presume that sampling by precinct would reveal precincts where the number of votes exceeded the number of registered voters, but the

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purpose of the hand count audit is “to assure that the machines are working properly.” The court determined there was “no evidence at all of phantom voters or manipulated vote totals or any other wrongdoing that might show up in a ‘cross-check’ against voter rolls.” The court also concluded that ARP’s suit was motivated by “political reasons” based on “[p]ublic mistrust,” which is an improper purpose. Additionally, the court rejected ARP’s attempt to avoid payment of fees by relying on the First Amendment, stating that it “does not give a litigant the right to file and maintain a groundless lawsuit.”

¶47 ARP argues that a bad faith inquiry under § 12-349 should be based on the types of conduct that “constitute an ‘improper purpose’ under the common law in a claim for abuse-of-process.” In ARP’s view, without this proposed limit judges could “liberally sanction people for holding political views that differ from their own,” as it contends happened in this case. The cases ARP cites, *see, e.g., Crackel v. Allstate Ins. Co.*, 208 Ariz. 252 (App. 2004), do not involve attorneys’ fees awarded under § 12-349. While ARP’s examples of improper purpose could likely constitute grounds for supporting a finding of bad faith in the context of § 12-349, nothing in the text of the statute limits a court’s analysis to the examples ARP identifies.

¶48 We are not persuaded by ARP’s contention that the superior court awarded fees under § 12-349 primarily for political motives. ARP argues the court was motivated by its own political views about voter fraud, the election, and former President Trump, such that it improperly relied on cases about election contests to “shoehorn in” its desire to make a “political statement.” ARP contends the court opined on these issues for no other reason than to “make a political statement that would be read and widely published by media.” ARP thus concludes that a finding of bad faith over a “political issue” of “public mistrust” following the November election is not the kind of bad faith contemplated by § 12-349.

¶49 ARP contends that “[d]uring the hearing in this matter, [the judge] went out [of] his way to question what evidence [ARP] had of actual fraud in the election; and in his Ruling on sanctions, he flippantly characterized the public’s concern with ‘voter fraud’ as a ‘theory for which no evidence exists.’” ARP’s contention reveals its failure to acknowledge the problem it was facing – that the lawsuit was based at least partially on the public’s concern about elections in general, rather than focusing on claims reasonably supported by the law.

¶50 ARP also overlooks the court’s finding that ARP changed from demanding a “fair election” to wanting “nothing more than a hand

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count audit conducted ‘completely by the book and in strict accordance with the law.’” And even more significant, ARP ignores its admission, made in response to the Secretary’s fee application, that “[p]ublic mistrust following this election motivated this lawsuit.” Addressing that admission, the superior court appropriately concluded:

[ARP] is effectively admitting that the suit was brought primarily for an improper purpose. It is conceding that the method of sampling ballots for the hand count audit is a minor procedural requirement, not a necessary step toward a fair election. It is saying that it filed this lawsuit for political reasons. “Public mistrust” is a political issue, not a legal or factual basis for litigation.

¶51 ARP argues it never argued or alleged “fraud,” but the record shows otherwise. In ARP’s response to the motions to dismiss it stated that “perhaps most importantly (and obviously) of all, concern about *potential widespread voter fraud* has taken on a special significance in this general election, warranting a thorough focus on these laws and compelling [ARP] to take action.” (Emphasis added.) According to the record provided to us, ARP made claims about protecting the integrity of the election and first invoked the specter of fraud. If the court made comments about fraud at one of the two hearings it conducted, it was ARP’s burden to provide transcripts to prove it. Regardless, ARP’s concern about who introduced the issue of fraud into the litigation overlooks the court’s well-reasoned analysis outlined above that redoing an election procedure requires a party to allege fraud or that the alternative procedure would change the election’s outcome.

¶52 In its rulings, the superior court specifically relied on statements made by ARP’s counsel, which presumably occurred during the hearings, as ARP has not asserted the statements were made in any other context. And in its decision on the merits, the court expressly stated that it had “considered the oral arguments of counsel.” In addressing whether ARP (1) brought claims for an improper purpose, (2) tried to distance itself from its own arguments, and (3) suggested that the court asked unfair questions about the public policy behind the hand count statute, the court explained: “[ARP] is not characterizing either its litigation posture or the Court’s inquiry honestly. *The Court’s questions addressed [ARP]’s own arguments.* For [ARP] to suggest otherwise is gaslighting. It evinces a lack of good faith.” Because ARP has not supplied transcripts, we presume that the matters raised and debated during the oral arguments support the court’s ruling. *See Baker*, 183 Ariz. at 73. Thus, we cannot conclude that

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ARP's contentions about the court's perception of those conversations support ARP's view. Furthermore, the court thoroughly explained its reasoning in both the ruling on the merits and the ruling on attorneys' fees.

¶53 Finally, we find no merit in ARP's contention that the First Amendment essentially immunizes a party who challenges election procedures from § 12-349 sanctions. ARP suggests "it may be beneficial" for us "to weigh in on what a finding of 'bad faith' under § 12-349 really requires, and when a judge's formulation of it becomes so erroneous as to violate First Amendment rights." According to ARP, the superior court admitted that it "considers a political belief held by one third of the public, as well as the country's former President, to be mere 'bad faith.'" ARP argues that allowing "such a broad definition of bad faith would violate any rational definition of what is permissible under the First Amendment, and would allow county judges to liberally sanction people for holding political views that differ from their own – which is exactly what the lower-court judge did in this case." The record shows otherwise.

¶54 The superior court issued its fee ruling based on the record before it. Responding to the fee application, ARP took issue with the court's comment (in the merits ruling) that it would be necessary to decide whether ARP brought its case in bad faith "to cast false shadows on the election's legitimacy." ARP asserted that the comment was "at odds" with around "a third of the general population," and "half of the Republican Party in this State, according to polls conducted by NPR, Reuters, and Politico among others."

¶55 ARP contends that the election's "legitimacy" was not an issue properly before the court. But ARP ignores its own filing. In requesting the preliminary injunction, ARP explicitly referenced concerns about the election's legitimacy if the injunction was not granted. *Supra* ¶ 16. Addressing those concerns in the context of the Secretary's fee request, the court stated: "This is why the Court raised the question whether [ARP] brought suit in order to 'cast false shadows on the election's legitimacy.' Undercutting the election's legitimacy by raising 'questions' is exactly what [ARP] did in this passage." ARP's assertions about the election's legitimacy, along with its failure to properly acknowledge or address the court's legal analysis on the legal flaws in its case, severely undermine ARP's claim that the superior court's ruling was politically motivated. And ARP cites no authority suggesting that general allegations about public mistrust and the legitimacy of the election, to the extent they could be relevant in a proper election-related lawsuit, provided any legal justification for filing its claims here.

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¶56 ARP also asserts that because politically charged election cases “are already hard to file and litigate,” judges need to “avoid deliberately becoming a part of the ‘political thicket.’” ARP argues that affirming the fee award in this case would

endorse this judge’s behavior, which only served to inflame and escalate an otherwise straightforward legal issue with his own personal political beliefs; and it only serves to chill lawyers and the public from seeking to raise important issues of obvious public concern in court. It would turn the courts into just another hostile political forum, where people have every right to fear irrational reprisals from biased judges – even though our courts are designed to be the one place where this does not happen.

For the reasons explained above, as well as those set forth in the superior court’s comprehensive rulings addressing the merits and attorneys’ fees, we reject ARP’s insinuation that the judge was biased and that his rulings were affected by political beliefs. *See Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, ¶ 21 (App. 2013) (recognizing that judges are presumed to be “free of bias and prejudice,” and “judicial rulings alone do not support a finding of bias or partiality without a showing of an extrajudicial source of bias or a deep-seated favoritism” (citation omitted)).

¶57 Further, like the superior court, we are not imposing any new requirement or limitation on the filing of an election-related lawsuit. Instead, as with any lawsuit, claims filed in an election matter are subject to the well-established principles—derived from statutes, rules, and case law—that govern all civil lawsuits in this state. *See, e.g.*, A.R.S. § 12-349; Ariz. R. Sup. Ct. 42, ER 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact”); *see also King v. Whitmer*, 556 F. Supp. 3d 680, 727 (E.D. Mich. 2021) (“Although the First Amendment may allow [attorneys] to say what they desire on social media, in press conferences, or on television, federal courts are reserved for hearing genuine legal disputes which are well-grounded in fact and law.”).

¶58 ARP cites no authority suggesting that courts refrain from holding a party and its attorney accountable for filing lawsuits that lack merit because of First Amendment considerations, and the few cases addressing this topic confirm the opposite view. The First Amendment does not shield attorneys or parties from a court’s obligation under § 12-349 to award attorneys’ fees against a party or attorney who brings or defends

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a claim without substantial justification. *See Larsen v. Comm’r*, 765 F.2d 939, 941 (9th Cir. 1985) (“The right to petition protected by the First Amendment does not include the right to maintain groundless proceedings.”); *see also In re Intel Sec. Litig.*, 791 F.2d 672, 676 (9th Cir. 1986) (rejecting an argument that a court’s power to impose sanctions for frivolous litigation is limited by the First Amendment); *King*, 556 F. Supp. 3d at 727; *cf. Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.”) (citations omitted). The court system exists to hear legitimate legal disputes, not for airing political disputes or grievances. *See King*, 556 F. Supp. 3d at 727 (“It is not . . . acceptable to use the federal judiciary as a political forum to satisfy one’s political agenda.”).

¶59 ARP has not shown that any of the court’s § 12-349 findings are clearly erroneous, or that the court abused its discretion in granting the Secretary’s fee request.

CONCLUSION

¶60 We affirm the superior court’s dismissal of ARP’s complaint and application for preliminary injunction, and the court’s award of attorneys’ fees. The Secretary requests an award of attorneys’ fees incurred on appeal under § 12-349, for the same reasons outlined by the superior court. In its reply brief, ARP does not address the fee request. We award reasonable attorneys’ fees to the Secretary subject to compliance with ARCAP 21. The award is joint and several against ARP and its counsel.



AMY M. WOOD • Clerk of the Court
FILED: AA

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Thank you.

Amy M. Wood
Clerk of the Court of Appeals
Division One

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA REPUBLICAN PARTY, *Plaintiff/Appellant*,

v.

STEPHEN RICHER, as Maricopa County Recorder; and the MARICOPA COUNTY BOARD OF SUPERVISORS, by and through, CLINT HICKMAN, JACK SELLERS, THOMAS GALVIN, BILL GATES, STEVE GALLARDO, *Defendants/Appellees*.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State; ARIZONA DEMOCRATIC PARTY, *Intervenors/Appellees*.¹

No. 1 CA-CV 21-0201
FILED 4-20-2023

Appeal from the Superior Court in Maricopa County
No. CV2020-014553
The Honorable John R. Hannah, Jr., Judge

AFFIRMED

COUNSEL

Wilenchik & Bartness P.C., Phoenix
By Dennis Wilenchik, Lee Miller, John D. Wilenchik
Counsel for Plaintiff/Appellant

¹ The caption has been amended to include all parties in this litigation and to reflect the substitution of the public officers currently serving in the capacities listed. *See* ARCAP 27(c)(2).

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Maricopa County Attorney's Office, Civil Services Division, Phoenix
By Thomas P. Liddy, Emily Craiger, Joseph I. Vigil, Joseph J. Branco,
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*Counsel for Defendants/Appellees, Maricopa County Recorder & Maricopa
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Law Offices of Sherman & Howard L.L.C., Phoenix
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Counsel for Intervenor Defendant/Appellee, Arizona Secretary of State

OPINION

Judge Michael J. Brown delivered the opinion of the Court, in which
Presiding Judge Randall M. Howe and Judge Brian Y. Furuya joined.

BROWN, Judge:

¶1 The Arizona Republican Party (“ARP”) appeals the superior court’s dismissal of its complaint challenging the hand count audit process Maricopa County used for the 2020 general election. ARP also challenges the court’s decision to award attorneys’ fees in favor of Arizona’s Secretary of State (“Secretary”) under A.R.S. § 12-349. Because ARP has not shown the court erred in dismissing the complaint or abused its discretion in awarding fees, we affirm.

BACKGROUND

¶2 Arizona law requires election authorities from each of the 15 counties to verify the accuracy of electronic vote counts by manually counting random batches of ballots. *See* A.R.S. § 16-602(B). This process, known as the “hand count audit,” starts before election day when the county elections officer informs the county political party chairs of how many of the parties’ designees will be needed to perform the audit. A.R.S. § 16-602(B)(7). At least one week before election day, the party chairs name the individuals who will physically count the ballots. *Id.* After the polls close, the party chairs take turns randomly choosing a few polling places to be audited. A.R.S. § 16-602(B)(1). The party chairs also select the races to be audited, except that the presidential race is always included. A.R.S. § 16-602(B)(2), (5).

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¶3 If the hand count audit reveals evidence that the machine tabulation may have been inaccurate, the audit expands in stages. A.R.S. § 16-602(C). But if the initial audit matches the machine result for a given race, “the results of the electronic tabulation constitute the official count for that race.” *Id.* Regardless, the audit must be completed before the canvassing of a county’s election results. A.R.S. § 16-602(I).

¶4 The statutory provision at issue, A.R.S. § 16-602 (addressing selection of polling places for the hand count audit), reflects the longstanding practice of organizing elections based on precincts. When that practice is followed, a county’s board of supervisors establishes “a convenient number” of precincts before each election and then designates one polling place in each precinct for the voters who reside in that precinct. A.R.S. § 16-411(A), (B). Consistent with that approach, § 16-411(B) refers to sampling of “precincts.”

¶5 In 2011, however, the legislature amended § 16-411 to authorize “the use of *voting centers* in place of or in addition to specifically designated polling places.” 2011 Ariz. Sess. Laws. ch. 331, § 3 (1st Reg. Sess.) (H.B. 2303) (emphasis added). The legislature also amended § 16-602(B) to require that the “hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual [“EPM”] adopted pursuant to § 16-452.” 2011 Ariz. Sess. Laws. ch. 331, § 8 (1st Reg. Sess.) (H.B. 2303); *see* Ariz. Sec’y of State, 2019 Elections Procedures Manual (“2019 EPM”) (Dec. 2019). But the legislature did not change the procedures in § 16-602(B)(1), which outlines what each county must do in conducting a hand count, including the requirement that “[a]t least two percent of the *precincts* in that county, or two *precincts*, whichever is greater, shall be selected at random from a pool consisting of every *precinct* in that county.” (Emphasis added.)

¶6 The 2012 and 2014 versions of the EPM included a provision covering hand count auditing procedures that allowed counties using vote centers to treat them as precincts for purposes of the audit. In 2019, the Secretary adopted the version of the EPM at issue, which likewise allows “counties that utilize vote centers” to consider “each vote center . . . to be a precinct/polling location and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is greater.” 2019 EPM, at 215. As required by A.R.S. § 16-452(B), the 2019 EPM was approved by the governor and the attorney general.

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¶7 As stated by the legislature, the purpose of the EPM is to “achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). And as recognized by our supreme court, the “EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.” *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020). But if an EPM provision conflicts with a statute, that provision is unenforceable. *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021).

¶8 On September 16, 2020, the Maricopa County Board of Supervisors (“Board”) announced it would be using vote centers for the November 3, 2020 general election. The day after the polls closed, the “Maricopa County Chairs” of the Republican, Democratic, and Libertarian parties met to select the vote centers and early ballots subject to auditing. The physical hand count, which audited 2,917 ballots cast on voting machines and more than 5,000 ballots cast through mail-in ballots, started on Saturday, November 7 and concluded on Monday, November 9. The hand count audit showed that “[n]o discrepancies were found.”

¶9 On November 12, ARP sued the Maricopa County Recorder and the Board (collectively “County”). The complaint sought an order declaring that certain provisions of the 2019 EPM addressing hand counts conflict with state statutes. ARP also requested mandamus relief directing the County to conduct a hand count of the election results “in strict accordance” with § 16-602(B)(1), which requires a sampling of two percent of “precincts,” not “vote centers.” At the same time, ARP applied for an order to show cause, alleging that conducting a hand count based on precincts would result “in a different method of data analysis that is certain to produce different results.” ARP asserted that

if precincts are sampled instead of voting centers, then the data is much easier for [ARP] and/or members of the public to cross-reference or cross-check with other voter registration data, since voter registration data is already “sortable” by precinct (but not by “vote center”). In other words, whatever hardship *vel non* it may cause to the county to sample precincts instead of vote centers, such hardship is vastly outweighed by the benefit to the public in being able to analyze and sort (and organize, process) the sampling data, thereby creating transparency to the public and confidence in the integrity of our elections, which is clearly the point to this statute to begin with (and which has clearly taken on a special

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and obvious importance in this election, which cannot be understated).

¶10 On November 13, the Secretary and the Arizona Democratic Party moved to intervene as defendants. The next business day, the court held a show cause hearing and later that day issued a minute entry granting the motions to intervene and setting expedited briefing deadlines for all pending matters, including a potential request for injunctive relief from ARP.

¶11 The Secretary, the County, and the Democratic Party separately moved for dismissal. The Secretary argued in part that (1) ARP's lawsuit was barred by laches; (2) ARP was wrong as a matter of law because § 16-602(B) is silent on the procedures for counties that use vote centers and it expressly authorizes the Secretary to fill that gap; (3) the lawsuit suffered from procedural defects, including failure to request injunctive relief postponing the official canvass, which had to be completed no later than November 23; and (4) ballots would be treated arbitrarily because several other counties used vote centers to perform their hand count audits.

¶12 Addressing laches, the Secretary argued ARP had known for "nearly a decade" that the EPM authorizes hand count audits based on samples from vote centers, and the County followed that process in the March 2020 presidential preference election and the August 2020 primary election. Yet, ARP raised no challenge to the procedure the EPM authorized until after the County had completed the hand count for the 2020 general election, causing prejudice to the Secretary, the County, and "Arizona voters, who deserve finality." The Secretary requested attorneys' fees under § 12-349, which mandates a fee award if a claim is brought, among other reasons, "without substantial justification."

¶13 After outlining the procedures and results of the hand count audit, and attaching a copy of the audit report, the County argued ARP had no basis to claim it was unaware that ARP's county chair had participated in the audit, because no later than November 11, ARP had received a copy of the report in a different lawsuit. The County argued that ARP participated – through its county chair – in the process to select vote centers instead of precincts, and that the county chair's participation in the hand count audit "shows [ARP's] unreasonable delay without justification."

¶14 The Democratic Party urged dismissal on similar grounds and referred to a November 12 letter from the Arizona Attorney General's office to Republican legislative leaders in response to "a number of

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inquiries regarding the scope and nature of the manual hand count audit” given the County’s use of voting centers. Providing initial thoughts on the issue, the letter stated in part:

Some have asserted that the audit should be conducted only using precincts The statute [§ 16-602], however, is silent on how the hand count audit should be conducted when voting centers are used. Instead, the statute directs the Secretary of State to fill in that gap and establish additional hand count procedures with the approval of the Governor and Attorney General, which was done in 2019.

¶15 In its four-page response covering all three motions to dismiss, ARP briefly addressed its argument that the County failed to conduct the hand count in accordance with § 16-602(B). The majority of the response focused on ARP’s position that the delay in filing the suit was not unreasonable because there had never been a “real case or controversy” over the hand count procedure until the 2020 general election cycle and that no prejudice existed for the other parties because there was “plenty of time” to issue the canvass.

¶16 ARP also applied for a preliminary injunction to enjoin the Board from certifying the results of the votes and issuing an official canvass until the merits of the complaint could be litigated. After outlining its legal reasoning that a new hand count was required, ARP asserted:

Given the importance of this election, and of doing everything with respect to this election “by the book,” there are also powerful public-policy reasons to grant this preliminary injunction. If an injunction is not granted, *then there will be lingering questions about the legitimacy of [the election] results* which could otherwise be answered through a proper hand count. This is also the basic prejudice that [ARP] and the voting public will suffer if the Court declines to grant an injunction – *it will create a cloud over the legitimacy of this election and its results.*

(Emphasis added.)

¶17 Following a one-hour oral argument held on November 18, the superior court issued a minute entry denying the request for preliminary injunction and dismissing ARP’s complaint with prejudice. The court stated that a more detailed ruling would follow and set a deadline

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by which the Secretary could submit a motion for attorneys' fees under § 12-349.

¶18 In applying for fees, the Secretary outlined many reasons in support of the assertion that ARP's claim was groundless, including that the challenged EPM provision had been "on the books for nearly a decade" and ARP had not objected to it in previous elections, and that ARP failed to timely seek injunctive relief. The Secretary also argued the claim was made in bad faith, asserting ARP's motives in filing the suit were to "delay final election results and sow doubt about the integrity of Arizona's elections system."

¶19 The superior court issued a detailed ruling addressing the merits of ARP's case. The court found that ARP's request for declaratory relief could not succeed because of ARP's unreasonable delay in pursuing the claim. The court also concluded that ARP had no claim for mandamus relief because County election officials followed the 2019 EPM and they lacked discretion to vary from it when performing the hand count.

¶20 Responding to the Secretary's fee application, as well as addressing the court's merits ruling, ARP argued in part that its lawsuit was justified because it hinged on the plain language of § 16-602(B), and that because the 2019 EPM conflicts with the statute, the statute must control. ARP also asserted it was unaware the hand count had already occurred because the hand count results had not yet been published on the Secretary's website, and the County was still counting votes when the complaint was filed. ARP asserted its claims were not brought in bad faith because it did not initially seek to delay the canvass until becoming aware that the County intended to certify it, which the Secretary argued would have made its claims moot. ARP also asserted that by "even contemplating" awarding attorneys' fees the court would be "close to engaging in very serious interference with the First Amendment right to petition government for a redress of grievances." *See* U.S. Const. amend. I.

¶21 In another detailed ruling, the court granted the Secretary's fee request for attorneys' fees under § 12-349, ordering ARP and its counsel to pay the \$18,237.59 award, jointly and severally. ARP timely appealed, and we have jurisdiction under A.R.S. § 12-120.21(A)(1).

¶22 After briefing in this appeal was complete, ARP moved to stay the appeal and revest jurisdiction in the superior court to allow ARP to move to disqualify the judge who decided this case, based on newly discovered evidence of alleged bias and prejudice. We granted ARP's

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motion to stay the appeal. After a different judge denied the motion to disqualify in the superior court, ARP unsuccessfully sought special action relief in this court. ARP did not seek to amend the notice of appeal to include the superior court's order denying its motion to disqualify. Thus, that ruling is not at issue in this appeal.

DISCUSSION

¶23 Broadly stated, ARP argues the superior court erred by (1) rejecting the merits of its claim that state law requires hand counts to be conducted based on precincts, not vote centers; and (2) awarding attorneys' fees under § 12-349 on the grounds that ARP's lawsuit was brought without substantial justification. As an initial matter, we address two procedural factors that impact our resolution of these issues.

¶24 First, rather than summarizing the relevant facts and procedural history in the "statement of facts" section of its opening brief, ARP includes numerous reasons it believes the court's rulings were improper. This tactic violates our appellate rules and needlessly injects uncertainty into the briefing process by leaving opposing counsel and this court to sort through a muddled presentation to discern what arguments have been fairly presented. *See* ARCAP 13 (outlining how appellate briefs should be organized and what content is appropriate in each section). We could justifiably ignore each of the "arguments" that ARP improperly embedded in its statement of facts section; however, in our discretion we have considered all assertions of error.

¶25 Second, ARP has not provided transcripts of the show cause hearing or the oral arguments held in the superior court. *See Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal."); *see also* ARCAP 11(c) (explaining the appellant's duty to order transcripts). Without such transcripts, we generally presume that the matters discussed at those hearings support the court's rulings. *See Baker*, 183 Ariz. at 73 ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). We recognize that in some instances, transcripts of hearings involving primarily procedural matters or oral arguments on pending motions might not be "necessary" for our consideration of an appeal. But for certain matters, such as the § 12-349 fee award before us, statements made by counsel and the court during non-evidentiary hearings may be particularly relevant to our analysis, as shown below.

I. Dismissal of Claim for Declaratory Relief

¶26 ARP argues the superior court erred in dismissing its claim for declaratory relief, which sought a ruling that the hand count sampling must be based on “precincts,” under the “plain language” of § 16-602. We review *de novo* the grant of a motion to dismiss for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012). We “assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient.” *Id.* at ¶ 9.

¶27 The superior court dismissed ARP’s claim for declaratory relief on several grounds, including laches. “In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497, ¶ 10 (2006); *see also League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009) (“Laches will generally bar a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party.”).

¶28 The superior court found that ARP unreasonably delayed pursuing its claim because it could have been filed much earlier. For example, ARP could have filed its claim earlier the same year in connection with the 2020 presidential preference and primary elections, or when the Board passed the resolution authorizing vote centers on September 16, 2020. Instead, ARP “waited until after the election, after the statutory deadline for commencing the hand count audit, and (as it turned out) *after the completion of the audit.*” The court found that ARP failed to acknowledge the prejudice to the County caused by the delay, including the tax dollars spent in conducting another audit under tight deadlines and disrupting an orderly administration of the election.

¶29 ARP contends that dismissal of its claim for declaratory relief was wrong because the court ignored the language of § 16-602(B). But in its opening brief, ARP states that it is not appealing the court’s laches ruling. Even if that statement does not reflect explicit waiver, ARP makes no attempt to challenge the court’s detailed analysis supporting the conclusion that the request for declaratory relief “was way too late.” Thus, ARP has waived any challenge to the court’s laches ruling. *See State v. Carver*, 160 Ariz. 167, 175 (1989) (explaining that failure to “present significant arguments, supported by authority,” in an opening brief on a particular claim usually results in waiver).

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¶30 Nonetheless, in its reply brief ARP asserts that the Secretary and the County misconstrued ARP's failure to address laches in the opening brief. According to ARP, the declaratory relief claim "is not even rationally susceptible to a 'laches' argument—the statute still says what it says, and there is no conceivable prejudice to talking about it now as opposed to months from now." We generally do not consider arguments raised for the first time in a reply brief. See *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91 (App. 2007). Even so, ARP does not inform us where this argument was raised in the superior court. See *BMO Harris Bank N.A. v. Espiau*, 251 Ariz. 588, 594–95, ¶ 25 (App. 2021) (explaining that arguments not presented to the trial court are waived on appeal). Nor does ARP point to any portion of the record suggesting that it conveyed to the court a desire to continue pursuit of the declaratory judgment claim as guidance for *future* elections. Instead, the court explained its understanding of ARP's claim:

It is telling that [ARP] lost interest in the declaratory judgment claim, and pivoted instead to the request for an injunction to stop the certification of the election and the canvass of the results, as soon as the defendants made clear that the hand count audit has been completed. [ARP] could have pursued the declaratory judgment claim to determine how to audit future voting center elections. That it did not do so demonstrates that its real interest was not the audit procedure as such.

¶31 On appeal, ARP does not challenge the court's reasoning that it apparently had no interest, for future elections, in litigating its claim that the 2019 EPM's hand count provision for vote centers is invalid because it conflicts with § 16-602(B). Thus, ARP has waived any argument that the court erred in dismissing its claim for declaratory relief. Similarly, ARP has waived any claim that the court erred in dismissing its claim for mandamus relief and denying the request for a preliminary injunction because ARP presents no challenges to those rulings in its opening brief. See *Carver*, 160 Ariz. at 175.

II. Award of Attorneys' Fees

¶32 "Except as otherwise provided by and not inconsistent with another statute," in any civil action a court "shall assess reasonable attorney fees" when an attorney or party "brings or defends a claim without substantial justification," which means "that the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(A)(1), (F). A fee award under § 12-349 must be supported by a preponderance of the

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evidence. *See Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244 (App. 1997) (construing an earlier, similar, version of § 12-349). We review the court's application of § 12-349 de novo, but we view the evidence in a manner most favorable to sustaining the decision, and we will affirm unless the court's findings are clearly erroneous. *Id.* at 243–44.

¶33 When awarding fees, a trial court “shall set forth the specific reasons for the award” and may consider various factors, A.R.S. § 12-350, but “the findings need only be specific enough to allow a reviewing court to test the validity of the judgment,” *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014). The following § 12-350 factors are relevant here: (1) the extent of efforts to determine a claim's validity before it was asserted; (2) the extent of post-filing efforts to eliminate invalid claims; (3) the availability of facts to help determine the validity of a claim; (4) “whether the action was prosecuted . . . , in whole or in part, in bad faith”; and (5) the extent to which the party prevailed. *See* A.R.S. § 12-350(1)–(3), (5), (7).

¶34 In addressing ARP's challenge to the superior court's fee ruling, we note that the two § 12-349 elements (groundless, lack of good faith) are not easily distinguishable, and other cases often analyze them jointly. We believe the better approach is to provide separate analysis, but we also recognize some overlap will exist given the breadth of each element.

A. Groundless Determination

¶35 Whether a claim is groundless involves an objective determination. *Rogone*, 236 Ariz. at 50, ¶ 22. A claim is groundless if the proponent is unable to present any rational argument, based on the law or the evidence, supporting the claim. *Id.*

¶36 In awarding fees to the Secretary under § 12-349, the court explained that it had “considered only those facts and circumstances” that both ARP and its counsel “have had a fair opportunity to address, either during the litigation on the merits or in response to [the Secretary's] fee application.” The court then stated, for several reasons, that ARP's claim was groundless.

¶37 First, the court found that “the relief sought was not legally available from the parties that were sued at the time the suit was filed. The other parties pointed out these procedural defects in their motions to dismiss, but [ARP]'s response to the motions barely addressed them.” Until ARP filed its lawsuit, it never objected to using vote centers or raised any issue about the hand count audit that would occur as part of the 2020

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general election even though the County used the same procedure twice in elections held earlier that year. As noted, ARP has not challenged the court's laches finding. Thus, ARP's inability to offer any viable legal rationale for waiting until after the 2020 election procedures were established, much less after the hand count audit was completed, supports the court's finding that ARP's attempt to require Maricopa County to perform a new audit was groundless.

¶38 Second, the court explained that even if it could have reasonably overlooked the laches problem as a matter of equity, election-law principles "unambiguously barred the claim after the election." ARP argues that its claim based on the alleged conflict between the 2019 EPM and § 16-602 was not groundless. However, the context and timing of a lawsuit challenging election procedures is critical. As the court explained, for decades Arizona courts have applied the principle that "if parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure." *Kerby v. Griffin*, 48 Ariz. 434, 444 (1936); see also *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 9 (2002) (stating that actions for procedural violations must be brought before the election); *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) (holding that procedures must be challenged before the election).

¶39 The court then rejected ARP's assertion that "every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity" after the fact through an election contest. Citing *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929), the court explained that an election challenge based on a procedural statute states a cause of action only if the plaintiff alleges that fraud has occurred or that the result would have been different had proper procedures been followed. *Id.* ("[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain."). The court added:

To say as [ARP] does that this case was "about auditing results, which by definition is simply checking them to ensure voter confidence and integrity," . . . and that fraud was "not germane to the case," . . . is to say that there was no colorable cause of action in the first place.

¶40 ARP argues that a hand count audit is not an "election procedure," suggesting that an election is over when the polls close. The

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procedures of an election are set forth in detail in statutes and the EPM. *See generally* A.R.S. §§ 16-400 to -678; 2019 EPM. Hand count procedures start no later than two weeks before election day, when the county official informs the county political party chairs how many of their respective members are needed to serve on the “Hand Count Boards.” *See* 2019 EPM, at 213. Party chairs “must” designate their members at least seven days before the election. *Id.* Hand count procedures continue until the County completes the audit report, in this case, on November 9, 2020. Contrary to ARP’s contention, the only reasonable interpretation of Arizona’s case law, considered in the context of election statutes and the 2019 EPM, is that a hand count audit constitutes an election procedure. Thus, as the superior court concluded, in the absence of fraud or a specific showing that a different outcome would have occurred, a party lacks a legal basis to file a court action demanding that an alternative election procedure must be performed.

¶41 Third, the court found that ARP failed to address the principle that “a writ of mandamus cannot issue to public officials who have no legal discretion concerning the matter at issue.” *See Adams v. Bolin*, 77 Ariz. 316, 322-23 (1954). Applying that rule, County election officials were legally required to follow the 2019 EPM and had no discretion to vary from it for purposes of the hand count. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 61, ¶ 4 (“[W]hen public officials, in the middle of an election, change the law based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.”). And as the court had explained earlier, election officials who performed the hand count could have been charged with a crime if they chose to ignore the 2019 EPM. ARP has not challenged these findings.

¶42 Fourth, the court found that ARP’s declaratory relief claim was “misdirected” because it sued the wrong party. Without citing authority, ARP argues that it needed to name only the County because if ARP had merely included the Secretary in its lawsuit, then the County would not have been “bound by any judgment or rulings in the case.” The County, however, is bound by the statutory election procedures, the EPM, and pertinent case law, the same as any other county. *See id.* at 63, ¶ 16. Thus, ARP provides no reasonable justification for failing to sue the Secretary when one of the express purposes of the lawsuit was to invalidate a portion of the 2019 EPM.

¶43 In sum, ARP was or should have been aware of the well-established principles that the EPM has the force of law, and that the time

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to challenge election procedures is *before* an election. *See id.*; *see also Sherman*, 202 Ariz. at 342, ¶ 9. ARP makes no reasonable argument that it had any chance of success when it failed to continue pursuit of the declaratory action. If ARP was interested in obtaining a judicial decision on whether hand counts carried out in counties that have decided to use vote centers is legally impermissible, then ARP could have litigated that issue in due course so the issue would be clarified for future elections. As the superior court noted, ARP presumably had no interest in doing so. Thus, the record supports the court's findings that ARP's claims were groundless.

B. Bad Faith Determination

¶44 Whether a party or its attorney acted in bad faith in pursuing a claim or defense is a subjective inquiry. *See Rogone*, 236 Ariz. at 50, ¶ 22. The relevant case law has not defined what constitutes bad faith under § 12-349, but rather only “offers illustrations of that standard as the courts have applied it case by case.” *City of Sedona v. Devol*, 196 Ariz. 178, 182–83, ¶ 23 (App. 1999).

¶45 The superior court found that ARP's claim was not made in good faith for several reasons. The court explained in part that ARP's claim seemed to presume that sampling by precinct would reveal precincts where the number of votes exceeded the number of registered voters, but the purpose of the hand count audit is “to assure that the machines are working properly.” The court determined there was “no evidence at all of phantom voters or manipulated vote totals or any other wrongdoing that might show up in a ‘cross-check’ against voter rolls.” The court also concluded that ARP's suit was motivated by “political reasons” based on “[p]ublic mistrust,” which is an improper purpose. Additionally, the court rejected ARP's attempt to avoid payment of fees by relying on the First Amendment, stating that it “does not give a litigant the right to file and maintain a groundless lawsuit.”

¶46 ARP argues that a bad faith inquiry under § 12-349 should be based on the types of conduct that “constitute an ‘improper purpose’ under the common law in a claim for abuse-of-process.” In ARP's view, without this proposed limit judges could “liberally sanction people for holding political views that differ from their own,” as it contends happened in this case. The cases ARP cites, *see, e.g., Crackel v. Allstate Ins. Co.*, 208 Ariz. 252 (App. 2004), do not involve attorneys' fees awarded under § 12-349. While ARP's examples of improper purpose could likely constitute grounds for supporting a finding of bad faith in the context of § 12-349, nothing in the text of the statute limits a court's analysis to the examples ARP identifies.

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¶47 We are not persuaded by ARP’s contention that the superior court awarded fees under § 12-349 primarily for political motives. ARP argues the court was motivated by its own political views about voter fraud, the election, and former President Trump, such that it improperly relied on cases about election contests to “shoehorn in” its desire to make a “political statement.” ARP contends the court opined on these issues for no other reason than to “make a political statement that would be read and widely published by media.” ARP thus concludes that a finding of bad faith over a “political issue” of “public mistrust” following the November election is not the kind of bad faith contemplated by § 12-349.

¶48 ARP contends that “[d]uring the hearing in this matter, [the judge] went out [of] his way to question what evidence [ARP] had of actual fraud in the election; and in his Ruling on sanctions, he flippantly characterized the public’s concern with ‘voter fraud’ as a ‘theory for which no evidence exists.’” ARP’s contention reveals its failure to acknowledge the problem it was facing – that the lawsuit was based at least partially on the public’s concern about elections in general, rather than focusing on claims reasonably supported by the law.

¶49 ARP also overlooks the court’s finding that ARP changed from demanding a “fair election” to wanting “nothing more than a hand count audit conducted ‘completely by the book and in strict accordance with the law.’” And even more significant, ARP ignores its admission, made in response to the Secretary’s fee application, that “[p]ublic mistrust following this election motivated this lawsuit.” Addressing that admission, the superior court appropriately concluded:

[ARP] is effectively admitting that the suit was brought primarily for an improper purpose. It is conceding that the method of sampling ballots for the hand count audit is a minor procedural requirement, not a necessary step toward a fair election. It is saying that it filed this lawsuit for political reasons. “Public mistrust” is a political issue, not a legal or factual basis for litigation.

¶50 ARP argues it never argued or alleged “fraud,” but the record shows otherwise. In ARP’s response to the motions to dismiss it stated that “perhaps most importantly (and obviously) of all, concern about *potential widespread voter fraud* has taken on a special significance in this general election, warranting a thorough focus on these laws and compelling [ARP] to take action.” (Emphasis added.) According to the record provided to us, ARP made claims about protecting the integrity of the election and first

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invoked the specter of fraud. If the court made comments about fraud at one of the two hearings it conducted, it was ARP's burden to provide transcripts to prove it. Regardless, ARP's concern about who introduced the issue of fraud into the litigation overlooks the court's well-reasoned analysis outlined above that redoing an election procedure requires a party to allege fraud or that the alternative procedure would change the election's outcome.

¶51 In its rulings, the superior court specifically relied on statements made by ARP's counsel, which presumably occurred during the hearings, as ARP has not asserted the statements were made in any other context. And in its decision on the merits, the court expressly stated that it had "considered the oral arguments of counsel." In addressing whether ARP (1) brought claims for an improper purpose, (2) tried to distance itself from its own arguments, and (3) suggested that the court asked unfair questions about the public policy behind the hand count statute, the court explained: "[ARP] is not characterizing either its litigation posture or the Court's inquiry honestly. *The Court's questions addressed [ARP]'s own arguments.* For [ARP] to suggest otherwise is gaslighting. It evinces a lack of good faith." Because ARP has not supplied transcripts, we presume that the matters raised and debated during the oral arguments support the court's ruling. *See Baker*, 183 Ariz. at 73. Thus, we cannot conclude that ARP's contentions about the court's perception of those conversations support ARP's view. Furthermore, the court thoroughly explained its reasoning in both the ruling on the merits and the ruling on attorneys' fees.

¶52 Finally, we find no merit in ARP's contention that the First Amendment essentially immunizes a party who challenges election procedures from § 12-349 sanctions. ARP suggests "it may be beneficial" for us "to weigh in on what a finding of 'bad faith' under § 12-349 really requires, and when a judge's formulation of it becomes so erroneous as to violate First Amendment rights." According to ARP, the superior court admitted that it "considers a political belief held by one third of the public, as well as the country's former President, to be mere 'bad faith.'" ARP argues that allowing "such a broad definition of bad faith would violate any rational definition of what is permissible under the First Amendment, and would allow county judges to liberally sanction people for holding political views that differ from their own – which is exactly what the lower-court judge did in this case." The record shows otherwise.

¶53 The superior court issued its fee ruling based on the record before it. Responding to the fee application, ARP took issue with the court's comment (in the merits ruling) that it would be necessary to decide whether

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ARP brought its case in bad faith “to cast false shadows on the election’s legitimacy.” ARP asserted that the comment was “at odds” with around “a third of the general population,” and “half of the Republican Party in this State, according to polls conducted by NPR, Reuters, and Politico among others.”

¶54 ARP contends that the election’s “legitimacy” was not an issue properly before the court. But ARP ignores its own filing. In requesting the preliminary injunction, ARP explicitly referenced concerns about the election’s legitimacy if the injunction was not granted. *Supra*, ¶ 16. Addressing those concerns in the context of the Secretary’s fee request, the court stated: “This is why the Court raised the question whether [ARP] brought suit in order to ‘cast false shadows on the election’s legitimacy.’ Undercutting the election’s legitimacy by raising ‘questions’ is exactly what [ARP] did in this passage.” ARP’s assertions about the election’s legitimacy, along with its failure to properly acknowledge or address the court’s legal analysis on the legal flaws in its case, severely undermine ARP’s claim that the superior court’s ruling was politically motivated. And ARP cites no authority suggesting that general allegations about public mistrust and the legitimacy of the election, to the extent they could be relevant in a proper election-related lawsuit, provided any legal justification for filing its claims here.

¶55 ARP also asserts that because politically charged election cases “are already hard to file and litigate,” judges need to “avoid deliberately becoming a part of the ‘political thicket.’” ARP argues that affirming the fee award in this case would

endorse this judge’s behavior, which only served to inflame and escalate an otherwise straightforward legal issue with his own personal political beliefs; and it only serves to chill lawyers and the public from seeking to raise important issues of obvious public concern in court. It would turn the courts into just another hostile political forum, where people have every right to fear irrational reprisals from biased judges – even though our courts are designed to be the one place where this does not happen.

For the reasons explained above, as well as those set forth in the superior court’s comprehensive rulings addressing the merits and attorneys’ fees, we reject ARP’s insinuation that the judge was biased and that his rulings were affected by political beliefs. See *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, ¶ 21 (App. 2013) (recognizing that judges are

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presumed to be “free of bias and prejudice,” and “judicial rulings alone do not support a finding of bias or partiality without a showing of an extrajudicial source of bias or a deep-seated favoritism” (citation omitted)).

¶56 Further, like the superior court, we are not imposing any new requirement or limitation on the filing of an election-related lawsuit. Instead, as with any lawsuit, claims filed in an election matter are subject to the well-established principles—derived from statutes, rules, and case law—that govern all civil lawsuits in this state. *See, e.g.*, A.R.S. § 12-349; Ariz. R. Sup. Ct. 42, ER 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact . . .”); *see also King v. Whitmer*, 556 F. Supp. 3d 680, 727 (E.D. Mich. 2021) (“Although the First Amendment may allow [attorneys] to say what they desire on social media, in press conferences, or on television, federal courts are reserved for hearing genuine legal disputes which are well-grounded in fact and law.”).

¶57 ARP cites no authority suggesting that courts refrain from holding a party and its attorney accountable for filing lawsuits that lack merit because of First Amendment considerations, and the few cases addressing this topic confirm the opposite view. The First Amendment does not shield attorneys or parties from a court’s obligation under § 12-349 to award attorneys’ fees against a party or attorney who brings or defends a claim without substantial justification. *See Larsen v. Comm’r*, 765 F.2d 939, 941 (9th Cir. 1985) (“The right to petition protected by the First Amendment does not include the right to maintain groundless proceedings.”); *see also In re Intel Sec. Litig.*, 791 F.2d 672, 676 (9th Cir. 1986) (rejecting an argument that a court’s power to impose sanctions for frivolous litigation is limited by the First Amendment); *King*, 556 F. Supp. 3d at 727; *cf. Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.”) (citations omitted). The court system exists to hear legitimate legal disputes, not for airing political disputes or grievances. *See King*, 556 F. Supp. 3d at 727 (“It is not . . . acceptable to use the federal judiciary as a political forum to satisfy one’s political agenda.”).

¶58 ARP has not shown that any of the court’s § 12-349 findings are clearly erroneous, or that the court abused its discretion in granting the Secretary’s fee request.

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CONCLUSION

¶59 We affirm the superior court's dismissal of ARP's complaint and application for preliminary injunction, and the court's award of attorneys' fees. The Secretary requests an award of attorneys' fees incurred on appeal under § 12-349, for the same reasons outlined by the superior court. In its reply brief, ARP does not address the fee request. We award reasonable attorneys' fees to the Secretary subject to compliance with ARCAP 21. The award is joint and several against ARP and its counsel.



AMY M. WOOD • Clerk of the Court
FILED: AA