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ARIZONA SUPREME COURT

**AUDIT-USA, an Arizona non-profit
corporation,**

Plaintiff/Appellant,

vs.

**MARICOPA COUNTY; MARICOPA
COUNTY BOARD OF SUPERVISORS,
a ,**

Defendant/Appellee.

Arizona Supreme Court
NO.

Court of Appeals
No. CA-CV 22-0254

Maricopa County Superior Court
NO. LC2021-000074-001

PETITION FOR REVIEW

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1 The Plaintiff /Appellant below, AUDIT-USA, petitions this court to review the
2 opinion of Division One of the Arizona Court of Appeals pursuant to Rule 23, Ariz.
3 Rules of Civil Appellate Procedure. The opinion is attached to this petition as Exhibit 1.
4

5 **THE ISSUE PRESENTED FOR REVIEW**

6 Whether A.R.S. § 16-625 expressly prohibits the Maricopa County Board of
7 Supervisors from releasing, pursuant to a public record request, an electronic copy of the
8 ballot images from the 2020 general election.
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10 A.R.S. § 16-625 provides:

11 Electronic data and digital images; ballots; security

12 The officer in charge of elections shall ensure that electronic
13 data from and electronic or digital images of ballots are protected
14 from physical and electronic access, including unauthorized copying
15 or transfer, and that all security measures are at least as protective as
16 those prescribed for paper ballots.
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18 **NON-DISPUTED FACTS**

19 1. All parties agree that “the officer in charge of elections at the general
20 election in November 2020 in Maricopa County was the defendant Maricopa County
21 Board of Supervisors.(¶ 11 Of Opinion), Ex. 1 attached.
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23 2. The County defendant does not dispute that the cast ballot images from that
24 election are public records. (ROA 30, 1822-24)
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26 3. The parties recognize that pursuant to the *Carlson v. Pima County*, 141
27 Ariz. 487 (1984) case certain public records may additionally be withheld if the

1 government entity makes a required factual showing of harm which was neither done nor
2 attempted in this case.

3 4. There is no factual question that the defendant board of supervisors protects
4 the electronic or digital images of ballots from physical and electronic access by any
5 unauthorized persons. They have a very secure system. (ROA 36, Ex. 7, p 50)

6 The “Dominion Company contract” with Maricopa County provides that “once the
7 polls have been closed, the Image Cast tabulators encrypt all of the results files prior to
8 transmitting them back to “the Election Management System.” (ROA) 24, Ex. 5 (B
9 Scope of Work Optional Preferences). The encryption of those files protects them, as
10 does their hash coding and other protections.

11 5. The County’s own 93 page public report entitled “Correcting The Record,
12 Maricopa County’s In-Depth Analysis of the Senate Inquiry” describes their “robust set
13 of physical security controls to prevent unauthorized access to the tabulation equipment,
14 including controlled restricted access and security cameras.” Furthermore, “to access
15 each tabulator, an operator needs a series of two passwords and a security token (key).
16 Passwords used to access the election program and to tabulate ballots are changed prior
17 to each election” (ROA 36, Ex.7, p. 50. In addition, ballots are only tabulated when
18 political party observers are present. (ROA, 36, Ex. 7 p. 51).

19 6. The defendant Board of Supervisors has not at any time suggested or
20 asserted any risk in providing AUDIT-USA with the ballot images. They claim they
21 would provide plaintiff’s the copies requested but for their view that such is expressly
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1 prohibited by the legislature when it enacted A.R.S. § 16-625 . (ROA 36, Ex. 7, p.2)

2 They simply claim that their hands were tied by the legislature despite their desire.

3 7. The County complied with a subpoena from the Arizona Senate around the
4 same dates as the public record request from AUDIT-USA for the same cast ballot
5 images. The defendant county provided a copy to the Senate and made a separate
6 “clone” at the same time. They tested the clone and concluded that it contained a faithful
7 copy of the cast ballot images from the election. (ROA 36, Ex. 7, p. 21)

10 **REASONS WHY THE COURT SHOULD GRANT THE PETITION**

- 11 1. The Court should grant review because no Arizona decision controls
12 the interpretation of the statute in question and the trial court and Court
13 of Appeals have incorrectly decided an important issue of law.

14 The Legislature in A.R.S. § 16-625 does not expressly prohibit copies of the cast
15 ballot images. To the contrary, it prohibits only “unauthorized” copies. The reference
16 to “unauthorized copying or transfer” clearly means that some authorization may occur.
17 Since the one sentence statute is addressed to “the officer in charge of elections,” which
18 in our situation is the Maricopa County Board of Supervisors, the authorization must
19 relate to them.
20

- 21 2. No special authorization is needed because in Arizona all public records are
22 available to the public, (A.R.S. § 39-121 et. seq.,) absent a specific exception from the
23 legislature or affirmative compliance with the requirements of Carlson v. Pima County,
24 141 Ariz. 487 (1984). The Court of Appeals concluded, however that a “court order”
25 would be required. There are no words that suggest such a conclusion and it makes no
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1 practical sense. Instead of a public record request to the county board of supervisors
2 they impliedly suggest that AUDIT-USA should have filed a “petition for public record
3 disclosure” with the Maricopa County Superior Court. If they had done so what standard
4 would the court have used beyond determining that the provision of a copy of those
5 records did not involve any risk to the integrity of those records. That would be an
6 unnecessary matter because the County is certain that such a copy would not be a risk.
7 They are certain because that is the result of the system they have designed and that they
8 have proven to their satisfaction. (ROA 36, Ex. 7, p. 21). If there had been such a
9 question it could have been addressed at a hearing. Plaintiff’s case was dismissed on a
10 Rule 12 (b)(6) Ariz. R. of Civil Proc. motion without an evidentiary hearing.
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14 3. The Court of Appeals conflates the protection needed for paper ballots
15 which were stored in some 1,600 boxes with the protection needed for electronically
16 stored and protected cast ballot images. A.R.S. § 16-624, which dates from at least 1927,
17 is our present statute that sets forth the protection of paper ballots. The use of ballot
18 images is a recent technological development utilizing high speed scanners and computer
19 recognition of votes.
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22 Paper ballots have a long history in our state. There are detailed requirements for
23 the handling and storage of paper ballots. For example, if an unauthorized person
24 obtained access to paper ballots a mere addition of a second mark on a ballot already
25 marked for a choice of a candidate would create an “over vote” and thereby cancel out
26 that voters ability to have his vote counted. All of the requirements for protecting paper
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1 ballots, such as depositing ballots in sealed boxes for twenty four months after the
2 canvass, have been developed because of the unique properties of paper. The
3 application of A.R.S. § 16-624 protections of paper ballots to A.R.S. § 16-625, which
4 relates to protection of electronic ballot images, is neither compelled nor required.
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6 The cases cited by the Court of Appeals opinion are not related to that issue. For
7 example Democratic party of Pima County v. Ford, 228 Ariz. 549 (App. 2012)
8 concerned “poll tapes” that had been placed in sealed boxes of ballots and needed court
9 order to retrieve them as the poll tapes were accessible public records.
10

11 The inclusion of A.R.S. § 16-624 which relates exclusively to the protection of
12 paper ballots was based upon what the Court of Appeals claimed was “the plain
13 meaning of the words (of A.R.S. § 16-625) in their broader context,” citing S. Ariz.
14 Home Builders Assn v. Town of Marana, ____ Ariz. ____, ¶31, 522 P.3d 671, ____ ¶31
15 (2023). However, in that cited case the legislature had “expressly directed” a narrow
16 construction of the statute. Regarding A.R.S. § 16-625, there is no express language to
17 consider and duplicate the standards for paper ballot storage in order to determine how to
18 protect electronic data.
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22 The Court of Appeals correctly stated “absent ambiguity or absurdity, our inquiry
23 begins and ends with the plain meaning of the legislature’s chosen words.” (¶10 of
24 opinion citing Welch v. Cochise Cnty. Bd. of Supervisors, 251 Ariz. 519, 523, ¶11
25 (2021). They then violated the requirement of that case’s direction by going beyond the
26 plain meaning of the legislature’s chosen words. Although a statute’s language is the
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1 best and most reliable index of the statute's meaning, uncertainty about the meaning or
2 interpretation of the statute's terms requires an appellate court to apply methods of
3 statutory interpretation that go beyond the statute's literal language; these methods
4 include consideration of the statute's context, language, subject matter, historical
5 background, effects and consequences, and spirit and purpose. Blake v Schwartz (App.
6 Div. 1 2002) 202 Ariz. 120, 42 P.3d 6, as amended.
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9 4. If the court had concluded that A.R.S. § 16-625 was ambiguous the proper
10 process was to determine legislative intent. State v Arthur (App. Div. 11980) 125 Ariz.
11 153, 608 P.2d 90. Legislative intent was not considered by the Court of Appeals nor by
12 the lower court despite such evidence being available and relevant. At no point in this
13 case has the county or any court examined the actual legislative intent. The only
14 reference to legislative intent by defendant was in the County's Answering Brief at p. 9
15 where it stated "as a preliminary matter, the history of A.R.S. § 16-625, isn't helpful."
16 They failed to explain why it wasn't helpful to the Court. The legislative history of
17 A.R.S. § 16-625 is important and supports the plain language interpretation advanced by
18 AUDIT-USA.
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22 AUDIT-USA provided the lower court with evidence of legislative intent. A
23 transcript of the Presentation of Senate Bill 1094, to the Arizona Senate Judiciary
24 committee which became A.R.S. § 16-625, was attached as Exhibit 1 to AUDIT-USA's
25 Motion for a new Trial (ROA 24). The transcript quoted an "unnamed staff person who
26 presented a "strike all amendment to Senate Bill 1904" in Chair's name." He explained:
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1 **Unnamed Staff Person:** Madam Chair and Members: The strike
2 everything amendment, in the Chair's name, dated 2/2/2017 at
3 3:20 p.m. required an officer in charge of elections to ensure that
4 electronic data from and electronic or digital images of ballots
5 are secured from physical and electronic access. This
6 includes unauthorized copying or transfer. Finally, the bill
7 stipulates all security measures are at least as protective as those
8 for paper ballots. With that, I am open for questions.

9 **Senator Griffin:** Thank you, Madam Chair and Committee members,
10 Jeffrey did an excellent job explaining it. We understand that there
11 are studies that will allow the manipulation of digital ballot so this is
12 really a protective issue to protect digital ballots in the same manner
13 as paper ballots are right now. There has been discussion about
14 releasing digital ballots to the public for certain people and we want
15 to prevent any fraud or manipulation to those ballots. So they're to be
16 treated the same as paper ballots.

17 The vote from the Arizona Senate Judiciary Committee was unanimous or 7-0. As
18 Senator Griffin said the bill was "really a protective issue" to prevent "any fraud or
19 manipulation of those ballots." She also said protections were to be treated in the same
20 manner as paper ballots. The manner of paper ballots is to secure them so that no one can
21 access the paper and make changes. The cast ballot image files are protected by the
22 Board of Supervisors so that no one can access the images and make changes. The Board
23 of Supervisors claims that the same "manner" means placed in sealed boxes. The
24 approximately 2.1 million paper ballots cast at the 2020 general election were placed in
25 some 1,600 boxes. Since the ballot images could be contained in one thumb drive or a
26 small "hard drive" the question arises as to the intent of the legislators. As previously
27 noted, any uncertainty of the meaning of a statute is resolved by including consideration

1 of the statutes context, historical background, effects and consequences, and spirit and
2 purpose. Blake v. Schwartz, supra.

3 A.R.S. § 16-625 uses the words “protection” and “protected.” The de novo
4 interpretation by the Court of Appeals of the protection needed for cast ballot images
5 solely looked at the protection for paper ballots with no analysis of the difference.
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7 A.R.S. § 16-624 exclusively relates to paper ballots and requires those boxes of
8 paper ballots to be turned over to the county treasurer “after the canvass has been
9 completed.” There is not a similar requirement for the elections electronic data and no
10 evidence that such a transfer to the county treasurer is or has ever been made.
11 Furthermore, such destruction of electronic data from elections, as occurs for paper
12 ballots, would be a very bad idea for valuable electronic data that should not be inferred
13 or assumed.
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17 5. One “effect” of preventing access to cast ballot images is to prevent any
18 possibility of any election contest in Arizona. “Recounts” of ballots are prohibited in
19 Arizona. Only so-called “automatic recounts” are allowed by A.R.S. § 16-661. Election
20 contests are virtually impossible because A.R.S. § 16-673 (A)(4) requires the filing of an
21 election contest “within five days after completion of the canvass of the election and
22 declaration of the result thereof by the secretary of state or by the governor”
23 Importantly, such a “verified” complaint must contain “the particular grounds of the
24 contest.” That cannot occur when neither the ballots or the ballot images may be seen.
25 A contestant must accept the printed numbers from the “black box.”
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1 The failure of an election contestant to strictly comply with statutory requirements
2 is fatal to his or her right to have the election contested. Donaghey v. Attorney General
3 (1978) 120 Ariz. 93,, 584 P.2d 557. Rules governing an election contest are purely
4 statutory. Brown v. Superior Court In and For Santa Cruz County (1956) 81 Ariz. 236,
5 303 P.2d 990. Time elements in election statutes are jurisdictional, and time
6 requirements for filing an election contest are strictly construed. Hunsaker v. Deal (App.
7 Div. 1) 1983, 135 Ariz. 616, 663 P.2d 608. The “five days” are calendar days as Rule
8 6(a) of Ariz. Rules of Civ. Proc. are not applicable. Smith v Board of Directors, Hosp.
9 Dist. No. 1, Pinal County, (App Div. 2 1985) 148 Ariz. 598, 716 P.2d 55.

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12 The 2020 General Election in Maricopa County had around 2.1 million ballots
13 cast. Ballots were either mailed in, dropped off or cast at “election centers” where
14 anyone from any county precinct could vote. Those ballots are not segregated physically
15 be precinct. The votes were counted by computers interpreting ballot images that had
16 been scanned in batches of approximately 200 ballots each. Those paper ballots are not
17 available for any potential contestant to see.

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20 An election contest within 5 days is possible only if ballot images are provided
21 pursuant to A.R.S. § 16-625. That is because the images are essentially a “picture” of
22 each ballot and the entire 2.1 million images can be sorted by computer and viewed
23 individually on a computer screen. The publicly available CVR’s, or cast vote record, is
24 available in Maricopa County as a public record and can be compared to the ballot
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1 “picture” to determine if it is was accurately determined by the computer software. The
2 images can be computer separated by district or race.

3 Therefore, an election contest could be filed within the time limit of A.R.S. § 16-
4 673 only because only the images may be viewed and counted. The Court of Appeals
5 opinion alone, by its addition of words not found in A.R.S. § 16-625, impliedly means
6 that no election contest could ever be filed in Arizona. Transparency is available by
7 technology and statute. The Court, however, shut that door without any analysis of its
8 consequence. Of course, an election challenge would be extremely rare if the images
9 could be viewed and counted.

10 The legal effect of the Court of Appeals decision is to negate the heart of our states
11 democracy as guaranteed by Ar. 7 § 7 of Arizona’s constitution.

12 Art. 7 § 7. Highest number of votes received as determinative of person elected

13 Section 7. In all elections held by the people in this state, the person or
14 persons, receiving the highest number of legal votes shall be declared
15 elected.

16 A.R.S. § 16-625, on the other hand, ensures that the person receiving the highest
17 number of legal votes is declared elected.

22 CONCLUSION

23 A.R.S. § 16-625 allows Maricopa County as the “officer in charge of elections to
24 protect its election data files by preventing “physical and electronic access” by anyone
25 but their election workers using their secure system wherein electronic images of cast
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1 ballots are “at least as protected as those prescribed for paper ballots.” Those public
2 records (the ballot images) are the guarantors of our democracy. The effect of the Court
3 of Appeals decision to include and apply A.R.S. § 16-624 to A.R.S. § 16-625 is to
4 prevent the only possible means of individual voters to confirm the accuracy of reported
5 election results. The court’s error leaves the door wide open to any and all claims of
6 fraud or manipulation when the already existing election system is safely capable of
7 complete transparency. This court should review the harmful ruling of the Court of
8 Appeals.
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11 In addition, under Ariz. R. Civ. App. Proc. 21(a), AUDIT-USA asks the Court to
12 award them the full reasonable costs they have incurred in prosecuting this petition, in
13 accordance with A.R.S. § 12-331, 12-341, and 12-342, and Ariz. R. Civ. App. Proc.
14 21(a).
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16
17 DATED this 16th day of March, 2023.
18

19 **RISNER & GRAHAM**

20 By /s/ William J. Risner
21 William J. Risner
22 Attorney for Plaintiff
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PROOF OF SERVICE

The undersigned William J. Risner, on the 16th day of March, 2023, file an Original and one (1) copy of the Petition for Review in the Supreme Court and served a copy to the following parties in compliance with Rule 5(c)(2) of the Arizona Rules of Civil Procedure as follows:

COPY of the foregoing emailed
this 16th day of March, 2023:

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