IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

LAURIE AGUILERA, a registered voter in Maricopa County, Arizona;
DONOVAN DROBINA, a registered voter in Maricopa County, Arizona,

Plaintiffs and Appellants,

v.

ADRIAN FONTES (since replaced by Stephen Richer), in his official capacity as Maricopa County Recorder;
CLINT HICKMAN, **JACK SELLERS**, **STEVE CHUCRI**, **BILL GATES AND STEVE GALLARDO**, in their official capacities as members of the Maricopa County Board of Supervisors; **MARICOPA COUNTY**, a political subdivision of the State of Arizona; **ARIZONA DEMOCRATIC PARTY**;

Defendants and Appellees
(As to Arizona Democratic Party, Defendants-In-Intervention)

COURT OF APPEALS CASE NO. CV-20-0688
APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY
(CV2020-014562)
HONORABLE MARGARET MAHONEY, JUDGE

APPELLANTS' OPENING BRIEF

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INTRODUCTION

A recent statutory change authorized the use of a new process called electronic adjudication, which Maricopa County now utilizes. Electronic adjudication involves poll workers reviewing digital images of damaged or defective ballots on a computer screen in an attempt to determine voter intent.

The law requires elections officials to perform the electronic adjudication of votes in a location open to public viewing. However, since implementing electronic adjudication, Maricopa County has failed to comply with this requirement. Aguilera and Drobina are Maricopa County voters who brought suit against Maricopa County alleging various causes of action. Their sixth cause of action alleged that the County had violated this law. It sought declaratory and injunctive relief requiring the County to allow the public access to the location where electronic adjudication takes place going forward. They appeal here from a denial of such relief.

The trial court denied relief on several erroneous grounds.

Firstly, the Court reasoned that the matter was moot as the electronic adjudication of votes for the 2020 general election had already been completed. Whether or not this was correct as to Plaintiffs' other claims, this holding is in error as to Aguilera and Drobina's sixth cause of action, which sought prospective relief directed at future elections.

Secondly, the Court found that the public could already view the

electronic adjudication process online and that this was sufficient to satisfy the requirements of the law. In doing so the Court errored in two ways. The court errored as a matter of law in finding that the County may satisfy the public observation requirement without allowing for in-person viewing. Even setting this aside, the Court errored abused its discretion in finding that the provisions the County had made for remote viewing were adequate. This is because the uncontested testimony of the County's only witness is that the cameras the County has installed at its facility do not, in fact, allow the electronic adjudication process to be observed.

Thirdly, the Court, claiming concern over ballot secrecy, stated that it questions a process which permits anyone other than the authorized personnel hired/appointed to do so, to view a ballot in the fine detail Plaintiffs desire. However, the law's requirements are not the Court's to question. Even if they were, the Court's finding that the requirements of the law compromise ballot secrecy is fundamentally in tension with its factual finding that a ballot, once cast, cannot be tied back to any given voter.

In addition, the Court ruled that Plaintiffs lacked standing to bring their claims (although it is not entirely clear whether it intended this holding to apply to their sixth cause of action). In doing so, it erroneously applied the "distinct and palpable injury" test, ignoring a recent ruling by the Arizona Supreme Court that all voters have standing to bring suit to challenge violations of

Arizona election law by public officials. Even had this not been the case, the Court would still have errored by finding that Plaintiffs lacked standing under a traditional standing analysis.

STATEMENT OF THE CASE

Under Arizona law, "The electronic adjudication of votes must be performed in a secure location, preferably in the same location as the EMS[1] system, but open to public viewing." Electronic Adjudication Addendum ("Addendum") to the 2019 Elections Procedure Manual ("EPM"), at 3, § D.1., Electronic Index of Record ("**EIR**") 72.[2] On November 12, 2020 Laurie Aguilera and Donovan Drobina (collectively "Plaintiffs") filed a Verified Complaint alleging, for its sixth cause of action, that Appellees (collectively "Maricopa County" or the "County") have not been fulfilling this legal obligation. Verified Complaint ("Complaint"), EIR 1, ¶¶ 4.41-4.43. On this cause of action, Plaintiffs requested declaratory relief as well as injunctive relief

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[1] Election management system.

[2] Electronic Adjudication Addendum to 2019 Election Procedures Manual ("EPM") D(1) https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf (last visited Dec. 3, 2020); ["As agreed by all parties, the EPM has the force of law. Minute Entry, Nov.30, 2020, EIR 57, at 7 n.1 (citing A.R.S. § 16-452(C)); *Arizona Public Integrity Alliance v Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020)) ("***Fontes***"); *see also* A.R.S. § 16-621(A) ("All proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual issued pursuant to section 16-452 under the observation of representatives of each political party and the public[.]").

requiring, in pertinent part, "the opening of the location where electronic adjudication is taking place to the public in **further elections**[.]" Complaint, EIR 1, at 14:25-15:7 (emphasis supplied).[3] Plaintiff's Complaint specifically sought attorney fees and costs pursuant to A.R.S. § 12-2030 (and other applicable law). Complaint, EIR 1 15:10-11. A.R.S. § 12-2030 provides for the award of fees to the successful party in a mandamus action.

The Arizona Democratic Party ("ADP") moved to intervene on November 15, 2020, and the Court granted the ADP's motion. 1 APPX 69-75, 192. The Court set an expedited briefing schedule and an evidentiary hearing (or trial) and oral arguments for November 20, 2020. On November 16, 2020, the County moved to dismiss Plaintiffs' complaint. The ADP filed its motion to dismiss the following day, and Plaintiffs responded in opposition to both motions on November 17, 2020 and November 18, 2020, respectively. 1 APPX 180-187, 211-217, 226-231.

In their response briefs, Plaintiffs pointed out that neither the County nor the ADP addressed Plaintiffs' sixth cause of action in their motions to dismiss. EIR 35, at 7:5-10; EIR 37, at 5:9-12. Plaintiffs' response to the County's motion to dismiss also explained why the case was properly classified as a mandamus action. *See e.g.*, EIR 35, at 4 n.3. Further, Plaintiffs, in their responses,

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[3] Certain other portions of Plaintiffs' Verified Complaint, not appealed from here, sought time-sensitive relief relating to the 2020 general election. Therefore, the matter was heard on an expedited track.

advanced two grounds for claiming standing. Plaintiffs claimed that the Arizona Supreme Court in *Fontes* recently made clear that every Arizona voter has standing to bring claims that public officials violated election law and that, even had this not been the case, they still had standing under the prior standing analysis. *See* EIR 35, at 4:20-5:2 ("Because alleging a palpable injury is not required for voters to bring an action to enforce Arizona election law, and because, even if required, each plaintiff has alleged a palpable injury that is connected to the actions of Defendants, they have standing to bring their claims."), *see also id*. at 4 n.3; EIR 37, at 2:7-3:25]

An all-day hearing or trial was held on November 20, 2020, at which the trial court, as finder of fact, took evidence and heard the testimony of the parties' witnesses. *See generally* Transcript of the Proceedings, Nov. 20, 2020 ("Tr.").

At trial, the County's only witness was Scott Jarrett ("Jarrett"), its director of election day operations. Jarrett testified on direct examination that the electronic adjudication process takes place at the Maricopa County Elections and Tabulation Center, referred to as the "central tabulation" room, and that "we don't just let any member from the public in." Tr. 31:32-9, 33:9-10; *see also* Tr. 77:2-9 (reaffirming statement on cross-examination). The requirement that the process be open to public viewing is supposedly accomplished through cameras located in the central tabulation room which

allow the County to provide a livestream online. Tr. 32:21-33:4, 77:8-9.

Jarrett further testified that the electronic adjudication process takes place on the computer screens that the "adjudication boards are viewing when they're performing the electronic adjudication." Tr. 77:10-15. He stated that adjudicators make their decisions by applying their training to what they see on those screens. Tr. 79:2-4. According to Jarrett, "political party observers" are permitted to be physically present and "view what the adjudicators are looking at [on their screens] and overhear any conversations that the adjudicators are having to make their determinations." Tr. 35:2-3, 77:2-8, 79:4-8. However, Jarrett acknowledged that the cameras set up to allow for public viewing do not display the adjudicators' screens. Tr. 709:9-12.

According to Jarrett, the County's justification for failing to show the adjudicators' screens on camera is that "having cameras viewing those ballots before election day and even subsequent to election day would be releasing results prior to election day, which is not allowed through statute." Tr. 79:21-24. Although, Mr. Jarrett admitted that only a minority of ballots are adjudicated (meaning that the adjudication process does not provide a complete picture of the results), he maintained that the County is prohibited from releasing the results of even one ballot prior to election day. Tr. 79:25-80:4, 80:8-11. However, Mr. Jarrett then admitted that this same prohibition on releasing any results prior to election day also applies to the political parties

whose observers the County permits to view the screens. Tr. 80:16-19.

Mr. Jarrett further stated, and Defense counsel reaffirmed, that the ballots being adjudicated contain "no identifying information" that could in any way indicate to an observer the identity of the person who cast that ballot. Tr. 46:12-13, 241:10-14.

Plaintiffs also testified at trial. They both stated that they were registered voters in Maricopa County and that they would like to have the opportunity to observe the adjudication process in-person. Tr. 101:4-6, 123:22-25, 152:17-20. This testimony was uncontested.

Following the presentation of evidence, the Court heard closing arguments, which included oral argument on the County's and ADP's motions to dismiss. *See generally* Tr. 224-254. Plaintiffs argued that, as a matter of law, a video feed cannot satisfy the requirement that "The electronic adjudication of votes must be performed in a secure location, preferably in the same location as the EMS system, but open to public viewing." EIR 72, at 3, § D.1.; *see* Tr. 225:4-7. Alternatively, Plaintiffs argued that the feed provided by the County was inadequate to satisfy this their legal obligations. *See* Tr. 226:19-227:2.

Subsequent to trial, the Court entered an order "dismissing with prejudice this action for failure to state a claim upon which relief can be granted, or alternatively, denying the relief sought by Plaintiffs given their failure to produce evidence demonstrating entitlement to same." Minute Entry, Nov. 30,

2020, EIR 57, at 10. The Court articulated four reasons for denying Plaintiffs relief on their claim that the County had failed to satisfy its legal requirement to open the location where the electronic adjudication of votes was taking place to public observation.

Firstly, the Court reasoned that the matter was moot as the electronic adjudication of votes for the 2020 general election had already been completed. Minute Entry, EIR 57, at 7-8. Secondly, the Court stated that "the uncontested evidence established that the public is able to view the adjudication process on an Elections Department website" and that "[a]lthough Plaintiffs' counsel argued that the website's camera view was distant or in some fashion inadequate to satisfy Plaintiffs, this was argument of counsel since Plaintiffs had never actually availed themselves of the website viewing opportunity to know personally what was visible or whether it was satisfactory." Minute Entry, EIR 57, at 8.

Thirdly, the Court stated that it "questions a process which permits anyone other than the authorized personnel hired/appointed to do so, to view a ballot in the fine detail Plaintiffs desire[,]" reasoning that "[d]isclosing the details of another voter's ballot to a member of the public offends ballot secrecy." Minute Entry, EIR 57, at 8.

Further, the Court found that Plaintiffs had failed to establish that a video feed, as a matter of law, failed to satisfy the requirement that the location where

the process was taking place be open to public viewing.

Minute Entry, EIR 57, at 8. In addition, the Court ruled that Plaintiffs lacked standing to bring their first through fifth causes of action (relating to primarily to vote denial) insofar as their claims "go[] to the process used with and available to all voters, not uniquely to Aguilera and Drobina." Minute Entry, EIR 57, at 9. It is unclear from the text of its order if the Court intended this portion of its ruling to apply to the sixth cause of action. *Id.* In determining that Plaintiffs lacked standing, the Court applied the "distinct and palpable injury" test, holding: "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury. An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Id.*[4] The Court found that Aguilera and Drobina had failed to allege a distinct or palpable injury sufficient for standing, and that Aguilera and Drobina had not established that their alleged injury was redressable via the relief sought. *Id.*

Finally, the Court rejected the County's contention that Plaintiffs' claim was barred by laches. Minute Entry, EIR 57, at 8-9.

Plaintiffs timely filed their notice of appeal on December 29, 2021 EIR 85; Ariz. R. Civ. App. P. 9(a). The notice of appeal stated that Plaintiffs

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[4] The Court cited *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975) and *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998) for this proposition.

intended to appeal from the portion of the Court's Order denying relief as to Plaintiffs' sixth cause of action. EIR 85. This Court has jurisdiction to hear the appeal. A.R.S. § 12-2101(A)(1) & (A)(5)(b).

STATEMENT OF THE ISSUES

1. Whether Maricopa County violates its legal duty to electronically adjudicate votes in a location open to public viewing when it: (1) denies the general public access to the facility where electronic adjudication is performed and (2) the cameras set up by the County to allow the general public to observe the electronic adjudication process do not actually show the process taking place.
2. Assuming the Court's holding that Aguilera and Drobina lack standing applies to Claim 6, whether Plaintiffs have standing to obtain the relief sought in Claim 6.

ARGUMENT

I. The standard of review.

An appellate court "review[s] issues construing statutes and rules de novo." *Fontes*, 250 Ariz. at 61-62, ¶ 8 (citing *Fitzgerald v. Myers*, 243 Ariz. 84, 88, ¶ 8 (2017)). Likewise, the issue of standing is reviewed de novo. *Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 658, ¶ 7 (App. 2008). Here, whether the trial court erred in dismissing Claim 6 centers on interpretation of the relevant statutory provisions under Title 16 and of the EMP, which the trial court and

all parties agree has the "force of law." A.R.S. § 16-452(B) & (C); *e.g*. 1 APPX 20, ¶ 4.34; 184 n.1.; 2 Minute Entry, EIR 57, at 7 n.10; *see Fontes*, 250 Ariz. at 63, ¶ 16 ("Once adopted, the EMP has the force of law…."). Accordingly, de novo review is appropriate here, except as to the factual issues concerning the trial court's denial of injunctive relief, which is reviewed for abuse of discretion. *Garden Lakes Cmty. Ass'n v. Madigan*, 204 Ariz. 238, 241, 62 P.3d 983, 986 (Ct. App. 2003).

II. The trial court errored in holding that Plaintiffs were not entitled to relief on their sixth cause of action

A. The fact that electronic adjudication had concluded by the time of trial is irrelevant, because Plaintiffs seek prospective relief.

Under Arizona's declaratory judgment law, any person "whose rights, status or other legal relations are affected by a statute … may have determined any question of construction or validity arising under the … statute … and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832. "Declaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials." *Riley v. Cochise County*, 10 Ariz.App. 55, 59 (1969). A party may seek declaratory relief if "he has a present legal right against the defendant with respect to which he may be entitled as a general rule to some consequential relief, immediate or **prospective**." *Id*. (*quoted in Fin. Inst. Products Corp. v. LOS Glob. Sys., LLC*, No. 2:16-CV-00283 JWS, 2016 WL 4479577, at *5 (D. Ariz. Aug. 25, 2016))

(emphasis added); *see also Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan*, 59 Cal.Rptr.3d 587, 595 (Cal. Ct. App. 2007) ("Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs").

Likewise, injunctive relief can be prospective. A.R.S. § 12-1801; *see*, *e.g*. *Rivera v. City of Douglas*, 132 Ariz. 117, 119, 644 P.2d 271, 273 (App. 1982) (emphasis added) ("injunction is an appropriate remedy to determine whether rights have been or **will be affected** by arbitrary or unreasonable action of an administrative officer or agent"); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 619, ¶ 28 (App. 2017) ("court can enjoin a public officer's arbitrary or unreasonable exercise of discretion" that has affected or will affect a plaintiff's rights); *Browne v. Bayless*, 202 Ariz. 405, 406, ¶ 1 n.1 (2002) (parenthesis omitted) (court entertained a "complaint for special action, declaratory judgment and injunctive relief" brought by "a prospective elector").

Here, Plaintiffs sought declaratory and injunctive relief. 1 APPX 21-22. Nonetheless, the trial court's first basis for dismissing Claim 6 was that the requested relief was not feasible because adjudication of votes had been completed "by or on" November 20, 2020, the date of the trial. This reason is not relevant, because the relief Plaintiffs seek in Claim 6 consists of (1) a declaration that the County violated the provision at EIR 72, at 3, § (D)(1) (which requires that electronic adjudication be "open to public viewing," *see*

supra n.2) by not allowing the viewing of electronic ballot adjudication in a way that allows the viewer actually to see the process; and (2) an injunction requiring the opening to the public of location(s) where electronic adjudication is taking place "**in further elections**, as well as during any additional electronic adjudication that takes place in [the Nov. 3, 2020] election (e.g. as a result of a recount)." 1 APPX 21:26-22:7 (emphasis added).

In short, Plaintiffs sought prospective relief by way of declaration and injunction. Moreover, even if the vote counting had been completed by November 20, 2020, such would not prevent the trial court from issuing a judgment (1) declaring the County's conduct to be unlawful and (2) ordering the County to conduct electronic vote tabulation in future elections in a way that the public will be able to observe and have a meaningful view of such adjudication. Thus, the trial court erred to the extent that it based its decision to dismiss Claim 6 on the fact that electronic adjudication of the November 3, 2020 general election ballots had concluded by November 20, 2020.

B. The County has not been complying with the legal requirement to open the facility where electronic adjudication takes place to public viewing.

a. The law requires the County to allow members of the public to observe the electronic adjudication process in person. [5]

[5] For the avoidance of doubt, Aguillera and Drobina do not believe that the requirement to open the facility where electronic adjudication takes place to public viewing prohibits the County from placing reasonable restrictions on the number of members of the public who may be present in the facility at any

The "cardinal principle of statutory construction" is that "courts must give effect, if possible, to every clause and word of a statute[.]" *Williams v. Taylor*, 529 U.S. 362, 367, 120 S. Ct. 1495, 1499, 146 L.Ed.2d 389, 402 (2000), *see also Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein*, 296 P.3d 1003, 1007, ¶ 12 (Ariz. Ct. App. 2013) ("Each word, phrase, clause and sentence must be given meaning so that no part of the statute will be void or trivial and the meaning determined must avoid absurd results.").

As set forth above, the law requires that "[t]he electronic adjudication of votes must be performed in a secure location, preferably in the same location as the EMS system, but open to public viewing." The addition of the qualifier "but open to public viewing" to the requirement that electronic adjudication "must be performed in a secure location" make it obvious that in-person public viewing is contemplated (after all, if a mere video feed was sufficient to satisfy the public viewing requirement, then the County could electronically adjudicate votes in an underground bunker). Or, in other words, electronic adjudication should happen in a secure place, but not one so secure as to be inaccessible to the public. Accordingly, if the County feels that allowing public access to the facility where the election management system is located poses an unacceptable risk, the law allows it to perform electronic adjudication in a separate location. Reading this rule so as not to require the County to allow in-person observation

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one time.

by members of the public renders the word “but” meaningless.

b. Even if the law does not require the County to allow members of the public to observe the electronic adjudication process in-person, the Court abused its discretion by ruling that the County’s video feed satisfies the public viewing requirement

The argument that the County is required to provide for in-person viewing should not be construed as a concession that it is not **also** required to provide a live video feed of the electronic adjudication process. Rather, the argument set forth above is merely to point out that **only** providing for public viewing via video feed is inadequate as a matter of law. But even if the Court did not error in finding that the County could satisfy the requirement to allow for public viewing without allowing for in-person viewing (it did), the Court still abused its discretion in finding that the video feed the County actually provides is adequate.

As to factual issues, a trial court abuses its discretion when its rulings as to issues of fact are not supported by substantial evidence. *See Dietel v. Day*, 16 Ariz. App. 206, 209, 492 P.2d 455, 458 (1972). The test is whether “reasonable men might differ as to whether certain evidence establishes a fact in issue[.]” *Id.* The Court’s findings that “the uncontested evidence established that the public is able to view the adjudication process on an Elections Department website” and that Plaintiffs’ contention “the website's camera view was distant or in some fashion inadequate to satisfy Plaintiffs” was merely

based on the "argument of counsel[,]" Minute Entry, EIR 57, at 8, are not supported by substantial evidence.

The uncontested testimony of the County's only witness, its Director of Election Day and Emergency Voting, was that the electronic adjudication process takes place on computer screens and that the cameras set up to allow for the electronic adjudication process to be "viewed" do not show these screens. Tr. 77:10-15, 79:9-12. There is no room for reasonable people to differ, therefore, on whether the electronic adjudication process is available for viewing on the elections department website – by the County's own admission it is not. *Dietel v. Day*, 16 Ariz. App. 206, 209, 492 P.2d 455, 458 (1972). Nor is there room to disagree on whether the video feed is adequate since, by the County's own admission, it does not show the electronic adjudication process at all. Therefore, even if a video feed could, as a matter of law, be adequate to satisfy the public observation requirement, the Court still abused its discretion in finding that the County's feed actually did so.[6]

C. Granting the relief Plaintiffs seek cannot "offend" ballot secrecy, because it is impossible to associate a ballot with the voter who cast it.

The trial court stated that it "questions a process which permits anyone

[6] Worth noting is the statutory requirement that the recording of the video feed be retained for the duration of the election challenge period, A.R.S. § 16-621(D), evidencing a legislative intent that the video feed be useful evidence in election challenges. A video recording that does not show the essential parts of the adjudication process, however, is of quite limited use as evidence.

other than the authorized personnel hired/appointed to do so, to view a ballot in the fine detail Plaintiffs desire[,]" concluding that such a process would "offend[] ballot secrecy[.]" Minute Entry, EIR 57, at 8. As an initial matter, the process is not the Court's to question and the Court errors when it substitutes its own judgment regarding what laws would be desirable for the law as it is actually written. *See Phoenix v. Butler*, 110 Ariz. 160, 162, 515 P.2d 1180, 1182 (1973) ("[I]t is not the function of the courts to rewrite statutes. The choice of the appropriate wording rests with the Legislature, and the court may not substitute its judgment for that of the Legislature."). Here, the law requires that the public be permitted to view the electronic adjudication process, which takes place on computer screens on which voters' ballots are displayed. [Tr. 77:10-19].

Even if it were the Court's place to rewrite the laws, the relief Plaintiffs seek does not "offend" ballot secrecy. Firstly, this is because, as the trial court found, "it is impossible to associate a ballot, once cast, with any specific voter Minute Entry, EIR 57, at 8. Secondly, the County representative's uncontested testimony is that the County already permits "political party observers" to be physically present and "view what the adjudicators are looking at [on their screens] and overhear any conversations that the adjudicators are having to make their determinations." Tr. 79:2-8. Therefore, ballots subject to electronic adjudication are already viewed by those outside County's employ including,

by definition, actors with partisan agendas.

III. If the trial court found that Plaintiffs had no standing to bring their sixth cause of action, then it errored.

Assuming that the trial court's holding regarding lack of standing applies to the claim at issue in this appeal, then the trial court errored by finding that Plaintiffs lacked standing. Firstly, it errored in failing to apply clear Arizona Supreme Court precedent that all Arizona voters have standing to challenge violations of election law by public officials. It errored secondly by finding that Plaintiffs lacked standing under a conventional standing analysis (which should not have been applied in the first place).

A. The trial court errored by applying the "distinct and palpable injury" test instead of finding that Plaintiffs had standing to bring their claim, as a matter of law, by virtue of their status as Arizona citizens and voters.

The trial court first errored by failing to apply recent Arizona Supreme Court precedent directly on point. In *Fontes*, the Arizona Supreme Court found that, although "as a general matter" courts require plaintiffs to allege a "distinct and palpable injury" in order to establish standing, the standard is "more relaxed" when a party brings an action to compel a public official to perform an act imposed by law. *Fontes*, 250 Ariz. at 62, ¶¶ 10-11 (internal quotations omitted). In such cases, the Court held that the intent of the Legislature is to "broadly afford standing to members of the public to bring lawsuits to compel officials to perform their public duties." *Id.* at ¶ 11. Thus, Arizona citizens and

voters who seek to compel public officials to perform non-discretionary duties have, as a matter of law, shown a sufficient beneficial interest to establish standing. *Id.* at ¶ 12 ("Here, Plaintiffs, as Arizona citizens and voters, seek to compel the Recorder to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law. Thus, we conclude that they have shown a sufficient beneficial interest to establish standing."). Similarly, this action was brought by Arizona citizens and voters to, in pertinent part, compel the County's elections officials to comply with the public access requirements of Arizona law. Thus, as a matter of law, the trial court errored by finding that Aguilera and Drobina lacked standing due to the fact that their claimed injury was common to all voters.

B. Even if Aguilera and Drobina were required to establish a "distinct and palpable injury," which they were not, the trial court still errored by finding they lacked standing.

Arizona's Constitution does not include a case or controversy requirement; instead, standing "only raises questions of prudential or judicial restraint." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 405, 207 P.3d 654, 658, ¶ 7 (Ct. App. 2008) (internal quotation marks omitted). Thus, in other sorts of cases: "Standing generally requires an injury in fact, economic or otherwise, caused by the complained-of conduct, and resulting in a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome." *Id.* at ¶ 8. Before jettisoning the "distinct and palpable injury" test entirely for cases

like the one at bar, the Arizona Supreme Court had already become very liberal in its application of this standard in mandamus type cases, opining that "[t]his requirement is a low bar and easily shown if there is a direct relationship between the plaintiff and the defendant with respect to the conduct at issue." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607, 616, ¶ 23 (Ariz. 2020) (internal quotations omitted). Thus, in *Hobbs*, where Plaintiffs/Petitioners argued that they had a right to collect signatures for their ballot initiatives electronically, and the Secretary of State had a policy of refusing to accept such signatures in digital form, Plaintiffs/Petitioners had standing to bring suit against the secretary as their alleged injury was "fairly traceable to the secretary. *Id.* ¶ 24. It is noteworthy that even though the Arizona Supreme Court denied relief on other grounds, and even though the Secretary did not raise the issue of standing, the Court viewed clarifying this liberal standard to be an issue of sufficient "statewide importance" to justify incorporation into its holding. *Id.* ¶ 21.

Similarly, here, Aguilera and Drobina alleged that they wish to observe the electronic adjudication process in-person and have the right to do so. The County has a policy of not allowing for such observation. Thus, they have a personal stake in the controversy's outcome and their alleged injury is fairly traceable to the County.

Without expressly adopting federal law's requirement of redressability

as a component of standing, the *Hobbs* Court noted that, to establish standing under federal law "a party must show that their requested relief would alleviate their alleged injury." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607, 617, ¶ 25 (Ariz. 2020). The Court noted that "[t]his is a relaxed burden, and the remedy need not completely cure the alleged harm." *Id.* Here, the alleged harm is that Aguilera and Drobina are being unlawfully prohibited from observing the electronic adjudication process. Allowing them to observe that process in future elections would at least partially alleviate their alleged injury.[7]

NOTICE OF REQUEST FOR ATTORNEY FEES UNDER RULE 21(a)

Plaintiffs requested that the trial court grant them an award of attorney fees pursuant to A.R.S. §§ 12-348, 12-2030 the common law doctrine, and other applicable law. EIR 1, at 22. They hereby provide notice pursuant to ARCAP Rule 21(a) that they will seek an award of attorney fees if they prevail in this appeal.

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[7] In the alternative, a panel of this Court recently recognized the possibility that standing could be waived in an exceptional case of great public importance in which the issue in dispute is capable of repetition yet evading review. *See Montelongo-Morales v. Driscoll*, 1 CA-CV 19-0502, 2020 WL 5951104, at *3, ¶¶ 17-19 (App. Oct. 8, 2020); *see also Sears v. Hull*, 192 Ariz. 65, 71, ¶ 25, 961 P.2d 1013, 1019 (1998) ("Although, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur"). Here, if not addressed in this litigation, the issue of public observation of the electronic adjudication process will certainly arise in future election cycles.

CONCLUSION

In summary of the foregoing, the trial court erred by dismissing Aguilera and Drobina's sixth cause of action and, alternatively, entering judgment against Aguilera and Drobina on the merits as to their sixth cause of action. Accordingly, Plaintiffs respectfully request that this Court reverse the Order of the trial court as to Plaintiffs sixth cause of action. Aguilera and Drobina further request that this Court provide Aguilera and Drobina declaratory and injunctive relief as to this item. *See Fontes*, 250 Ariz. at 64, 65 ¶¶ 25, 27, 31 (granting such relief directly in an election-related matter). Specifically, Plaintiffs request:

A. A declaration that Defendants' practice of not allowing members of the public to view the electronic adjudication process in-person is contrary to law. Alternatively, a declaration that the County's current provisions for remote viewing do not comply with the requirements of the law insofar as they do not actually show the electronic adjudication process taking place.

B. Injunctive relief requiring the County to open the facility where electronic adjudication process takes place to members of the public in future elections so that they may observe the electronic adjudication process in-person. Alternatively, injunctive relief requiring the county to show the electronic adjudication process

taking place on its livestream.

C. Leave to seek their attorneys' fees and costs incurred on appeal.

DATED: This 8th day of February, 2021
RESPECTFULLY SUBMITTED,

By /s/ Alexander Kolodin

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Ariz. R. Civ. App. P., the undersigned counsel certifies that Appellant's Opening Brief uses a proportionately spaced typeface of 14 points or more, and is double-spaced using a Times New Roman font. According to the Microsoft Word count function, Appellants' Opening Brief contains 5,528 words.

DATED: This 8th day of February, 2021
RESPECTFULLY SUBMITTED,

By: /s/Christopher Alfredo Viskovic

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing will be served upon Appellees in conformity with the applicable rules of procedure. Given the expedited nature of this matter, service shall be electronic.

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