Clerk of the Superior Court
*** Electronically Filed ***
03/01/2021 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-016840 02/25/2021

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

MARICOPA COUNTY, et al. STEPHEN W TULLY

v.

KAREN FANN, et al. THOMAS J. BASILE

JAMES E BARTON II
JOHN A DORAN
THOMAS PURCELL LIDDY
JOSEPH EUGENE LA RUE
JOSEPH J BRANCO
EMILY M CRAIGER
KORY A LANGHOFER
JACQUELINE MENDEZ SOTO
GREGREY G JERNIGAN
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE THOMASON

MINUTE ENTRY

East Court Building – Courtroom 713

9:03 a.m. This is the time set for Oral Argument on Plaintiffs' Motion for Summary Judgment, filed February 22, 2021, President Fann and Senate Judiciary Committee Chairman Petersen's Motion for Judgment on the Pleadings, filed February 22, 2021, and Democratic Senators' Motion for Summary Judgment, filed February 22, 2021 via Court Connect. All appearances are virtual and are as follows:

- Counsel, Stephen W. Tully, John A. Doran, Thomas P. Liddy, Joseph J. Branco, Joseph E. LaRue, and Emily Craiger are present on behalf of Plaintiffs/Defendants-in-Counterclaim Maricopa County; Clint Hickman, in his official capacity as Chairman of the Maricopa County Board of Supervisors; and Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, in their official capacities as Members of the Maricopa County Board of Supervisors, who are not present.
- Counsel, Thomas Basile and Kory Langhofer are present on behalf of Defendants/Plaintiffs-in-Counterclaim Arizona Senate President Karen Fann, who is present, and Senate Judiciary Committee Chairman Eddie Farnsworth, who is not present. General counsel for Arizona State Senate, Gregrey G. Jernigan, is also present.
- Counsel, James Barton, II, and Jacqueline Mendez Soto are present on behalf of Defendants Lupe Contreras, Andrea Dalessandro and Martin Quezada, in their official capacities as Members of the Arizona Senate Judiciary Committee, who are not present.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court outlines the pleadings reviewed in preparation for this hearing.

Oral argument is presented.

For the reasons stated on the record,

IT IS ORDERED taking this matter under advisement.

9:28 a.m. Matter concludes.

The Arizona Constitution requires the Arizona Commission on Judicial Performance Review to conduct performance evaluations of superior court judges. The Commission is asking for your help to evaluate Maricopa County Superior Court judges currently undergoing performance review. After your hearing, if the judge you are in front of is undergoing review, a survey will be emailed to you and you can take the survey online. The survey is conducted by the Docking Institute of Public Affairs at Fort Hays State University and is anonymous and confidential. Your participation in the review process is important! More information on Judicial Performance Review can be found at www.azjudges.info.

La Constitución de Arizona exige que la Comisión de la Evaluación del Desempeño Judicial realice evaluaciones de desempeño de los jueces de los tribunales superiores. La comisión pide su ayuda para evaluar a los jueces del Tribunal Superior del Condado de Maricopa a quienes

actualmente se les está evaluando su desempeño. Después de su audiencia, si el juez ante el cual comparece está sometido a una evaluación se le enviará por correo electrónico una encuesta que usted podrá tomar por Internet. La encuesta es realizada por el Docking Institute of Public Affairs de la Fort Hays State University y se mantiene anónima y confidencial. ¡Su participación en el proceso de la evaluación es importante! Para obtener más información sobre la evaluación del desempeño judicial, diríjase a www.azjudges.info.

LATER:

BACKGROUND

Maricopa County and the Maricopa County Board of Supervisors, in their official capacities (at times referred to collectively as the "County"), filed suit in CV2020-016840 asking the Court to declare that two legislative subpoenas issued to the Maricopa County Board of Supervisors (the "2020 subpoenas") were illegal and unenforceable. The 2020 subpoenas required production of numerous documents and electronic materials dealing with the November 2020 election.

Karen Fann ("Fann"), as President of the Arizona Senate, and Eddie Farnsworth ("Farnsworth"), as Chairman of the Arizona Senate Judiciary Committee, filed a Counterclaim seeking enforcement of the 2020 subpoenas. Fann and Farnsworth filed a Motion for Preliminary Injunction, asking the Court to enforce the 2020 subpoenas. After the Motion was filed, a notice of substitution was filed under Arizona Rule of Civil Procedure 25(d), stating that Warren Petersen ("Petersen"), the incoming Chairman of the Senate Judiciary Committee, was substituting for Farnsworth, who no longer held that position. (Fann and Petersen are, at times, referred to as the "Senators").

The Court considered the Motion for Injunctive Relief, the Response and the Reply, along with the arguments of counsel. The Court also considered the Amicus brief from the Attorney General of the State of Arizona and the Amicus brief filed by certain Republican Chairmen and House members. At a hearing held on January 13, 2021, the Court found that the dispute before the Court was moot, in light of the fact that the 2020 subpoenas were no longer enforceable.

The day before the January 13 hearing, Fann and Peterson issued two new subpoenas to the Board of Supervisors. Subpoenas were also issued to the Maricopa County Recorder and the Maricopa County Treasurer. (The subpoenas issued on January 12 are collectively referred to as the "Subpoenas.") The County filed CV2021-002092, asking the Court to declare that the Subpoenas were illegal and unenforceable.[1] Nonetheless, in response to the Subpoenas, the County

[1] CV2020-016840 and CV2021-002092 have been consolidated.

"quickly produced some 11.32 gigabytes of data" and commissioned two separate examinations of its tabulation machines, to ensure that they functioned properly during the November 2020 election.

The Subpoenas were served on the afternoon of January 12. The Subpoenas commanded appearances the next day, January 13, 202, at 9:00 a.m. The Chairman of the Board of Supervisors, Jack Sellers, Maricopa County Recorder Stephen Richer, and Maricopa County Treasurer John Allen appeared at the Senate at 9 a.m. They were ostensibly prepared to testify and to notify the Senators that they could not possibly produced all of the subpoenaed material in the time frame provided. The Subpoenas commanded production of some 2.1 million voted paper ballots, nine large Central Count Tabulators, 350 smaller Precinct Based Tabulators and other hardware and electronically stored information ("ESI"). There was no Senate hearing on January 13 and no testimony was taken. Despite the production of 11.32 gigabytes of data, the County has not provided all of the materials that were subpoenaed. Among other things, the County has not provided the Senators the ballots from the election.

The County later filed a request for injunctive relief. The County was concerned that the Arizona State Senate was going to hold County officials in contempt and possibly have them arrested. The Senate vote to hold the County officials in contempt failed by one vote, and the request for injunctive relief was withdrawn.

The Court has now been asked to issue an expedited ruling on the merits of the dispute. The County wants the Court to declare that the Subpoenas are illegal and unenforceable. The Senators ask the Court to rule that the Subpoenas are legal and enforceable. Specifically, the County has filed a Motion for Summary Judgment, and the Senators have filed a Motion for Judgment on the Pleadings. The Democratic Members of the Senate Judiciary Committee have also filed a Motion for Summary Judgment.[2] (The Democrat Members of the Senate Judiciary Committee are referred to as "Democrat Senators.") The parties agreed that there would be no responses. The Court has considered these various Motions and the arguments of counsel.

[2] The Court questions the standing of the Democrat Senators. It is not clear why they were named as defendants. As minority members, the Democrat Senators have no authority to issue subpoenas under A.R.S. § 41-1151, which provides that subpoenas can be issue by "the presiding officer of either house or the chairman of any committee." The Democrat Senators are not the target of the Subpoenas, so their standing to object is suspect. Nonetheless, the Court has considered the Motion filed by the Democrat Senators.

SCOPE OF THE RULING

The courts should generally be hesitant to enter the fray of political disputes between two other branches of government. The controversy between the Senators and the County is a highly charged political dispute.[3] Serious accusations have been made and emotions are raw.

The Senators believe that the County has snubbed the clear authority of the Senators to issue the Subpoenas. The County believes, on the other hand, that the Subpoenas are the result of continuing claims by supporters of former President Trump that the election was "stolen" and that this entire matter is a waste of time. The County firmly maintains that the Senators are abusing their powers and refusing to show proper deference to another branch of government.

This Court has no interest in the political dispute between these parties. This is a Court of law, not a Court of politics.

It is, however, an appropriate function for the Court to issue declaratory rulings on limited legal issues. As such, the Court will issue declaratory rulings on whether the Subpoenas are valid and have a proper legislative purpose, whether the Subpoenas violate separation of powers and whether the Subpoenas improperly seek production of materials protected by confidentiality statutes. Issuing such rulings is a proper and necessary exercise of the jurisdiction given to the Court in the Uniform Declaratory Judgment Act, A.R.S. § 12-1831 *et seq.*

It is, of course, not the Court's place to address the wisdom of the Subpoenas. The statutes of this State give the Senators the right to issue subpoenas and to enforce those subpoenas. This Court must follow the law.

It is regrettable that this matter has resulted in a highly bitter dispute between two branches of our government. The members of the County Board of Supervisors and the Senators are all dedicated public servants. This Court has urged these public servants to devote their time and energies to finding a mutually agreeable solution to this problem. They apparently have not done so. Our governmental officials should not be spending valuable resources on lawyers, "fighting" with another branch of government over what materials can be provided to another branch of government under a subpoena. Rather, the citizens expect their governmental officials to work cooperatively for the common good. It is highly unfortunate that that has not happened here. When government officials resort to "name calling" and threats, something has gone terribly wrong.

[3] The political dispute initially arose out of the allegations by former President Trump and his allies that there was widespread fraud in the 2020 presidential election. The County accused the Senators of taking part in the purported effort of President Trump and his allies to "overturn" the 2020 election. President Biden is now in office and there clearly will be no "overturning" of the 2020 election.

This ruling decides only very narrow legal issues. This Court is not enforcing the Subpoenas. This Court has serious concerns about whether it has jurisdiction to enforce the Subpoenas and the Senators have not asked the Court to issue an order enforcing the Subpoenas. As such, this Court's ruling is a narrowly focused declaratory ruling.

VALIDITY OF THE SUBPOENAS

A.R.S. § 41-1151 authorizes "the presiding officer of either house or the chairman of any committee" to issue a subpoena. A.R.S. § 41-1151 *et seq*. provides a mechanism for the legislature to enforce the subpoenas and provides that a person who does not comply is guilty of a misdemeanor. A.R.S. §§ 41-1153, -1154. The statutes also authorize the Senate to find that a person who does not comply with a subpoena to be held in contempt. Moreover, a person who does not comply can be arrested by the sergeant-at-arms. A.R.S. § 41-1153.

Statutory Requirements

The Court first briefly addresses the County's argument that the Subpoenas do not comply with statutory requirements. The County argues that the Subpoenas are invalid because there was no actual hearing conducted on January 13.

The County claims that legislative subpoenas "must be tethered to a hearing." There is nothing in A.R.S. § 41-1151, however, that requires a hearing. Rather, the statute refers only to requiring "the attendance of the witness at a certain time and place." The Subpoenas did command that witnesses appear at a specific time and place. The fact that no actual hearing occurred did not invalidate the Subpoenas.[4] The fact that the Senators did not force the witnesses who appeared to testify did not render the Subpoenas a nullity. The County's argument that the Subpoenas are invalid because there was no hearing is inconsistent with the statute that authorized the issuance of the Subpoenas.

A.R.S. § 41-1154 requires that a witness produce material "upon reasonable notice." The Subpoenas were served less than 24 hours before the due date. The County, however, knew about the 2020 subpoenas and, therefore, knew for several weeks what materials the Senate was seeking. Moreover, the County has now had weeks to comply, and has, in fact, produced many of the requested materials. As such, while a "reasonable notice" objection might have been valid at the time, it is hardly valid now. Moreover, it appears as if the County is refusing to produce certain information, irrespective of whether it had reasonable notice. A party cannot use the lack of

[4] The Democrat Senators acknowledge that the legislature is authorized to issue subpoenas for documents, without requiring attendance of witnesses at a hearing. Democrat Senators' Motion at 4. As they point out in their Motion, A.R.S. § 41-1152 refers to "[t]estimony or evidence produced pursuant to this article," supporting the notion that evidence other than witness testimony can be the target of a legislative subpoena.

reasonable notice as a defense if it intends to not comply, irrespective of the notice provided. *See United States v. Bryan,* 339 U.S. 323, 333-34 (1950).

The County's argument that the Senate cannot subpoena electronically stored information ("ESI") or tangible objects, such as voting "machines", is also meritless. A.R.S. § 41-1154 addresses enforcement of legislative subpoenas. The County cites the portion of the statute that refers to production of "relevant books, papers or documents," and argues that ESI and machines are not books, papers or documents. The County ignores, however, the same portion of the statute, which refers to production of "any material." Clearly, ESI and machines constitute "material."

A.R.S. § 41-1154 clearly reflects the legislative intent that legislative subpoenas can demand production of "any material," in addition to "books, papers or documents." Moreover, the statute does not somehow immunize information from being subpoenaed simply because the information is electronically stored. In modern parlance, "documents" include electronically stored information. Indeed, when parties in litigation are producing "documents," they understand that documents include ESI. It is absurd to think that information that happens to be electronically stored and not kept on a piece of paper is not a "document" that can be subpoenaed.

Necessity of a Resolution

The County argues that the issuance of a legislative subpoena is dependent on an active investigation established by resolution. No Arizona authority so holds. Indeed, such a conclusion is contrary to the operative statute.

The Arizona legislature granted the authority to the presiding officer and committee chairmen in each chamber of the legislature to issue subpoenas. A.R.S. § 41-1151. This grant of authority to these officials is diametrically opposed to the County's position that there must be some resolution passed before a subpoena can be properly issued.[5] There is nothing in the statute

[5] The Arizona statute has no similar counterpart in federal law. It is true that Congress' constitutional subpoena power is vested in the body as a whole and delegation of that power to a committee must entail an authorizing resolution. *See, e.g., Trump v. Mazars USA, LLP,* 140 S. Ct. 2019 (2020); *Comm. on the Judiciary, U.S. House of Representatives v. Miers,* 558 F. Supp. 2d 53, 70-71 (D.D.C. 2008). Arizona legislative subpoenas, however, are not governed by the federal standards and rules for issuing congressional subpoenas. Arizona legislative subpoenas are not issued by the body as a whole and, therefore, require no "resolution." Indeed, the presiding officer of the Senate, the president, does not chair any committee. Yet, the statute gives that official the authority to issue a subpoena. This clearly indicates that no committee resolution is necessary.
Although *Buell v. Superior Court* involved a legislative investigation pursuant to a resolution, the Arizona Supreme Court did not hold that a resolution was required before a legislative subpoena could be issued. *Buell v. Superior Court,* 96 Ariz. 62 (1964). *Buell* concerned the power of the legislature to hold a lawyer in contempt for failing to comply with a legislative subpoena. It did not specifically address the requirements for issuance of such a subpoena. It certainly did not hold that a resolution was required before a subpoena could issue.

that requires an open formal investigation or a resolution, as a necessary precursor to the issuance of a subpoena.

The County further argues that the power to issue subpoenas is only held by the Senate as a corporate body, not by individual Senators. The argument again ignores the plain language of the statute, which expressly authorizes "the presiding officer of either house or the chairman of any committee" to issue subpoenas. A.R.S. § 41-1151. [6]

Accordingly, the Senators themselves, in their capacities as Senate president and committee chair, had the statutory power to issue subpoenas.[7] As long as the Subpoenas were issued for a proper legislative purpose and do not violate Constitutional protections, the Subpoenas are valid and enforceable.

It is not the Court's function to ascertain the wisdom of the Senators' decision to issue the Subpoenas or to determine if any attendant investigation is "justified." *See Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20-21 (D.D.C. 1994) ("[T]his Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties.'") (citations omitted). Similarly, the Court is not in a position to determine whether some or all of the information being subpoenaed is "immaterial" to the inquiry being undertaken by the Senators. Indeed, materiality is arguably framed by the scope of the Subpoenas themselves.

Proper Legislative Purpose

The Arizona Supreme Court has held that "[i]t is within the powers of legislative committees to conduct investigations…and to issue subpoenas and to summon witnesses generally and punish them for contempt if they refuse to answer relevant questions or produce records." *Buell*, 96 Ariz. at 66.[8] A legislative subpoena is issued for a proper legislative purpose if "the

---

The cases cited by the County from California and other states are not persuasive because they do not address the specific requirements of Arizona's legislative subpoena statutes. For example, in *Connecticut Indem. Co. v. Superior Court*, 3 P.3d 868, 810 (Cal. 2000), cited by the County, the statute in question, Cal. Gov. Code § 37104, states that subpoenas can be issued by "[t]he legislative body." A.R.S. § 41-1151 does not authorize the "legislative body" to issue subpoenas; only the presiding officers and committee chairs may do so. As such, California law is completely irrelevant.

[6] There is nothing in the record suggesting the Senators were acting outside their official capacities.

[7] Judge Warner did not rule that the Senators are not authorized, individually, to issue legislative subpoenas, as the County claims. The issue decided by Judge Warner was whether mandamus was a proper means of enforcing a legislative subpoena. *Fann v. Maricopa County*, No. CV2020-016904, Decision Order (Dec. 23, 2020). In fact, Judge Warner expressly stated that "A.R.S. § 41-1151 authorizes the presiding officer or a committee chair of either house of the Arizona Legislature to issue subpoenas." *Id.* at 1.

[8] During oral argument, the County admitted that the legislature has "broad powers of inquiry."

subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain v. Daughtery*, 273 U.S. 135, 177 (1927). If there is a conceivable legislative purpose, the court will presume that the purpose of the subpoena is proper. *Id.* at 178. So long as the subpoena can be construed to relate to a subject upon which legislation might be had, the subpoena is valid. *Id.* at 180.

The Subpoenas seek numerous pieces of data and information dealing with the November 2020 election. For purposes of this ruling, the Court finds that the Subpoenas were issued for a valid legislative purpose.

The Arizona Constitution entrusts the legislature with the power to enact "laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. The United States Constitution empowers the legislatures of the states to set the time, place and manner of elections. U. S. Const. art. 1, § 4, cl. 1. The states also determine the manner in which electors are chosen. U.S. Const. art. II, § 1, cl. 2.

The Senators state that they intend to use the data gathered under the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and competence of county officials in performing their election duties, with an eye to introducing possible reform proposals. This is a valid legislative purpose. Granted, there was no specific legislation pending before, or even being examined by, the Senate at the time the Subpoenas were issued. There does not, however, have to be actual legislation pending in order for a legislative subpoena to be issued for a proper purpose. A.R.S. § 41-1151 does not require pending legislation, or even a formal "investigation," before a presiding officer or committee chair can issue a subpoena.

Wilkinson v. United States, 365 U.S. 399 (1961), cited by the County, stated only that the existence of pending legislation was a factor to be considered in determining whether the subpoena was issued for a proper purpose. Further, in the absence of pending legislation, legislative investigations can appropriately determine whether other governmental agencies are properly performing their functions. *See McGrain*, 273 U.S. at 177-78 (Congressional investigation into whether the Attorney General and his assistants were performing or neglecting their duties).

The County contends that the Subpoenas were not issued for a proper legislative purpose because the Senators are allegedly seeking to re-adjudicate the presidential election. Indeed, the County argues that "Fann is attempting to perform a private recount[9] of the election" and that the Senators have no authority to "audit" elections. The County asks the Court to examine statements

[9] The Court does not know what the County means when it refers to a "private recount." A "private recount," whatever that is, would have no legal significance. The fact that the Senators might conduct a "private recount" does not negate the notion that there was a proper legislative purpose—investigating the need for election reform and examining possible legislation attendant thereto.

made by Senator Fann in order to ascertain the "true" purpose of the Subpoenas. Granted, Senator Fann has made public comments about concerns of "many voters" regarding the accuracy of the presidential election and the need to "audit" the election.[10] These comments, however, do not mean that the Subpoenas were not issued for a proper legislative purpose.[11]

If there is a conceivable proper purpose, the Court must construe the Subpoenas as valid. *Id.* at 180. There clearly is a proper legislative purpose here. Assessing electoral integrity is a proper legislative purpose. Examining potential legislative reforms to the electoral process is certainly a proper function of the State legislature.

This Court is not in a position to determine if the "real" purpose of the Subpoenas is to try to "overturn" the result of the election.[12] Even if one of the original purposes of the 2020 subpoenas was to see if the election could somehow be challenged, there still is a perfectly valid legislative purpose for the Subpoenas.[13] Accordingly, the Court finds that there was a proper legislative purpose.

SEPARATION OF POWERS

The County suggests that the Subpoenas could "usurp" the administration of elections and duties of County officials and the Secretary of State. Therefore, according to the County, the Subpoenas present separation of powers problems. The entire electoral infrastructure, however, is a legislative creation. The functions of County officials and the Secretary of State were the result of delegations by the legislature.[14]

Powers held by the counties are those delegated to the counties by the legislature. Ariz. Const. art XII, § 4; *see Assoc. Diary Prods. Co. v. Page*, 68 Ariz. 393, 395-96 (1949) ("The boards

[10] The County's contention that the Senators are acting improperly in looking at the integrity of the 2020 election is somewhat ironic in light of the fact that the County itself just completed a "forensic audit" of the election.
[11] The Democrat Senators acknowledge that it is a proper purpose to use a legislative subpoena to "investigate election administration in general." The Democrat Senators insist, however, that it is not proper for the legislature to issue subpoenas to investigate the November 2020 election. An investigation of the 2020 election, however, clearly could be of assistance in investigating election administration and possible reforms.
[12] In light of the fact that the Electoral College has voted, Congress has confirmed the election, and President Biden has been sworn in, any purported attempt to "overturn" the result of the election now would clearly be futile.
[13] Indeed, the Senators acknowledge that one purpose of the 2020 subpoenas was to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome. Even though that might have been one purpose of the 2020 subpoenas, the goal of studying the result and trying to determine if legislation should be passed to improve the election process is still a valid purpose, sufficient to uphold the Subpoenas.
[14] The Arizona Constitution gives the legislature authority to define the powers and duties of the Secretary of State. Ariz. Cont. art. V, § 9. The duties of the Secretary of State are set out by in A.R.S. § 41-121, which duties include certifying election results. A.R.S. § 41-121(A)(6).

of supervisors of the various counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature."); *State v. Payne,* 223 Ariz. 555, 561, ¶ 15 (App. 2009).[15] Since the legislature delegated powers to the counties, it can certainly investigate modifying or improving those delegated powers.[16] It also has the power to investigate whether the County is properly discharging its delegated functions. *See McGrain*, 273 U.S. at 177-78.

The County's characterization of the Senators' argument as "bizarre" is premised on the notion that the real purpose of the Subpoenas is to "overturn" or "challenge" the election. A subpoena, however, cannot "overturn" an election. A subpoena simply demands production of information. Responding to the Subpoenas could hardly result in the "overturning" of the presidential election in Arizona.

If one assumes, as the Court must, that the Subpoenas were issued to examine potential election reforms, then it is evident the Subpoenas were not an attempt to "usurp" powers of the County and the Secretary of State. Subpoenaing materials from the County is not a usurpation of the County's powers. Rather, it is simply gathering of information.

Accordingly, the Subpoenas do not violate the separation of powers. As noted above, the counties have only such powers as delegated to them by the legislature. It is axiomatic that the legislature can take action, so long as it is acting within the scope of its legislative authority. Separation of powers issues are raised when one branch of government tries to usurp a power it has delegated to another branch. No such attempt has been made here.

CONFIDENTIALITY

The County also contends that the Subpoenas might threaten the "right to a secret ballot" and violate certain state statutes on confidentiality. The statute governing confidential voter information, however, permits access by any "authorized government official in the scope of the official's duties." A.R.S. § 16-168(F).

[15] The statutes governing counties are set out in Title 11 of Arizona Revised Statutes. Chapter 2, Article 4 of Title 11 describes the powers and duties of the county boards of supervisors, which include the power to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. § 11-251(3).

[16] The County argues that "the Legislature gave the Executive Branch" authority to canvass and proclaim the results of the election. That is true. That does not prevent, however, the legislature from considering or passing legislation addressing the voting process or potentially revoking some of the authority delegated to the County or the Secretary of State. Indeed, the Arizona Constitution charges the legislature with the responsibility of ensuing the "purity" of elections and guarding against abuse. *See* Ariz. Const. art. VII, § 12.

Confidentiality statutes do not prevent ballots and associated materials from being provided to government officials. Rather, these statutes are intended to prevent disclosure of information to the public. All government officials are obligated to follow the law and comply with confidentiality statutes. This, of course, includes the Senators.

The County cites the Arizona Constitutional right to a "secret" ballot. Ariz. Const. art. VII, § 1. Absent unusual circumstances, however, it is impossible to tie any given ballot to the voter who completed the ballot. Moreover, producing information to government officials clearly does not deprive a voter of his or her right to a secret ballot. All government officials, including the Senators, clearly have a corresponding duty to maintain the secrecy of ballots that are provided to them.

The County even cites A.R.S. § 16-1018(4), which makes it unlawful to "[s]how[ ] another voter's ballot to any person after it is prepared for voting in such a manner as to reveal the contents[.]" This provision, however, obviously does not prohibit the showing of the ballot to government officials. Indeed, if that were the case, it would be illegal for any County official to "see" any ballot after it was prepared for voting. It is apparent that the word "person," as used in this statute, does not refer to government officials.[17]

When interpreting confidentiality statutes, the Court must "'apply constructions that make practical sense' rather than those that 'frustrate legislative intent'" *State v. Zeitner (Zeitner I)*, 244 Ariz. 217, 224, ¶ 27 (App. 2018), *aff'd* 246 Ariz. 161 (2018) (*Zeitner II*). The clear intent of the legislature in enacting these confidentiality statutes was to protect voters' rights to cast secret ballots. The legislature did not intend for these statutes to prevent it from having access to the materials it deemed necessary to fulfill its duty to oversee the election process.

[17] The County cites a number of other statutes that clearly have no application to the question of production of balloting materials to the legislature. For example, the County argues that A.R.S. § 16-1005(H) makes it "illegal to possess voted ballots even when it is unknown who cast them," Section 16-1005(H) prohibits the practice of "ballot harvesting." That statute was held unconstitutional by the Ninth Circuit in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 222 (Mem) (Oct. 2, 2020). In any event, the ballot harvesting prohibition was not intended to prevent the legislature or other governmental bodies and officials from examining ballots and related materials. If that were the case, the County and its officials would not be permitted to possess and examine ballots.

Statutes such as §§ 16-624 and 625, operate as restrictions on access by the general public.[18] The statutes do not prohibit disclosure of voting information to another part of the government.[19]

During oral argument, counsel for the County focused on A.R.S. § 16-624 and argued that compliance with the Subpoenas would require the County to violate the law. The Court disagrees.[20]

Section 16-624(A) requires the "officer in charge of elections" to deposit the package containing ballots in a secure facility, managed by the County Treasurer, to be kept "unopened and unaltered" for a period of twenty-four months for federal elections. This statute, which imposes obligations on the "officer in charge of elections" and the County Treasurer, does not immunize the ballots from being subpoenaed, let alone from being subpoenaed by the legislature, acting in

[18] The County argued that, under A.R.S. § 16-624, once paper ballots are sealed after a canvass, ballots can only be unsealed by court order for purposes of a court-ordered "recount." (County's Motion at pp. 3, 13.) The County seems to suggest that this is the only situation where the ballots can be unsealed. This is clearly not the case. Subsection of A of the statute states that, after a canvass is completed, the County Treasurer must keep the ballots for 24 months for federal elections. Subsection B provides that "irregular ballots" must be preserved for six months and "may be opened and the contents examined only upon on order of the court." Subsection D states that, in the case of a recount within six months, "the county treasurer may be ordered by the court" to deliver the ballots to the court. The County's argument suggesting that ballots can be opened only under situations specifically addressed in the statute is clearly wrong. The statute only specifically refers to a court order providing for opening the ballots in the narrow circumstances dealing with "irregular ballots" (subsection B). While the power of the Court to open ballots in recount situations under subsection D may be implied, the statute does not directly provide such authorization. In any event, it is clear that the Court has the inherent authority to order the opening of ballots in other situations. *See* discussion below in fn. 21. Similarly, the Senate, as a co-equal branch of government with broad subpoena powers, can subpoena ballots in situations not provided for in the statute itself.

[19] *Garner v. Cherberg*, 765 P.2d 1284 (Wash. 1988), is not controlling, nor is it persuasive. In *Garner*, the Washington Supreme Court quashed a legislative subpoena, which sought confidential records from the commission on judicial conduct pertaining to a particular judge. The court did not hold that the confidentiality rules precluded all legislative oversight, as indicated at the end of the decision where the court "invite[d] the Majority Leader of the Senate and the Speaker of the House of Representatives to join the Chief Justice of the Supreme Court to conduct such an in camera inspection of the Commission's investigation files on Judge Little to satisfy themselves of the objectivity of the report." *Id.* at 1290. In addition, that case did not involve the oversight of elections, which the Arizona legislature is Constitutionally empowered to oversee.

[20] The Court understands that, in addition to ballots, the County has also not produced various voting machinery and hardware. The confidentiality statutes cited by the County clearly provide no justification for withholding those materials.

its Constitutional role to ensure the "purity" of elections.[21] This statute simply does not create a privilege, justifying non-disclosure.[22]

In fact, the statutory requirement that ballots be maintained for twenty-four months itself suggests these materials may be responsive to, and subject to, compulsory process long after an election has been certified and any contest period has lapsed. The County certainly provides no other explanation as to why ballots are required to be maintained for such a long period of time. Common sense suggests that they are maintained because they may be relevant to a legislative investigation, or perhaps a lawsuit, and that they might be subpoenaed. *See Zeitner I*, 244 Ariz. at 224, ¶ 27. There is simply no suggestion from the statute itself, or from common sense, that the statute means that no one is entitled to see the ballots, let alone Senators who are considering ways to improve the electoral process.[23]

The County's argument could lead to absurd results. According to the County, any statute that imposes obligations on a person to do specific things with documents or information immunizes those documents or information from being subpoenaed. For example, a state statute could require state charted financial institutions to keep certain information confidential and "under lock and key." By further way of example, a state statute could require companies who do business with the State to keep certain information safely stored and confidential. Such statutes cannot, and do not, prevent the "confidential" material from being subject to subpoena.

If the County's argument is correct, that providing ballot materials would violate the law, then the County is itself violating the law presently. The County admits that it has not stored the ballots as provided for in § 16-624 because the ballots are still "under the custody and control of the Board of Supervisors." (County's Statement of Fact ¶ 88.) The County claims it has not stored the ballots with the County Treasurer as required "because of ongoing litigation." The County states that it will deposit the ballots in the Treasurer's vault, "as the law requires," only after litigation concludes. It is unclear why the County feels justified in violating the law simply because

[21] *See Democratic Party of Pima County v. Ford*, 228 Ariz. 545 (App. 2012) (noting that trial court had entered an order granting political party's public records request to gain access to ballot records required to be kept confidential under A.R.S. § 16-624). The public record request in *Ford*, which was approved by the court, certainly demonstrates that ballots may be subject to disclosure in circumstances other than those specifically identified in § 16-624(B) and (D), contrary to the County's assertion otherwise.

[22] Indeed, during oral argument, the County admitted that the relevant statutes do not render the material in question the confidential or privileged material of the County.

[23] The County's argument that the Senate's attempt to pass legislation specifically providing that ballot materials can be subpoenaed constitutes an admission that the current law does not provide for subpoenaing such materials is unconvincing. The Senators have firmly maintained that they have the power to subpoena these materials. A legislative attempt to clarify what could be seen as an ambiguity in the current law is hardly an admission by the Senators.

litigation is pending, but claims that it cannot violate the law by complying with the Subpoenas. [24] Complying with the Subpoenas would not violate the law.

The Senators had the power to issue the Subpoenas and have the statutory power to enforce those Subpoenas in the manner set forth in the statutes. The Subpoenas are, in essence, the equivalent of a Court order, requiring production of certain information. The County cannot avoid a subpoena based on statutes that require that the material being subpoenaed be kept confidential.

While a claim of privilege might, under certain circumstances, constitute a defense to a legislative subpoena, a claim of confidentiality does not.[25] The Senators, of course, are obligated maintain confidentiality of the materials turned over to them. Confidentiality, however, is not a basis for quashing the Subpoenas.[26]

CONCLUSION

The Court finds that that Subpoenas are legal and enforceable. There is no question that the Senators have the power to issue legislative subpoenas. The Subpoenas comply with the statutory requirements for legislative subpoenas. The Senate also has broad constitutional power to oversee elections. The Arizona legislature clearly has the power to investigate and examine election reform matters. Accordingly, the Senators have the power to subpoena material as part of an inquiry into election reform measures. As such, the Subpoenas have a proper legislative purpose.[27] The Subpoenas also do not violate separation of powers principles. Production of the subpoenaed materials would not violate confidentiality laws.

---

[24] The ballot material could have been stored by the County Treasurer and retrieved, if it were determined that the materials were properly subject to subpoena.

[25] *See Zeitner II*, 246 Ariz. at 168, ¶ 28 (Arizona Supreme Court stated that the statutory physician-patient privilege "must yield to the State's interest in combatting fraud."); *Buell*, 96 Ariz. at 68-69 (finding claim of attorney-client privilege was defeated by legislature's need for subpoenaed materials in investigation of the Arizona Corporation Commission).

[26] This is not to say that the Court does not have concern about the confidentiality of the subpoenaed ballot information. The Elections Procedures Manual has carefully delineated provisions providing for the security of ballots. The Manual, however, simply cannot be reasonably read to prevent production of subpoenaed material to government officials, particularly State legislators who are constitutionally charged with ensuring election integrity. For example, Congress often investigates topics that involve highly confidential and sensitive information and subpoenas confidential and sensitive information. Congress, of course, is obligated to maintain the confidentiality of such materials. Similarly, the Senators certainly are obligated to maintain confidentiality of the subpoenaed materials here.

[27] The County has also argued that the Subpoenas are overly broad and unduly burdensome. The Court's function, however, is to simply determine if the Subpoenas were valid and had a proper legislative purpose. The Senators have broad discretion in determining what information is needed. The Court is in no position to determine if specific requests are unduly burdensome. Disagreements about the breadth and burdensomeness of the Subpoenas should be worked out between the Senators and the County and their counsel.

The County's Motion for Summary Judgment is denied. The Senators' Motion for Judgment on the Pleadings is granted, to the extent consistent with this Order. The Democrat Senators' Motion for Summary Judgment is granted in part and denied in part, consistent with this Order.

The Court expressly finds that there is no just reason for delay and expressly directs entry of this Order as final partial judgment under Rule 54(b) of the Arizona Rules of Civil Procedure.

/s/ HON. TIMOTHY THOMASON

HONORABLE TIMOTHY THOMASON
JUDICIAL OFFICER OF THE SUPERIOR COURT