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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KAREN FANN, in her official capacity as
President of the Arizona Senate; EDDIE
FARNSWORTH, in his official capacity as
Chairman of the Arizona Senate Judiciary
Committee,

Petitioners,

v.

No. CV2020-016904

**MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER
JURISDICTION**

(Hon. Randall Warner)

1 MARICOPA COUNTY BOARD OF)
2 SUPERVISORS, the governing body of)
3 Maricopa County, Arizona; JACK)
4 SELLERS, in his official capacity as a)
5 member of the Maricopa County Board of)
6 Supervisors; STEVE CHUCRI, in his)
7 official capacity as a member of the)
8 Maricopa County Board of Supervisors;)
9 BILL GATES, in his official capacity as a)
10 member of the Maricopa County Board of)
11 Supervisors; CLINT HICKMAN, in his)
12 official capacity as a member of the)
13 Maricopa County Board of Supervisors; and)
14 STEVE GALLARDO, in his official)
15 capacity as a member of the Maricopa)
16 County Board of Supervisors,)
17 Respondents.)

18 Come now Respondents MARICOPA COUNTY BOARD OF SUPERVISORS;
19 JACK SELLERS, STEVE CHUCRI, BILL GATES, CLINT HICKMAN and STEVE
20 GALLARDO, in their official capacities as Members of the Maricopa County Board of
21 Supervisors, (“Respondents”), and file their Motion to Dismiss this action for lack of
22 subject matter jurisdiction. Petitioners have filed a complaint seeking special action
23 mandamus relief in an effort to accelerate the Court’s ruling on the validity of their
24 legislative subpoena, but the claim does not state a claim for mandamus relief, Arizona
25 law does not provide the Court with the power to enforce a legislative subpoena, and
26 Petitioners have no standing to maintain this action. Accordingly, this action must be
dismissed.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On December 14, 2020 the Senate Judiciary Committee held an interim meeting to
address claims of fraud in the 2020 General Election. The committee heard from no one

1 claiming fraud or irregularities in the election. Instead the committee took testimony from
2 Maricopa County officials and the Arizona Attorney General's office regarding the
3 County's running of the election and both parties responses to claims of irregularities in
4 the election. At the end of the hearing, Petitioner Farnsworth stated that he was going to
5 be issuing subpoenas so that a "forensic audit" could be performed of the 2020 election in
6 Maricopa County. The next day on December 15, 2020, Petitioners Fann and Farnsworth
7 signed two subpoenas requesting either production of or access to essentially all the
8 records of the last election and the systems by which the votes were counted in Maricopa
9 County for 2020. Complaint Exhibits A & B. The subpoenas were not in relation to any
10 committee hearing. *Id.* The access and documents were requested to be provided by
11 Friday December 18, 2020 at 5:00 PM solely to Petitioner Farnsworth. *Id.*

12 The Respondents timely responded to the subpoenas by filing an action in this
13 Court to declare the subpoenas unconstitutional and illegal and to have them quashed.
14 CV2020-016840. The action sought no injunctive relief because the Senate had taken no
15 action to enforce the subpoenas, and it was out of session and therefore unlikely to take
16 any enforcement action until it goes back in session on January 11, 2021.

17 Petitioners request for special action relief is predicated on their desire to perform
18 a "forensic audit" of the Maricopa County election before the United States Congress
19 meets to count the electoral votes for President on January 6, 2021. Complaint ¶20. If
20 Petitioners find anything they determine "could call into question the accuracy of the
21 official canvass" Petitioners intend to send the information to the United States Congress.
22 Complaint ¶21.

23 **II. PLAINTIFFS ARE NOT ENTITLED TO SPECIAL ACTION RELIEF.**

24 There are two forms of special action relief. See Ariz. R.P. Spec. Act. 1(b); *Circle*
25 *K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199
26 (App. 1993). Statutory special actions provide a legal avenue for mandatory judicial

1 review pursuant to laws that “expressly authorize[] proceedings under certiorari,
2 mandamus, or prohibition[.]” Ariz. R.P. Spec. Act. 1(b). Nonstatutory special actions
3 provide an avenue for discretionary judicial review, encompassing the traditional writs of
4 mandamus, certiorari, and prohibition, originating under A.R.S. §§ 12-2001-2029 or the
5 common law. *Circle K*, 178 Ariz. at 103, 870 P.2d at 1199; Ariz. R.P. Spec. Act. 1(a).

6 Unlike a statutory special action, for which the right to review is granted by
7 statute, the superior court has the discretion to deny jurisdiction over a non-statutory
8 special action. *See Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App.
9 1979) (“As a general rule, an appellate court's decision regarding whether or not it will
10 entertain the merits of a non-statutory special action is a discretionary one.”). “[W]hen a
11 special action is initiated by complaint in superior court the judge must first exercise his
12 discretion and decide whether to consider the case on its merits.” *Id.*

13 In this case there is no statutory claim for special action relief and therefore the
14 Court has discretion as to whether it will entertain the Petition. It should not.

15 Petitioners’ Complaint seeks mandamus relief. Mandamus actions are governed by
16 A.R.S. §§ 12-2021-2030. “Mandamus is an extraordinary remedy issued by a Court to
17 compel a public officer to perform an act which the law specifically imposes as a duty.”
18 *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11 (1998). Mandamus is not “available to compel an
19 officer to perform acts not authorized or required by some plain provision of the law.”
20 *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995).

21 The writ of mandamus is an extraordinary and expeditious legal remedy
22 which proceeds upon the assumption that the applicant has an immediate
23 and complete legal right to the thing demanded. *Campbell v. Hunt*, 18 Ariz.
24 442, 162 P. 882. As against public officers in particular, it is issued only to
25 compel the performance of an act which the law especially enjoins as a duty
26 arising out of the office. *Territory v. Board of Supervisors*, 2 Ariz. 248, 12
P. 730. If such officer is not specifically required to perform the duty or has
any discretion as to what shall be done, the writ does not lie. *Collins (Board
of Supervisors) v. Krucker*, Ariz., 104 P.2d 176.

1 *Graham v. Moore* 56 Ariz. 106, 109, 105 P.2d 962, 964 (1940).

2 No statute requires the Maricopa County Board of Supervisors to provide
3 Petitioner Farnsworth with complete access to Maricopa County's voting systems and
4 records so that he might provide them to someone else to perform some form of cyber
5 audit of the election. If Petitioners had a legal right to perform a cyber audit, they would
6 not need to submit subpoenas, but could have filed a mandamus action seeking access to
7 the voting machines and records as of right under statute.

8 Petitioners attempt to argue around this fatal flaw by suggesting that the power of
9 Petitioners to issue subpoenas is unlimited, and that therefore all subpoenas must be
10 complied with in all respects. (Complaint ¶¶ 37-38) As discussed below that premise is
11 false. Based on that false premise, Petitioners assert that the Respondents have a non-
12 discretionary legal duty to comply with Petitioners' demands. However, the duty to
13 respond to a legislative subpoena is not a duty of the Maricopa County Board of
14 Supervisors. It is a duty of every person subpoenaed over which the legislature can assert
15 personal jurisdiction. It is not a duty of Respondents' office, and therefore not a proper
16 subject of a mandamus action.

17 Mandamus also is only available where there is "no other plain, speedy and
18 adequate remedy at law." *Rhodes v. Clark*, 92 Ariz. 31, 35, 373 P.2d 348, 350 (1962).
19 Ariz.R.P.Spec.Act. 1. Here Petitioners have a plain, speedy and adequate remedy at law.
20 Arizona law provides that the remedy for contempt of a legislative subpoena is with the
21 house of the legislature that issued the subpoena. A.R.S. 41-1151 et. seq. It is plain,
22 speedy and adequate. It is plain, the method of enforcement is spelled out in statute. It is
23 speedy, they need only vote on a resolution, and it is adequate as it provides a method of
24 ensuring compliance with the subpoena up to and including imprisonment.

25 Petitioners have suggested that they have no speedy remedy because they desire to
26 perform an audit for which they have no legal authority, and to provide a letter to the

1 Congress by January 6, 2020 for which they have no legal mandate. Petitioners suggest
2 that their unlawful requests and personal desires require a quick decision on the propriety
3 of the subpoenas.¹ But Petitioners cannot make their own emergency. The time for the
4 legislature to act in selecting Presidential electors has passed. 3 U.S.C. §§5, 7. The
5 legislature has no role now to play in that determination. The legislature is out of session,
6 no laws shall be passed before January 11, 2020. If the time is urgent and the will of the
7 legislature is to find Respondents in contempt, the remedy is for the legislature to call
8 itself into session. If the votes to achieve that are unavailable, then the will of the
9 legislature is not thwarted. The fact that the legislature may not have the same interests or
10 desires as Petitioners is the natural and necessary check on this attempt to take actions far
11 outside of legislative authority.

12 **III. THE LEGISLATURE’S POWER TO SUBPOENA WITNESSES AND** 13 **DOCUMENTS IS LIMITED.**

14 Contrary to the claims of Petitioners, the power of the legislature to issue
15 subpoenas is limited. “Congress has no enumerated constitutional power to conduct
16 investigations or issue subpoenas, but we have held that each House has power ‘to secure
17 needed information’ in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161, 47
18 S. Ct. 319, 71 L. Ed. 580 (1927).” *Trump v. Mazars USA, LLP* 140 S. Ct. 2019, 2031,
19 207 L. Ed. 2d 951, 964 (2020).

20 Because this power is “justified solely as an adjunct to the legislative
21 process,” it is subject to several limitations. Most importantly, a
22 congressional subpoena is valid only if it is “related to, and in furtherance
23 of, a legitimate task of the Congress.” The subpoena must serve a “valid
24 legislative purpose,”; it must “concern a subject on which legislation ‘could
25 be had’. *Id.* (internal quotations omitted).

25 ¹ Any correspondence to Congress could only be sent in Petitioners’ personal capacities
26 as they have no right individually to represent the will of the state, the legislature or even
the Arizona Senate.

1 Similarly the Arizona Constitution provides the legislature express no power to
2 investigate or issue subpoenas. *See generally* Ariz. Const. Art IV. In 1955, Arizona
3 enacted statutes providing both houses of the legislature with the power to issue of
4 subpoenas to witnesses commanding them to appear before either legislative house or any
5 committee thereof. The subpoenas can be signed either by the presiding officer of the
6 house or the chairman of the committee before which a person is called to testify. A.R.S.
7 § 41-1151.

8 The Arizona Supreme Court, in *Buell v. Superior Court* 96 Ariz. 62, 391 P.2d 919
9 (1964) held that:

10 It is within the powers of legislative committees to conduct investigations
11 such as the one here involved, and to issue subpoenas and to summon
12 witnesses generally and punish them for contempt if they refuse to answer
13 relevant questions or produce records. *In re Chapman*, 166 U.S. 661, 17
14 S.Ct. 677, 41 L.Ed. 1154 (1897); *Ex parte Battelle*, 207 Cal. 227, 277 P.
15 725, 65 A.L.R. 1497 (1929). *Buell* at 66, 922

16 Importantly, in both cases cited by the Court in *Buell* for the power of the
17 legislature to issue subpoenas, the power was limited. In *ex parte Battelle* the Court
18 actually quashed the contempt finding. The Court in *Buell* noted that the statute that
19 Petitioners cite for the power to issue subpoenas was adopted from California. Complaint
20 ¶25 and *Buell* at 67, 923. And the California courts recognize a limitation on the power to
21 issue subpoenas. *Conn. Indem. Co. v. Superior Court* 23 Cal. 4th 807, 813, 3 P.3d 868,
22 872 (2000).

23 Arizona's statutes also recognize that power of the legislature to compel the
24 production of testimony and documents is limited. A.R.S. § 41-1154 provides that one is
25 guilty of a class 2 misdemeanor for failing to comply with a legislative subpoena but only
26 if they fail to comply with the subpoena "**without lawful excuse**" and for the failure to
produce "**any material and relevant** books, papers, or documents in his possession or
under his control." The statute itself recognizes there are limits to legislative subpoenas,

1 that lawful excuses for compliance exist, and that any documents requested must be
2 material and relevant to the work of the legislature. Compliance with a subpoena thus is
3 not a ministerial act and not the proper subject for a mandamus action.

4 **IV. THE COURT HAS NO AUTHORITY TO HEAR THIS ACTION.**

5 Arizona statutes provide two methods of enforcement of a legislative subpoena.
6 Pursuant to A.R.S. §41-1153, the Senate or the House may by resolution entered in the
7 journal, commit a person for contempt. Once a resolution of contempt has been entered,
8 the sergeant-at-arms may arrest the witness but only “upon the authority of a copy of the
9 resolution signed by the president or speaker, and countersigned by the secretary or chief
10 clerk.” *Id.* A.R.S. § 41-1155 (A)(3) provides that the Sergeant at Arms can imprison a
11 witness for failing to appear pursuant to a legislative subpoena. Here the Senate has
12 issued no resolution and therefore none of the defendants are in contempt and none may
13 be arrested.

14 The second sanction for failing to comply with a legislative subpoena is to be
15 prosecuted for a class 2 misdemeanor. A.R.S. § 41-1154. But such prosecution would not
16 be by the President of the Senate or a committee chair as the legislature has no
17 prosecutorial authority. To pursue a misdemeanor charge the Senate would need to refer
18 the matter to the relevant prosecutorial authority. But no such action has been taken and
19 any prosecution would not provide the documents sought.

20 While some states provide by statute that the courts may enforce legislative
21 subpoenas, Arizona is not one of those states. *See State ex rel. Joint Comm. on Gov't &*
22 *Fin. v. Bonar* 159 W. Va. 416, 230 S.E.2d 629 (1976)(Mandamus unavailable, but court
23 had authority to enforce legislative subpoena by statute - subpoena quashed). Because
24 under Arizona law there is no authority for the court to enforce a legislative subpoena,
25 this mandamus action must be dismissed.
26

1 **V. THE PETITIONERS HAVE NO AUTHORITY TO BRING THIS ACTION.**

2 Even if the law permitted the court to enforce legislative subpoenas, Petitioner
3 have no standing to bring this mandamus action. In order to maintain any claim, they
4 would need to allege an injury to themselves or have a resolution from the Senate
5 authorizing them to assert the right of the body in state court. *Bennett v. Napolitano*, 206
6 Ariz. 520, 527, ¶29, 81 P.3d 311, 318 (2003). Petitioners have filed this action in their
7 official capacities as Senators and as President of the Senate and Chairman of the
8 Judiciary Committee respectively (Complaint ¶¶7&8). They claim no personal injury.
9 The Senate has issued no resolution granting them authority to seek enforcement of their
10 subpoenas. And no statute or Senate rule grants them standing to enforce the subpoenas.
11 Accordingly, Petitioners lack standing to bring this action and it must be dismissed.

12 **VI. CONCLUSION**

13 The Subpoenas exceed the constitutional authority of the Senate President and
14 Committee Chairman, and the petition for writ of mandamus as a judicial enforcement
15 mechanism, if allowed, would deny every other senator his or her lawful authority to
16 participate and disenfranchise their respective voters. This is why the County was forced
17 to challenge the Subpoenas' lawfulness in court. Rather than acknowledging the
18 problems with the Subpoenas and withdrawing them, the Petitioners attempt to use
19 mandamus, an improper vehicle, to compel the County to bow to their will. But the Court
20 has no jurisdiction to enforce a legislative subpoena by mandamus or otherwise. The
21 Petitioners have no standing to ask the court for mandamus relief and the petitioners have
22 not stated a claim entitling them to special action relief, and therefore the Court should
23 decline to accept jurisdiction over this request. The Court should dismiss this action with
24 prejudice.
25
26

DATED this 23rd day of December, 2020.

MARICOPA COUNTY ATTORNEY

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/s/ Thomas P. Liddy

/s/ Stephen W. Tully

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ORIGINAL of the foregoing efiled
this 23rd day of December, 2020

COPY of the foregoing delivered via email
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Rebekah.Richardson@jbazmc.maricopa.gov

COPY of the foregoing e-served via AZ Turbo Court
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