



**Maricopa County Attorney**  
**RACHEL MITCHELL**

November 27, 2022

**VIA EMAIL TO:**

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RE: Response to your November 19, 2022 letter

Dear Ms. Wright:

Your November 19, 2022 letter requested information regarding the 2022 General Election. You also sought answers to several legal questions. This letter, which addresses your legal questions, and the Election Department's Report (the "Report"), which is publicly available at <https://elections.maricopa.gov/asset/jcr:d294ebcd-eb4d-4efc-83d7-bd85f2fd7f9d/2022.11.27-Final-Report-and-Exhibits>, stands as the Maricopa County Board of Supervisors' (the "County")<sup>1</sup> continued commitment to operating elections transparently.<sup>2</sup>

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<sup>1</sup> This response is provided on behalf of the Maricopa County Board of Supervisors and not Maricopa County Recorder Stephen Richer as the Board, not Recorder Richer, has statutory responsibility (as well as responsibility under the Elections Operations Agreement between the Board and Recorder Richer) for election day voting and tabulation.

<sup>2</sup> The County has had three business days to provide the information requested in the November 19, 2022 letter, which was not a reasonable amount of time to respond prior to the canvass of the election, as you requested. The Elections Department's leadership and staff are working diligently to prepare the various reports required by law for the canvass of the election. Nevertheless, they have simultaneously gathered data to answer most of your questions, and those answers are presented in the Report. The County reserves the right to make revisions to this Report should any become necessary. The remaining questions will have to wait. The County will provide supplemental information as soon as it is able to do so, but notes that three races from the 2022 general election ballot are subject to an automatic recount. Those recounts, required by law, will keep the Elections Department fully occupied for the next several weeks.

**A. The Meaning of the Requirement of Uniformity in Elections.**

In footnote 1 to your letter, you state that “State and federal law require ‘uniform’ administration of elections.” The County’s technical, printer issues in some of its vote centers did not violate that requirement.

**1. The Free and Equal Clause of the Arizona Constitution.**

First, you cite to Article II, Section 21 of the Arizona Constitution to support your suggestion that the County’s printer difficulties, causing some voters to need to place their ballots into Door 3, violated the requirement for uniform and free elections. That constitutional provision requires that “[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” This constitutional guarantee means that the state of Arizona must provide for uniformity in elections across the state so that they will be free and equal for all the state’s voters. It does not mean that an election might be invalid if there are unexpected printing difficulties preventing on-site tabulation, when all the voters who attempted to vote were provided legal options for doing so.

Eight Arizona counties do not have any tabulators in their polling locations at all. In Apache, Coconino, Gila, Mohave, Pima, Pinal, Santa Cruz, and Yavapai counties, *every* Election Day voter places his or her ballot into a ballot box (much like Door 3). All those ballots are taken back to a central, election headquarters to be tabulated (just like Door 3 ballots are taken to the Maricopa County Tabulation and Election Center to be tabulated).

It cannot be the case that the limited use of the Door 3 ballot box for some voters in Maricopa County violates the Constitution, while the required use of a ballot box by every voter in over half of the state’s counties does not. Simply stated, the failure of printers to print ballots capable of being read by precinct-based tabulators cannot violate the Free and Equal clause when (1) all voters were still provided reasonable, lawful options for voting, (2) Maricopa County’s contingency plan, of instructing voters to place their ballots into a ballot box to be tabulated later is used by eight counties in the state, and (3) no Arizona law requires ballots to be tabulated in polling locations using precinct-based tabulators.

**2. Arizona Statutory Uniformity Requirements.**

Next, you cite to A.R.S. §§ 16-449(B) and -452(A), which require, among other things, uniformity in the procedures for voting and tabulation of ballots. These laws, however, do not require that every printer and tabulator work perfectly such that there can never be any unplanned and unanticipated equipment malfunctions or failures. *Aguilera v. Fontes*, CV2020-014562, 2020 WL 11273092, at \*2 (Maricopa Cty. Super. Ct., Nov. 30, 2020) (Ruling, Granting the County’s motion to dismiss) (holding that the Arizona election statutes do not require perfection in election administration). The plaintiffs in *Aguilera* asserted that, because the precinct-based tabulators were unable to read some ballots that were cast on Election Day in the 2020 general election, the laws related to uniformity—which the plaintiff interpreted as requiring perfection—had been violated. *Id.* at \*\*1–2. One of the plaintiffs had placed her ballot into Door 3, which she alleged in her lawsuit violated the uniformity laws. *Id.* The court was unpersuaded. It concluded that “[a]

flawless election process is not a legal entitlement under any statute, EPM [*i.e.*, Elections Procedures Manual] rule, or other authority identified by the parties or otherwise known to the Court.” *Id.* at \*4. Significantly, this was true *even if* “the tabulators experienced some problem that interfered with the machines’ ability to” tabulate the ballots in the polling location. *Id.* at \*4.

Maricopa County experienced unanticipated printing problems in 31% of its vote centers. These problems caused some ballots to be printed in a way that prevented some of the precinct-based tabulators from reading them, although all the ballots were easily readable by the human eye. When compared to the total number of voters who participated in the 2022 General Election, fewer than 1% of ballots cast were affected by these printer issues. But importantly, every lawful voter was still able to cast his or her ballot. No voter was disenfranchised because of the difficulty the County experienced with some of its printers. Every voter was provided a ballot by which he or she could record their votes, and all such ballots cast by lawful voters were tabulated, whether in the vote center or at the Maricopa County Tabulation and Election Center.

The printing issues, leading to precinct-based tabulators being unable to tabulate some of the votes cast, was regrettable. But it did not violate the uniformity statutes, and any suggestion that it did is unfounded.

### **3. Federal Uniformity Requirements.**

Finally, you cite to federal statutory and constitutional provisions to suggest that the technical, printer issues in some of the County’s vote centers violated federal uniformity requirements. Neither the First and Fourteenth Amendments of the United States Constitution, nor 42 U.S.C. § 1983, are violated when, as occurred here, (1) technical issues happen in some vote centers but (2) all voters are still provided a meaningful opportunity to vote. Your suggestion to the contrary is incorrect.

#### **B. The Legality of Maricopa County’s “Check-out” Procedures.**

You also requested that we provide you “the legal basis for the ‘check out’ procedures [utilized in vote centers, to allow voters to go to another vote center to vote] in light of A.R.S. § 16-584(D).”<sup>3</sup>

No statute prohibits a voter from checking *out* of a particular polling location to go to another polling location to vote. The County allows voters to do so. The procedure the County utilizes is as follows. If a voter who has checked in to a vote center decides that she would rather go to a different vote center to cast her ballot, she may spoil her ballot in the presence of the poll

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<sup>3</sup> In footnote 3 of your letter, you state that on November 8, 2022 you forwarded to the County two complaints, made by voters, concerning the check out procedure being utilized in vote centers. The County’s records indicate that you forwarded the first complaint at 2:20 p.m. and the second at 3:10 p.m. By that point in time, the County had already identified an issue with some of its printers, which was the proximate cause for some voters desiring to check out of some voting locations. The County was already working to resolve the printer issue and had already sent out a reminder to poll workers, reminding them of their training concerning check out procedures.

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workers and check out of that polling location. When she arrives at her preferred vote center, she will check in and be issued a ballot. During check in, the site book verifies that she is not currently checked in to another vote center (and so, there is no presumption that she has already voted).

If a voter leaves a vote center without checking out, then goes to another vote center to vote, the site book will show that she checked in at the previous vote center. Consistent with Arizona law, she will be allowed to vote a provisional ballot in the new vote center and place it in a provisional ballot envelope. The County will then research whether she had already cast a ballot in order to determine whether "there is information showing the person did vote." If there is, the provisional ballot envelope will remain unopened and her vote will not be counted. A.R.S. § 16-584.

### **C. Reconciliation of Votes Cast.**

Finally, the letter alleges that Maricopa County was "required to complete a 'reconciliation of ballots cast against check ins' at the voting location, not at central count." The letter cites various state statutes, including A.R.S. § 16-602(A), which states:

For any primary, special or general election in which the votes are cast on an electronic voting machine or tabulator, the election judge shall compare the number of votes cast as indicated on the machine or tabulator with the number of votes cast as indicated on the poll list and the number of provisional ballots cast and that information shall be noted in a written report prepared and submitted to the officer in charge of elections along with other tally reports.

This statute was written when state law required voters to go to their assigned precinct-based polling location, and that was the only location at which they could lawfully cast a ballot. Only voters assigned to a particular precinct were allowed to vote in that precinct's polling location. If a voter from a different precinct attempted to vote, they would be instructed to go to their home precinct or allowed to vote a provisional ballot, which would not be counted. Since 2020, Maricopa County voters are afforded the ability to vote at any vote center in the County, which is consistent with current Arizona law.

The County's poll workers create reports in the vote centers on Election Night before leaving the vote centers. But the reconciliation of which you speak is conducted at MCTEC, not in the vote center. Because the County now uses electronic site books to check in voters instead of paper poll rosters, there is no longer a "poll list" in the vote center for the judges to access to create this report. The reconciliation does, however, still occur, it just occurs at MCTEC instead of in each vote center.

Additionally, the County fully complies with the stringent requirements for the post-election audit of each voting location, set out in the Elections Procedures Manual, set forth in Chapter 10, Section II, Part H, found on page 211. That audit includes the reconciliation between check ins and votes cast and requires a full accounting of any discrepancies. That post-election audit is in front of observers from the county's political parties.

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The other statutes you cite are not applicable. A.R.S. § 16-564(A) requires that the ballot box containing ballots (*i.e.*, Door 3) not be removed from the polling location after the polls close, and says nothing about the reconciliation report. Similarly, A.R.S. §§ 16-607, -608, -614, -615, and -616 have nothing to do with the reconciliation about which you are concerned.

Sincerely,

*/s/Thomas P. Liddy*

Thomas P. Liddy  
Division Chief, Civil Services Division