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19 * *Pro Hac Vice* Motion forthcoming

20 *Attorneys for Plaintiffs*
21 *Arizona Alliance for Retired Americans,*
22 *Inc. and Stephani Stephenson*

23 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
24 IN AND FOR THE COUNTY OF COCHISE

25 ARIZONA ALLIANCE OF RETIRED
26 AMERICANS, INC. and STEPHANI
27 STEPHENSON,

27 Plaintiffs,

28 v.

No. **CV 202200518**

**VERIFIED SPECIAL ACTION
COMPLAINT**

Hon.

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TOM CROSBY, ANN ENGLISH, and
PEGGY JUDD, in their official capacities as
the Cochise County Board of Supervisors;
DAVID STEVENS, in his official capacity
as the Cochise County Recorder; and LISA
MARRA, in her official capacity as the
Cochise County Elections Director,

Defendants.

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1 Pursuant to Rule 4 of the Arizona Rules of Procedure for Special Actions, Plaintiffs
2 Arizona Alliance of Retired Americans, Inc., and Stephani Stephenson, by and through
3 their undersigned counsel, allege as follows:

4 **SUMMARY OF THE CASE**

5 1. Just days before Election Day and with voting well underway, the Cochise
6 County Board of Supervisors (the “Board”) has decided to conduct a hand count audit of
7 all early ballots (the “Full Early Ballot Audit”). The Board has chosen to do so despite being
8 warned numerous times by multiple parties—including its own County Attorney and the
9 Secretary of State—that such an audit is unlawful. The Board has no authority to create new
10 audit procedures, let alone procedures that directly conflict with mandatory, statutory audit
11 procedures. Yet, at this late date, the Board has decided to disregard its required legal duties,
12 instead attempting to replace Arizona law with the unlawful audit processes that the Board
13 prefers. But “when public officials, in the middle of an election, change the law based on
14 their own perceptions of what they think it should be, they undermine public confidence in
15 our democratic system and destroy the integrity of the electoral process.” *Ariz. Pub.*
16 *Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 4 (2020). The Board’s illegal actions, if not
17 stopped by this Court, will sow confusion among voters and undermine the public’s
18 confidence in Arizona’s elections.

19 2. The Board claims it is undertaking its unlawful actions because “[i]t is widely
20 known that many voters lack confidence in the voting system.” But it is Defendants’
21 unlawful Full Early Ballot Audit that will cast false doubt on this year’s election results.
22 Arizona law already provides robust procedures to audit electronic tabulation results. Any
23 changes to these procedures must be made by the Legislature or the Secretary of State—not
24 Defendants. As the lone Defendant Supervisor who opposes the full audit explained: “[The
25 audit] isn’t something that I think is our choice to make. We are designed by the State. We
26 are a creature of the State. They tell us what we can do. . . . If they haven’t given us the
27 authority then we can’t do it.”

28

1 accordance with Arizona law. As Arizona citizens and voters, the Alliance's members have
2 a significant interest in ensuring Defendants perform their mandatory election audit duties
3 in full compliance with the state's election laws.

4 12. Plaintiff Stephani Stephenson is a qualified and registered voter in Cochise
5 County, Arizona. Plaintiff Stephenson has already cast her early ballot in Cochise County,
6 which has been received and accepted for counting. The Full Early Ballot Audit will subject
7 Plaintiff Stephenson's ballot to an unlawful counting process.

8 13. Defendants Tom Crosby, Ann English, and Peggy Judd comprise the Cochise
9 County Board of Supervisors. Each supervisor and the Board are named in their official
10 capacities only. As members of the Board of Supervisors, they are responsible for
11 conducting elections within Cochise County, including canvassing and certifying the
12 county's election results. *See* A.R.S. §§ 11-251(3), 16-621, -622(A), -642, -645, -449.

13 14. Defendant David Stevens is the Cochise County Recorder and is named in his
14 official capacity only. As County Recorder, he is responsible for facilitating components of
15 election administration within Cochise County, including signature verification of early
16 ballots so they can be processed and tabulated. *See* A.R.S. §§ 16-550, -621.

17 15. Defendant Lisa Marra is the Cochise County Elections Director and is named
18 in her official capacity only. As Elections Director she is Cochise County's officer in charge
19 of elections and is responsible for conducting logic and accuracy testing on the counting
20 equipment, overseeing the processing and tabulating of votes, and conducting hand count
21 ballot audits. *See* A.R.S. §§ 16-449, -602, -621.

22 GENERAL ALLEGATIONS

23 **A. Arizona law permits only limited hand count audits of early ballots that** 24 **must be conducted according to statutory procedures.**

25 16. Arizona law sets out clear, specific, and mandatory rules that must be followed
26 for post-election early ballot audits. Defendants and all election workers must comply with
27 their legal duties under the Arizona Election Code.
28

1 **1. Arizona law requires early ballots to be tabulated by machine**
2 **and provides for only limited hand audits.**

3 17. Under Arizona law, all early ballots and ballots cast in polling places must be
4 tabulated in the first instance by electronic tabulators. “The result printed by the vote
5 tabulating equipment, to which have been added write-in and early votes, shall, when
6 certified by the board of supervisors or other officer in charge, constitute the official canvass
7 of each precinct or election district.” A.R.S. § 16-622(A). Ballots may be counted manually
8 only if “it becomes impracticable to count all or a part of the ballots with tabulating
9 equipment.” A.R.S. § 16-621(C).

10 18. To confirm that electronic tabulation is accurate, A.R.S. § 16-602 provides
11 detailed procedures for auditing the early ballot tabulation. Those procedures are
12 mandatory: “The hand count shall be conducted as prescribed by this section and in
13 accordance with hand count procedures established by the secretary of state in the official
14 instructions and procedures manual adopted pursuant to § 16-452.” *Id.* § 16-602(B).¹
15 A.R.S. § 16-602 is also the sole authorization for hand count audits. No other provision of
16 Arizona law allows for hand count audits.

17 19. Nothing in either the statutory audit procedure created by A.R.S. § 16-602 or
18 the EPM authorizes election officials to conduct a full hand count of all early ballots. Rather,
19 the statutory procedures and the EPM require that hand count audits start with small
20 samples, and expand *only* on an individual race basis and *only if* hand counts repeatedly
21 differ from electronic tabulations for that race by more than a designated margin for error.

22 20. The early ballot audit cannot begin until after the close of polls on Election
23 Day, but must commence within 24 hours of the polls closing and be completed before the

24 ¹ The Secretary of State promulgated the operative Elections Procedures Manual (“EPM”)
25 in 2019. The manual has the force of law, except to the extent that any provision directly
26 contradicts statutory requirements. *See* A.R.S. § 16-452; *Ariz. Pub. Integrity All.*, 250 Ariz.
27 at 63 ¶ 16 (“Once adopted, the [EPM] has the force of law; any violation of an EPM rule is
28 punishable as a class two misdemeanor.”); *Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz.
2022) (“[A]n EPM regulation that contradicts statutory requirements does not have the force
of law.”). The EPM is available at:
[https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APP
ROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

1 canvassing of the election for that county, which falls on November 28 this year. A.R.S. §
2 16-602(I).

3 21. For the early ballot audit, election workers “shall randomly select one or more
4 batches of early ballots” that were counted by each tabulation machine and sequester them,
5 and then “shall randomly select” from those sequestered ballots a sample of one percent of
6 all early ballots cast, or five thousand ballots, “whichever is less.” A.R.S. § 16-602(F).

7 22. Bipartisan teams then conduct a hand count of up to five races randomly
8 chosen according to specific rules, *id.* § 16-602(B)(2), (F), comparing small samples of
9 ballots to the electronic tabulation of those same ballots, *id.* § 16-602(F). If the results fall
10 within the designated margin, the audit must end. *Id.* Otherwise, a second hand count is
11 performed on the same ballots. *Id.* If and only if the second hand count also falls outside
12 the designated margin for any race, the audit is expanded to an additional one percent or
13 five thousand ballot sample. *Id.* “If at any point in the manual audit of early ballots the
14 difference between any manual count of early ballots is less than the designated margin
15 when compared to the electronic tabulation of those ballots, the electronic tabulation shall
16 be included in the canvass *and no further manual audit of the early ballots shall be*
17 *conducted.” Id.* (emphasis added).

18 23. Arizona law is clear that only the county officer in charge of elections, who is
19 Defendant Elections Director Marra in Cochise County, may supervise the hand count audit
20 of early ballots. A.R.S. § 16-602(B)(7) (“[E]lection board members . . . shall perform the
21 hand count under the supervision of the county officer in charge of elections.”).

22 24. As A.R.S. § 16-602(B) expressly authorizes, the Secretary of State has
23 promulgated additional procedures for audits in the EPM. *See* EPM at 213–34. Those
24 procedures provide additional detail, but they generally mirror A.R.S. § 16-602 in requiring
25 that hand count audits begin with small samples and expand only if those audits repeatedly
26 fall outside of the designated margin from the electronic tabulation.

27
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1 **2. Arizona law prescribes a strict chain of custody for voted early**
2 **ballots that does not allow for the Full Early Ballot Audit.**

3 25. Arizona law outlines strict chain of custody requirements to ensure the security
4 of voted early ballots.

5 26. Generally, after an early ballot is received and the county recorder verifies the
6 voter's signature, the ballot is delivered to the early election board for processing and
7 tallying. A.R.S. § 16-550, -551; EPM at 68–70. The early election board verifies that the
8 voter's affidavit is sufficient, and if so, opens the envelope and sends the allowed ballots to
9 the central counting place for tabulation. A.R.S. § 16-552(B), (F); EPM at 70–72.

10 27. Once all ballots have been delivered to the central counting center, the hand
11 count audits of early ballots may begin. A.R.S. § 16-602(B)(1). Specifically, the audits must
12 begin within 24 hours of the polls closing. *Id.* §16-602(I). During the audits “the *county*
13 *officer in charge of elections* shall retain custody of the ballots for purposes of performing
14 *any* required hand counts and the officer shall provide for security for those ballots.” A.R.S.
15 § 16-602(H) (emphasis added); *see also* EPM at 225 (“Throughout the hand count, the
16 officer in charge of elections must retain custody and control of all hand counted ballots.”).
17 Thus, Defendant Elections Director Marra must retain custody of ballots throughout the
18 audits.

19 28. After the ballots are processed, tabulated, and audited, Defendant Elections
20 Director Marra “shall transfer the ballots to the County Treasurer for retention.” EPM at
21 200; *see also* A.R.S. § 16-624(A) (“After the canvass has been completed, the officer in
22 charge of elections shall deposit the package or envelope containing the ballots in a secure
23 facility managed by the county treasurer . . .”). Once the ballots are in the custody of the
24 county treasurer, they must be retained for a period prescribed by law and may be opened
25 only pursuant to a court order. A.R.S. § 16-624(A), (D); EPM at 248–49.

26 29. Accordingly, at no point in this process may early ballots be subject to an audit
27 other than that authorized by A.R.S. § 16-602 under Defendant Elections Director Marra's
28 supervision.

1 **B. There is no factual basis for hand counting ballots at this stage, a**
2 **process that is subject to human error and presents significant election**
3 **administration challenges.**

4 30. In recent years, and particularly after the 2020 presidential election, some in
5 Arizona and elsewhere have purported that electronic voting systems are unreliable. But as
6 the Secretary of State has explained to the Board, “Arizona has rigorous standards to ensure
7 that electronic voting systems used in our elections are secure and accurate, including
8 federal and state certification requirements [and] pre- and post-election logic and accuracy
9 testing.” Ex. A, Oct. 19, 2022 Sec’y Ltr. at 1; *see also* Ex. G, Arizona 2021 Sec’y Report
10 on 2020 Election (“The 2020 election was secure and accurate, and it is well past the time
11 to accept the results and move forward.”).²

12 31. While there may be a role for limited hand recounts in audits, studies have
13 shown that mechanical and electronic voting systems are more reliable in tabulating the
14 results of multiple contests on a single ballot than humans are. As one such study explained:

15 We find . . . that vote counts originally conducted by computerized scanners
16 were, on average, more accurate than votes that were originally tallied by
17 hand. This finding should not be surprising, either to people who have
18 administered elections or to those who have a grasp of the extension of
19 automation into the workplace. Computers tend to be more accurate than
20 humans in performing long, tedious, repetitive tasks. The demanding election
21 night environment only drives a bigger wedge between human and machine
22 performance.

23 Stephen Ansolabehere, Barry C. Burden, Kenneth R. Mayer, & Charles Stewart III,
24 *Learning from Recounts*, 17 Elec. Law J. 100, 115 (2018).³ The Secretary of State has also
25 warned the Board of this fact, explaining in an October 19, 2022 letter that hand counts are
26 “prone to human error.” Ex. A, Oct. 19 Sec’y Letter at 1.

27 32. Hand counting of multiple races on a single ballot is also exceptionally time
28 consuming. Again, the Secretary cautioned the County Board: “A full hand count raises

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30 ² The court may take judicial notice of all attached exhibits because they are public records
31 of Cochise County and the State of Arizona. *See* Ariz. R. Evid. 201(b)(2); *see also, e.g.,*
32 *Mathieu v. Mahoney*, 174 Ariz. 456, 457 n.1 (1993) (“We take judicial notice of the records
33 of the Secretary of State.”).

34 ³ Available at: <https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440> (last visited
35 Oct. 26, 2022).

1 numerous concerns. Notably, hand counting is necessarily time intensive . . . Any election
2 director in Arizona—the official responsible for overseeing tabulation of ballots—can attest
3 that it’s impossible to complete an accurate hand count of an election with dozens of races
4 on the ballot in time to comply with applicable statutory deadlines, including the county
5 canvass deadline.” *Id.*

6 **C. On October 24, the Board rejected a hand count of all ballots but**
7 **approved a more limited audit of ballots cast at precincts.**

8 33. By mid-October, it became clear that the Board was considering conducting a
9 hand count audit of all ballots cast in the 2022 General Election.

10 34. On October 19, 2022, Kori Lorick, State Elections Director, sent a letter to the
11 Board on behalf of the Secretary of State cautioning against such an audit. The letter warned
12 that the Board’s eleventh-hour full hand count audit would create an intolerable risk of
13 administrative errors and produce voter confusion, undermining public faith in the integrity
14 of the election: “Early voting for the 2022 General Election began over a week ago” and
15 “[d]rastically changing procedures now—mere weeks before Election Day—creates
16 significant risk of administrative error and has the potential to cause voter confusion and
17 mistrust in our elections.” *Id.* at 2.

18 35. The letter separately explained why a full hand count is unlawful, urged the
19 Board not to proceed, and threatened legal action to ensure compliance with Arizona law if
20 the Board insisted on its “misguided effort.” *Id.* at 1. Director Lorick stated that “the Board
21 has no authority” to “conduct a full hand count . . . to audit . . . machine-tabulated results,”
22 and explained that A.R.S. § 11-251(3) “does not grant [the Board] the power to unilaterally
23 perform a full hand count audit of all votes.” *Id.* at 2. Director Lorick further cautioned that
24 “[w]hile A.R.S. § 16-602 and the Elections Procedures Manual lay out procedures for a
25 limited post-election hand count audit, nothing in Arizona law authorizes the Board to
26 conduct a full hand count outside of those procedures.” *Id.* Director Lorick concluded that
27 “[t]he Board would therefore be exceeding its authority under Arizona law if it conducts a
28 full hand count under the guise of either a hand count audit or a recount.” *Id.*

1 36. At the October 24 meeting, the Cochise County Attorney, Brian McIntyre, also
2 addressed the Board, stating:

3 There is no statutory authorization for this proposed separate hand count or
4 validation. It violates the Election Statutes and the Elections Procedures
5 Manual Additionally, you cannot order county employees to violate the
6 law Because I have advised you that there is no legal basis for this, I
7 cannot ethically defend you against any claims over this action. The Board
8 will pay its own attorney's fees, and when opposing parties prevail in their
9 claims, the Board will pay those parties' attorneys fees. . . . I implore you, do
10 not attempt to order this separate hand count.

11 Video Recording of October 24, 2022 Special Meeting Hand Count of Ballots ("October 24
12 Special Meeting Video") at 2:59:25–3:03:13.⁴

13 37. After the Cochise County Attorney's remarks, an unnamed representative
14 from the Arizona Counties Insurance Pool warned that the Board would not "have insurance
15 to count on" if it went "in the face of your county attorney's opinion" because "it would be
16 improper to expect that the other counties are going to pay attorney bills" for that
17 "intentional act." *Id.* at 3:03:30–3:04:30.

18 38. Members of the public, including Cochise County voters, also spoke out
19 against an audit of all ballots cast in the general election.

20 39. After these warnings, the Board unanimously voted *not* to conduct "a hand
21 count of all ballots cast in the General Election." *Id.* at 3:06:02-3:06:20; *see also* Ex. B,
22 Cochise Cnty. Bd. of Supervisors, Agenda for Oct. 24, 2022 Special Board Meeting.

23 40. In the last few minutes of the meeting, however, the Board considered another
24 agenda item (the "October 24 Audit Measure"), which stated: "Pursuant to ARS 16-602 B;
25 the County Recorder or other officer in charge of elections shall take such action necessary
26 to perform a hand count audit of all County precincts for the 2022 General Election to assure
27 agreement with the voting machine count." *Id.*

28 ⁴ Available at <https://www.youtube.com/watch?v=170xHmbhnJI&feature=youtu.be> (last visited October 31, 2022); *see also* Sarah Lapidus, *Despite warnings of legal consequences, Cochise County supervisors vote for hand count of ballots*, AZCentral (Oct. 25, 2022, 4:17 pm), <https://www.azcentral.com/story/news/politics/elections/2022/10/24/arizona-cochise-county-supervisors-approve-hand-count-election-ballots/10593843002/>.

1 41. On its face, the October 24 Audit Measure would only authorize Cochise
2 election officials to conduct a hand count audit of ballots cast in-person on Election Day at
3 precincts—not early ballots, which make up the vast majority of all ballots cast. While this
4 proposal was much narrower than a hand count audit of all ballots cast in the general
5 election, the County Attorney advised the Board it was still unlawful. *See* October 24
6 Special Meeting Video at 2:59:17–3:00:23, 3:02:17–3:03:10 (“If [the Board] votes to
7 approve these items, the Board will get sued and the opposing parties will prevail. I implore
8 you: Do not attempt to order this separate hand count.”).⁵

9 42. By the end of the meeting, despite significant legal concerns, Defendant
10 Supervisor Judd remained undeterred: “I don’t feel like I want to back down so, I might go
11 to jail but oh well.” *Id.* at 3:39:44–3:40:05.

12 43. Defendant Supervisor English, who voted against both October 24 audit
13 proposals, said:

14 I think that you haven’t presented me with any specifics on how it will be
15 done, no research, no dollars, no time, in other words no specifics. . . . This is
16 right now an idea . . . [it] isn’t something that I think is our choice to make.
17 We are designed by the State. We are a creature of the State. They tell us what
18 we can do. . . . If they haven’t given us the authority then we can’t do it, and
19 I take that seriously.

20 *Id.* at 3:40:30–3:41:30.⁶

21 44. The Board then voted 2-1 along party lines to adopt the October 24th Audit
22 Measure, with only Defendant Supervisor English voting against it. *Id.* at 3:42:09–3:43:09.

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25 ⁵ The background description of the October 24 Audit Measure also suggested that the
26 Board was still interested in an audit of all ballots cast. As the Board wrote, “It is widely
27 known that many voters lack confidence in the voting system. A 100% County wide hand
28 count audit of the 2022 General Election will enhance voter confidence. It will provide
proof of concept for emergency back-up if the voting machine(s) failed in the future. Such
audit will be completed prior to final certification of 2022 general election canvass by the
Board of Supervisors.” Ex. C, Oct. 24, 2022 Special Bd. of Supervisors Meeting Action 2.

⁶ *See also* Lapidus, *supra* note 4 (quoting Supervisor English).

1 **D. Despite further warnings from the Secretary of State, the Board has**
2 **since expressed its intention to conduct an even broader audit than the**
3 **one authorized at its October 24 meeting.**

4 45. On October 25, 2022, the Secretary of State sent a second letter to the Board
5 reiterating that “the Board has no discretion to deviate” from the procedure “established by
6 the Legislature and in the EPM,” and that “[a]ny attempt by the Board to circumvent these
7 mandates and conduct a full hand count audit of all ballots cast in the county, under the
8 false premise that it is proceeding pursuant to A.R.S. § 16-602(B), would be unlawful.” Ex.
9 D, Oct. 25, 2022 Sec’y Ltr. at 3. After explaining in detail the proper procedures under
10 Arizona law for § 16-602 audits (as described in Section A.1, *supra*)—including clearly
11 stating that hand count audits of early ballots are “expressly limited to one percent of early
12 ballots,” *id.* at 2—the letter sought to confirm that Cochise County did not intend to conduct
13 a hand audit of all early ballots, which the Secretary’s Office said would be unlawful. *Id.* at
14 1. She further warned that “under no circumstance should the Board’s misguided effort to
15 conduct an expanded hand count be permitted to delay the County’s canvass and
16 certification of election results.” *Id.* at 3.

17 46. Consequently, the Secretary instructed the Board to confirm in writing that the
18 Board would not attempt to conduct a full hand count audit, including of early ballots, and
19 that it would follow all applicable statutory and Electronic Procedures Manual requirements
20 in conducting its statutory hand count audit under A.R.S. § 16-602(B). *Id.* The Secretary
21 also cautioned that “[i]f the County refuses to provide [confirmation] or take any action in
22 furtherance of an unlawful full hand count of all ballots cast, the Secretary will take all
23 available legal action.” *Id.*

24 47. The next day, the Board stated in response to the Secretary’s Letter that it
25 “wishe[d] to follow all applicable requirements” in conducting its audit. Ex. E, Oct. 26,
26 2022 Cochise Cnty. Ltr. But it did not clarify how such a hand count audit would be
27 structured or whether it would actually comply with state law.
28

1 48. Shortly thereafter, during an October 28, 2022 Board meeting, Supervisor Judd
2 backtracked, expressing an intent to conduct a full hand count audit, including for all early
3 ballots (the Full Early Ballot Audit). In support of the Full Early Ballot Audit, Supervisor
4 Judd referenced an informal opinion received from the Office of the Attorney General
5 which stated that the Board could conduct a full hand count of “100 percent of early ballots
6 cast[.]” October 28 Board Work Session Video at 11:47–12:44⁷; *see also* Ex. F, Oct. 28,
7 2022 Office of Attorney General Guidance. The Board noted that the full audit would be
8 limited to four to five specific races, as required by Arizona law. October 28 Board Work
9 Session Video at 11:47–12:44.

10 49. In addition to his previous concerns about the auditing of all ballots, County
11 Attorney McIntyre explained that any hand count audit still had to be consistent with the
12 statutory requirements under A.R.S. § 16-602, such as respecting the mandatory ballot chain
13 of custody, conducting the audit at a secure facility, and having bipartisan teams conduct
14 the audit. *Id.* at 36:33–38:17.

15 50. In particular, County Attorney McIntyre explained that pursuant to A.R.S.
16 § 16-602 Defendant Elections Director Marra must retain custody of the ballots for purposes
17 of performing any hand count audits. *Id.* at 36:33-38:15. Defendant Elections Director
18 Marra added that “the custody ends with me after the election. Then the ballots go to the
19 treasurer’s vault and at that point they’re retained for the two years that we keep ‘em. And
20 that’s a court order to get them removed from the treasurer’s vault.” *Id.* at 43:29-43:56.

21 **E. The Full Early Ballot Audit violates Arizona law.**

22 51. The Full Early Ballot Audit violates Arizona law because it fails to comply
23 with the mandatory, exclusive, and specific statutory and EPM procedures for conducting
24 early ballot audits.

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28 ⁷ Available at <https://www.youtube.com/watch?v=ZSS4VuE7PGM> (last visited Oct. 31, 2022).

1 52. On information and belief, the Full Early Ballot Audit will cover “100% of
2 early ballots cast in Cochise County.” October 28 Board Work Session Video at 11:47–
3 12:44. But the law permits no such audit.

4 53. Compliance with the statute and the EPM is mandatory and exclusive: “The
5 hand count *shall* be conducted as prescribed by [A.R.S. § 16-602 and the EPM],” which the
6 Secretary of State alone has the authority to adopt. A.R.S. §§ 16-602(B) (emphasis added);
7 16-452. The statute authorizes only a specific and limited hand count audit of early ballots.
8 *See supra* Section A.1. Specifically, the early ballot audit can encompass only “one percent
9 of the total number of early ballots cast or five thousand early ballots, *whichever is less*,”
10 and only for a maximum of five races. *Id.* at § 16-602(B)(1), (F).⁸ Unless that audit reveals
11 discrepancies exceeding the designated margin, “no further manual audit of the early ballots
12 shall be conducted.” *Id.* at § 16-602(F). And only after repeated findings that the designated
13 margin of error has been exceeded is a full recount of early ballots permitted, and even then,
14 only for the single race in question. *Id.* at § 16-602(F).

15 54. In sum, the statutory procedure and the EPM require that a hand count audit of
16 early ballots begin with small samples and may expand only on an individual race basis and
17 only if hand counts repeatedly differ from electronic tabulations by more than a designated
18 margin for error. Nothing in statute or the Elections Manual permits Defendants to audit
19 “100% of early ballots cast in Cochise County.”

20 55. Moreover, Defendants have not provided any detail regarding how the Full
21 Early Ballot Audit will comply with the other statutory requirements of A.R.S. § 16-602 or
22 the EPM, such as who will oversee the audit, chain of custody issues for the ballots, or
23 where the Full Early Ballot Audit will be conducted at a secure facility.

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⁸ The Board and the Attorney General appear to be relying on a single sentence in the EPM to claim that all early ballots may be audited. *See* EPM at 215 (“Counties may elect to audit a higher number of [early] ballots at their discretion.”). But this portion of the EPM conflicts with all other EPM regulations and the clear language and purpose of A.R.S. § 16-602(F), which places statutory caps on the number of early ballots that may be audited, and is thus invalid. *See Leibsohn*, 517 P.3d at 51 ¶ 22 (“[A]n EPM regulation that contradicts statutory requirements does not have the force of law.”).

1 62. A.R.S. § 16-602 imposes a non-discretionary legal duty on Defendants to
2 conduct hand count audits as prescribed by the section and the EPM. *See Ariz. Pub. Integrity*
3 *All.*, 250 Ariz. at 63 ¶ 16 (“[The EPM] has the force of law.”). Moreover, only the Secretary
4 of State can promulgate rules related to these hand count audits; Defendants have no such
5 authority. A.R.S. § 16-452(A).

6 63. Rather, Defendants have only those powers “expressly conferred by statute”
7 and “may exercise no powers except those specifically granted by statute and in the manner
8 fixed by statute.” *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (quotation
9 omitted); *see Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14 (Defendants’ powers “[are]
10 limited to those powers expressly or impliedly delegated to [them] by the state constitution
11 or statutes.”); *see also* Ariz. Const. art. 12, § 4 (stating that “[t]he duties, powers, and
12 qualifications” of county officers “shall be as prescribed by law”). Indeed, “[a]ctions taken
13 by a board of supervisors by methods unrecognized by statute are without jurisdiction and
14 wholly void [because] [a] governmental body may not do indirectly what a statute does not
15 give it the power to do directly.” *Hancock*, 188 Ariz. at 498 (internal quotations omitted)
16 And “[t]he absence of a statutory prohibition does not mean the county has inherent
17 authority to engage in certain conduct.” *Id.* (internal quotations omitted); *see also Maricopa*
18 *Cnty. v. Black*, 19 Ariz. App. 239, 241 (1973) (“[T]he absence of any constitutional or
19 statutory prohibition, if such be the case, does not mandate a conclusion that the county may
20 engage in the conduct here questioned. The issue must be approached from the affirmative,
21 that is, what constitutional or statutory authority can the county rely upon to support its
22 questioned conduct?”).

23 64. By adopting the Full Early Ballot Audit, Defendants have exceeded their legal
24 authority and have failed to perform their non-discretionary duties under § 16-602. *See Ariz.*
25 *Pub. Integrity All.*, 250 Ariz. at 60–63 ¶¶ 1–18. Defendants have no authority to promulgate
26 instructions on how to conduct hand count audits—and certainly not procedures that
27 conflict with state law after the election is already underway—yet they seek to do just that
28 with the Full Early Ballot Audit. Additionally, in conducting the Full Early Ballot Audit,

1 Defendants fail to comply with their non-discretionary hand count audit duties and the
2 prescribed procedures and limitations in § 16-602 and the EPM.

3 65. “Election laws play an important role in protecting the integrity of the electoral
4 process,” and “public officials should, by their words and actions, seek to preserve and
5 protect those laws.” *Id.* at 61 ¶ 4 (citations omitted). Defendants cannot simply ignore
6 Arizona election law and supplant it “based on their own perceptions of what they think
7 [the law] *should be.*” *Id.* The Alliance and its members have a significant interest in ensuring
8 Defendants perform their non-discretionary duties and comply with state election law. *See*
9 *id.* at 62 ¶¶ 11–12.

10 66. The Court should therefore order Defendants to conduct hand count audits of
11 early ballots only as permitted by and in accordance with A.R.S. § 16-602 and the EPM,
12 declare that the Full Early Ballot Audit is unlawful, and prohibit Defendants from
13 conducting the Full Early Ballot Audit.

14 **COUNTS II and III**

15 **Declaratory Judgment (A.R.S. § 12-1831) and Injunctive Relief (A.R.S. § 12-1801) –** 16 **Violation of A.R.S. § 16-602 and the EPM**

17 67. Paragraphs 1–66 are incorporated by reference herein.

18 68. Courts have authority to “declare rights, status, and other legal relations
19 whether or not further relief is or could be claimed. . . . The declaration may be either
20 affirmative or negative in form and effect; and such declarations shall have the force and
21 effect of a final judgment or decree.” A.R.S. § 12-1831. “The declaratory judgment act is
22 remedial and is to be liberally construed.” *Citizens’ Comm. for Recall of Jack Williams v.*
23 *Marston*, 109 Ariz. 188, 192 (1973).

24 69. Additionally, Courts have authority to grant injunctions. A.R.S. § 12-1801.
25 “[A]ll public officials . . . may be enjoined from acts that are beyond [their] power.” *Ariz.*
26 *Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14 (quotations omitted).

27 70. As explained above in Count I, A.R.S. § 16-602 and the EPM provide the only
28 lawful procedures for hand count audits. Defendants’ powers, including to authorize or

1 conduct hand audit elections results, “[are] limited to those powers expressly or impliedly
2 delegated to him by the state constitution or statutes.” *Ariz. Pub. Integrity All.*, 250 Ariz. at
3 62 ¶ 14. Moreover, Defendants, including the Board, have only those powers “expressly
4 conferred by statute,” and they “may exercise no powers except those specifically granted
5 by statute and in the manner fixed by statute.” *Hancock*, 188 Ariz. at 498; *see also* Ariz.
6 Const. art. 12, § 4 (stating that “[t]he duties, powers, and qualifications” of county officers
7 “shall be as prescribed by law”).

8 71. Thus, under Arizona election law, including A.R.S. § 16-602 and the EPM,
9 Defendants do not have the power to authorize or conduct the Full Early Ballot Audit, nor
10 do they have authority to supplant Arizona election laws with processes of their own
11 choosing. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶¶ 3–4.

12 72. Declaratory and injunctive relief is necessary to ensure Defendants do not
13 violate state election law. The Court should therefore declare that the Full Early Ballot Audit
14 is unlawful, enjoin Defendants from authorizing or conducting the Full Early Ballot Audit,
15 and order them to conduct hand count audits of early ballots only as permitted by and in
16 accordance with A.R.S. § 16-602 and the EPM.

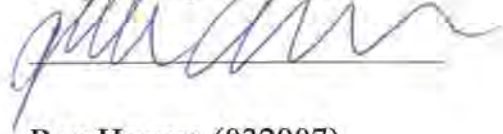
17 **DEMAND FOR RELIEF**

18 WHEREFORE, Plaintiffs demand relief in the following forms:

- 19 A. A writ of mandamus or preliminary and permanent injunction prohibiting the Full
20 Early Ballot Audit and compelling Defendants to conduct hand-count audits of
21 early ballots only in accordance with statutory procedures and the EPM;
- 22 B. A declaration that Defendants’ planned Full Early Ballot Audit violates Arizona
23 law;
- 24 C. An award of fees, costs, and other expenses; and
- 25 D. Such other and further relief as the Court, in its inherent discretion, deems
26 appropriate.

1 Dated: October 31, 2022

Respectfully submitted,



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Telephone: (202) 968-4490
Facsimile: (202) 968-4498

*Attorneys for Plaintiffs
Arizona Alliance for Retired Americans,
Inc. and Stephani Stephenson*

* *Pro Hac Vice* Motion forthcoming

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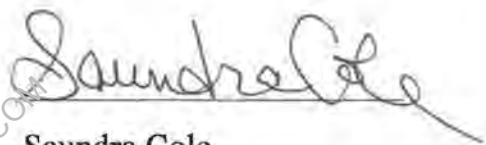
VERIFICATION

I, Sandra Cole, make the following verification under penalty of perjury:

I have read the foregoing complaint and verify that the facts stated in it are true to the best of my knowledge and belief, except as to those matters alleged on information and belief, and as to them, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 30, 2022.



Sandra Cole
President, Arizona Alliance for
Retired Americans, Inc.

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EXHIBIT A

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KATIE HOBBS
SECRETARY OF STATE

October 19, 2022

Via Email

Cochise County Board of Supervisors
Tom Crosby, tcrosbv@cochise.az.gov
Ann English, aenglish@cochise.az.gov
Peggy Judd, pjudd@cochise.az.gov

Re: 2022 General Election Tabulation

Dear Cochise County Board of Supervisors,

We understand that the Cochise County Board of Supervisors will vote next week on whether to conduct a hand count of all votes cast, despite both the Cochise County Attorney's and Legislative Council's determination that doing so would be unlawful. The Secretary of State agrees with the County Attorney and Legislative Council and urges the Board to abandon this misguided effort.

As you know, Arizona has rigorous standards in place to ensure that electronic voting systems used in our elections are secure and accurate, including federal and state certification requirements, pre- and post-election logic and accuracy testing, and post-election limited hand count audits. *See* EPM, Ch. 4, A.R.S. §§ 16-442, -449, -602. The use of electronic tabulation combined with these and other security measures allows counties to fulfill their statutory duties in a timely manner while ensuring the accuracy and integrity of our elections. Indeed, as recently explained by the General Counsel of the Arizona Legislative Council, Arizona law only contemplates manual counting of ballots where "it becomes impracticable to count . . . ballots with tabulating equipment." *See* A.R.S. § 16-621(C).

And this is for good reason: a full hand count raises numerous concerns. Notably, hand counting is necessarily time intensive and prone to human error. Any election director in Arizona—the official responsible for overseeing tabulation of ballots—can attest that it's impossible to complete an accurate hand count of an election with dozens of races on the ballot in time to comply with applicable statutory deadlines, including the county canvass deadline. A.R.S. § 16-642(A) (requiring counties to canvass between six and twenty days after an election). Additionally, transitioning to a full hand count this close to the election raises operational and security concerns. Election procedures are generally developed

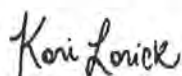
through careful consideration and with sufficient time to prepare for an upcoming election. In fact, Cochise County has already filed its election program and emergency contingency plan for the General Election with the Secretary of State, confirming its usage of electronic equipment for this election. See A.R.S. § 16-445(A). Early voting for the 2022 General Election began over a week ago, and counties are already permitted by law to begin processing and tabulating ballots. Drastically changing procedures now—mere weeks before Election Day—creates significant risk of administrative error and has the potential to cause voter confusion and mistrust in our elections.

Even if, as indicated at the Board's October 11, 2022 work session, the Board intends to tabulate votes electronically and conduct a full hand count only to audit those machine-tabulated results, the Board has no authority to do so. County boards of supervisors have only those powers "expressly conferred by statute," and the Board "may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (quotations omitted). A.R.S. § 11-251(3) gives the Board the power to canvass election returns. It does not grant the power to unilaterally perform a full hand count audit of all votes. While A.R.S. § 16-602 and the Elections Procedures Manual lay out procedures for a limited post-election hand count audit, nothing in Arizona law authorizes the Board to conduct a full hand count outside of those procedures. Similarly, Arizona law authorizes recounts only when the canvassed results fall within the statutorily designated margin. A.R.S. § 16-661. And when an automatic recount is triggered, it must be done by electronic tabulation. A.R.S. § 16-664. The Board would therefore be exceeding its authority under Arizona law if it conducts a full hand count under the guise of either a hand count audit or a recount. The Board cannot simply make up its own extra-statutory process.

If the Board votes to proceed with a full hand count—putting at risk the accuracy and integrity of our elections—the Secretary will take all available legal action to ensure that Cochise County conducts the 2022 General Election in compliance with Arizona law. If that occurs, we note that Arizona law provides for mandatory fee shifting under these circumstances. A.R.S. § 12-348.01. We are all stewards of taxpayer dollars, and taxpayers should not bear the burden of the Board's contemplated unlawful action. We sincerely hope such action is unnecessary and that the Board will follow the advice of its own attorney, protect the integrity of our elections, and ensure continued compliance with Arizona law.

Please let me know if you need additional information.

Sincerely,



Kori Lorick
State Elections Director
Arizona Secretary of State Katie Hobbs
klorick@azsos.gov

cc

Tim Mattix, Clerk of the Board

tmattix@cochise.az.gov

Christine Roberts, Chief Civil County Attorney

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Richard Karwaczka, County Administrator

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Sharon Gilman, Deputy County Administrator,

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Lisa Marra, Elections Director

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David Stevens, County Recorder

dstevens@cochise.az.gov

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EXHIBIT B

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Cochise County Board of Supervisors

Public Programs...Personal Service
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TOM CROSBY
Supervisor
District 1

RICHARD G. KARWACZKA
County Administrator

ANN ENGLISH
Chairman
District 2

SHARON GILMAN
Deputy County Administrator

PEGGY JUDD
Vice-Chairman
District 3

TIM MATTIX
Clerk of the Board

**AGENDA FOR SPECIAL BOARD MEETING
MONDAY, OCTOBER 24, 2022 at 2:00 PM
BOARD OF SUPERVISORS HEARING ROOM
1415 MELODY LANE, BUILDING G, BISBEE, AZ 85603**

ANY ITEM ON THIS AGENDA IS OPEN FOR DISCUSSION AND POSSIBLE ACTION

ROLL CALL

Members of the Cochise County Board of Supervisors will attend either in person or by telephone, video or internet conferencing.

Members of the public may also [attend this meeting](#) via Microsoft Teams computer or mobile app, or via phone by calling 602-609-7513 or 888-680-6714, Conference ID 392 434 924#. If you have trouble accessing this meeting remotely, call 520-432-9200 for direction.

The Board may permit public comment during the discussion of any item on this agenda. To speak on an agenda item, complete and return the [speaker request form](#) to the Clerk of the Board prior to the start of the meeting.

ACTION

Board of Supervisors

1. Order a hand count of all ballots cast in the General Election to be held on November 8, 2022, to be completed prior to Canvass of Election Results. [Click to View](#) -- Disapproved
2. Pursuant to ARS 16-602 B; the County Recorder or other officer in charge of elections shall take such action necessary to perform a hand count audit of all County precincts for the 2022 General Election to assure agreement with the voting machine count. Such audit shall be completed prior to the canvass of general election results by the Board of Supervisors. [Click to View](#) -- Approved

Attachments

[ARS 11-532](#)

[Recorder Oct. 11 Presentation](#)

Pursuant to the Americans with Disabilities Act (ADA), Cochise County does not, by reason of a disability, exclude from participation in or deny benefits or services, programs or activities or discriminate against any qualified person with a disability. Inquiries regarding compliance with ADA provisions, accessibility or accommodations can be directed to Cochise County ADA Coordinator, ADACoordinator@cochise.az.gov, (520) 432-9830, TDD (520) 432-8360, 1415 Melody Lane, Building C, Bisbee, AZ 85603.

Cochise County Board of Supervisors
1415 Melody Lane, Building G Bisbee, Arizona 85603
520-432-9200 520-432-5016 fax board@cochise.az.gov

The undersigned hereby certifies that a copy of this notice was duly posted at the address listed above in accordance with the statement filed by the Cochise County Board of Supervisors.

Posted this _____ day of _____, 2022 at _____

by _____

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EXHIBIT C

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Special Board of Supervisors Meeting - 2:00 pm

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Action 2.

Board of Supervisors

Meeting Date: 10/24/2022

100% County-wide Handcount Audit

Submitted By: Tim Mattix, Board of Supervisors

Department: Board of Supervisors

Presentation: No A/V Presentation

Document Signatures:

Recommendation:

of ORIGINALS

Submitted for Signature:

NAME Tom Crosby

TITLE

Supervisor,

of PRESENTER:

of PRESENTER:

District 1

Mandated Function?:

Source of Mandate

or Basis for Support?:

Information

Agenda Item Text:

Pursuant to ARS 16-602 B; the County Recorder or other officer in charge of elections shall take such action necessary to perform a hand count audit of all County precincts for the 2022 General Election to assure agreement with the voting machine count. Such audit shall be completed prior to the canvass of general election results by the Board of Supervisors.

Background:

It is widely known that many voters lack confidence in the voting system. A 100% County wide hand count audit of the 2022 General Election will enhance voter confidence. It will provide proof of concept for emergency back-up if the voting machine(s) failed in the future. Such audit will be completed prior to final certification of 2022 general election canvass by the Board of Supervisors.

Proposed outcome: It is expected that a 100% audit will confirm the accuracy of the voting machine count.

Attachments - [Recorder's video presentation from Oct. 11, 2022 related work session.](#)

Department's Next Steps (if approved):

As directed

Impact of NOT Approving/Alternatives:

n/a

To BOS Staff: Document Disposition/Follow-Up:

n/a

Budget Information

Information about available funds

Budgeted:

Funds Available:

Amount Available:

Unbudgeted:

Funds NOT Available:

Amendment:

Account Code(s) for Available Funds

1:

**Fund Transfers
Attachments**

[ARS 11-532](#)

[Recorder Oct. 11 Presentation](#)

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KATIE HOBBS
SECRETARY OF STATE

October 25, 2022

Via Email

Cochise County Board of Supervisors
Tom Crosby, tcrosbv@cochise.az.gov
Ann English, aenglish@cochise.az.gov
Peggy Judd, pjudd@cochise.az.gov

Re: 2022 General Election Hand Count Audit

Dear Cochise County Board of Supervisors:

Last week, the Secretary of State's Office wrote to warn you against proceeding with a full hand count of all ballots cast in Cochise County during the November 2022 General Election. As detailed in that letter, a full hand count would not only have been illegal but would also have (1) undermined the orderly administration of this election, (2) raised serious security and ballot chain of custody concerns, (3) caused voter confusion in the middle of early voting and mere weeks before Election Day, and (4) threatened the County's ability to timely canvass the election as required by law.

For all these reasons, the Secretary listened carefully to yesterday's Board meeting and is grateful the Board took her cautionary words seriously and voted unanimously to reject "a hand count of all ballots cast in the General Election to be held on November 8, 2022, to be completed prior to Canvass of Election Results." This item should never have found its way onto the Board's agenda, and the Secretary applauds the other Cochise County officials, including the County Attorney, and numerous Arizonans who also spoke out against that dangerous course of action. Their courage and commitment to uphold the Constitution and laws of the State of Arizona—in the face of unfounded efforts to sow chaos, doubt, and distrust in our elections—deserves our recognition and praise.

Despite the Board's rejection of a full hand count, it did approve the following secondary agenda item:

Pursuant to ARS 16-602 B; the County Recorder or other officer in charge of elections shall take such action necessary to perform a hand count audit of all County precincts for the 2022 General Election to assure agreement with the

voting machine count. Such audit shall be completed prior to the canvass of general election results by the Board of Supervisors.

The Secretary, like the Cochise County Attorney, continues to have serious concerns about the legality of this agenda item, particularly considering the lack of any details as to how the Board intends to proceed and the fact that the election is just two weeks away. But because the Board voted to conduct a full precinct hand count audit “pursuant to” A.R.S. § 16-602(B), the Secretary believes it is important to lay out precisely what that statute and the 2019 Election Procedures Manual (“EPM”) require. After all, the Board has only those powers “expressly conferred by statute,” and the Board “may exercise no powers except those specifically granted by statute and in the manner fixed by statute.” *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (citations omitted).

Under A.R.S. § 16-602(B) and the EPM, the County’s precinct hand count audit must comply with the following, among other, requirements:

1. Because Cochise County uses a vote center model, each vote center is considered to be a precinct/polling place for the purposes of the precinct hand count audit under A.R.S. § 16-602. EPM Ch. 11, III(A); *see also Arizona Republican Party v. Fontes*, No. CV2020014553 (Maricopa Cnty. Super. Ct. Dec. 21, 2020) (attached as Exhibit 1).
2. The precinct hand count audit may only be conducted on regular ballots cast at vote centers in Cochise County on Election Day and may not include any early ballots (regardless of when or how they were returned). A.R.S. § 16-602(B)(1); EPM Ch. 11, III(A). The early ballot hand count audit is expressly limited to one percent of early ballots and controlled by A.R.S. § 16-602(F), a statute the Board did not—and could not—invoke in approving an expanded precinct hand count audit. *See also* EPM, Ch. 11, III(B).
3. The precinct hand count audit cannot begin “until all ballots voted in the precinct polling places have been delivered to the central counting center” and “[t]he unofficial vote totals from all precincts [have been] made public.” A.R.S. § 16-602(B)(1).
4. The precinct hand count audit cannot be conducted as to all races on the ballot, but instead is limited to four contested races that must be selected “by lot.” Specifically, the participating county political party chairpersons shall select by lot one statewide ballot measure, one race for statewide office, one race for federal office, and one race for legislative office. A.R.S. § 16-602(B)(2), (6); EPM Ch. 11, V-VI.
5. The precinct hand count audit must be conducted by representatives of the political parties entitled to representation on the state ballot through a process that requires the cooperation of those political parties. *See* A.R.S. § 16-602(B)(7). The audit “shall not proceed” unless the political parties provide the recorder or other officer in charge of elections with “a sufficient number of persons by 5:00 p.m. on the Thursday preceding the election and a sufficient number of persons, pursuant to this paragraph, arrive to perform the hand

count." *Id.* And even then, "for the hand count to proceed, not more than seventy-five percent of the persons performing the hand count shall be from the same political party." *Id.*

6. Precinct hand count board members and alternates must be registered to vote in Arizona. Candidates appearing on the ballot, except for precinct committeeman, may not serve as board members. And all board members must take the oath specified in A.R.S. § 38-231(E); EPM Ch. 11, I.

7. The precinct hand count must be completed in time for the County to meet its statutory canvass deadline under A.R.S. § 16-642(A). The results of the precinct hand count audit must be provided to the Secretary to be publicly posted on the Secretary's website. A.R.S. § 16-602(I).

These are just some of the requirements for a precinct hand count audit established by the Legislature and in the EPM, and from which the Board has no discretion to deviate. *Hancock*, 188 Ariz. at 498. Any attempt by the Board to circumvent these mandates and conduct a full hand count audit of all ballots cast in the county, under the false premise that it is proceeding pursuant to A.R.S. § 16-602(B), would be unlawful. And under no circumstance should the Board's misguided effort to conduct an expanded hand count be permitted to delay the County's canvass and certification of election results.

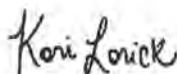
The Secretary thus requests that the Board confirm in writing, no later than 5:00 p.m. on October 26, that:

- 1. The Board will not attempt to conduct a full hand count of all ballots cast in Cochise County under the false premise that it is proceeding pursuant to A.R.S. § 16-602(B); and**
- 2. The Board will follow all applicable requirements in statute and the EPM when conducting its expanded precinct hand count audit under A.R.S. § 16-602(B).**

If the County refuses to provide these assurances or takes any action in furtherance of an unlawful full hand count of all ballots cast, the Secretary will take all available legal action, including filing a special action to compel the County's compliance with these non-discretionary legal duties. If the Board does not respond by 5:00 p.m. on October 26, the Secretary will deem the Board's silence to be an admission that it is threatening to proceed without or in excess of jurisdiction or legal authority.

Please let me know if you need any additional information. We look forward to your prompt response.

Sincerely,



Kori Lorick
State Elections Director
Arizona Secretary of State Katie Hobbs

cc

Tim Mattix, Clerk of the Board
tmattix@cochise.az.gov

Christine Roberts, Chief Civil County Attorney
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Richard Karwaczka, County Administrator
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Sharon Gilman, Deputy County Administrator,
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Lisa Marra, Elections Director
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David Stevens, County Recorder
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Exhibit 1

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2020014553

12/21/2020

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

ARIZONA REPUBLICAN PARTY

JOHN DOUGLAS WILENCHIK

v.

ADRIAN FONTES, ET AL.

JOSEPH EUGENE LA RUE
EMILY M CRAIGER
JOSEPH I VIGIL
THOMAS PURCELL LIDDY
SARAH R GONSKI
DANIEL A ARELLANO
ROOPALI HARDIN DESAI
KRISTIN ARREDONDO

COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC

RULING

Arizona law requires election authorities to validate electronic vote counts by manually recounting random batches of ballots. For this process, called the “hand count audit,” election officials enlist representatives of Arizona’s political parties to sample and count the ballots. Following the 2020 general election, Republican, Democratic and Libertarian Party appointees hand-counted 2917 ballots cast on voting machines at polling places in Maricopa County, and 5000 additional early (mail-in) ballots. *The hand counts verified that the machines had counted the votes flawlessly.* Maricopa County, Arizona General Election - November 3, 2020 Hand Count/Audit Report (“Audit Report”), available at <https://azsos.gov/election/2020-general-election-hand-count-results> (last visited December 9, 2020).

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In this lawsuit, the plaintiff Arizona Republican Party asked for a court order directing the defendant Maricopa County officials to redo the hand count audit using different batches of ballots. The plaintiff baldly asserted that this relief was necessary to maintain “confidence in the integrity of our elections,” without alleging any facts to show that the machines might have miscounted the votes. The plaintiff could not explain why the suit had not been filed before the election, or what purpose another audit would serve.

This order explains why the Arizona Republican Party’s case was meritless, and the dismissal order filed November 19, 2020 was required, under applicable Arizona law. What remains is intervenor Arizona Secretary of State’s application for an award of attorneys’ fees. That application will require the Court to decide whether the Republican Party and its attorneys brought the case in bad faith to delay certification of the election or to cast false shadows on the election’s legitimacy. *See* Arizona Revised Statutes § 12-349(A) (court “shall” assess fees and costs against a party or attorney when the party’s claim is brought “without substantial justification” or “solely or primarily for delay”).

ELECTION LAW BACKGROUND: AND THE ISSUE IN THIS CASE

Section 16-602 of the Arizona Revised Statutes requires a hand count audit of any election in which the votes are cast or counted on “an electronic voting machine or tabulator.” A.R.S. § 16-602(A). The hand count audit verifies that the machines are working properly and accurately counting votes by hand counting some ballots and comparing the result to the machine count of those same ballots. The statute calls for the ballots cast on the voting machines at the polling places to be audited separately from the early (mail-in) ballots. *Compare* A.R.S. § 16-602(B)(1) with A.R.S. § 16-602(F). The election results do not become “official” until the hand count audits confirm the accuracy of the machine counts. A.R.S. § 16-602(C).

Subsection (B) of section 16-1602 sets out hand count audit procedures for ballots cast on voting machines at polling places. The process starts before the election, when the county officer in charge of elections tells the county political party chairs¹ how many of the parties’ designees will be needed to perform the hand count. A.R.S. § 16-602(B)(7). At least a week before the election, the party chairs name the individuals who will physically count the ballots. *Id.* After the election, when the polls have closed and the unofficial vote totals have been made public, the party chairs take turns randomly choosing a limited number of specific polling places for audit. A.R.S. § 16-602(B)(1). The party chairs also choose the specific races that will be audited, A.R.S. § 16-602(B)(6), except that the presidential race is always audited. A.R.S. § 16-602(B)(5).

¹ The county political parties are effectively subgroups of the recognized state political parties under Arizona law. *See* A.R.S. section 16-825 (state committee of each party consists of county party chairs and one member of each county committee for every three elected at the county level).

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The hand count must begin within twenty-four hours after the polls have closed. A.R.S. § 16-602(I). If the limited hand count produces evidence that the machine count might be inaccurate in some way, the hand recount expands in stages. A.R.S. § 16-602(C).² But when the limited hand count matches the machine count for a given race, “the results of the electronic tabulation constitute the official count for that race.” *Id.* In all events, the hand count audit must be completed before the canvassing of the county election results. A.R.S. § 16-602(I). The responsible county officials must report the results of the audit to the secretary of state, who in turn must make the results publicly available on the secretary of state’s website. *Id.*

The provision of section 16-602 at issue in this case, concerning the selection of polling places for audit, reflects the longstanding Arizona practice of organizing elections around political precincts. When the election is organized by precinct, the county board of supervisors establishes “a convenient number” of precincts before each election, and then designates one polling place in each precinct for the voters who resided in that precinct. *See* A.R.S. § 16-411(B). Consistent with that model, the statute refers to sampling of “precincts.”³

² The hand recount can extend to an entire county or jurisdiction, if necessary. A.R.S. § 16-602(D). Under some circumstances it can be treated as the official count. A.R.S. § 16-602(E). When the hand recount expands to cover an entire jurisdiction, the secretary of state must make available to the superior court “the escrowed source code for that county,” and the judge then must appoint an independent expert with software engineering expertise to review the software and “issue a public report to the court and to the secretary of state regarding the special master’s findings on the reasons for the discrepancies.” A.R.S. § 16-602(J).

³ The text of the statute says, in pertinent part:

B. For each countywide primary, special, general and presidential preference election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities. The hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452. . . . The hand count shall be conducted in the following order:

1. At least two per cent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county. The county political party chairman for each political party that is entitled to continued representation on the state ballot or the chairman’s designee shall conduct the selection of the precincts to be hand counted. The precincts shall be selected by lot without the use of a computer, and the order of selection by the county political party chairmen shall also be by lot.

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In 2011, the Legislature authorized Arizona counties to establish “voting centers” as polling places in place of the traditional precinct locations. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) section 3, *codified at* A.R.S. § 16-411(B)(4). At a voting center, any voter in the county can receive an appropriate ballot and lawfully cast the ballot on Election Day. *Id.* But the Legislature chose not to amend section 16-602 to specify hand count audit procedures for voting center elections. In fact, section 16-602 does not refer to voting centers at all.

Instead the Legislature delegated to the secretary of state the authority to make rules for hand count audits, including audits of elections conducted at voting centers. It did so by amending a sentence in section 16-602(B) that had read, “[t]he hand count shall be conducted as prescribed by this section.” The sentence as amended in 2011 says, “[t]he hand count shall be conducted as prescribed by this section *and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.*” 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) section 8, *codified at* A.R.S. § 16-602(B) (emphasis added).

The “official instructions and procedures manual adopted pursuant to § 16-452” is known as the Elections Procedures Manual. Arizona Secretary of State, State of Arizona Elections Procedures Manual (December 2019) (“Election Procedures Manual”), *available at* <https://azsos.gov/about-office/media-center/documents> (last visited November 25, 2020). The Elections Procedures Manual comprehensively lays out process and procedure details for Arizona elections. A new edition issues not later than December 31 of each odd-numbered year immediately preceding the general election. A.R.S. § 16-452(B). Each new edition must be formally approved by both the Governor and the Attorney General. *Id.* The current edition, issued at the end of 2019, received the endorsement of both Governor Ducey and Attorney General Brnovich.

Under the authority of section 16-602(B), the Election Procedures Manual gives detailed instructions to the county officials who conduct hand count audits. Election Procedures Manual at 213-234. The rule on sampling polling places for voting center election audits is straightforward and simple. “Each vote center shall be considered to be a precinct/polling location during the selection process and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or two vote centers, whichever is greater.” Election Procedures Manual at 216. Consistent with that directive, Maricopa County’s 2020 general election hand count audit focused on a random sample of the voting centers that served as polling places.

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The plaintiff here claimed that the Maricopa County hand count did not comply with section 16-602, because the statute refers to selection of “precincts” for audit and says nothing about voting centers. The plaintiff asked the Court to order Maricopa County election officials to identify all of the ballots cast at the voting centers by residents of randomly sampled precincts, and to hand count those ballots to see whether the count matched the electronic vote count.

RELEVANT FACTS AND PROCEDURAL HISTORY

The decision to conduct the 2020 election at voting centers instead of precinct polling places was made by the Maricopa County Board of Supervisors on September 16, 2020. See Maricopa County Elections Department, *Election Day & Emergency Voting Plan – November General Election* (September 16, 2020), (“Election Plan”), available at <https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Election%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf> (last visited Nov. 25, 2020). The Board’s decision effectively determined that the hand count audit likewise would focus on voting centers, since that is what the Elections Procedures Manual requires. There is no record, however, that the Republican Party expressed any objection, before the Board of Supervisors or to the officials who carried out the election plan. No one sought judicial intervention to clarify the alleged mismatch between the manual and the statute.

“The start of the hand count can be defined as the official training of the Hand Count Board members, selection of the precincts and races, coordinating the hand count with the party leaders, or any other activity that furthers the progress of the hand count for that election.” Election Procedures Manual at 225. By that definition, the 2020 general election hand count arguably started in Maricopa County two weeks before the election, when the county officer in charge of elections told the county political party chairs how many of their respective members would be needed to serve on the “Hand Count Boards,” and moved forward a week later, when the county chairs designate Hand Count Board members and alternates. See Elections Procedures Manual at 213. Again there is no record of any objection from the Republican Party when these steps were taken. No one asked for a judicial declaration that the county election officials were planning to recount the wrong ballots.

The official audit report says that the Maricopa County hand count began on the day after the general election, November 4. Maricopa County, Arizona General Election – November 3, 2020 Hand Count/Audit Report (“Audit Report”), available at <https://azsos.gov/election/2020-general-election-hand-count-results> (last visited December 9, 2020). That evening, the Maricopa County chairs of the Arizona Republican, Democrat and Libertarian parties took turns choosing “the polling places (vote centers) to be audited.” *Id.* On November 7, the volunteers appointed by the parties began counting the ballots cast at the selected voting centers. *Id.* They completed the task mid-day on November 9. *Id.* In all they hand-counted 2917 ballots from four voting centers,

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and another 5000 randomly sampled Maricopa County early (mail-in) ballots. *Id.* Nothing in the official report suggests that the Republican Party expressed disagreement, at any point in the process. *Id.*

As far as the court record shows, the complaint in this case stated the Arizona Republican Party's objection to the 2020 general election hand count audit for the first time. Filed on November 12, the complaint was framed as though the hand count had not yet begun when the complaint was filed. "Verified Complaint" at 1 ("Because the 'sampling' is expected to begin soon, Plaintiff seeks expedited relief.") The complaint requested a declaratory judgment that the law requires sampling of precincts rather than voting centers for the hand count audit, and a writ of mandamus directing Maricopa County officials to conduct the hand count audit accordingly.

Responding to the complaint in a motion to dismiss, on November 16, the defendants advised the Court that by September 12 the hand count audit had already been completed, reported and posted on the secretary of state's website.⁴ *The report showed that the hand count matched the machine count exactly. See Audit Report ("No discrepancies were found by the Hand Count Audit Boards.")* The plaintiff reacted by applying for an injunction to bar the Board of Supervisors from certifying the election results. The plaintiff continued to assert, even in the face of the audit showing a flawless vote tabulation, that a second hand count of a different sample of ballots was necessary to avoid "lingering questions" and a "cloud" over the "legitimacy" of the election." Application for Preliminary Injunction at 3.

THE REASONS THE PLAINTIFF'S CASE WAS DISMISSED

The plaintiff's claim for mandamus relief failed because the duty of County election officials was to comply with the Election Procedures Manual, and they did so. The declaratory judgment claim failed because its extreme tardiness prejudiced both the defendant county officials and the public interest. Both those claims, and the mid-case request for an injunction, were prohibited post-election challenges to election procedures. These issues are addressed in turn. The question whether the Elections Procedures Manual correctly applies section 16-602(B) is not addressed, because the plaintiff did not make the showing necessary to justify that inquiry.

⁴ What exactly the Arizona Republican Party and its attorney knew or had reason to know about the status of hand count audit, at the time of filing the complaint, will be an issue on the application for attorneys' fees. The Republican Party appears to have had constructive knowledge, at least, of facts that contradicted the allegations in the complaint. The attorney (who also verified the complaint) said he "did not receive a copy" of the audit report until after the suit had been filed, Plaintiff's Response to Defendant/Intervenors' Motion to Dismiss at 3, n.1, but what he knew about the audit when he filed the complaint is unclear.

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Mandamus Did Not Apply Because the Election Officials Followed the Law

The plaintiff presented its case primarily as a claim for mandamus relief. A writ of mandamus is an extraordinary remedy issued by a court against a public officer to compel the officer to perform an act required by law. *Sears v. Hull*, 192 Ariz. 65, 961 P.2d 1013, para. 11 (1998); *Adams v. Bolin*, 77 Ariz. 316, 322-323, 271 P.2d 472 (1954). If the officer is not specifically required to perform the duty or has any discretion as to what shall be done, the court may not issue the writ. *Adams v. Bolin*, 77 Ariz. 316 at 323.

Maricopa County officials had no discretion, under Arizona law, to hand count precincts instead of voting centers for the hand count audit. A county official's authority is limited to those powers expressly or impliedly delegated to him or her by state law. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶14 (2020). The Elections Procedures Manual directs county election officials to treat the voting centers as "precincts" for purposes of the hand count audit. Election Procedures Manual at 216. The manual has the force of law, meaning that county election officials must do as it says. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶16 (2020). Maricopa County officials therefore could not lawfully have performed the hand count audit the way the plaintiffs wanted it done. If they had done so, they would have exposed themselves to criminal punishment. See A.R.S. § 16-452(C) (a person who violates a rule in the Election Procedures Manual is guilty of a class 2 misdemeanor).

Since Maricopa County election officials had no power to vary from the Election Procedures Manual rules for the hand count audit, this Court likewise has no authority to issue a writ of mandamus to compel them to do so. "It is the duty of the court so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the right of electors." *Hunt v. Campbell*, 19 Ariz. 254, 269, 169 P. 596, 602 (1917). A judge cannot change election rules whenever someone has "questions" or "concerns" about the results. A writ of mandamus lies only if election officials fail to follow the rules established by the law – here, the Election Procedures Manual. When Maricopa County officials conducted the hand count audit, they followed the Elections Procedures Manual to the letter. As a result, there was and is no basis for mandamus relief.

The Request for Declaratory Relief Was Way Too Late

There are legally appropriate ways to test the validity of the Elections Procedures Manual in court. The political party has the right to sue for a judicial determination of whether the Elections Procedures Manual follows the law. The Arizona Republican Party nominally did that here, by asking the court to "declare that the hand count sampling be of "precincts . . . and not of "vote centers." Verified Complaint at 5. But the law sets out basic rules, for that kind of lawsuit,

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that were not followed here. The suit was brought against the wrong party, and far too late, for the requested relief.

Arizona's Uniform Declaratory Judgments Act, A.R.S. §§ 12-1831 through 12-1846, is an "instrument of preventive justice" that allows a court to determine a person's rights, status or other legal relations. *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 258 P.3d 154 ¶ 18 (App. 2011). When a justiciable controversy exists, the Act allows adjudication of rights before the occurrence of a breach or injury necessary to sustain a coercive action for damages or injunctive relief. *Id.* A justiciable controversy arises when the party seeking the declaration has a real, present interest in the issue and the party being sued has a real, present interest in opposing the declaration being sought. *Moore v. Bolin*, 70 Ariz. 354, 358, 220 P.2d 850, 852-853 (1950).

A party seeking a declaratory judgment must file suit against the appropriate party. On a claim like this one, where the plaintiff says that government officials have misinterpreted the law, the proper defendant is the government agency or official responsible for the interpretation. The official responsible for the Elections Procedures Manual, including the hand count audit rules, is the secretary of state. A.R.S. § 16-452. The secretary of state therefore should have been named as the defendant in this case for purposes of the declaratory judgment claim.

The plaintiff chose to sue Maricopa County election officials instead of the secretary of state. County officials have no power to rewrite the Elections Procedures Manual. As a result, the plaintiff's request for a declaratory judgment against them was futile. Fortunately for the plaintiff, the secretary of state chose to intervene. But for that decision, the declaratory judgment claim would have been dismissed out of hand.

A party seeking a declaratory judgment also must file suit at the appropriate time. Declaratory relief cannot be sought until a justiciable controversy has arisen. *Arizona State Board of Directors for Junior Colleges v. Phoenix Union High School District*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967). On the other hand, the party seeking relief must not unduly delay. A legal doctrine called *laches* discourages dilatory conduct by litigants. *Lubin v. Thomas*, 213 Ariz. 496, 144 P.3d 510 ¶ 10 (2006). *Laches* requires dismissal of a case when unreasonable delay in bringing the claim prejudices the opposing party or the administration of justice. *Id.*

This case is a textbook example of unreasonable delay that calls for the application of *laches*. The plaintiff could have gone forward with the case months ago. Instead it waited until after the election, after the statutory deadline for commencing the hand count audit, and (as it turned out) *after the completion of the audit*. The delay prejudiced both the defendants and the public. That defect, unlike the failure to sue the proper party, could not have been fixed.

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The plaintiff itself admitted that its claim could have been filed long ago. In one of its filings, the plaintiff said, “until this election cycle, there was simply no real case or controversy to decide in Maricopa County . . . because the county used the ‘precinct’ model” instead of the voting center model. Plaintiff’s Response to Defendant/Intervenors’ Motion to Dismiss at 3. The necessary implication is that a justiciable controversy arose when the Board of Supervisors first approved the use of voting centers for 2020 election cycle. Since the first elections in 2020 were the presidential preference primaries on March 17, the decision to use voting centers for those elections happened in January, or February at the latest. The plaintiff could have filed the case then, or at any time in the eight or nine months since.

Even if the focus is narrowed to the general election, the plaintiff delayed unreasonably. The Board of Supervisors passed the resolution authorizing the use of voting centers for the general election on September 16. The plaintiff unquestionably could have brought the action then. Instead the plaintiff waited another eight weeks to file the complaint, until the election was over and the statutory post-election deadline for commencing the hand count audit had passed.

The plaintiff asserted that its eleventh-hour filing decision primarily stemmed from worries about election integrity. “[P]erhaps most importantly (and obviously) of all concern about potential widespread voter fraud has taken on a special significance in this general election, warranting a thorough focus on these [election] laws and compelling Plaintiff to take action.” Plaintiff’s Response to Defendant/Intervenors’ Motion to Dismiss at 2. Setting aside for the moment the illogic of an attempt to disprove a theory for which no evidence exists, the plaintiff’s defense of the case’s timing failed on its own terms. The filing delay created a situation in which an order requiring another audit with different rules would only have amplified public distrust.

The Arizona Supreme Court very recently highlighted the prejudice caused by belated lawsuits directed at election rules. The issue arose when the Maricopa County Recorder proposed sending out mail-in ballots with instructions different than those specified in the Elections Procedures Manual. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 (2020). Disallowing the Recorder’s proposal, our Supreme Court warned: “When public officials, in the middle of an election, change the law based on their own perceptions of what they *think* it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.” 475 P.3d 303 ¶ 4 (emphasis in original).

The Supreme Court’s admonition to public officials who would change the rules “in the middle of the election,” applies squarely to this case. It applies to the Maricopa County officials administering the election. It applies to the Arizona Republican Party as an official participant in the election. Most importantly, it applies to this Court, when a participant in the election asks the court to change an election process that is already underway or, worse, to order election officials to do it over using different rules. Either way, the only possible answer is “no.”

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The plaintiff also failed to acknowledge the prejudice that its delay caused Maricopa County. The plaintiff argued that there was still time to conduct another audit before the deadline for the canvass. Assuming (generously) that the plaintiff was right about that, the argument ignored the cost to the county of repeating the hand count audit. A second audit would have cost tax dollars and disrupted the orderly administration of the election. The fact that the second audit would have been conducted under tight deadlines, with election resources at a premium, would have multiplied those costs. For that reason also, the plaintiff's declaratory relief claim was not well taken.

A Post-Election Judicial Inquiry into Election Procedures Was Not Justified

It is telling that the plaintiff lost interest in the declaratory judgment claim, and pivoted instead to the request for an injunction to stop the certification of the election and the canvass of the results, as soon as the defendants made clear that the hand count audit has been completed. The plaintiff could have pursued the declaratory judgment claim to determine how to audit future voting center elections. That it did not do so demonstrates that its real interest was not the audit procedure as such. The real issue, evidently, was the outcome of the 2020 election.

Arizona law categorically prohibits this kind of post-election lawsuit. Actions concerning alleged procedural violations of the electoral process must be brought prior to the actual election. *Sherman v. City of Tempe*, 202 Ariz. 339, 342, 45 P.3d 336 (2002). “[T]he procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures *must* be challenged before the election is held.” *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367 (1987) (emphasis in original). “If parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure.” *Kerby v. Griffin*, 48 Ariz. 434, 444, 62 P.2d 1131 (1936). Our state Supreme Court long ago explained why this rule exists, in terms that remain relevant today.

The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as when it is known precisely how many votes it will take to change the result; and men who are willing to sell their votes before election will quite as readily sell their testimony afterwards, especially as the means of detecting perjury and falsehood are not always at hand until after the wrong sought to be accomplished by it has become successful and the honest will of the people has been thwarted.

Hunt v. Campbell, 19 Ariz. 254, 277, 169 P. 596, 605 (1917), quoting *Oakes v. Finlay*, 5 Ariz. 390, 53 P. 173 (1898).

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Because the public interest in protecting “the honest will of the people” is paramount, an allegation that election officials did not “follow the law” is not sufficient to sustain a post-election claim. Noncompliance with a procedural rule that could have been enforced by mandamus prior to the election justifies rejecting the vote afterward only if there has been “actual fraud” or a demonstrable effect on the election’s outcome. *Id.* at 267-268, 169 P. at 601-602. The “cardinal rule,” after the election, is this:

[G]eneral statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.

Findley v. Sorenson, 35 Ariz. 265, 269, 276 P. 843, 844 (1929).

From these substantive principles, procedural rules follow. One is that election results are presumed to be valid and free of fraud. *Hunt v. Campbell*, 19 Ariz. at 268, 169 P. at 602. The presumption against fraud is especially strong when the election contest “arises from the acts of public officers, acting under the sanction of their official oaths.” *Id.* at 271, 169 P. at 603 (citation and internal punctuation omitted). “The presumption is in favor of the good faith and honesty of the members of the election board. Regarding their official conduct, like all public officials, courts never presume fraud against them to impeach their official acts.” *Id.* at 268, 169 P. at 602. The election challenger bears the burden of proving the existence of fraud or impropriety. *See id.* at 264, 169 P. at 600.

Moreover, proof “of the most clear and conclusive character” is necessary to justify judicial intervention that might jeopardize “the certainty and accuracy of an election.” *Id.* at 270-271, 169 P. at 603. (citation and internal punctuation omitted). Fraud or impropriety “ought never to be inferred from slight irregularities, unconnected with incriminating circumstances; nor should it be held as established by mere suspicions, often having no higher origin than partisan bias and political prejudices.” *Id.* at 264, 169 P. at 600. “[N]othing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns. It is not sufficient to cast suspicion upon them; they must be proved fraudulent before they are rejected.” *Id.* at 271, 169 P. at 603. “To destroy the credit of the official returns there must be positive and unequivocal evidence of the fraud, and if the circumstances of a case can be explained upon the hypothesis of good faith, that explanation will prevail. *Id.* at 276, 169 P. at 605.

These longstanding rules have stood the test of time. They remain vital today, guarding the electoral process against the gamesmanship of those who might otherwise hedge against a loss at

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the polls by holding legal issues in reserve or use the law as a tool to thwart the will of the voters. An example of their recent application, in a case analogous to this one, is *Williams v. Fink*, 2019 WL 3297254 (Ariz. App. July 22, 2019). Williams, a candidate for Santa Cruz County Superior Court judge, challenged the result of the election because opposing candidate Fink's name had been listed first on most of the ballots.

The Court of Appeals affirmed the trial court's order dismissing Williams's claim without a hearing. The court held that "Williams's challenge to how the ballots were printed should have – and could have – been brought before the election. Because he failed to address the county's method of alternating the candidates' names on the ballots prior to the election, he cannot, after the election, question the county's procedure." *Id.*, ¶ 14. Alternatively the court held, citing *Findley v. Sorenson*, that Williams had failed to state a claim because he had not plausibly alleged that the purported misconduct of election officials might have affected the outcome of the election. *Id.*, ¶¶ 15-20.

The same rules applied here, in the same way as in *Williams*. The alleged procedural violation of the election laws (here, the sampling of ballots for the hand count audit by voting center rather than by precinct) resulted directly from pre-election decisions that were known, or should have been known, to the party claiming to be aggrieved. The implementation of the questioned procedure began before the election (in *Williams*, when the ballots were printed; here, when the political party officials chose the Hand Count Board members) though the alleged harm occurred later (in *Williams*, during the election itself; here, immediately after the election when the polling places were sampled for audit). The time for testing whether the procedure comported with the law, here as in *Williams*, was likewise before the election.

Similarly, here as in *Williams*, the plaintiff failed to state a viable post-election claim. The plaintiff here demanded a hand count audit "in strict accordance" with the statute, Verified Complaint at 1, at a time when an alleged failure strictly to comply did not give rise to a cause of action. The plaintiff offered only suspicion of wrongdoing, in a situation that required it to plead specific, facially credible facts backed by "the most credible, positive, and unequivocal evidence" of fraud or malfeasance. The plaintiff here did not even allege facts that cast doubt on the reliability of the hand count audit, let alone the outcome of the election or the honesty of the officials who administered it. The law therefore required immediate dismissal of the case.

The Proposed Amendment Adding a Claim for Injunctive Relief Was Futile

When this case was dismissed, Plaintiff's Motion for Leave to File an Amended Complaint was pending. The plaintiff asked in the motion for permission to add an application for preliminary injunction to the application for a writ of mandamus and the declaratory judgment claim. The plaintiff sought to enjoin the defendants from certifying the countywide voting results and issuing

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the official canvass “until there has been a judgment or other dispositive ruling in this matter, and the terms of such ruling or judgment, if any, have been complied with.” Application for Preliminary Injunction at 1.

A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. *Arizona Association of Providers for Persons with Disabilities v. State of Arizona*, 223 Ariz. 6, 219 P.3d 216 ¶ 12 (App. 2009). As with any request to amend the complaint, however, a request to add a claim for an injunction may be denied if the amendment would be futile. *First Citizens Bank & Trust Company v. Morari*, 242 Ariz. 562, 399 P.3d 109 ¶ 12 (App. 2017).

The plaintiff’s application for a preliminary injunction was futile here. The underlying election challenge had no chance of success, for all of the reasons stated above. The plaintiff could not show irreparable injury from the certification of the election results, or a favorable balance of hardships, because the plaintiff could not explain how, exactly, it would benefit from a do-over of the hand count audit. At the November 18 oral argument, counsel said, “It’s about making sure there’s no error, making sure there’s no fraud.” But that explanation ran headfirst into the public policy that prohibits judicial intervention into an election based on mere suspicion that something went wrong. As a matter of policy, the public’s interest in “the certainty and accuracy of an election” far outweighed what the Arizona Republican Party described as “the importance . . . of doing everything with respect to this election ‘by the book.’” Application for Preliminary Injunction at 3. In short, all four criteria weighed *against* the request for injunctive relief.

For all these reasons,

IT IS ORDERED affirming the order of dismissal filed November 19, 2020.

EXHIBIT E

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Cochise County Board of Supervisors

Public Programs...Personal Service
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TOM CROSBY
Supervisor
District 1

ANN ENGLISH
Chairman
District 2

PEGGY JUDD
Vice-Chairman
District 3

RICHARD G. KARWACZKA
County Administrator

SHARON GILMAN
Deputy County Administrator

TIM MATTIX
Clerk of the Board

October 26, 2022

Katie Hobbs, Secretary of State
Kori Lorick, State Elections Director
Arizona Secretary of State Katie Hobbs

via email to KLorick@azsos.gov

Dear Secretary Hobbs and Ms. Lorick:

We know we have lots of work to do. If you care to assist, please contact County Recorder Stevens or Elections Director Marra.

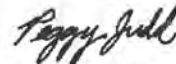
The Board wishes to follow all applicable requirements in statutes and the Elections Procedure Manual when conducting its expanded precinct hand count audit. That will mean that there will not be a full hand count of every item on every ballot.

Best wishes in your future endeavors.

Sincerely,


Tom Crosby (Oct 26, 2022 15:12 PDT)

Tom Crosby
Supervisor, District 1



Peggy Judd
Supervisor, District 3

EXHIBIT F

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MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE

MICHAEL S. CATLETT
DEPUTY SOLICITOR GENERAL

October 28, 2022

Hon. David Gowan
Arizona State Senate
1700 W. Washington, Ste.
Phoenix, AZ 85007
dgowan@azleg.gov

Dear Senator Gowan,

You requested a formal opinion from this Office, asking whether a county board of supervisors may “audit the results of an electronically tabulated general election by hand counting all of the election ballots of their county.” As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. The Office understands that time is of the essence regarding your request, because of the impending 2022 General Election and the Cochise County Board of Supervisors’ (the “Board”) recent decision to authorize an expanded hand count audit of all Cochise County precincts for the General Election. In approving an expanded hand count audit, the Board relied exclusively on A.R.S. § 16-602(B). For these reasons, the Office offers the following informal opinion regarding the scope of Cochise County’s authority under A.R.S. § 16-602(B) (and statutory provisions and regulations referenced therein): Cochise County has discretion to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County, along with 100% of early ballots cast in Cochise County, so long as the expanded hand count audit of statewide and federal races is limited to five contested statewide and federal races appearing on the 2022 General Election ballot.

A.R.S. § 16-602(B) provides that “[f]or each countywide primary, special, general and presidential preference election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities.” In 2011, the Legislature amended § 16-602(B) to provide the Secretary with authority to create procedures for hand count audits through the Election Procedures Manual (“EPM”). More specifically, § 16-602(B) now provides that “[t]he hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.” The EPM, therefore, has heightened significance in the context of hand count audits because the Arizona Legislature has expressly delegated power to the Secretary of State to create hand count audit procedures. Following the 2020 General Election, for example, the Office relied on the EPM’s hand count audit procedures in advising President Fann and Speaker Bowers regarding how such audits should be conducted in counties utilizing voting centers. See <https://www.azag.gov/media/interest/letter-pres-fann-speaker-bowers-re-vote-center-audits> (last accessed Oct. 26, 2022). And the Maricopa County Superior Court relied on the EPM’s hand

count audit procedures in later dismissing a claim challenging the manner in which Maricopa County conducted its hand count audit following the 2020 General Election. *See Ariz. Republican Party v. Fontes*, No. CV2020014553 (Maricopa Cnty. Super. Ct. Dec. 21, 2020 Ruling) (“Under the authority of section 16-602(B), the Election Procedures Manual gives detailed instructions to the county officials who conduct hand count audits.”) Thus, in rendering this informal opinion, the Office has relied upon the express provisions of § 16-602 and the hand count audit procedures contained in the 2019 EPM (at pp. 213-232), which is the last version of the EPM approved by the Attorney General and Governor.¹

Both A.R.S. § 16-602(B) and the EPM contain different requirements for (1) hand counting ballots cast in person and (2) hand counting early ballots. Regarding the hand count audit of ballots cast in person, § 16-602(B) provides a floor for the percentage of precincts that should be included in the audit: “At least two percent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county.” A.R.S. § 16-602(B)(1). The EPM contains similar language but also includes broader reference to polling locations: “At least 2% of the precincts/polling locations in the county (rounded to the nearest whole number) or two precincts/polling locations, whichever is greater, shall be selected at random from a lot consisting of every precinct/polling location in that county.” 2019 EPM p. 215. There is no provision in § 16-602 or the EPM (or anywhere else in Arizona law) that imposes a ceiling on the percentage of precincts or vote centers that can be included in the hand count audit of votes cast in person. This why following the 2020 General Election, the Office wrote to the Chairman of the Maricopa County Board of Supervisors, suggesting that Maricopa County should “consider expanding the hand count audit to five per cent of the voting center locations, which it may do in accordance with A.R.S. § 16-602(B)(1) and Chapter 11, Section III(A) of the Elections Procedures Manual.” *See* <https://www.azag.gov/media/interest/letter-hon-hickman-re-hand-count-audit> (last accessed October 26, 2022). Thus, it is the Office’s conclusion that the Board has discretion under A.R.S. § 16-602(B) and the EPM to conduct an expanded hand count audit that includes ballots from 100% of the precincts or voting centers located in Cochise County.

There is similarly no limit in § 16-602(B) or the EPM on the number of ballots that the Board can include in the hand count audit of votes cast in person. To the contrary, the statutory text and purpose strongly suggest that the Board should review all ballots cast at polling places. Section 16-602(B)(1) provides that “[t]he selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center.” And the statute makes clear that “[o]nly the ballots cast in the polling places and ballots from direct recording electronic machines shall be included in the hand counts conducted pursuant to this section.” A.R.S. § 16-602(B)(1). Thus, “[p]rovisional ballots, conditional provisional ballots and write-in votes shall not be included in the hand counts.” *Id.* The EPM explains that “[a] post-election hand count audit includes a precinct hand count, which involves a manual count of regular

¹ The Arizona Supreme Court recently concluded that the 2019 EPM remains in effect. *See Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶25 (2022) (explaining that “The Committee was required to follow the 2019 EPM established by the Secretary and approved by the governor and the attorney general.”).

ballots from selected precincts[.]” 2019 EPM at p. 214. Moreover, one primary purpose of a hand count audit is to ensure that the machine-count totals closely match the hand-count totals, and that exercise could have reduced value if only a subset of ballots cast in person are permitted to be included. The Board, therefore, has discretion to review 100% of the ballots cast in person at 100% of the precincts or voting centers located in Cochise County when conducting the hand count audit required under § 16-602(B).

Although there is no limit on the number of precincts or voting centers or the number of ballots that can be included in the hand count audit of votes cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit. Both A.R.S. § 16-602(B) and the EPM reflect that the required hand count audit shall include up to five contested races. *See* A.R.S. § 16-602(B)(2) (“The races to be counted on the ballots from the precincts that were selected pursuant to paragraph 1 of this subsection for each primary, special and general election *shall include up to five contested races.*” (emphasis added)); 2019 EPM p. 217 (“The races to be counted in the hand count audit generally includes up to five contested races[.]”). For a general election, the races to be included are determined by selecting by lot from the ballots cast for one statewide ballot measure, one contested statewide race for statewide office, one contested race for federal office, and one contested race for state legislative office. *See* A.R.S. § 16-602(B)(2)(a)-(d). Moreover, “[i]n elections in which there are candidates for president, the presidential race shall be added to the four categories of hand counted races.” *Id.* § 16-602(B)(5). If additional races are needed to fill out the number of races that the Board decides to count, according to the EPM, “[t]he priority for selecting other categories, if needed, is as follows: statewide candidate, statewide ballot measure, federal candidate and then state legislative.” 2019 EPM p. 220. Thus, for example, if the Board chooses to count five contested races for the 2022 General Election, because there is no presidential election in 2022, the Board should choose two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Turning to Board authority under § 16-602 regarding a hand count audit of early ballots, as stated, § 16-602 handles ballots cast in person differently than early ballots. As to early ballots, § 16-602(B)(1) directs that “the early ballots shall be grouped separately by the officer in charge of elections² for purposes of a separate manual audit pursuant to subsection F of this section.” Thus, § 16-602(B)(1) incorporates by reference the procedures set forth in § 16-602(F) for a hand count audit of early ballots.

While early ballots are not cast in precincts or voting centers, and therefore the discussion above about the percentage of precincts or voting centers that can be included in a hand count audit is inapplicable to early ballots, § 16-602(F) requires that “the chairmen or the chairmen’s designees shall randomly select one or more batches of early ballots that have been tabulated to include at least one batch from each machine used for tabulating early ballots.”

² In Cochise County, the “officer in charge of elections” for purposes of A.R.S. § 16-602 appears to be the Director of the County Elections Department.

Regarding the number of early ballots that can be included as part of a hand count audit, § 16-602(F) instructs that “[t]he chairmen or the chairmen's designees shall randomly select from those sequestered early ballots a number equal to one percent of the total number of early ballots cast or five thousand early ballots, whichever is less.” *See also* 2019 EPM p. 215. This statutory language does not set a maximum limit on the number of early ballots that can be included in the hand count audit, and at the very least, it is ambiguous. As discussed, the Secretary has been delegated statutory authority to create hand count audit procedures through the EPM. And she did so with respect to the number of early ballots that can be included in the hand count audit. More specifically, the EPM grants the Board discretion to include additional early ballots (with no limit) in the hand count: “Counties may elect to audit a higher number of ballots at their discretion.” 2019 EPM p. 215. Thus, the Board at its discretion may include up to 100% of early ballots in an expanded hand count audit.

Like with ballots cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit of early ballots. In fact, the races included in the hand count audit of early ballots must be the same races included in the hand count audit of ballots cast in person. *See* A.R.S. § 16-602(F) (“[T]he county officer in charge of elections shall conduct a manual audit of the same races that are being hand counted pursuant to subsection B of this section.”). Thus, the Board is limited to conducting an expanded hand count audit of early ballots cast in the same races as those audited for ballots cast in person.

In sum, the Office concludes that, pursuant to A.R.S. § 16-602, the Board is permitted to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County. Moreover, the Board is permitted to perform an expanded hand count audit of 100% of early ballots cast in Cochise County. The Board must limit the number of competitive statewide and federal races audited to five. Finally, if the Board chooses to conduct a hand count audit of five statewide and federal races for the 2022 General Election, the Board should choose, by random lot, two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Please note this informal opinion does not address any of the following issues: (1) whether Cochise County has authority for a hand count outside the scope of A.R.S. § 16-602, including for races not mentioned in A.R.S. § 16-602³, (2) the procedures Cochise County should use for any hand count conducted outside the scope of A.R.S. § 16-602, and (3) what effect, if any, a full or expanded hand count might have on the official outcome of the 2022 General Election.

³ For example, in an informal opinion from Justice John R. Lopez IV (then Solicitor General), in 2015, the Office concluded that “A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside of A.R.S. § 16-602. That section only provides instructions for the county official in charge of elections on what races to count in an A.R.S. § 16-602 hand count.” *Ariz. Att’y Gen. Op. I15-009* (available at <https://www.azag.gov/opinions/i15-009-r15-021>).

Sen. David Gowan
October 28, 2022
Page 5

Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Catlett". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael S. Catlett
Deputy Solicitor General

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EXHIBIT G

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Office of the Arizona Secretary of State
**Report on the Partisan Review of the
2020 General Election in Maricopa County**

August 19, 2021

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KATIE HOBBS
SECRETARY OF STATE

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Forward

The information contained within, where not indicated by a footnote, is the product of the Office of the Arizona Secretary of State and expert observers who were granted access to the Coliseum through a court-ordered settlement, which was agreed to by the Arizona Senate, Cyber Ninjas, and Cyber Ninjas' subcontractors. The primary observers, who were not paid or otherwise compensated for their time, travel, or any other expenses by the Secretary, or any agent thereof, were Ryan Macias, Jennifer Morrell, and Elizabeth Howard. Certified election officers on staff with the Secretary of State's Office also participated as observers in tandem with these three experts. Arizona Secretary of State Information Security Officer Ken Matta also participated as an observer, and his observations are included in this report.¹

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KATIE HOBBS
SECRETARY OF STATE

¹ See Appendix A.

Executive Summary

The 2020 General Election was unlike any election previously seen in the United States. Despite setbacks posed by a global pandemic, the unprecedented domestic and foreign spread of mis- and disinformation, and historic voter turnout, election officials across the nation rose to the occasion and administered a safe, secure, and accurate election. Historically, established election best practices have provided confidence and instilled faith that election officials were acting with integrity and fairness.

In Arizona, several pre- and post-election tests are undertaken in order to ensure the integrity of the election. These include the required logic and accuracy tests of election equipment both before and after the election, as well as the post-election hand count audits, which were completed with no evidence of discrepancies or widespread fraud. Additionally, Maricopa County election officials completed a separate forensic audit, which further confirmed that there was no systemic fraud. In fact, Arizona's results were canvassed, certified, litigated, and audited with no evidence of systemic fraud or interference.

Despite the overwhelming evidence of a secure election and a complete lack of evidence to support claims of systemic fraud, there are those at the national, state, and local levels who dismiss the validity of these tests and refuse to accept the outcome of the 2020 presidential election. Instead they offer outlandish, unsubstantiated theories of fraud, perpetuating disinformation that continues to simultaneously undermine the results of a free and fair election and erode public confidence in the democratic process.

Embracing these conspiracy theories, Arizona Senate President Karen Fann pursued further review of the election in Maricopa County. Despite frequent references to this review as an audit, the exercise undertaken by the Arizona Senate's Florida-based contractor, Cyber Ninjas, fails to meet industry standards for any credible audit, much less for an election audit. The Senate's contractors demonstrated a lack of understanding of election processes and procedures both at a state and county level. This exercise is more accurately described as a partisan review of the 2020 General Election ballots in Maricopa County, the results of which are invalid and unreliable for a number of reasons, which are outlined in this report.

Problems plagued this exercise from the start, stemming from the opaqueness of the contractor's processes and procedures, as well as from glaring security issues which

were reported in the media.² This prompted the Secretary of State's Office to take legal action,³ which resulted in a settlement agreement that provided ongoing access to the media and to Secretary of State observers. This report is based on the observations of experts who noted security lapses, issues surrounding the chain of custody of both ballots and tabulation equipment, and evidentiary integrity problems throughout the entire exercise. The overarching areas of concern include:

Lack of Security and Chain of Custody Procedures. For Example:

- Observers noted that there was no security presence preventing entrance into the venue or access to the areas where ballots were being stored on the first day of the review.
- Throughout the ballot review, ballot counters were seen with both black and blue pens. In a credible election audit, black and blue pens are prohibited because this ink can be read by ballot tabulators and used to alter ballots. As a result, there is no way to confirm if the original ballots that were being reviewed were altered or destroyed.
- Any participant using a computer could access critical systems housing tally data and ballot images because each computer had a single login, shared passwords, and no multifactor authentication.
- Observers noted that ongoing chain of custody interruptions for both the data and the equipment, including when voting system software and ballot image data was sent to a location in Montana, compromised the data integrity.

Lack of Transparency. For Example:

- Media and outside observers were not allowed to watch the proceedings initially; it was only as a result of litigation that they were allowed to observe. However, no observers were allowed to watch the review of the voting systems. Voting system data is reported to have then been sent to a company in Montana with no indication of how that data was secured or what was being done with it by the subcontractor.

² Loew, M. (2021, April 23). *Security lapses plague Arizona Senate's election audit at State Fairgrounds*. AZFamily. https://www.azfamily.com/news/investigations/cbs_5_investigates/security-lapses-plague-arizona-senates-election-audit-at-state-fairgrounds/article_b499aee8-a3ed-11eb-8f94-bfc2918c6cc9.html

³ Oxford, A. (2021, May 6). *Democrats settle lawsuit with Arizona Senate, Cyber Ninjas on Maricopa county election audit*. The Arizona Republic. <https://www.azcentral.com/story/news/politics/arizona/2021/05/05/arizona-audit-settlement-reached-lawsuit-between-democrats-senate/4964988001/>.

- Observers noted serious concerns with the aggregation of tally sheets involving training, software, and ballot identification. For example, there are three sets of tallies recorded for every batch of ballots, and the sets of tallies are not required to match. Keeping three sets of tallies creates an opportunity to alter the results of the counting.

Lack of Consistent, Documented Quality Control Practices, Policies, and Procedures.
For Example:

- Unlike a reliable election audit, policies, processes, and procedures were not clearly defined at the outset of the review. When, after a court order, some documentation was made available, observers noted that regulatory processes were rarely followed. Observers reported these discrepancies and were often informed that the policy, process, or procedure had been modified.
- There was no test plan or test procedure for the review of the voting systems, as is standard in a credible audit.
- The Senate's contractors changed procedures while the review was in process, sometimes in the middle of shifts, without updating documentation or training for those involved.
- Paper examination participants were encouraged to flag ballots as suspicious. Many of the reasons ballots were marked as suspicious were determined to be unfounded by observers knowledgeable in election equipment and ballot technology.
- Ballots were imaged using an unnamed software that observers found unreliable.
- Participants consistently made errors in the data collection.

There are numerous examples of failures that all but guarantee inaccurate results, which would also be impossible to replicate. Any one of these issues would deem an audit completely unreliable, but the combination of these failures renders this review meritless.

The 2020 election was secure and accurate, and it is well past the time to accept the results and move forward.

Section 1: The 2020 Election was Secure and Accurate

On October 7, 2020, early ballots were mailed to voters, marking the start of the 2020 General Election in Maricopa County. The election concluded on November 30, 2020,

when the Secretary of State certified the results of the November 3, 2020 election. The breakdown of votes cast in Maricopa County is as follows:⁴

Elector Group	Counting Group	Ballots	Voters	Registered Voters	Turnout
Total	EARLY VOTE	1,915,487	1,915,487		73.81%
	ELECTION DAY	167,878	167,878		6.47%
	PROVISIONAL	6,198	6,198		0.24%
	Total	2,089,563	2,089,563	2,595,272	80.51%

According to the County's final official results, the Biden/Harris ticket received 1,040,774 votes (49.81%), the Trump/Pence ticket received 995,665 votes (47.65%), and the Jorgensen/Cohen ticket received 31,705 votes (1.52%).⁵

Multiple checks, reviews, and audits of the election confirmed the security and integrity of the process, as well as the accuracy of the results.

Pre-Election Logic and Accuracy Testing

In accordance with Arizona election law, the Secretary of State's Office conducted a Logic and Accuracy (L&A) test on Maricopa County's election machines prior to the election. This process is established in Arizona Revised Statutes (A.R.S.) § 16-499 and occurs before every election. During the 2020 election cycle, the L&A test took place on October 6, 2020,⁶ and was performed by the Secretary of State's staff. It was overseen by qualified election staff of different political parties.⁷ Notice of the event was provided in a county-wide newspaper, online, via a media advisory, and was open to be observed by the public, press, political parties, and candidates via online observation links. The chairs of all three major political parties in the county—Democratic, Republican, and Libertarian—were invited to attend in September via direct communications with staff and a calendar invite.⁸

⁴ Maricopa County Recorder's Office & Election Department; FINAL OFFICIAL RESULTS General Election November 3, 2020 (2020). Phoenix, Arizona.

<https://recorder.maricopa.gov/electionarchives/2020/11-03-2020-1%20Final%20Official%20Summary%20Report%20NOV2020.pdf>

⁵ *Id.*

⁶ Blasius, M. (2020, November 11). *Maricopa County Republican Chairman Rae Chornenky steps down*. KNXV. <https://www.abc15.com/news/election-2020/maricopa-county-republican-chairman-rae-chornenky-steps-down>; Maricopa County. *Maricopa County Election facts : Voting equipment & accuracy* <https://www.maricopa.gov/5539/Voting-Equipment-Facts>.

⁷ Maricopa County, *supra* note 5.

⁸ Slugocki, S. [@Slugocki]. (2020, October 6). *One of my legal responsibilities as County Chair is to conduct the accuracy tests of the voting machines and certify* [Tweet]. Twitter. <https://twitter.com/Slugocki/status/1313647249684004864>; Wingett Sanchez, Y. (2020, November 12).

The L&A test showed that the machines worked, accurately counting ballots and attributing votes to the correct candidates in the election management system, and that each candidate and ballot measure received the accurate number of votes—all without error.⁹ Accordingly, on October 6, 2020, the Secretary of State certified that the voting equipment was errorless and ready for use in the election.¹⁰

Post-Election Reviews

In the event of a discrepancy between the vote totals, election officials proceed under clear audit escalation procedures established in state law. Election officials will compare the hand count margin for each race to the designated margin established by the Vote Count Verification Commission (VCVC), which is composed of statisticians, election officials, and other elections experts, and by law, not more than three members may be of the same political party. Prior to each statewide election, the VCVC establishes the variance rate (the number of differences discovered between the hand count vote totals and the machine count vote totals), which triggers an expanded hand count, and, potentially, a full hand count of all ballots cast. If any hand-counted race results in a calculated margin that is equal to or greater than the designated margin for the precinct hand count, a second precinct hand count of that race and of those same ballots must be performed.

Maricopa County Post-Election Hand Count Audit

Shortly after the election, from November 4 to November 9, 2020, the Maricopa County Elections Department conducted a hand count of ballots from 2% of the Election Day vote centers and 5,000 early ballots, as required by Arizona law. See A.R.S. § 16-602 (B).¹¹

Statute directs political party chairs (or their designees) to select which ballots will be counted by hand after an election.¹² Once unofficial vote totals are made public, officials from each party are required to meet and select at random, without the use of a computer,¹³ five seats from the election that will be subjected to the recount.¹⁴ In the same manner, those officials are also required to select at least 2% of precincts in the

Maricopa County GOP chair resigns after skipping election equipment verification test. The Arizona Republic. <https://www.azcentral.com/story/news/politics/elections/2020/11/12/maricopa-county-republican-party-chair-rae-chornenky-resigns-skipped-election-equipment-test/6263050002/>

⁹ Maricopa County, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*; Maricopa County, Arizona, *Hand Count/Audit Report* at 1, https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf

¹² A.R.S. § 16-602(B)(1-2).

¹³ A.R.S. § 16-602(B)(1)

¹⁴ A.R.S. § 16-602(B)(2)

county, or two precincts, whichever is greater, from which ballots will be hand recounted.¹⁵ Additionally, those officials also select at least one batch¹⁶ from each machine used for tabulating early ballots, and, in the same random manner, designate 1%, or five thousand ballots of those ballots, whichever is fewer, for hand recount.¹⁷

The hand count began on November 4, 2020, when the Maricopa County Chairs of the Republican, Democratic, and Libertarian parties met to randomly select the races, precincts, and batches of early voting ballots that would be recounted by hand,¹⁸ after the participants took an oath to uphold the constitutions of the United States and Arizona.¹⁹ The order of the draw was done by lots, and the Republican Party went first, followed by the Libertarian Party, and finally the Democratic Party.²⁰ The party representatives then selected five races across four precincts and 26 batches of early voting ballots for hand counting.²¹

The races selected included President, Arizona Corporation Commission, Proposition 208, U.S. Representative, and State Senator. The precincts selected included Trinity Bible Church, ASU Polytechnic, Betania Presbyterian Church, and Turf Paradise, and they combined for 2,917 ballots.²² The 26 early voting batches contained 5,165 ballots.²³

The actual hand count of these ballots was conducted by 26 three-member boards, with not more than two members of each board from the same political party.²⁴ The audit boards are composed of people appointed by the Republican, Democratic and Libertarian party chairs.²⁵

Upon completion of the hand recount, no discrepancies were noted between the machine tabulated results and the actual count.²⁶ This confirmed that the machines had accurately counted the ballots.

¹⁵ A.R.S. § 16-602(B)(1)

¹⁶ In the 2020 election, batches ranged from 192-200 ballots.

¹⁷ A.R.S. § 16-602(F)(1).

¹⁸ Maricopa County, *supra* note 10, at 1.

¹⁹ Maricopa County Recorder's Office. [@RecordersOffice]. (2020, November 7). *Thank you to the appointed volunteers from all 3 political parties in @maricopacounty who spent their Saturday participating* [Tweet]. Twitter. <https://twitter.com/RecordersOffice/status/1325235298234593280?s=20>

²⁰ Maricopa County, *supra* note 10, at 1.

²¹ *Id.*

²² *Id.* at 1-2, 4.

²³ *Id.* at 5.

²⁴ *Id.* at 1.

²⁵ Maricopa County, *supra* note 5.

²⁶ Maricopa County, *supra* note 10, at 1.

Maricopa Post-Election Logic and Accuracy Testing

Local election officials must also conduct a post-election L&A test of tabulation equipment after the official count has been completed but before the county canvass.²⁷ L&A testing “is intended to confirm that votes are attributed to the correct candidates and ballot measures in the election management system (EMS) and that each candidate and ballot measure receives the accurate number of votes.”²⁸

Maricopa County officials completed their post-election L&A testing of the voting equipment on November 18, 2020, with members of the Republican, Democratic, and Libertarian parties, as well as the Arizona Attorney General’s Office in attendance.²⁹ This test was open to the public and a press advisory was sent beforehand.³⁰ As required, Maricopa officials used the same test ballots as were used during the pre-election L&A testing. This test generated the same results as the pre-election L&A test: no discrepancies were found.³¹

Additional Post-Election Audits in Maricopa County

On January 27, 2021, the Maricopa County Board of Supervisors unanimously voted to commission a “forensic audit of ballot tabulation equipment used in the 2020 election.”³² This audit was “comprised of three separate audits”: 1) voting system procurement audit (conducted by a Certified Public Accounting Firm), 2) compliance forensic audit (performed by a Voting System Testing Laboratory (VSTL) accredited by the U.S. Election Assistance Commission (EAC), and 3) field audit (performed by a VSTL accredited by the EAC).³³ The field audit and compliance audit were focused on the

²⁷ Arizona Election Manual, Chapter 12, Section II.

²⁸ Arizona Election Manual, Chapter 4, Section II.

²⁹ Maricopa County. (2021, January 27). *2020 election security & accuracy*.

<https://maricopacountyaz.medium.com/2020-election-security-accuracy-7044895ef410>; Arizona Republic. (2020, November 20). *Postelection logic and Accuracy test for Maricopa County tabulation machines*. <https://www.azcentral.com/picture-gallery/news/politics/elections/2020/11/20/postelection-logic-and-accuracy-test-maricopa-county/3770104001/>.

³⁰ Maricopa County Elections Department. (2020, November 17). Media Advisory: Post Election Logic and Accuracy Test on Nov. 18. <https://content.govdelivery.com/accounts/AZMARIC/bulletins/2acfff>.

³¹ Maricopa County, *supra* note 28; Arizona Republic, *supra* note 28.

³² Maricopa County. *Auditing elections equipment In Maricopa County*.

<https://www.maricopa.gov/5681/Elections-Equipment-Audit>.

³³ *Id.*; Jarrett, S., & Valenzuela, R. (2021, February 23). Update on the Forensic Audit of Maricopa County’s Tabulation Equipment.

<https://www.maricopa.gov/DocumentCenter/View/66842/Foresic-Audit-Transmittal-Letter>

software, systems, and elections equipment, and began on February 2, 2021, and were completed over the following two weeks. They found no evidence of vote-switching, internet connectivity, tabulation software modifications, malicious software, or hardware installation, and these results were published on February 23, 2021.³⁴

Maricopa County officials concluded: “The combination of these findings, along with the pre- and post-election logic and accuracy tests performed by election officials, the post-election hand count performed by the political parties, and the many security protocols implemented by the Elections Department, confirm that Maricopa County’s Elections Department’s configuration and setup of the voting equipment and election management system provided an accurate counting of ballots and reporting of results.”³⁵

Section 2: Arizona Senate Republicans conduct Secretive and Disorganized Review

Despite Maricopa County Election Officials’ compliance with Arizona’s established statutory regime for reviewing election results, State Senate President Karen Fann and the Senate Judiciary Committee sought an additional review of the election in Maricopa County. While they did not question the accuracy of the votes cast on these ballots for their Republican colleagues in the state legislature, they took the unprecedented step of issuing a subpoena for Maricopa County’s 2020 election materials to launch a partisan review of the results for U.S. President and U.S. Senator—two statewide races won by Democratic candidates.

On December 15, 2020, President Fann and then-Chair of the Judiciary Committee Senator Eddie Farnsworth subpoenaed Maricopa County’s nearly 2.1 million ballots and election machinery in order to conduct what they called a “full forensic audit.”³⁶ On

³⁴ *Id.*; See SLI Compliance. (2021, February 23). *Forensic Audit Report: Dominion Voting Systems, Democracy Suite 5.5B*. <https://www.maricopa.gov/DocumentCenter/View/66843/SLI-Compliance-Forensic-Audit-Report?bidId=>.

(“SLI Compliance found there to be no internet connectivity occurring within the specific time period (July 6, 2020 through November 20, 2020) on any of the examined components.”; “No instance of malicious software was found on any of the devices.”); Pro V&V. (2021, February 23). *Field Audit Report: Dominion Voting Systems Democracy Suite (D-Suite) 5.5-B Voting System Maricopa Post-Election Field Audit*. <https://www.maricopa.gov/DocumentCenter/View/66844/Post-Audit-Report>.

(“Pro V&V determined that the network it evaluated is a “Closed Network” and does not have access to the internet.”; “No discrepancies [discovered by a malware/virus scanning software] were noted at any time”; “[A]ll [test] votes were tallied and adjudicated resulting in an accurate ballot count.”)

³⁵ Jarrett & Valenzuela, *supra* note 32.

³⁶ See *Maricopa County et al. v. Fann et al.*, [Compl. Ex. 1](#) (subpoena), Maricopa Cty. Sup. Ct., No. CV2020-016840 (Dec. 18, 2020). Senator Farnsworth was later replaced with Senator Warren Petersen

December 18, 2020, the Maricopa County Board of Supervisors filed a complaint in Maricopa County Superior Court, asking the court to quash the subpoenas and declare them unlawful.³⁷

While this challenge was pending, on January 12, 2021, President Fann and Senator Petersen served updated subpoenas on the Maricopa County Board of Supervisors; Stephen Richer, the Maricopa County Recorder; and John Allen, the Maricopa County Treasurer.³⁸ A full list of the requested materials can be found in the [subpoenas](#).

The County and Senators litigated the validity of the subpoenas, and on February 25, 2021, Judge Timothy Thomason ruled that the subpoenas were valid.³⁹ He found the Senate's stated reasoning—to determine whether changes should be made to the state election code—valid and within its powers, though he also noted concerns about voters' privacy and ballot security, concluding that the Senators were "obligated to maintain the confidentiality" of the subpoenaed ballot information.⁴⁰

On March 31, 2021, President Fann announced that she had hired a Florida-based cybersecurity company called Cyber Ninjas to conduct what it called a "comprehensive, full forensic audit of the 2020 election in Maricopa County."⁴¹ It remains unclear how Fann chose Cyber Ninjas, as the company has no documented election experience and did not submit a formal bid.⁴² While at least one other vendor submitted a bid to conduct a forensic audit for \$8 million, Cyber Ninjas agreed to charge the Senate \$150,000. The Senate's contractors announced in July 2021 that supporters had raised \$5.7 million in connection with the Senate's ballot review.⁴³ This followed an earlier report that the

when Petersen took over as the Chairperson of the Judiciary Committee at the start of the 2021 legislative session in January.

³⁷ *Id.*

³⁸ See *Maricopa County et al. v. Fann et al.*, [Not. Re New Subpoenas](#), Maricopa Cty. Sup. Ct., No. CV2020-016840 (Jan. 12, 2020); *Maricopa County et al. v. Fann et al.*, [Not. Re New Subpoenas Ex. A](#), Maricopa Cty. Sup. Ct., No. CV2020-016840 (Jan. 12, 2020); <https://www.azmirror.com/blog/judge-reschedules-arguments-due-to-new-subpoena-in-election-audit-fight/>

³⁹ Fifield, J. (2021, February 27). *Judge rules Maricopa county must provide 2020 ballots to Arizona Senate for audit under subpoenas*. The Arizona Republic. <https://www.azcentral.com/story/news/politics/elections/2021/02/26/judge-says-maricopa-county-must-provide-2020-ballots-arizona-senate/6825892002/>.

⁴⁰ *Id.*

⁴¹ Duda, J. (2021, April 1). *Arizona Senate hires a 'stop the steal' advocate to lead 2020 election audit*. Arizona Mirror. <https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/>.

⁴² Riccardi, N. (2021, May 23). *Experts or 'grifters'? Little-known firm runs Arizona audit*. AP NEWS. <https://apnews.com/article/donald-trump-arizona-business-technology-election-recounts-c5948f1d2ecdff9e93d4aa27ba0c1315>.

⁴³ Duda, J. (2021, July 29). *Election conspiracy theorist groups paid \$5.7 million for the Arizona 'audit'*. Arizona Mirror. <https://www.azmirror.com/2021/07/28/election-conspiracy-theorist-groups-paid-5-7-million-for-the-arizona-audit/>.

costs of the exercise had topped \$9 million⁴⁴, and a judge indicating that the Arizona Senate cannot keep information regarding the funding sources private.⁴⁵

Cyber Ninjas proceeded to subcontract with smaller firms, which were also lacking significant elections experience and were not accredited by the U.S. Election Assistance Commission: Wake Technology Services, Inc., CyrFir, and Digital Discovery.⁴⁶ Only Wake Technology Services, Inc. had conducted a post-election audit, which had involved fewer than 8,000 ballots (compared to the 2.1 million in Maricopa). The Senate's contractors subcontracted with Wake to run the review's hand count. However, when Wake's contract ended on May 14, 2021, the company chose not to continue and left with the hand count review unfinished.⁴⁷ This disruption led to a new company, StratTech Solutions, an Arizona internet technology company with no election auditing experience, replacing Wake.⁴⁸

The Statement of Work, agreed to by the State Senate and Cyber Ninjas, detailed Cyber Ninjas' planned course of work, including four phases: "Registration and Votes Cast Phase"; "Vote Count and Tally Phase"; "Electronic Voting System Phase"; and "Reported Results Phase."⁴⁹ As described, the "Registration and Votes Cast Phase" was meant to include phone calls and physical "canvassing" of Maricopa County voters to question them about undefined "anomalies." However, on May 5, 2021, the U.S. Department of Justice sent a letter to President Fann, warning her that the procedures being used for the "audit" may violate federal law, including laws which prohibit voter intimidation and laws which require election officials to safeguard and preserve federal election records.⁵⁰ On May 7, 2021, President Fann sent a letter in response to the Department of Justice, explaining that the Senate would "indefinitely defer" the "voter

⁴⁴ Pulitzer, J. *How do you feel about today in #Maricopa*. (2021).

<https://www.facebook.com/JovanHuttonPulitzer/videos/985248078942100/?t=19>

⁴⁵ *American Oversight v. Fann et al.*, Order to Produce Public Records, Maricopa Cty. Sup. Ct., No. CV2021-008265 (Aug. 2, 2021).

⁴⁶ Fifield, J., Randazzo, R., & Oxford, A. (2021, April 1). *Founder of company hired to conduct Maricopa county election audit promoted election fraud theories*. The Arizona Republic.

<https://www.azcentral.com/story/news/politics/elections/2021/03/31/cyber-ninjas-founder-doug-logan-pushed-election-fraud-theories/4825258001/>

⁴⁷ Fifield, J., & Oxford, A. (2021, May 26). *Tech company running Arizona ballot recount backs out: 'they were done'*. The Arizona Republic.

<https://www.azcentral.com/story/news/politics/elections/2021/05/25/cyber-ninjas-subcontractor-strattech-solutions-takes-over-arizona-election-audit-hand-count/7429980002/>

⁴⁸ *Id.*

⁴⁹ Cyber Ninjas. (2021). *Statement of Work*. See Appendix B or

<https://www.documentcloud.org/documents/20536950-arizona-senate-cyber-ninjas-statement-of-work-executed-033121>.

⁵⁰ Karlan, P. (2021, May 5). DOJ Letter to Fann.

<https://assets.documentcloud.org/documents/20698904/doj-letter-to-fann-5-5-21.pdf>

canvassing” component of the process.⁵¹ Senate Liaison Ken Bennett quickly contradicted Fann, stating the team “will still do ‘spot checks’ of some addresses, such as places where a large number of votes were reportedly cast.”⁵²

Lack and Transparency and Access

In contrast to election audits conducted by election officials in compliance with state law that are open to the public and the press, the State Senate and their contractors have consistently fought to prevent or limit access by the public or press to information about the review, including written procedures, who the counters and staff members are, and who is funding this exercise.⁵³ Citing the proprietary interests, they prevented independent nonpartisan experts and press from observing the process at the Coliseum.⁵⁴ Initially, only One American News Network, a television network that helped to organize and fund the review, was granted access.⁵⁵

In a March 3, 2021 letter to President Fann and Arizona Senator Warren Peterson, the Arizona Secretary of State expressed her concern with the Senate’s plans to review ballots.⁵⁶ Alongside other suggestions and requests, she requested that the Senate “[p]ermit the Secretary of State’s Office, the Governor’s Office, the Attorney General’s Office, Maricopa County officials, and political party designees to observe every step of any audit and any handling, inspection, or counting of ballots.”⁵⁷ The Senate failed to respond.

On April 20, 2021, the Maricopa County Elections Department announced that it would transfer ballots and election equipment to the Veterans Memorial Coliseum in Phoenix

⁵¹ Fann, K. (2021, May 7). Fann Response to DOJ.

<https://assets.documentcloud.org/documents/20700735/fann-response-to-doj-5-7-21.pdf>

⁵² Duda, J. [@JeremyDuda]. (2021, May 12). *Though @FannKfann told DOJ that the audit indefinitely suspended plans to knock on voters’ doors to confirm voter.* [Tweet]. Twitter.

<https://twitter.com/jeremyduda/status/1392629603785527300?s=20>

⁵³ MacDonald-Evoy, J. (2021, April 23). *Senate won’t say who is funding the election audit or allow media access.* Arizona Mirror. <https://www.azmirror.com/2021/04/23/senate-wont-say-who-is-funding-the-election-audit-or-allow-media-access/>

⁵⁴ Oxford, A. (2021, April 26). *Cyber ninjas, hired by Arizona Senate to recount Maricopa County’s ballots, asks court to keep its procedures secret.* The Arizona Republic.

<https://www.azcentral.com/story/news/politics/elections/2021/04/25/cyber-ninjas-wants-to-keep-its-arizona-election-recount-secret/7379117002/>

⁵⁵ Mimms, S. (2021, May 18). *Pro-Trump OAN reporters are Blatantly raising money for a BOGUS election “Audit” In Arizona.* BuzzFeed News. <https://www.buzzfeednews.com/article/sarahmimms/arizona-election-results-oan-reporters-fundraising>; Valdes, N. (2021, May 5). *Maricopa County Senate Audit observers forced to sign non-disclosure agreements.* KNXV.

<https://www.abc15.com/news/state/maricopa-county-senate-audit-observers-forced-to-sign-non-disclosure-agreements>

⁵⁶ Hobbs, K. (2021, March 3) Letter to Karen Fann.

https://azsos.gov/sites/default/files/Fann_Letter_3_3_2021.pdf

⁵⁷ *Id.* at 3.

("the Coliseum"), the venue selected for the exercise.⁵⁸ The next day, on April 21, the Secretary of State's Elections Director, Sambo Dul, emailed Fann and former Secretary of State Ken Bennett, the Senate's "audit liaison," to request permission to designate independent experts to observe the audit alongside national nonpartisan nonprofit organizations.⁵⁹ Dul also requested that the audit be open to press observers. Bennett expressed openness to the idea by telephone, but neither Bennett nor Fann followed through.⁶⁰

At the same time, the Senate's contractors sought to keep press out of the Coliseum and to keep its policies and procedures for conducting the process a secret.⁶¹ The only publicly available information was its Statement of Work.

In a letter to Fann and Bennett dated April 22, 2021, multiple Arizona news organizations voiced similar concerns, describing the press's failed efforts to gain access to the Coliseum and explaining why the refusal to permit press observers violated the First Amendment.⁶²

That same day, the Arizona Democratic Party and a member of the Maricopa Board of Supervisors sued in Arizona Superior Court to stop the ballot review, citing violations of Arizona election law and risks to voter privacy and ballot security.⁶³

The court subsequently ordered the Senate's contractors to file all policies and procedures relevant to the exercise by April 25, 2021.⁶⁴ Cyber Ninjas and the Senate defendants immediately appealed the order with the Arizona Supreme Court and were denied.⁶⁵ The contractors also requested that its policies and procedures be sealed and that a hearing on the matter be closed to the public, claiming legislative privilege as well

⁵⁸ Maricopa County Elections Department. *Maricopa County to Deliver Subpoenaed Election Materials to Arizona Senate*. (2021, April 20). <https://www.maricopa.gov/CivicAlerts.aspx?AID=2235>.

⁵⁹ See *Arizona Democratic Party et al. v. Fann et al.*, Mot. to Intervene by Ariz. Sec. of State Katie Hobbs, Ex. A (proposed Compl.), Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 27, 2021) at 4.

⁶⁰ See *Arizona Democratic Party et al. v. Fann et al.*, Mot. to Intervene by Ariz. Sec. of State Katie Hobbs, Ex. A (proposed Compl.), Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 27, 2021) at 4.

⁶¹ MacDonald-Evoy, *supra* note 52.

⁶² Bodney, D. (2021, April 22). Phoenix Newspapers, Inc., Arizona Broadcasters Association and Arizona Mirror/News Organizations' Right of Access to Election Audit .

<https://assets.documentcloud.org/documents/20689181/election-audit-access-demand-letter.pdf>; see also Alexander, P. et al., (2021, April 22). Letter to Karen Fann.

<https://www.brennancenter.org/sites/default/files/2021-04/Arizona%20Senate%20Audit%20Letter.pdf>.

⁶³ *Arizona Democratic Party et al. v. Fann et al.*, Complaint, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 22, 2021), *Arizona Democratic Party et al. v. Fann et al.*, Order Denying Special Action, Ariz. Sup. Ct., No. C21-0102-SA (Apr. 23, 2021).

⁶⁴ *Arizona Democratic Party et al. v. Fann et al.*, Complaint, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 22, 2021) at 4.

⁶⁵ *Arizona Democratic Party et al. v. Fann et al.*, Order Denying Special Action, *supra* note 62.

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as trade secret protection.⁶⁶ Arizona Supreme Court Justice Clint Bolick denied that motion.⁶⁷

On April 26, 2021, the First Amendment Coalition of Arizona filed a motion in the Superior Court to intervene in the lawsuit for the purpose of opposing these secrecy requests, which was granted.⁶⁸ The Secretary of State's Office moved to intervene on April 27,⁶⁹ requesting that the court order the defendants to "allow independent observers, including independent experts designated by the Secretary, members of political parties, and members of the press, to effectively observe the audit."⁷⁰ The court granted the Secretary's motion over the defendants' objections,⁷¹ and following a hearing and negotiations,⁷² all parties agreed that the Secretary's independent expert observers could observe the proceedings.⁷³

The parties later reached a settlement on additional issues⁷⁴, and while the review was allowed to continue, the Senate's contractors were required to provide greater transparency into their procedures and permit the press and qualified observers throughout the review.⁷⁵

⁶⁶ *Arizona Democratic Party et al. v. Fann et al.*, Simultaneous Brief of Cyber Ninjas, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 25, 2021) at 2, 5-6.

⁶⁷ *Arizona Democratic Party et al. v. Fann et al.*, Order Denying Special Action, *supra* note 62, at 2.

⁶⁸ *Arizona Democratic Party et al. v. Fann et al.*, Mot. to Intervene by First Amendment Coalition of Arizona, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 26, 2021).

⁶⁹ *Arizona Democratic Party et al. v. Fann et al.*, Mot. to Intervene by Ariz. Sec. of State Katie Hobbs, Ex. A (proposed Compl.), *supra* note 58.

⁷⁰ *Id.*

⁷¹ *Arizona Democratic Party et al. v. Fann et al.*, Mot. to Intervene by Ariz. Sec. of State Katie Hobbs, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 27, 2021).

<https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/2663/637551959803530000>

⁷² *Arizona Democratic Party et al. v. Fann et al.*, Order to Meet and Confer, Maricopa Cty. Sup. Ct., No. CV2021-006646 (Apr. 28, 2021) Min. Entry, Dkt. No. 5 at 3.

⁷³ Phillips, M. (2021, April 30). *Secretary of state gets observers inside Maricopa county Election Audit, Cyber Ninjas has to reveal methods*. KNXV. <https://www.abc15.com/news/state/secretary-of-state-gets-observers-inside-maricopa-county-election-audit-cyber-ninjas-has-to-reveal-methods>.

⁷⁴ *Arizona Democratic Party, et al. v. Fann et al.*, Settlement Agreement. Maricopa Cty. Sup. Ct., No. CV2021-006646 (May 5, 2021). See Appendix C or

<https://assets.documentcloud.org/documents/20698756/settlement-agreement-final-00547419xc217c.pdf>

⁷⁵ *Id.*

Section 3: Expert Election Observers Document Senate Reviews Failures

“The legitimacy of an election—the peaceful transference of power based on the will of the people—necessitates diligence in assuring that the correct outcome was announced and certified.”⁷⁶ Pursuant to Arizona law, election administration in Arizona incorporates many aspects of performance management, security, quality control, *and* pre-election testing and robust post-election auditing protocols that can identify issues that impact the legitimacy of an election.⁷⁷ These audits provided further evidence of the integrity of Maricopa County’s elections and the accuracy of the certified election outcome.

“Professional auditing is a method of verifying, through evidence gathered by inquiry, observation and testing, the activities and results of a process.”⁷⁸ Furthermore, “it is the method by which third parties and stakeholders—both internal and external to the process—can be assured that the process was performed in accordance with the established procedures and will increase acceptance of the process outcomes because of the independent validation of the established procedures.”⁷⁹

The purported “audit” conducted by the Senate’s contractors did not meet this definition. Moreover, it failed to satisfy the basic standards for elections auditing. Because of these failures, any findings or report issued by Cyber Ninjas, or the state senate, based on the information collected using these faulty and inconsistently-applied procedures and processes, should not be considered trustworthy or accurate.

Designated Election Observers

Following the litigation, the Secretary of State’s Office consistently sent qualified, non-partisan election experts to observe the review.⁸⁰ Based on their observations inside the Coliseum, the expert observers documented and quickly shared concerns, which allowed the SOS to report issues and to ensure that the public received timely information. The following section outlines the most significant concerns noted by the expert observers.

⁷⁶ Morrell, J. (2019, May). *Knowing It’s Right, Part One A Practical Guide to Risk-Limiting Audits*. https://democracyfund.org/wp-content/uploads/2020/06/2019_DF_KnowingItsRight_Part1.pdf.

⁷⁷ See e.g. ARS § 16-602 (prescribing post-election hand-count audits).

⁷⁸ The Maryland State Board of Elections . (2008, December 3). *Development of a Pilot Election Audit Program*. https://elections.maryland.gov/press_room/documents/Maryland_Pilot%20Election%20Audit_12-3-2008.pdf.

⁷⁹ *Id.*

⁸⁰ A timeline of the observers’ review is included at Appendix X.

Overarching Concerns

Lack of Compliance with Federal Law

Federal law requires election officials to safeguard and protect election materials, including ballots, for 22 months after an election.⁸¹ “Election [materials must] be retained either physically by election officials themselves, or under their direct administrative supervision. This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders of election officers.”⁸² At all times, “election officers [must retain] ultimate management authority over the retention and security of those election records, including the right to physically access [these records].”⁸³

The Senate forced Maricopa County election officials to hand over voting machines and the approximately 2.1 million ballots cast in the November 2020 General Election. Based on observer accounts and understanding, the Senate and their agents, including the contractors, retained complete management authority over these materials upon Maricopa County election officials’ transfer of these materials, beginning on April 21, 2021, into their custody, as required pursuant to court order.

Upon receipt of these materials, the Senate, and its agents, including the contractors, failed to comply with the custodial duties to protect and maintain federal election materials.

Transparency

Throughout this exercise, there have been concerns about transparency, despite the contractors describing it as the “most transparent in American history.”⁸⁴ Processes have changed throughout, without clear communication to the press or observers, and confusion on the floor was commonplace. The contractors were seemingly developing and changing procedures as they moved through the process. True transparency, a hallmark of a credible audit, was entirely lacking in this exercise. Although the contractors called much attention to the livestream of their efforts, in reality, the

⁸¹ 52 U.S.C. §§ 20701-20706.

⁸² United States Department of Justice. (2017, December). *Federal Prosecution of Election Offenses*. <https://www.justice.gov/criminal/file/1029066/download>.

⁸³ *Id.* at 90.

⁸⁴ Dana, J. (2021, May 4). *Cyber ninjas claim Maricopa county election Audit 'most transparent in American history'*. 12news.com. <https://www.12news.com/article/news/local/valley/cyber-ninjas-claim-maricopa-county-election-audit-most-transparent-in-american-history/75-cfd09684-59c0-4848-8eea-84c99154f686>.

cameras did not cover all parts of the exercise, as the contractors purported they would. Processes, procedures, and standards remained obscured from observers and often from participants.

For example, during observers' conversation with a StratTech employee and Cyber Ninjas attorney Bryan Blehm regarding the infrastructure, security, and transparency concerns, Blehm told observers directly that this exercise was not a certification of the election or its results and added that the contractors could determine the level of transparency to provide.

Observers were also informed that Cyber Ninjas CEO Doug Logan and Bryan Blehm both instructed participants not to talk if/when official observers were near them, and that code words were used by participants to warn others that the Secretary of State observers were in the area.

With concerns about the lack of transparency around the aggregation process mounting, observers asked for demonstrations. When observers requested copies of the procedures, they were informed that the procedures were in "draft form" and not subject to disclosure—although these procedures had been printed and distributed to participants as a working guide for performing the aggregation duties. When observers directed this request to Senate Liaison Ken Bennett, he replied, "I have been asking for the same thing," illustrating that the process was unclear to both the observers and to Bennett himself. Observers noted this as an indication that it was, in fact, the contractors in control of the operation—not the Arizona Senate.

Security guards blocked observers from tours of the operation given to delegates from other states. The observers added that the contractors would speak in a manner that would prevent the observers from hearing what was being said on the tours. Observers were told that this was a COVID-19 protocol and the observers could not stand within 6 feet of the delegates. However, this policy was only selectively enforced, as all of the delegates were huddled together, the contractors were within 6 feet of the delegates, and the non-Secretary of State observers were allowed to be within 6 feet of the process.

Security

Cybersecurity Concerns

Both physical and cybersecurity concerns plagued the entire exercise. Basic tenets of cybersecurity dictate that users do not use shared accounts, do not share passwords, and do not write down passwords. These basic standards are implemented for several reasons, including for the protection of data integrity, which is of critical importance.

Violations of these cybersecurity foundational principles provide opportunities for computers to be accessed by unauthorized personnel, including bad actors, who may intentionally, or unintentionally, alter data, such as vote tallies.

During the first few weeks of this exercise, observers noted an alarming failure to comply with basic cybersecurity standards that protect data integrity. Data was collected and initially stored locally on the computers at each of the following stations: 1) paper examination tables, where participants took pictures of the ballots and 2) aggregation stations, for compiling the tally sheets completed by counters.

The Senate contractors set up stations for different parts of the counting process. This is problematic for two reasons: 1) any bad actors with access to the computers, or to the passwords for those computers, could change and manipulate data in the spreadsheets without anyone else being able to track it; and 2) the data could be lost without consistent backups. With the data being stored locally, there were no redundant copies of the information to ensure that any lost or altered data could be recovered.

For example, the observers were informed that the spreadsheets being used to store the tally data were stored locally on the computers. The data was only backed up to the server once daily, and, as part of the backup process, the server created a hash of the file for an integrity check. However, because this only happened once a day, the hash could be altered several times without detection. Further compounding the situation was the lack of logs created on the files, except a general log of which Windows account accessed the file, along with a date stamp.

The observers recognized this as a significant security concern. Each day, multiple people had access to each computer. With two shifts, at least two people were typically entering data on each computer. Additionally, with a single Windows login on each computer and a shared password that dozens of people have, any worker could log into a computer. Observers alerted personnel about this security concern. They described the following example:

Data Entry Shift 1 personnel enters data into Spreadsheet A, B, and C during the shift. Then, Data Entry Shift 2 personnel opens the same Spreadsheet A, B, and C, and modifies the tallies, then continues on with Spreadsheet D, E, and F, as s/he was tasked.

The observers inquired about how changes to the data could be detected using this process, and they were informed that the computers have cameras on them. Observers had previously been informed that those cameras were not monitored in real time, but could be reviewed if an incident occurred.

In another cybersecurity concern, observers discovered a device connected to the server that looked like a wireless router with the name "Netgear" printed on it. Observers were able to confirm that the device was a wireless router and that it was physically connected to an ethernet port for a switch to the servers capturing the ballot counting station video recording footage. Observers were told that the WiFi function of the router had been disabled.

However, this device can be configured as an access point, allowing anyone with another WiFi-enabled device to attach to the audit network from some distance, even in areas off-camera. Observers were assured that the device would be removed from the floor, but it remained connected until May 14, 2021, when the exercise was forced to pause while pre-scheduled events were conducted at the review venue space in the Coliseum.

Observers noted that multiple Wake TSI subcontractors, and other participants, had usernames and passwords written on a purple sheet of paper which they carried in their pockets. This was another significant security vulnerability which indicated a lack of understanding or adherence to best practices for network and data security. Observers reported more than six staff members carrying the list of passwords, participants holding password sheets facing outward so that they could easily be seen, and several participants handing the password sheets to other participants.

In June, observers noticed the manufacturer boxes for the "Ankylin WiFi Microscope" portable cameras used on the paper examination stations indicated they were WiFi capable. The security team scanned each of the paper examination stations with a radio frequency reader. For nearly 15 minutes, each time that the security team placed the radio frequency reader near the microscope cameras, the reader detected a steady stream of transmission. The observers noted that the computers showed that there was no internet connection, but until the June 17 discovery, the observers were unaware that the microscope cameras had built-in WiFi that connects to Apple and Android products via an app. Having WiFi-enabled microscope cameras that transmit data to Apple and Android products created a vulnerability, which could have allowed a bad actor using an unauthorized and undetected device to access the ballot images captured by the cameras.

Physical Security Concerns

Security concerns went beyond hardware and software to include physical security matters. For example, on May 14, 2021, the day the contractors had to pause operations and move equipment from the Coliseum, observers noted much confusion among participants moving equipment, including the server, onto a trailer for storage while the Coliseum was used for high school graduations. Contractors decided to lock

the equipment trailer, but not use a tamper-evidence seal because the data being stored was “not evidentiary.” Both Logan and Blehm agreed that tamper-evident seals would be “overkill.”

At this time, the driver of the truck and trailer walked around to the back and put in the combination to unlock the trailer. Access to the content in the trailer was supposed to be limited, yet even the driver had the combination to the lock. This security vulnerability was witnessed by an observer and an Arizona Ranger on site for security purposes. The driver later stated that the lock was not his, but belonged to his boss, and that the combination was “3030.” Shared locks and combinations are a major security vulnerability. Shortly thereafter, Doug Logan decided that sealing the trailer would be appropriate, but still did not make an effort to get the seals and put them on the trailer. Instead, the Arizona Ranger left the site, got two seals, and returned to seal the trailer.

Internal Security

The contractor's overall lack of election administration comprehension resulted in several other security issues. In Arizona, voters who qualify under the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), including military members serving our country, may return their completed ballots electronically. Observers noticed that the contractors treated these ballots with less care, and overheard comments made by the contractors indicating that they believed these were not legitimate nor official ballots.

This dismissive treatment of these ballots again indicated a lack of understanding of election processes, as these were valid ballots voted by active members of the military. In one instance, observers reported seeing Bennett and several other contractors rifling through boxes of UOCAVA ballots. In two separate instances, the UOCAVA ballots were poured out of containers. In the first instance, the ballots were not handled with care, resulting in the UOCAVA ballots being unceremoniously dumped across a table.

The second time, Bennett, and several other participants toppled a box of UOCAVA ballots, spilling them across the Coliseum floor. When returning the ballots to the box, they failed to check the number of ballots returned to the box to ensure that no ballots had been lost or misplaced.

Additionally, some of their own security protocols were blatantly ignored—access to the different cages was supposed to be limited to certain individuals. Observers reported, however, that while initially only the table managers or runners could take custody of the ballot boxes from the secure cages, at some point, this security measure was disregarded entirely. Eventually, all participants were allowed to take custody of the boxes of ballots and remove or return them to the secure cages.

The Senate Cage held all of the data that was sensitive, such as personally identifying information. This cage was originally only accessible by Bennett. During Phase 2, access was also granted to Randy Pullen, the former Chair of the Arizona Republican Party, who the Senate suddenly identified as "Audit Co-Chair" when the review resumed, on May 24, 2021.

On a separate occasion, the observers saw Bennett access boxes of "spoiled" ballots from the Senate Cage and noticed that when Bennett unlocked the cage, he set the combination lock on the floor outside the cage. Observers clearly saw the readily visible code on the lock, which was set to "6404." Observers confirmed that the code showing was correct because Bennett picked the lock up, placed it back together, and then turned the combination of numbers to relock the lock. The poor security practices that continued to be an issue with the contractors alarmingly included lapses in protocol to protect voters' personal identifiable information.

Inconsistently Applied Access and Security Restrictions

The Secretary of State observers' access was often subject to change. On April 30, 2021, the head of security told two Secretary of State observers that "per the Secretary's Office," the observers were no longer authorized to observe. After an approximately thirty-minute delay, the observers were told that the Secretary had not revoked their designation, but, in order to access the Coliseum, they needed a formal letter from the Secretary's Office. Upon admittance, Cyber Ninjas representatives instructed the observers that the rules had changed, and observers were no longer permitted to have technology (i.e., computers or phones) on the floor; however, they could bring a yellow notepad and red pen on the floor. Observers noted many instances when the security restrictions were blatantly disregarded by the contractors. For example, observers were told that no computers were allowed on the floor, yet they noted several computers on the floor, including at paper examination stations and at the aggregation stations. Also, observers were told no personnel could have phones on the floor. However, the contractors were not prohibited from using their cell phones on the floor.

Inconsistently Applied Policies and Procedures

In the instances where policies and procedures existed, the contractors regularly failed to comply with them. Observers were told that photography was prohibited. When observers informed Blehm that a contractor was violating this prohibition, Blehm approached the representative, who immediately put the phone away. When Blehm left, the contractor immediately retrieved the phone and again began taking photos.

Observers asked Blehm about the incident, who said that the employee had been instructed not to take photos but he took them anyway. Another Cyber Ninjas representative asked Blehm about the incident, at which point Blehm ran to the observers to inform them that he instructed the representative who took the photos to delete them. In a similar incident, Bennett was inside the cage taking photos of the last regular box of ballots being taken out onto the counting floor to be counted, and observers noticed that reporters were taking photos of Bennett on the counting floor using his phone to take pictures.

Chain of Custody Concerns

The term “chain of custody” is not unique to elections. In a court of law, it refers to evidence and the sequence of gaining custody of that evidence along with its control, transfer, examination, and final disposition when admitted into court. Proving that an item has been properly handled through an unbroken chain of custody is a required component of any credible audit. It assures a court of law that the evidence is authentic and was never unaccounted for. The chain of custody during an audit should provide the same assurances that ballots are authentic and accounted for as ballots are:

- Transported
- Reviewed
- Moved between stations, and
- Stored

Chain of custody logs document a ballot’s journey through the audit process. They provide evidence to relieve any uncertainty that ballots have been tampered with by indicating when and who took possession of them each time they are physically moved.⁸⁵

Chain of custody issues were observed throughout the process. For example, observers noted that some boxes containing personally identifiable information were removed from the Senate Cage, which was supposed to have the most robust security features, into the cage with all other ballots with comparatively open access. The following day, more boxes were moved from the Senate Cage. Chain of custody forms were not included on these boxes. Observers also noted multiple occasions when folders of tally sheets and corresponding chain of custody sheets were left unattended at quality control stations—the area and computers designated for quality control processes to take place—as the data was re-entered into spreadsheets for the “Phase 1 Retrospective Quality Control.”

⁸⁵ Morrell, J. (2021, February). *Knowing It's Right, Part Four Ballot Accounting Audits Best Practices Guide*. https://democracyfund.org/wp-content/uploads/2021/02/2021_DF_KnowingItsRight_Part4.pdf.

The number of ballots being processed at a station was not tracked at all, making it impossible to ensure that no ballots had been added or lost during handling.⁸⁶

Other Security Concerns

Many of the concerns the observers noted stemmed from the fact that the contractors and participants seemed to have little knowledge of election laws or best practices. For example, Deputy Senate Liaison John Brakey publicly stated that he was receiving copies of all the ballot images and expected to post them all publicly. This action would be a violation of the settlement agreement⁸⁷ and of Arizona law⁸⁸.

Lack of and Inappropriate Communication

Cyber Ninjas' representatives consistently refused to provide information requested by observers and/or provided inaccurate information in response to questions about the procedures, processes or planned work schedule. Throughout the process, observers found that for the most part, their presence was not welcome in the Coliseum. Ongoing communication issues made it clear that the intent of the contractors is not to provide clarity regarding their actions, but instead to obfuscate processes and procedures.

Additionally, the Senate's contractors cultivated and contributed to an environment in which the Secretary's observers were treated unprofessionally. The following are examples of the observers' interactions with floor staff and volunteers:

On multiple occasions, the Senate's contractors, Bennett, or Deputy Senate Liaison John Brakey asked the observers for assistance. Observers were regularly shocked by the Senate's contractors' demonstrated lack of understanding about elections and Maricopa County's processes. Furthermore, on multiple occasions, observers were asked to provide the contractors with copies of their notes and information on the errors in the process, so that they could fix them immediately, rather than having to change procedures after learning about the concerns from the Secretary's correspondence with the attorneys.

The contractors, attorneys, and Senate Liaison continuously provided inconsistent information that regularly failed to comport with the instructions provided to observers or with the processes and procedures provided to the participants performing the review.

⁸⁶ Morrell, J. (2021, May 21). *I watched the GOP's Arizona election audit. It was worse than you think.* The Washington Post. <https://www.washingtonpost.com/outlook/2021/05/19/gop-arizona-election-audit>.

⁸⁷ Settlement Agreement, *supra* note 73.

⁸⁸ A.R.S. § 16-1018

While the Senate's contractors and Bennett frequently told observers and media that the working participants were mostly volunteers, the observers noted that sign-in sheets, filled front and back, for paid staff were provided daily. In contrast, when observers asked if operations would continue on Memorial Day, they were initially informed that they would, because most workers were paid independent contractors. In fact, a contractor told an observer they were actively trying to keep volunteers from knowing that others were being paid to do the same job.

Observers were often mocked, sometimes blatantly; Secretary of State Observers were called "pinkos" for the pink shirts which contractors required them to wear and which were specifically assigned to these observers ("pinkos" is a pejorative term from the 1920s for people that were sympathetic to communism).



Pullen told one observer that the shirt which he was required to wear on the floor made him "look like a transgender."

However, some participants expressed gratitude to the observers. One participant told an observer: "I've been wanting to tell you I am thankful that you are here." Another stated, "thank you for the great work you are doing."

Additionally, at one point, a Senate contractor advised the Secretary's observers to get into the business of consulting for forensic audits because this exercise would create business for years to come.

⁸⁹ Photograph: Courtney Pedroza/Getty Images

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Ballot Counting Process

Effective and trustworthy hand tally procedures are typically written prior to the launch of an audit, and used for training purposes. They remain consistent throughout the process, and help ensure an accurate count of votes cast for individual candidates.

These procedures require each ballot to be individually reviewed by a team of two or more officials. This is often a slow, methodical process marked by regular pauses in counting, often after five or 10 ballots, to verify accuracy. Election officials are trained and provided with instructions on how to count ballots with unclear marks, and typically receive a state guidebook with pictograms.⁹⁰ Standard hand count tally procedures include clear escalation procedures for any ballot that the team of officials cannot agree how to count. This procedure ensures that ballots without clear marks receive additional scrutiny and are accurately counted.

The Senate's contractors' tally process failed to include an escalation procedure, and was more similar to an opinion poll—only soliciting opinions of how the ballots should be counted—than it was to effective ballot hand count procedures used by officials across the country. The procedures did not require the people counting to agree on how to count individual ballots. In fact, the procedures do not even require the counters to agree on the aggregate totals for ballots in a batch. If opinions differ on the aggregate totals (within an error rate that varied by day and/or table), then there was no attempt to ensure that individual ballots are counted accurately.

The Senate's contractors refused to provide written procedures prior to the start of the hand count. When a court subsequently compelled them to produce written procedures, meta data indicated that these procedures, "Counting Floor Policies," (the "Policies") were written days after the start of the hand count on April 28, 2021. After the procedures were written, the counting table staff were observed routinely failing to follow, or saying that they were unaware of, the applicable written procedure(s).

Moreover, the procedures and policies changed multiple times before and after they were put in writing, despite the lack of a formal procedure change process or notification requirements. When observers noticed a process change, for example, the change in the number of ballots per batch from 100 to 50, and asked the Senate's contractors to explain the change, they provided various rationale for the change, but did not provide a copy of the revised procedures or insight into the the process used to identify, consider

⁹⁰ Arizona Election Procedures Manual Chapter 11, Section IX

https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

and adopt these changes. Clear procedures that are consistently applied are critical to obtaining reliable vote tallies.

Hand Tally Process

The ballot-counting process conducted at the Coliseum consists of two main parts: 1) a hand tally of voter selections for two selected races (President and U.S. Senate); and 2) the aggregation of votes recorded on the hand tally forms.

The hand tally procedures were not designed to result in an accurate count.

Round tables, outfitted with a large rotating tray on which two ballot display easels were mounted, were designated as "counting tables." Each table was staffed with three counters and one or two table leads. Table leads handled the ballots and prepared them to be tallied by counters by placing the ballots on the rotating tray and spinning it around the table.

Each counter was provided with an individual tally sheet for each "batch" of ballots. Counters were instructed to review marks on the ballot for two races: President and U.S. Senate. To complete the tally sheet, they were to put a hash mark in the appropriate column (e.g., Trump, Biden, or Jorgensen; Kelly or McSally). There was also a single column for overvotes, undervotes, and write-in votes in both races—standard industry practice calls for each of these ballot marks to be tracked separately, not jointly. Each row of the tally sheet allowed for the results from five ballots to be logged, which allowed for the entry of 100 ballots on each tally sheet.

The observers reported many concerns regarding the tally sheets, such as:

- The Senate's contractors informed observers that all tally forms will be maintained. If errors occurred, the sheets would be voided, but none would be destroyed or discarded. However, observers did see tally sheets being torn in half and discarded.
- Some table managers instructed the counters not to tally the number of ballots on the tally sheet, saying that the "Ballots" column was optional and filling it in would slow the process.
- Observers also noted that when conducting a recount, some counters used scratch paper to write down the tallies for the recount instead of using the tally sheets. This was a violation of policy and does not fit the concept of treating the tally sheet as "legal documents."
- Observers noticed that manila envelopes were placed on many of the counting stations. Blehm told observers they were added as an underlayer to the tally sheet because some of the tables had staples or other items that made their

surface difficult to write on. However, observers documented multiple instances of scratch paper being used for recounts.

- Observers saw multiple instances of table managers failing to get consensus on the tallies among the counters. If there were two out of three matches, then the result of the two was considered to be “good enough.”⁹¹

Hand Tally Error Rate

While the written policies require batches of 100 ballots, in practice, there were a variety of circumstances that resulted in batches of under 100 ballots. For example, when the total number of ballots in a box was not divisible by 100, the last batch counted in that box would typically have fewer than 100 ballots, and when, according to the Senate’s contractors, table leads were given discretion to decrease batch sizes to 50. Counters were not permitted to touch or handle the ballots, nor were they permitted to discuss any questions about the ballots or marks thereon.

After marking tally sheets for the last ballot in the batch, counters were instructed to sum the hash marks and enter aggregate totals in each column. Table leads were responsible for reviewing the tally sheets completed by each counter. This review was limited to comparing the aggregated vote totals and did not include a review of whether the counters agreed on how to count individual ballots. Although the counters reviewed the same ballots, the procedures did not require the counters to agree on how to count individual ballots.⁹² Moreover, the procedures did not require the counters to agree on the aggregate vote totals for candidates for each batch.

If, at the end of the batch, the aggregate totals of two of the three counters matched, and the aggregate totals of the third counter were within two votes of the matching aggregate totals, then the batch was considered complete and the table moved to the next batch.

⁹¹ While this is the documented procedure, it is a concern when the table manager is aware that the number of ballots that an individual counted is different from the number that the other two individuals on that table counted (e.g., if one counter had the number of total ballots equaling 100, but the third counted 99 or 101 ballots). During the process of re-entering the tallies from Phase 1 into the spreadsheets, there were multiple instances where this lack of consistency was evident. One observer witnessed, in Yellow Module 2, one counter state, “I give up, I already have 80,” when the other two and the leader said they were only on ballot number 79. The counter said, “Oh well, we only need two out of three,” so the table manager allowed them to continue. At the conclusion of the batch, the counter acknowledged being off by one still, and said “why bother” fixing it if they match.

⁹² In fact, there was no process for comparing how individual ballots were counted by the three table counters, and the tally sheets were not designed to enable this comparison. Because of this, it would likely not be possible to obtain a complete count of ballot interpretation discrepancies between table counters.

If the tally sheets did not meet this standard, it was the responsibility of the table lead to determine which row or rows (of five ballots) resulted in the discrepancy. Written procedures then called for the table lead to have all three counters review the relevant ballots again. If the aggregate totals were not within the permissible error rate after 1-3 reviews, the table lead would have the table recount the entire batch.

As there were no standards in place for addressing any discrepancies, recording the tally often came down to the opinion of the table lead.

The fluctuating batch size was a significant concern because it created an unacceptably high potential for error, or error rate. The authorization to create an error rate for the hand count procedures was established in Section 5.2.2 of the Cyber Ninjas' Statement of Work.⁹³ This error rate was incorporated into the *Counting Floor Policies*. However, the relevant written policies were poorly drafted and resulted in a much greater error rate than was authorized in the Statement of Work.

Policy No. 8 requires that "the ballot counting teams must be accurate to within 0.03%."⁹⁴ However, the explanatory text describes an error rate (of approximately) 3%—not .03%.⁹⁵ Specifically, the procedures call for ballots to be counted in batches of 100, and allow for vote count total discrepancies among counters of up to, but not including, three votes. In practice, the table counters consistently complied with the error rate as expressed in a total number of ballots (up to, but not including, a discrepancy of three). However, they failed to consistently use batch sizes of 100 (e.g., according to Blehm, Table leads were provided with discretion to determine batch size, and could use batch sizes of 50.)⁹⁶ Of course, when the number of ballots in a batch

⁹³ Cyber Ninjas, *supra* note 48. ("5.2.2 Accurate Counting will be done in groups with three individuals independently counting each batch of ballots, and an individual supervising the table. All counts will be marked on a sheet of paper as they are tallied. If, at the end of the hand count, the discrepancies between counting personnel aggregate to a number that is greater than the margin separating the first and second place candidates for any audited office, the ballots with discrepant total from the Contractor's counting personnel will be re-reviewed until the aggregate discrepancies within the hand count are less than the margin separating the first and second place candidates.")

⁹⁴ Wake TSI. (2021). *Counting Floor Policies*. <https://www.cyberninjas.com/static/20210429155650/Wake-TSI-Counting-Floor-Policies.pdf>.

⁹⁵ *Id.* at 6. ("If two of three counters totals agree but the third counter is off 1 or 2 votes in any one race, the tally sheets are sent to aggregation. If two of three counters' totals agree but the third counter is off by 3 votes in any one race, the ballots must be recounted.") *But see* Election Assistance Commission. (2005). *Voluntary Voting System Guidelines Volume II, National Certification Testing Guidelines*. https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_VOL_2.508compliant.FINAL.pdf. ("For each processing function, the system shall achieve a target error rate of no more than one in 10,000,000 ballot positions, with a maximum acceptable error rate in the test process of one in 500,000 ballot positions.")

⁹⁶ The process allowed table managers to decide if the table tally 100 ballots on a tally sheet or to stop after the 50th ballot to subtotal and check for errors. For example, on May 10, 2021, a person loading the ballots onto the carousel of Blue Module 4 spun the 51st ballot around and the counters asked her to stop so that they could subtotal. Her response was "I don't usually subtotal at 50," but that is what the counters

size decreases, but the number of ballots used to determine if there is an impermissible discrepancy remains the same, the effective error rate increases. For example, when batch sizes of 50 ballots were used, the effective error rate was double the error rate of when batch sizes of 100 were used.

Moreover, as the hand tally process does not require agreement on how individual ballots are counted (only the aggregate totals), the estimated maximum number of potential ballot tally errors does not include potential tally errors on individual ballots. This means that each hand tally participant is using their own "standard" for how votes are to be counted, with no clear, consistent, and repeatable instructions in place. This is in stark contrast to the federally required standard for states to establish regulations on what counts as a vote and what does not⁹⁷. This process failure is fatal to the entire endeavor and no count resulting from this process should be relied upon for any purpose, other than as an example of procedures that should not be used.

Ongoing Process Revisions and Changes

Effective and trustworthy hand tally procedures are ideally written and used for training prior to the start of an audit. They remain consistent throughout the entire process. The Senate's contractors' process failed to comply with both of these standards. First, the hand tally began before written procedures were shared and were only made available after litigation. More troubling, implementation of the procedures as written was inconsistent, and changes were made to the procedures regularly and in the middle of ongoing processes. Many of the modifications to the procedures came after the Secretary of State or observers held a press briefing or released notes identifying all of the errors being observed or identified by staff. The hand tally process changes impacted the quality and accuracy of the vote totals that were generated by the contractors through this process. An overview of some of the major changes is provided below.

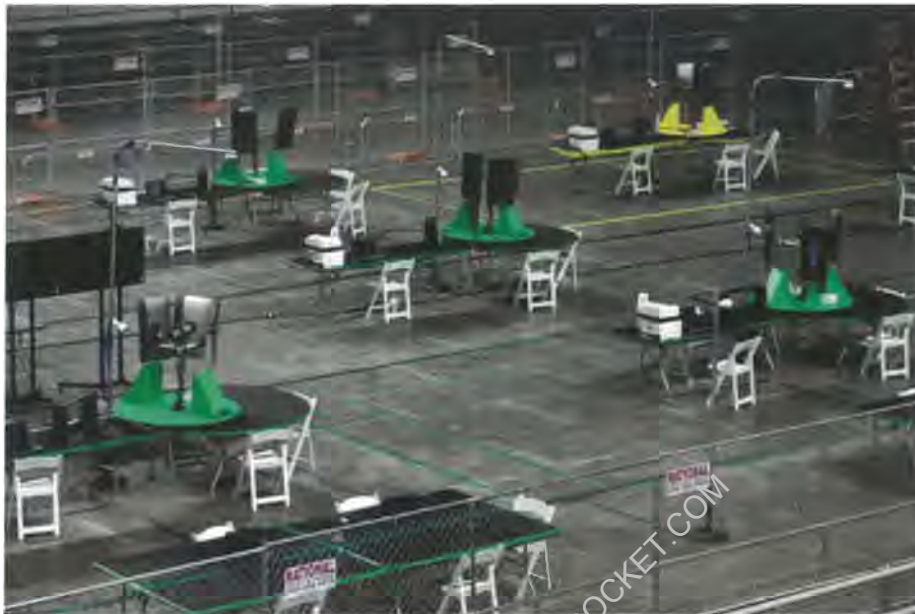
Initial Hand Tally Procedures

At the launch of the exercise, individual ballots were scanned and digital images were displayed on a computer screen, which was visible by all three table counters at each round table. Counters were instructed to first compare the paper ballot on the turntable to the digital image on the screen to confirm that it was the correct digital image, then to review the marks as they appeared on the digital image for vote-tallying purposes.

were used to doing, so the comment caused confusion. Other table leads said that they would not stop and subtotal at 50 ballots; rather, they would just count batches of 50 to make it easier on the counters.

⁹⁷ 52 USC § 21081(a)(6) ("Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.")

Observers noted that the hardware and software used were not federally or state-certified, nor had it undergone testing by an accredited laboratory.



After this process had been in use for approximately one week, the contractors revised the process (by striking the procedures related to scanning the paper ballots) and told observers that the process was inefficient and confusing. A Senate observer later told Secretary of State observers that the ballot scanning process had been abandoned because the contractors performed a software update which resulted in the loss of all of the ballot images.⁹⁹

Revised Hand Tally Procedures

After ballot scanning ceased, the hand tally procedures relied solely upon review of individual paper ballots using a turntable, on which hundreds of ballots were spun past table counters who struggled to mark, on a tally sheet, each voter's selection for the presidential and Senate races. Each round table was staffed with three counters and one or two table leads. Table leads handled the ballots and prepared them to be tallied

⁹⁸ Thomas Hawthorne/The Republic

⁹⁹ Based on the information provided, it seemed that the data was being stored locally within the software application, and the update wiped out all previous information. While this theory could not be confirmed, Blehm confirmed that there were some reasons why all ballots that were previously scanned would need to be rescanned. However, the boxes and batches of ballots that had been tallied using this method would not be retallied using the new procedures that all other ballots would be tallied under. This was the first of several instances identified throughout this report where a portion of the population of ballots being recounted was recounted using different practices. Tranches of ballots were counted differently from all other ballots because multiple changes to process were implemented and not replicated on the ballots that had been previously counted.

by counters, which included placing the ballots on the turntable and spinning it. Each counter typically had only a few seconds, or less, to record what they saw.¹⁰⁰ Occasionally, a counter would look up, realize that they had missed a ballot, and then grab the wheel to stop it.¹⁰¹ Speed does not necessarily pose a problem if the audit has a process for catching and correcting mistakes. This exercise, however, lacks that hand tally process.

Due to the previously mentioned accepted error rate, the batch was considered complete if two of the three counters' tallies matched, and the third was off by no more than two ballots. According to the *Policies*, the table counters were to recount the batch only if there were vote tally discrepancies when comparing their tally sheets of three or more votes. While some table leads complied with this policy and instructed the table counters to recount when there were too many errors, other table managers just instructed the counters to "fix" their "math mistakes" (requiring individual table counters to double- and triple-check their math).¹⁰²



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Voter Intent

The staff performing the counting were not provided with a copy of the Arizona state laws or procedures¹⁰⁴ that govern voter intent rules. Each member of the counting crew were told to look at the ballot and determine for whom they believed the voter intended

¹⁰⁰ Morrell, *supra* note 85.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Matt York/AP

¹⁰⁴ Arizona Procedures Manual Chapter 11, Section IX

https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

to vote. Process and procedures state that counters are not allowed to speak with the table managers or other staff when they are unsure of the situation; they must determine what they perceive the voter's intent to be without any instructions, conversations, or procedures.

Throughout the counting process, the majority of issues raised by the counters had to do with how to interpret marginal marks (e.g., when an oval is not completely filled-in), overvotes, write-ins, and undervotes. Also, because the Senate's contractors consider overvotes, undervotes, and write-ins as equivalent (i.e., these are combined on the tally sheet), there is no accuracy around this process and no ability to resolve discrepancies.

Duplicated Ballots

Many states, including Arizona,¹⁰⁵ have election officials "duplicate" certain ballots that cannot be read by a voting machine. For example, they may be torn, damaged, or stained, military and overseas ballots submitted electronically, provisional ballots in which the voter voted out of precinct, braille ballots, etc.¹⁰⁶ In these instances, ballots are generally duplicated by bipartisan teams¹⁰⁷ that verify that the duplicate ballot matches the respective candidates and contests from the original ballot the voter used. Then, the original ballot and its duplicate ballot are marked with a unique and corresponding serial number, an indicia mark, so the two ballots can be joined. The original ballots are then saved and the duplicate ballots are scanned and counted. Ordinarily, in an audit that requires a manual review of ballots, if the duplicated ballot is selected for the audit, the original will also be retrieved to ensure that voter markings were transferred correctly. In a recount, only the duplicated ballot will be rescanned or recounted. There are no known situations where any election official would count both the original ballot and the duplicated ballot. The only purpose for consulting the original ballot is to ensure that the voter markings were accurately transferred.¹⁰⁸

The Senate's contractors determined a process for tallying these ballots, after observers noticed damaged ballots spinning on a rotating tray, and inquired about it. The process, reportedly, was to tally the originals, but the tallies would not be included in aggregation. Soon after, observers were informed that the process had been modified. The new procedure was to count, tally, and aggregate the results of the original ballots, which

¹⁰⁵ ARS § 16-621(A)

¹⁰⁶ *Id.*

¹⁰⁷ Arizona Election Procedures Manual, Chapter 10 Section II ("Each Ballot Duplication Board shall be comprised of at least two members who are registered voters not of the same political party").

¹⁰⁸ *Id.* ("Place all original ballots in an envelope or container labeled 'ballots that have been duplicated'... It is never permitted to enhance or alter a voter's original ballot markings to render the ballot readable. Instead, the ballot should be duplicated.")

Maricopa County does not use for tabulation, instead of the duplicates, which Maricopa County does use for tabulation.

Observers also heard participants being instructed not to aggregate duplicate ballots and to handle other provisional ballots as regular ballots. Later, observers were told that tallies from the provisional ballots would be entered into a separate spreadsheet. It was unclear if Cyber Ninjas intended to include any of these in the aggregation process. The lack of clarity from the start about how to handle provisional ballots was quite concerning, especially as the policy appeared to change frequently.

Alarming, observers heard Senate Liaison Ken Bennett say that he "doesn't know why provisionals would be duplicated. I have never seen a provisional [ballot] that needs to be duplicated." As Bennett was the former chief election official in Arizona and the person providing election expertise consulting on the process, this remark was cause for concern among observers. There are as many potential reasons for a valid provisional ballot to be duplicated as there are for regular ballots to be duplicated.

An additional process related to the original and duplicated ballots was implemented in June. Observers noticed two teams of data entry participants at a paper examination station with military and overseas ballots and damaged ballots. The observers noted that the ballots were not being photographed, as had been done previously. Instead, the information was being entered into a spreadsheet. The Senate's contractors explained that this new process entailed documenting the indicia number, the vote for President, and the perceived rationale for why the ballot needed to be duplicated. Also, duplicated ballots would be entered along with the indicia number and the vote for president, and compared to the information entered from the original ballot. Although some of the tallying was done on camera, observers noted that the data-entry process was not, creating an opportunity to alter the data.

Ballot Box Storage

There was no consistency in how the Senate's contractors labeled and stored the boxes of ballots. In the "Completed Cage," some boxes were labeled as "Counted, Complete" while other boxes were labeled as "Counted, Examined, Complete." Blehm said that "Complete" meant that the quality control process had been finished. This was obviously inaccurate because quality control had not yet begun. When the observers called this to his attention, he responded with, "keep coming back and you'll see it start."

The matter of which cage a box of ballots was stored in was also inconsistent. Blehm had described to the observers that a box of ballots will not go into the "Completed Cage" until all counting and paper examination had been completed and that no other

examinations were needed. Later, the “Hand Audit Batch 19 of 52” box had been moved from the “Completed Cage” to the “In Process Cage.” When an observer asked Bennett about this, he stated that once a box was in the “Completed Cage,” it should not be removed. He did not have an explanation for this.

Aggregation

Aggregation is the process of compiling the individual tallies into the final results. The process should be clear, with established procedures that ensure checks and balances, and quality control processes. Data entry is a very tedious task that is ripe for errors.

There were no publicly-available procedures for the aggregation process. The observers consistently requested information about how the three separate tally sheets for every single batch would come together into a single set of results, but this was never provided. When the observers were authorized to bring a monocular so that they could see the data entry being conducted at the aggregation stations, participants routinely obfuscated the view, preventing meaningful observation of the data-entry and problem-resolution procedures. The Senate's contractors refused to provide observers with access to or detailed information about the aggregation process, databases, or spreadsheets (including macros).

Observers witnessed the Senate's contractors rushing to develop instructions, spreadsheets, and Access database(s), while changing multiple portions of the process. Operational consistency is critical for aggregated data to be considered reliable. The Senate's contractors failed to provide consistent processes or ensure that their entire team was aware of process changes occurring.

Aggregation Data Entry

Standard best practice for tallying data for election audits requires two-person bipartisan teams to enter the data. This provides an opportunity to detect errors in data entry. Aggregation was the most opaque portion of the exercise conducted at the Coliseum.

The most consistent aspect of the counting process was that all three tally sheets for each batch were entered into spreadsheets. Data entry was performed by multiple participants. The tally sheets were brought from the counting tables to the aggregation station by a runner, who would “check in” the tally sheets. During the check-in process, tally sheets were reviewed and placed into color-coded boxes. Participants doing data entry would retrieve the spreadsheets from these boxes and enter the information into a

spreadsheet. When the data entry was complete, the tally sheets were stored in boxes. However, this process was modified multiple times, creating complexity, confusion, and duplication of efforts.

Observers also realized that each of the data entry personnel were required to write on the tally sheets using a red pen, presumably to identify themselves as the reviewer. This was an immediate concern, since red pens were also used by the counting tables to designate an error or change. For instance, if a counting member made a tally mistake, they would cross it out and correct the error in red ink. Since each data entry personnel member is required to write on the tally sheets, a person could strike through the tally at the aggregation station and update the totals. This would be indistinguishable from the marks of the counter, creating another opportunity to manipulate the totals without detection.

Beginning on May 12, 2021, a group of staff began scanning tally control sheets and tally sheets onto a thumb drive. Prior to this, the tally sheets were only kept in a hard copy format. The explanation for this new process was twofold: 1) to make it easier to search for a specific tally sheet in case it needed to be reviewed, and 2) as an integrity check (i.e., so that the sheet could not be manipulated later, as previously described). The lack of clarity in the chain of custody for the tally sheets being scanned and the use of red pens were both major flaws in this process.

These flaws would make any manipulation of the tally sheets prior to scanning virtually undetectable and could produce manipulated evidence electronically. The observers also noticed that after scanning was completed, it had to be replicated after the pause in operations that occurred on May 14. Furthermore, once the new aggregation system was developed, the tally sheets had to be rescanned for a third time so that the tally sheet could be linked to the data that had been entered into the spreadsheet.

Process Used

During Phase 1, Blehm and Bennett told observers multiple times that a CPA firm would conduct the data aggregation. Observers were also told that aggregation had not started and that there were no procedures for aggregation because it was being outsourced. This is not a standard practice. However, when observers attempted to confirm this information, subcontractors from Wake TSI and from StratTech indicated that it was inaccurate.

Further, Kern explained that there were two databases and that each had the same data that ran through separate software. This allowed the Senate's contractors to compare the data in the two databases to compare the outcomes. Observers were

informed that “dozens of pages” of policies and procedures were written on the aggregation process and that procedures had to be modified to match StratTech’s system configuration. Observers requested a demonstration of the software. Instead, observers received a description of a process that did not match.

Observers were then told that there was only one software program and one database. The day before operations were paused, observers overheard someone asking if the aggregation software would even be used.

When Phase 2 began, after the hiatus, the observers noted no movement on the quality control or the aggregation processes. They did, however, notice that a new person was leading the aggregation process. And in early June, two more people began working on the master aggregation computer daily.

Additionally, in early June, observers noticed a crowd gathering around the master aggregation computer over what seemed to be a massive tallying error. Observers overheard one of the people in the crowd say that “it [would] take the rest of the audit” to correct the errors. After noticing that the observers were documenting the situation, the group moved to an area on the floor where observers were prohibited.

Quality Control

During Phase 1, observers were told that “if [the quality control] hasn’t started yet, it will start soon.” The observer indicated that the process had not yet started, and the following week, the observer was informed that the quality control process would begin during Phase 2.

In late May, observers noticed that a new spreadsheet had been developed for data entry staff. Observers saw that one member of the staff was having significant issues with the new spreadsheet. He was attempting to drag the data from the matching cells, instead of re-entering the information. However, instead of dragging (i.e, copying) the information, he would move the information to the next cell. This was creating a red “#REF” error in the row in cells beside the data which he moved.

This was the first time observers saw this error. Observers asked about it and learned that Cyber Ninjas employees had applied an electronic quality check on the data, and believed that was sufficient.

This red #REF cell indicated that further review was needed. Observers also noted that the checks were looking for items such as, “do the total number of votes add up to the total number of ballots?”

This process did not check for transposed numbers, a common occurrence during a hand tally, if the tallies from the three counters matched, or if they were counting the same ballot. This was a drastically insufficient quality control check.

During the second week of June, observers saw a new set of printed instructions entitled "Phase 1 Retrospective Quality Control." This was more than three weeks after the initiation of Phase 2, and more than a month after the observers had been told that the quality control stations and computers were set up. The observers were not allowed to obtain a copy of the "Phase 1 Retrospective Quality Control" procedures because the document was a draft, yet it was on each of the quality control stations and the data entry personnel were using it to rekey the data. Even though the document was titled "Quality Control", the observers witnessed data entry personnel rekeying all of the tally sheets into the spreadsheet that was introduced on May 24.

There were no additional checks. Observers indicated that it seemed to be referred to as Quality Control because the participants were using the revised spreadsheet that included the feature that flagged mismatched numbers. Observers witnessed data entry staff putting all of the data from the Red Modules into the new spreadsheet. Observers were not able to ascertain what happened to the original spreadsheets. They were told that any errors that occurred at a counting station would be "corrected" in the spreadsheet.

In mid-June, observers noted a new process being referred to as "quality control." This process has three phases: QCC, QCT, and QCTR. Observers believed that these initials stood for Quality Control Count, Quality Control Tally, and Quality Control Tally Retrospective. Observers additionally noted that:

- The QCC or Quality Control Count process appeared to be an attempt to count the number of ballots in a given batch and in an entire box, and to compare it to the number of ballots that Maricopa County recorded on the batch sheet.
- The QCT, or Quality Control Tally, process required participants to complete the counting process again. This was done by spinning the ballots on the turntable again to get a new tally of the entire box of ballots.
- The Quality Control Tally Retrospective process was added on June 19, 2021. Observers were unable to ascertain what the process entailed.

Overall, there was no information available about how tally differences would be reconciled, recorded, or which of the tallies would be considered correct. This provides another opportunity for the results of the tally to be altered. Observers noted that quality control processes lacked integrity and further renders the results unreliable.

Physical Examination

There may be instances in which a physical audit of the equipment will be reviewed in an election. As described earlier, Maricopa County brought in two independent firms to conduct forensic examinations of the equipment used in the election in order to check for any hardware or software on the machines that should not have been there. The forensic audits that were conducted found that the machines had not been tampered with. Nevertheless, the Senate Review called for examination of the machines, and also called for a physical examination of the ballots themselves. The paper examination process, also known as “paper forensic examination,” is an exercise that originated from debunked conspiracy theories about counterfeit ballots being introduced into the election.

Paper Examination

It quickly became evident that the Senate's contractors did not have the necessary expertise in ballot production, ballot printing, or in the processes for handling ballots that would have rendered their findings credible. Observers noted that while processes changed regularly, coinciding with the prevalence of new conspiracy theories or conjectures, these two steps remained constant:

Step 1: Take two photos of the entire ballot; the first photo is of the back of the ballot and the second photo is of the front of the ballot. This was done using a Canon 5k camera connected to a PC running the EOS software.

Step 2: Take a third photo using a microscope camera of particular areas of the ballot. These cameras were connected to the same computer, which was running an unnamed software.

A separate process, dismantled before a judge ordered the contractors to allow Secretary of State observers into the Coliseum, included putting ballots into a dark box and inspecting them under UV light, presumably for the purpose of. This process was developed in response to a conspiracy theory that counterfeit ballots from China would contain bamboo fibers.¹⁰⁹

Observers were provided a software demonstration and the items being captured. The following items were what was described:

¹⁰⁹ Levine, S. (2021, May 6). *Arizona Republicans hunt for bamboo-laced China ballots in 2020 'audit' effort*. The Guardian. <https://www.theguardian.com/us-news/2021/may/06/arizona-republicans-bamboo-ballots-audit-2020>.

The areas on the ballot which the microscope cameras captured included:

- Calibration mark in upper right (circle with +)
- Timing mark at the top right (black square)
- Bottom left area of blank paper—to see 'fibers' and 'security feature' of the paper
- Vote selection for president (filled-in oval)—except when an overvote or undervote was present. For an overvote, they choose a selection, since the intent was to determine whether the oval was filled with "ink or toner"

According to the procedures manual posted at each table, paper examiners were to look for the following ballot features:



Key for Flagging Anomalies
Folded or Unfolded
Missing Security Feature
Presidential Selection Mark
Weight and Toner
Other

The paper examination manager described that there was a software update with a new user interface on May 8, 2021, stating that "a lot has changed." The user interface then had the following buttons:



The paper examination manager told observers that this feature was added to the software so that the paper examination could automatically send the files to the correct folder on the server. He added that this was implemented because of human error and confusion stemming from the use of an "error folder" and manually moving the photos. After observers inquired further, he added that sending the images to the server was

also a new process. One copy of every photo went to the server and a second to an SD card. This was also a new process.

When each new box was started, a new SD card was inserted into the paper examination computer to capture all of the photos. Observers were told that this was done so that Maricopa County officials could receive a copy of all the photos taken. The SD card would be stored in the box with the ballots in a manila envelope, contradicting the previous claims to return the boxes of ballots back to the county “exactly as they were received.” Observers noted that the county should not accept the SD cards, and should refrain from introducing them into the election infrastructure.

From a cybersecurity perspective, unknown devices from questionable sources pose a significant threat to the network. From a practical standpoint, this action puts undue burden on the county, because it requires county officials to open every box and remove the electronics in order to ensure that the ballot boxes are returned in their original condition.

Initially, the paper examination manager told observers that they were capturing the data locally on a USB thumb drive, but were changing to SD cards because they were less expensive and did not require a USB-A port, leaving one open for additional uses. The observer acknowledged that each computer had a multi-USB hub and free USB ports, and inquired about what other uses would be needed for the USB port. The response was that there was no planned use; it just provided flexibility.

Observers noted that USBs were not previously seen in the paper examination computers. During the week of June 6, 2021, observers witnessed Cyber Ninjas employees copying photo images from the server onto SD cards for boxes that had been completed early in the process, and which had not previously contained an SD card. This contradicts the statement that the USB would be provided for the boxes that used it and that SD cards would only be provided moving forward.

These changes confused many of the paper examiners; observers noted that a person at paper examination table 9 stated that he was confused because the process changed from one day to the next. The paper examination manager replied, “that happens sometimes,” to which the paper examiner said, “every day, every day!”

Another paper examination manager, while describing the new software and process to paper examination table 12 personnel, stated that “[it] doesn’t mean it will be this way tomorrow, but it’s what we are doing today.” On multiple occasions, paper examination personnel complained about the microscopes falling out of place. The observers had heard the terms “fidgety” and “loose” to describe this ongoing issue.

Machine Examination

Observers were provided limited insight into the machine examination process. During their first day on site, observers asked Blehm for access to the machine examination. However, the following morning, the contractor returned a majority of the equipment to Maricopa County, stating that they had made a copy of the election management system server and central counting devices, so they no longer needed the hardware.

Observers further noted that the Senate's contractors were unable to analyze the precinct level tabulators, because they could not determine how to access the data they wanted to review. Except when stored in the trailer during the hiatus, these devices remained on the pallet, untouched until moved again. As the contractors loaded the voting equipment onto a trailer in preparation for the move from the Coliseum to another storage facility, observers saw four physical hard drives. The contractors informed observers that the images of the data that had been extracted from the voting equipment was on those hard drives.

Shortly thereafter, Bennett confirmed that copies of voting system data had been sent to a lab in Montana. He did not specify what security measures were in place, or what the lab in Montana would do with the data, or how long the copies would be in Montana.

Observers asked Bennett about the reports which stated that Ben Cotton, founder of CyFIR, a subcontractor, had driven the files to Montana. Bennett confirmed that Cotton did take the files, but he did not know when. The observers reminded Bennett that the observers had witnessed the hard drives being stored, locked, and sealed in the trailer. In order for Cotton to physically access the data and drive it to Montana, one of three things had to happen:

1. Cotton received the hard drives from the trailer on May 23, 2021, after the equipment had been shipped back to the Coliseum from storage.
2. There was another copy of the data that was not locked and sealed in the trailer.
3. Someone accessed the trailer in the storage location, unlocked, and unsealed the trailer to obtain the hard drives.

Bennett told observers that he did not know how Cotton had obtained the data, but he made a statement that Cotton was present on May 18, 2021, during a closed question and answer session with Senators Fann and Peterson. The physical examination of the machines remains unclear, as are the Senate's contractors plans for the paper ballot images..

On June 28, 2021, the Senate's contractors and Cotton told observers that they would be moving the remaining voting machine equipment from the cage in which it was

currently located into a cage on the counting floor. This was to alleviate the need for extra security. During the move, at approximately 3:40 p.m., observers witnessed Bennett, Cotton, and other staff removing voting equipment from the aluminum rack and stacking the equipment on the table. While being moved, the rack had to be lifted over an approximately 2-inch ramp. They were not able to lift the rack over the ramp. The rack's feet hit the ramp with such force that Rack 7 collapsed and broke into pieces. Voting system scanners fell on top of each other.

During the cleanup, the red, plastic, tamper-evident seals on multiple machines broke and fell onto the floor. The Senate's contractors, Bennet, Cotton, and Pullen were quick to blame Maricopa County and the manufacturer of the rack. Cotton also told observers that no equipment had been harmed in the process, without having fully examined or tested it. Observers also saw Cotton using his cell phone in the cage on the floor to take photos of one piece of equipment, which the observers later noted had either a broken or severely scratched screen. Later, the observers noticed multiple pieces of equipment with damage.

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Conclusion

All credible audits are characterized by controls, access, and transparency that allow for the processes and procedures to be replicated, if necessary. These standards are all the more important in a post-election audit, where the outcome affects our democracy. As this report has described, the review conducted by the Senate's contractors has consistently lacked all three of these factors. Procedures have been modified and changed throughout, observer and media access has been inconsistent and limited, and the process has been opaque. This exercise has been a partisan political review of the 2020 General Election for President and U.S. Senator in Maricopa County. It was unnecessary and has undermined public confidence in accurate and secure elections that were conducted in 2020.

Maricopa County conducted both statutorily required, as well as voluntary pre- and post-election tests and audits. In an attempt to assure the public, the county also had not one, but two independent, accredited Voting Systems Test Labs conduct an audit of the ballots and equipment involved in the 2020 General Election. The election results also withstood legal scrutiny, when, in multiple lawsuits challenging the results of the election, judge after judge found that there was no credible evidence of wrong-doing or widespread fraud during the 2020 General Election.

Senators Fann and Peterson insisted on conducting this review despite the long-lasting damage their actions are having on these democratic institutions. Similar attempts to undermine the election results are spreading to other states and communities purely because some elected leaders refuse to accept the results of the election and tell their constituents the truth -- that the 2020 election cycle was secure.

It is clear that any "outcomes" or "conclusions" that are reported from the Senate's review, by the Cyber Ninjas or any of their subcontractors or partners, are unreliable. As such, it is imperative that leaders across the state and country proclaim that the 2020 General Election was fair and accurate. The voters in Maricopa County turned out, despite ongoing challenges, and made their voices heard. The right to vote is a preeminent feature of American democracy and must be honored.