

**ARIZONA COURT OF APPEALS  
DIVISION 2**

ARIZONA ALLIANCE FOR  
RETIRED AMERICANS, INC. and  
STEPHANI STEPHENSON,

Plaintiffs-Appellees,

v.

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 MARA, in  
her official capacity as the Cochise  
County Elections Director,

Defendants-Appellants.

No. 2CA-CV2022-0136

Cochise County Superior Court  
No. CV2022-00518

**APPELLANTS' OPENING BRIEF**

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## INTRODUCTION<sup>1</sup>

Every general election, each county in Arizona that uses tabulation machines must count some ballots twice—once by machine and once by hand. Counties must meet certain minimums as to the number of ballots that are recounted but have the discretion to count more if they wish. Prior to election day, the elected Cochise County Board of Supervisors (“Board”) and the elected County Recorder chose to exercise this discretion to conduct an expanded hand count of all the ballots cast in the 2022 General Election. Appx. 0006 at 5:16-18. By law, this expanded hand count must be completed prior to the canvass of election results. A.R.S. § 16-602(I).

As Stephani Stephenson, the individually named Plaintiff, testified, the hand count process has never harmed her in any way despite its longstanding use. Appx 0260 at 36:21-23. In actual fact, no voter would or could be harmed by what the County has voted to do because no possible harm can result from having one’s ballot counted twice to confirm the accuracy of the count. Nevertheless, the afternoon prior to the election, the trial court entered a writ of mandamus prohibiting the County from proceeding with its 100% hand count of all ballots—“day-of” and early alike. Appx. 0213.

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<sup>1</sup> Appellants respectfully request leave of this Court to dispense with the Table of Contents, Table of Authorities, and hyperlinks to the law due to the time constraints owing to the emergency nature of this action.

Expanded hand counts to assuage voter concerns are not new. Indeed, a few years ago, Maricopa County conducted its own expanded hand count to assuage voter concerns regarding the 2020 General Election, something that none of the named Plaintiffs in this case challenged. Appx. 0308. This case revolves around two subparts of A.R.S. § 16-602. While nothing in Title 16 expressly requires counties to use electronic tabulators to begin with, A.R.S. § 16-602(B) provides the rule for hand count audits of **election day ballots** when counties do use tabulators. *See* A.R.S. § 16-602(A) (statute applies to “any primary, special or general election in which the votes are cast on an electronic voting machine or tabulator”). The statute further provides: “**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” for a hand count audit. A.R.S. § 16-602(B)(1). By the plain language of the statute, counties may elect to audit a greater percentage.

A.R.S. § 16-602(F) controls hand count audits of **early ballots** for races in which electronic tabulation is used. It provides that a “number equal to one percent of the total number of early ballots cast or five thousand early ballots, whichever is less” are to be recounted by hand. The statutory text is not clear on whether counties may count more early ballots than this, but the (currently operative) 2019 Elections

Procedures Manual<sup>2</sup> (“EPM”), which also has the force of law, provides: “The officer in charge of elections is required to conduct a hand count of 1% of the total number of early ballots cast, or 5,000 early ballots, whichever is less. A.R.S. § 16-602(F). **Counties may elect to audit a higher number of ballots at their discretion.**” EPM at 215. Even Secretary of State Katie Hobbs, who drafted the EPM, conceded this fact. Appx. 0157 at n. 4. Plaintiff Stephenson, meanwhile, conceded that, if the law in place allows counties to elect to audit a higher number of ballots in their discretion, she would “be happy with that...” Appx. 0298. The president of Plaintiff AARA agreed:

*Q. If Secretary Hobbs in her capacity as the Secretary of State were to issue an elections procedure manual in 2021 that specifically and very clearly allowed counties, such as Cochise County, to count more ballots than a minimum required by law in an audit, would you support that?*

*A. Yes.*

Appx. 0288-0289 at 64:25-65:6.

However, even though identical language was included in the draft 2021 EPM that Secretary Hobbs prepared, she nonetheless argued (as amicus) that “[s]ince the issuance of the 2019 EPM...both the factual and legal landscape have changed in material ways,” justifying a finding that the provision was “invalid and

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<sup>2</sup> The current text of the EPM is available at [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).



without the force and effect of law.” Appx. 0157-0158 at n. 4. Factually, she claimed that “previously routine aspects of election administration have come under increasing attack by proponents of baseless election conspiracy theories.” *Id.* Obviously, however, this does not change the law. Legally, she claimed on the basis of *McKenna v Soto*, 250 Ariz. 469 (2021), that “the Arizona Supreme Court has begun to scrutinize and invalidate specific EPM provisions that either conflict with a statute or do not have specific statutory authorization.” Appx. 0157-0158 at n. 4. But *McKenna v. Soto* reaffirmed that the EPM’s procedures for “collecting, counting, tabulating and storing ballots” are the law. 250 Ariz. at 473 ¶ 20. It was provisions outside of these topics that lacked specific statutory authorization and could, therefore, be invalidated. *Id.* Nonetheless, Secretary Hobbs, and the nominal Plaintiffs, successfully convinced the trial court to change the law, in the middle of an election, to suit the Secretary’s new policy preferences.

Especially in light of the recent and well publicized election-day issues with Maricopa County’s electronic voting system,<sup>3</sup> voter confidence in the accuracy of electronic tabulation is at an all-time low. Cochise County can still finish the labor

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<sup>3</sup> See, e.g.,

<https://www.azcentral.com/story/news/politics/elections/2022/11/08/arizona-election-problems-maricopa-county-tabulator-issues/8302133001/>,  
<https://www.12news.com/article/news/politics/elections/decision/tabulators-down-people-can-still-vote-maricopa-county-officials-say/75-9de41949-f2d2-4314-9a37-2724ae1d1150>

intensive 100% hand count and reassure voters that their election has been free and fair, but by law it must do so before the canvass in late November.<sup>4</sup> Accordingly, though this controversy is certainly the type of matter that could easily repeat in such a way as to evade review, the matter is in urgent need of rectification for *this* election cycle.<sup>5</sup>

### STATEMENT OF THE CASE AND JURISDICTION

Late in the afternoon of November 7, 2022, visiting Pima County Superior Court Judge Casey F. McGinley, sitting as a judge of the Superior Court for Cochise County, issued his Ruling in this case, Appx. 0213, from which this appeal is taken by Appellants. The Ruling issued after an all-day trial on November 4, 2022, during which evidence and testimony was taken.

In addition to the testimony of witnesses, the court had before it briefs filed by Defendant David Stevens (the elected Recorder of Cochise County) and the Board of Supervisors of Cochise County, and the court also granted the motion of Secretary Hobbs (also a current candidate for Governor) to file an amicus brief but denied her request to appear and argue.

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<sup>4</sup> Cochise County has already commenced the hand count process as required by law in conformity with the scope of the trial court's order.

<sup>5</sup> This appeal could not have been filed earlier because, by law, the Board of Supervisors was required to give a 24-hour notice before meeting to authorize this appeal.

The Ruling adjudicated the Petition for Writ of Mandamus, or in the Alternative, Motion for Preliminary Injunction, filed on October 31, 2022, by the Appellees, Plaintiffs below. The relief sought by the Petition was to stop Recorder Stevens from performing a recount by hand of all ballots cast in the General Election scheduled for November 8, 2022. On October 24, 2022, the Board had directed the Recorder to perform a hand recount of all ballots cast in the General Election, whether early, mail-in, or day-of ballots. By the Ruling, the court granted the relief requested and enjoined the recount of all ballots.

The Ruling is a final appealable order that disposes of all of the issues presented in the case. A.R.S. § 12-2101(A)(1) (final judgment in an action or special proceeding commenced in superior court); A(5)(b) (granting an injunction).

This Court has jurisdiction to hear this appeal. A.R.S. § 12-120.21(A)(1). Venue is proper in this Division as the Ruling was issued by the Cochise County Superior Court, which is in this Division. A.R.S. § 12-120.21(B).

### **STATEMENT OF THE FACTS**

The operative facts are largely uncontested. On October 24, 2022, by a 2-1 vote the Cochise County Board of Supervisors, finding that it was “widely known that many voters lacked confidence in the voting system” and that “[a] 100% County wide audit of the 2022 General Election [would] enhance voter confidence,” adopted a resolution requiring the County

Recorder or other officer in charge of elections “to perform a hand count audit of all County precincts for the 2022 General Election.” Appx. 0214.

The Board acted in reliance on an informal legal opinion from the Arizona Attorney General explaining that the Board had the discretion, pursuant to statute and the EPM (which also has the force of law), to perform a hand recount of all ballots cast. Appx. 0075.

On October 31, 2022, Plaintiffs collectively filed a special action with the Cochise County Superior Court seeking a declaratory judgment and injunctive relief to prevent the full hand count audit. Additionally, they filed a Petition seeking either a writ of mandamus or a preliminary injunction to prevent the proposed full hand count audit of the election. Appx. 0214-0215.

Plaintiff Arizona Alliance for Retired Americans, Inc., is a 504(c)(4) nonprofit organization which represents retired people from every county in Arizona on a variety of issues (“AARP”). Appx. 0214. Their membership

includes 1,200 to 1,300 residents of Cochise County. *Id.* The AARP’s primary stated objective is to “enroll and mobilize retired union members and other

senior and community activists into a nationwide grassroots movement advocating a progressive political and social agenda—one that respects work and strengthens families.”<sup>6</sup> On



October 19, 2022, Plaintiff

AARP endorsed a slate of Democratic candidates: Mark Kelly, Katie Hobbs, Adrian Fontes, Kris Mayes, Kathy Hoffman, and others.<sup>7</sup> Plaintiff Stephani Stephenson is a Cochise County resident who cast an early ballot for the 2022 election. Her ballot has been accepted, validated, and is ready for tabulation. Appx. 0214.

Defendant David Stevens (Defendant Stevens) is the duly elected County Recorder for Cochise County. Appx. 0215. His office is responsible for, among other statutory requirements, registering voters, providing early ballots, and ensuring that early ballots are properly provided to the County

<sup>6</sup> See <https://arizona.retiredamericans.org/about-us/> (last accessed 11/8/2022).

<sup>7</sup> See <https://www.facebook.com/azretiredams/>.

Elections Director for tabulation. *Id.* However the County’s authority to conduct hand count audits is typically delegated to Director Mara. *Id.* He is intimately familiar with the 2019 EPM because he participated in drafting it. Appx. 0316-0317. The 2019 EPM was promulgated by Secretary Hobbs after consultation with recorders across the state and is the currently governing EPM.

Defendants Tom Crosby, Ann English, and Peggy Judd (Defendant Board of Supervisors) are the duly elected members of the Cochise County Board of Supervisors, which voted to adopt the full hand count audit procedure challenged by Plaintiffs. Appx. 0214-0215.

Defendant Lisa Marra (“Marra”) is a nominal defendant in her capacity as the appointed Elections Director for Cochise County, but she agrees that Plaintiffs are entitled to the relief they seek. She has already started the process of tabulating early ballots and sequestering ballots for the statutorily required audit as required by A.R.S. § 16-602(I). Appx. 0215.

### **STATEMENT OF THE ISSUES**

1. Did the trial court err in finding that A.R.S. § 16-602(B) prohibits the County from performing a hand count audit of all election-day ballots when, as it acknowledged, “[a] plain reading” of A.R.S. § 16-602(B)(1) “permits

elections of officials to lawfully choose to hand count” as many such ballots as they please? Appx. 0220.

2. Did the trial court err in finding that A.R.S. § 16-602(F) prohibits a county from performing a hand count audit of more than 5,000 early ballots when the EPM provides that “Counties may elect to audit a higher number of [early] ballots at their discretion”? 2019 EPM at 215.

### STANDARD OF REVIEW

Appellate courts review questions of legal construction de novo. *Fitzgerald v. Myers*, 243 Ariz. 84, 88 ¶ 8 (2017).

### ARGUMENT

- I. **The trial court erred by adopting an absurd construction of A.R.S. 16-602(B) contrary to its plain meaning.**

The trial court’s interpretation of A.R.S. § 16-602(B) was guided by the subpart’s requirement that the ballots to be recounted by hand be randomly selected. Appx. 0220. The trial court reasoned that because a 100% hand count, by definition, does not involve random selection, the statute cannot be read to authorize a 100% hand count of election day ballots. Under the trial court’s reasoning, the County can hand count 99% of election day ballots but not 100%. This is absurd.

The rule of random selection is an eminently sensible one. Political preferences are not homogenous but vary across several categories. For example, rural areas tend to be much more Republican than the average, while urban communities tend to be

much more Democratic.<sup>8</sup> If the ballots to be recounted are not randomly selected, then the potential for elections officials to put their thumbs on the scale by picking ballots to recount that are likely to favor their side is obvious (e.g., a Democratic elections official might choose to recount only those ballots from vote centers in predominantly urban areas in the hopes that the result would favor Democrats).

But these concerns, as per Recorder Stevens' uncontradicted testimony, are not implicated when there is a 100% hand count because there can be no possibility of bias with a 100% hand count. Appx. 0393 (The point of the random sample portion of a random sample hand-count audit is "to prevent bias." [Recorder Stevens]). As he further explained: "If you're selecting them all, there is no bias involved." *Id.* at 0394. Even Director Mara agreed with this assessment. *Id.* at 0475.

It in no way renders the random selection safeguard "void, inert, or trivial" to recognize that it has no applicability in the one and only situation in which it is not needed—a 100% hand count. *See Marshall v. Marshall (In re Marshall)*, 403 B.R. 668, 678 (C.D. Cal. 2009) ("[T]here has been no showing that Judge Bufford was biased or prejudiced, or that a reasonable person could perceive as much. Accordingly, the policies of random assignment—i.e. avoiding bias and the appearance of impropriety—**are not implicated** by the assignment.") (emphasis supplied). But this

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<sup>8</sup> See <https://morningconsult.com/2022/02/22/rural-voters-polling-democrats-face-electoral-demise/>.



hardly undermines legislative intent to prevent bias in the hand counting since, again, it is **impossible** for a 100% hand count to contain a biased selection to begin with. Therefore, the trial court's reasoning that the random selection safeguard acts as a prohibition on a 100% hand count ignores legislative intent. It is exactly the sort of "overly technical construction," *Gosnell v. Phoenix*, 126 Ariz. 121, 122 (1980), resulting in "absurd and unreasonable" results, *State v. McFall*, 103 Ariz. 234, 238 (1968), that courts are required to eschew.

**II. The trial court erred in failing to find that the County had lawful authority to conduct a 100% hand count of early ballots pursuant to the EPM.**

**A. The EPM, which has the force of law, expressly authorizes the 100% hand count of early ballots. It is the EPM, not statute, that establishes any requirement of machine counting and the EPM is free to modify it.**

The EPM expressly authorizes a 100% hand count of early ballots:

The officer in charge of elections is required to conduct a hand count of 1% of the total number of early ballots cast, or 5,000 early ballots, whichever is less. A.R.S. § 16-602(F). **Counties may elect to audit a higher number of ballots at their discretion.**

2019 EPM at 215 (emphasis supplied).

This provision has the force of law. *See Ariz. Pub. Integrity All. V. Fontes*, 250 Ariz. 58, 63 (citing A.R.S. § 16-452I) ("Once adopted, the EPM has the force of law."). Indeed, "[t]he legislature has **expressly delegated** to the Secretary the authority to promulgate rules and instructions for early voting [via the EPM]." *Ward*

*v. Jackson*, 2020 Ariz. LEXIS 313, at \*5 (Dec. 8, 2020) (emphasis supplied). In these areas, the EPM speaks for the legislature.

Indeed, nothing in Title 16 imposes a requirement that counties count ballots by machine at all rather than by hand. Instead, Title 16 makes clear that the use of ballot-tabulating machines is, by default, discretionary. *See* A.R.S. § 16-443 (“At all...elections, ballots or votes **may** be...counted by voting or marking devices and vote tabulating devices as provided in this article.”) (emphasis supplied). *See also* Appx. 0412. Rather, it is the EPM, not Title 16, that is the source of any **requirement** that counties tabulate votes by machine. *See* EPM at 76 (arguably mandating that voting systems must include an electronic tabulation component). The EPM having created any requirement of machine counting in the first instance, it is naturally free to modify it by providing that counties may, at their discretion, count more ballots than 5,000 by both machine and hand. This is perfectly sensible since the results printed by vote tabulating equipment only constitute the official canvass “when certified by the board of supervisors.” A.R.S. § 16-622(A). The act of certifying the canvass is not ministerial. Rather, according to the U.S. Election Assistance Commission:

The purpose of the canvass is to account for every ballot cast and to ensure that each valid vote is included in the official results. For an election official, the canvass means aggregating or confirming every valid ballot cast and counted—absentee, early voting, Election Day, provisional, challenged, and uniformed and overseas citizen. The canvass enables an election official to resolve discrepancies, correct

errors, and take any remedial actions necessary to ensure completeness and accuracy before certifying the election.<sup>9</sup>

In other words, the County is required to satisfy **itself** that the results are accurate before certifying an election. The discretion conferred by the EPM to recount by hand as many ballots as is required in order to obtain such satisfaction is thus a natural corollary of the County's power to certify the canvass. Thus, the trial court erred in finding that the "[EPM] clause at issue cannot be relied upon to conduct a full hand count audit." Appx. 0221.

**B. Alternatively, the EPM has the force of law and *can* be harmonized with ARS 16-602(F). Therefore, it *must* be harmonized.**

The law requires courts, wherever possible, to harmonize laws that appear in conflict. "Any differences [between two laws] **must be reconciled**, if such is possible." *Hughes v. Martin*, 203 Ariz. 165, 168 (2002) (emphasis added). Harmonization is possible if a "consistent workable whole" can be achieved even if two laws are "seemingly in conflict." *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969). As the Attorney General, the Secretary of State, and the Governor all realized when they jointly approved the 2019 EPM,<sup>10</sup> the discretion of counties to

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<sup>9</sup> Available at

[https://www.eac.gov/sites/default/files/eac\\_assets/1/6/EMG\\_chapt\\_13\\_august\\_26\\_2010.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/EMG_chapt_13_august_26_2010.pdf).

<sup>10</sup> Indeed, even the Secretary's proposed draft 2021 EPM contains the operative language. *See*

[https://azsos.gov/sites/default/files/2021\\_EPM\\_Draft\\_for\\_Public\\_Cmt.pdf](https://azsos.gov/sites/default/files/2021_EPM_Draft_for_Public_Cmt.pdf) at 223.

hand count more than 5,000 early ballots is not in direct conflict with the language of A.R.S. § 16-602(F). See *Washburn v. Pima Cty.*, 206 Ariz. 571, 576 ¶ 11 (App. 2003) (courts presume that lawmakers are “aware of existing statutes” when they make new law). In finding that the two sources of law could not be harmonized, the trial court erred. Appx. 0221.

Indeed, the EPM and A.R.S. § 16-602(F) can be easily harmonized by construing A.R.S. § 16-602(F) in light of its purpose and legislative intent, as this Court must. *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996). For “[t]he goal of statutory construction is “to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). Accordingly, a court is to “interpret statutes ‘in such a way as to achieve the general legislative goals that can be adduced from the body of legislation in question.’” *Zamora*, 185 Ariz. at 275 (citing *Dietz v. General Electric Co.*, 169 Ariz. 505, 510 (1991)).

The court’s reasoning with respect to A.R.S. § 16-602(F) suffers from similar faults to its reasoning with respect to A.R.S. § 16-602(B). Namely, it is overly technical<sup>11</sup> and disregards the statutory intent and purpose. The statute exists because

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<sup>11</sup> For example, taking the trial court’s reasoning that subpart (F) mandates that counties must count a number of early ballots exactly equal to one percent of the total vote centers or 5,000, whichever is less, at face value, the County could never comply because the County has less than 20 vote centers, meaning that selecting even one vote center would put the County over the maximum. Further, the number of ballots cast at any given vote center never equals exactly 50,000.

the legislature thinks it is a good thing to hand count ballots as a check on machines. To the extent that either statute contains limiting rules, those rules plainly exist to prevent the possibility of bias in the selection of ballots to be hand counted, which cannot exist in a 100% hand count. Like the similar limitations in (B), the limitations in (F) serve the useful purpose of preventing elections officials from putting their thumb on the scale. In subsection (F), the concern is focused on eliminating the possibility of bias by preventing elections officials who choose to recount less than 100% of ballots from stopping the count at an arbitrary number that favors their preferred candidate. Obviously, this is not a harm that must be safeguarded against when the County has made a decision before the election to count 100% of the ballots (though these safeguards would do valuable work in the event of a hand count of any lesser number of ballots).

If laws “relate to the same subject or have the same general purpose—that is...are in *pari materia*—they should be read in connection with, or should be construed together with other related [laws], as though they constituted one law.” *State ex rel Larson v. Farley*, 106 Ariz. 119, 122 (1970). Reading the EPM and A.R.S. § 16-602(F) as one law, it is apparent that subsection (F) can be harmonized by construing subsection (F) as providing fixed and definite points at which a hand count must be terminated to avoid the possibility of bias if the County has decided to initially count less than 100% of ballots by hand. The trial court erred by not

construing the statute and the corresponding provision of the EPM in this harmonious way.

### **CONCLUSION**

WHEREFORE Appellees pray that the trial court's Ruling be REVERSED and the conduct of a 100% hand count audit be DECLARED to be within the County's rightful authority. Alternatively, Appellees pray that this court REVERSE the decision of the trial court as to a 100% hand count of election day ballots.

### **RULE 21(A) NOTICE OF CLAIM FOR COSTS**

Appellants request costs below and on appeal pursuant to Ariz. R. Civ. App. P. 21, A.R.S. § 12-332, and other applicable law.

**RESPECTFULLY SUBMITTED** this 10th day of November 2022.

**Davillier Law Group, LLC**

By: /s/ Alexander Kolodin

Alexander Kolodin

Veronica Lucero

Roger Strassburg

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By: /s/ Bryan Blehm (with permission)

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*Attorney for the Board of Supervisors Appellants*

**ARIZONA COURT OF APPEALS  
DIVISION 1**

ARIZONA ALLIANCE FOR RETIRED  
AMERICANS, INC. and STEPHANI  
STEPHENSON,

Appellees,

v.

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 MARA, in her  
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Elections Director,

Appellants.

No.

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**APPENDIX TO ANSWERING BRIEF**

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Respectfully submitted this 10<sup>th</sup> day of November, 2022

**Davillier Law Group, LLC**

By: /s/Alexander Kolodin

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*Appellants*

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SUPERIOR COURT, STATE OF ARIZONA, In and for the County of Cochise

ARIZONA ALLIANCE FOR RETIRED AMERICANS, INC., AND STEPHANI STEPHENSON,

Plaintiff(s),

vs

TOM CROSBY, ANN ENGLISH, AND PEGGY JUDD, Cochise County Board of Supervisors; DAVID STEVENS, Cochise County Recorder; LISA MARRA, Cochise County Elections Director,

Defendant(s).

Case No. CV20220518

ORDER REASSIGNMENT OF JUDGE

2022 OCT 31 PM 4:18  
BY: B.M. DEPUTY

HONORABLE TIMOTHY B DICKERSON  
DIVISION FOUR

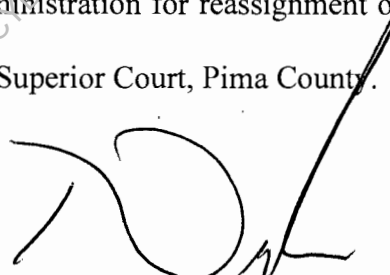
By: Lizette Castaneda- Arroyo  
Judicial Administrative Assistant

Having reviewed this matter, the Court FINDS that it is appropriate and in the Interest of Justice that it be heard by an Out-of-County Judge.

IT IS ORDERED referring this matter to Court Administration for reassignment of Judge. The matter will be reassigned to Honorable Kellie Johnson, Judge of the Superior Court, Pima County.

OCT 31 2022

DATED: \_\_\_\_\_

  
HONORABLE TIMOTHY B DICKERSON  
PRESIDING JUDGE OF THE SUPERIOR COURT  
FOR COCHISE COUNTY

mailed/distributed: B.M. 10/31/22

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

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

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

27 Plaintiffs,

28 v.

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PHOENIX, ARIZONA  
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No. **CV 202200518**

**PETITION FOR WRIT OF  
MANDAMUS, OR IN THE  
ALTERNATIVE MOTION FOR  
PRELIMINARY INJUNCTION  
(Expedited relief requested)**

1 TOM CROSBY, ANN ENGLISH, and  
2 PEGGY JUDD, in their official capacities  
3 as the Cochise County Board of  
4 Supervisors; DAVID STEVENS, in his  
5 official capacity as the Cochise County  
6 Recorder; and LISA MARRA, in her  
7 official capacity as the Cochise County  
8 Elections Director,

9 Defendants.

10 Pursuant to Rule 4(c) of the Arizona Rules of Procedure for Special Actions,  
11 Plaintiffs hereby petition this Court for a writ of mandamus, or in the alternative, pursuant  
12 to Rules 57 and 65 of the Arizona Rules of Civil Procedure, move for a preliminary  
13 injunction. Defendants' plan to conduct a full hand count audit of all early ballots clearly  
14 violates Arizona law. Plaintiffs request that the Court order Defendants to Conduct hand  
15 count audits of early ballots only as permitted by and in accordance with A.R.S. § 16-602  
16 and the Election Procedures Manual, and prohibit Defendants from conducting a hand count  
17 audit of all early ballots. This request is supported by the following Memorandum of Points  
18 and Authorities.

## 19 MEMORANDUM OF POINTS AND AUTHORITIES

### 20 INTRODUCTION

21 Arizona law carefully prescribes—and expressly limits—how manual hand count  
22 audits of early ballots are performed. Within 24 hours of the election but no later than the  
23 deadline for the county canvass, election officials must randomly select *at most* 5,000 early  
24 ballots to audit by hand. A.R.S. §§ 16-602(F), (I). Only if the difference between the hand  
25 count and the electronic count twice meets or exceeds a designated margin as to a given  
26 race may officials increase the sample size of ballots to be manually audited for that race,  
27 but even then they may add no more than 5,000 ballots to the sample. *Id.* § 16-602(F). If at  
28 any step of this process the results of the hand count fall within the designated margin of  
error, the electronic count is canvassed “and *no further manual audit of the early ballots*  
*shall be conducted.*” *Id.* (emphasis added).

1 Arizona law thus clearly and expressly prohibits county officials from conducting a  
2 hand count audit of ballots beyond the limited sample size allowed by statute, let alone all  
3 early ballots cast in the election. Against the advice of its own County Attorney and the  
4 Secretary of State, the Cochise County Board of Supervisors (the “Board”) plans to conduct  
5 a full audit of all early ballots cast in the 2022 general election (the “Full Early Ballot  
6 Audit”). But hand counting all early ballots is not permitted under Arizona law, which  
7 prescribes the exclusive procedures by which election officials must audit election results.  
8 Such an approach is not only unlawful, but also risks undermining both the integrity of the  
9 election and voter confidence in the election results and threatens to delay Cochise County’s  
10 ability to timely certify results.

11 Because hand-counting all early ballots would be contrary to Arizona law, Plaintiffs,  
12 including Cochise County voters, are entitled to a writ of mandamus compelling Defendants  
13 to conduct their audit in compliance with Arizona law. Plaintiffs are separately entitled to a  
14 preliminary injunction enjoining Defendants from conducting such an audit. This Court’s  
15 intervention is necessary to prevent an unlawful, chaotic, time-consuming, and unnecessary  
16 audit, which has a significant likelihood of delaying Cochise County’s certification of the  
17 2022 general election results and, at minimum, will seriously undermine voter confidence.

## 18 BACKGROUND

### 19 **I. Although Arizona’s voting machines and practices are subject to rigorous 20 scrutiny, some are determined to end the state’s reliance on them.**

21 Every election cycle, Arizona’s election equipment undergoes thorough testing by  
22 independent, neutral experts, *see* A.R.S. § 16-442(A), (B), as well as four independent  
23 audits, two before the election, and two after. The pre-election audits include (1) a logic and  
24 accuracy test performed by the Secretary of State on a sample of the tabulation equipment,  
25 *see* A.R.S. § 16-449(A), (B); and (2) a logic and accuracy test performed by the counties on  
26 all tabulation equipment, *see* 2019 Arizona Elections Procedures Manual (“EPM”) at 86.<sup>1</sup>

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27 <sup>1</sup> The Secretary of State promulgated the operative Election Procedures Manual in 2019.  
28 The Manual has the force of law unless it contradicts statutory requirements. *See* A.R.S.

1 The post-election audits include (3) a limited hand count of a small percentage of ballots  
2 overseen by both county election officials and representatives of the political parties, *see*  
3 A.R.S. § 16-602(B), (F), and; (4) post-election logic and accuracy testing performed by the  
4 counties, *see* EPM at 235.

5 In the aftermath of the 2020 general election, however, some who continue to  
6 question the validity of the 2020 election have aggressively pushed to end Arizona’s use of  
7 voting machines, which they claim cannot be trusted. In 2021, this effort culminated in a  
8 months-long and expensive effort by a partisan cybersecurity group, the Cyber Ninjas, to  
9 hand count all of Maricopa County’s ballots from the 2020 general election. That “audit,”  
10 despite its many shortcomings, only confirmed that President Biden won the election and  
11 that Maricopa County’s results were accurate. As the Secretary’s Office has explained,  
12 “[t]he 2020 election was secure and accurate, and it is well past the time to accept the results  
13 and move forward.” Ex. G at 5.<sup>2</sup>

14 But the crusade against voting machines and in favor of election conspiracies has  
15 persisted into 2022. Earlier this year, Representative Mark Finchem and candidate Kari  
16 Lake sued to ban the use of voting machines and electronic ballot tabulation equipment in  
17 Maricopa and Pima Counties, seeking to require county election officials to hand-count all  
18 ballots during the 2022 elections. *See Lake v. Hobbs*, 2022 WL 3700756, No. 2:22-cv-  
19 00677 (D. Ariz. Aug. 26, 2022). This past August, a federal judge dismissed their suit and  
20 denied a preliminary injunction, finding that their claims of election hacking were far too  
21 speculative to create a justiciable case. *Id.* at ECF No. 100. More importantly, however, the  
22 court found that conducting a hand count of election results would not be in the public  
23 interest, citing a lack of any evidence that a hand count would be more accurate, the

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24  
25 § 16-452; *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (Ariz. 2020); *Leibsohn v.*  
26 *Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz. 2022). The manual is available at:  
[https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APP](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)  
ROVED.pdf.

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

1 impossibility of conducting a hand count without enormous resources, and the expectation  
2 that “the results of the election would be delayed.” *Id.* at \*2 n.1.

3 That conclusion was correct. In contrast to voting machines, which are subject to  
4 rigorous standards, hand counting ballots is an unreliable method. Studies have found that  
5 “vote counts originally conducted by computerized scanners were, on average, more  
6 accurate than votes that were originally tallied by hand.” Stephen Ansolabehere, Barry C.  
7 Burden, Kenneth R. Mayer, & Charles Stewart III, *Learning from Recounts*, 17 Elec. Law  
8 J. 100, 115 (2018), <https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440> (last  
9 visited Oct. 30, 2022). Hand counting is also extremely time-intensive. The so-called  
10 “audit” of the 2020 Maricopa County results as to only two contests took the Cyber Ninjas  
11 six months to complete. As the Secretary’s Elections Director has explained, “[a]ny election  
12 director in Arizona—the official responsible for overseeing tabulation of ballots—can attest  
13 that it’s impossible to complete an accurate hand count of an election . . . in time to comply  
14 with applicable statutory deadlines, including the county canvass deadline.” Ex. A.

15 **II. Defendants are planning to conduct a hand count audit of all early ballots**  
16 **despite repeated warnings that it is unlawful.**

17 By mid-October, it became clear that the Board was considering conducting a hand  
18 count audit of all ballots cast in the 2022 General Election, including of all early ballots. On  
19 October 19, 2022, in a letter to the Board on behalf of the Secretary, State Elections Director  
20 Kori Lorick warned against an eleventh-hour full hand count audit, emphasizing that it  
21 would create a “significant risk of administrative error” and could “cause voter confusion  
22 and mistrust” in the election. Ex. A. The Secretary’s Office explained that, “[w]hile A.R.S.  
23 § 16-602 and the [EPM] lay out procedures for a limited post-election hand count audit,  
24 nothing in Arizona law authorizes the Board to conduct a full hand count outside of those  
25 procedures.” *Id.* At the Board’s October 24 meeting, the Cochise County Attorney Brian  
26 McIntyre echoed these same concerns to the Board, stating:

27 There is no statutory authorization for this proposed separate hand count or  
28 validation. It violates the Election Statutes and the [EPM] . . . . Because I have  
advised you that there is no legal basis for this, I cannot ethically defend you

1 against any claims over this action. . . . I implore you, do not attempt to order  
2 this separate hand count.

3 Video Recording of October 24, 2022 Special Meeting Hand Count of Ballots (“October 24  
4 Special Meeting Video”) at 2:59:25–3:03:13.<sup>3</sup>

5 At that time, the Board voted *not* to conduct “a hand count of all ballots cast in the  
6 General Election.” *Id.* at 3:06:02-3:06:20; *see also* Ex. B. But in the final minutes of the  
7 meeting, the Board considered and by a 2-1 vote adopted another proposal, which  
8 authorized a hand count of all Election Day ballots (the “October 24 Audit Measure”):

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

14 *Id.* at 3:42:09–3:43:09; Ex. B.

15 Shortly after the Board’s meeting, the Secretary of State sent another letter to  
16 Cochise County, seeking to confirm that Cochise County did not intend to conduct a hand  
17 audit of all early ballots, which the Secretary’s Office said would be unlawful. *See* Ex. D at  
18 1. The Secretary’s Office advised it would consider legal action if the Board did not agree  
19 to comply with statutes. The next day, the Board stated in response to the Secretary’s letter  
20 that it “wishe[d] to follow all applicable requirements” in conducting its audit. Ex. E. But it  
21 did not clarify what any of those procedures would be.

22 On October 28, 2022, however, Supervisor Judd once again expressed an intent to  
23 conduct a hand count of all early ballots. Supervisor Judd referenced an informal,  
24 nonbinding opinion received from the Office of the Attorney General which stated that the  
25 Board could conduct a full hand count of “100 percent of early ballots cast[.]” Oct. 28 Board  
26 Work Session Video at 11:47–12:44<sup>4</sup>; *see also* Ex. F. County Attorney McIntyre disagreed  
27 with this interpretation and has maintained that he cannot represent the Board if they

28 <sup>3</sup> Available at <https://www.youtube.com/watch?v=170xHmbhnJI&feature=youtu.be> (last visited October 31, 2022).

<sup>4</sup> Available at <https://www.youtube.com/watch?v=ZSS4VuE7PGM> (last visited Oct. 31, 2022).



1 conduct such a hand count of all early ballots. *See* Oct. 28 Work Session Video at 54:38-  
2 56:44 (reiterating, “[i]t remains my opinion that conducting whether it’s called the expanded  
3 hand count or a separate process that . . . [it] remains barred by EPM and . . . the statute”).

4 Defendants plan to hand count audit all early ballots for up to five races based on the  
5 Attorney General’s October 28, 2022 nonbinding, advisory opinion. *See* Ex. F; *see also*  
6 October 28 Board Work Session Video at 11:47-12:44 (Supervisor Judd agreeing, “[t]he  
7 board must limit the number of competitive statewide and federal races audited to five.”).

## 8 LEGAL STANDARD

9 “A writ of mandamus allows a ‘party beneficially interested’ in an action to compel  
10 a public official to perform an act imposed by law.” *Ariz. Pub. Integrity All.*, 250 Ariz. at  
11 62 ¶ 11.

12 A court considering a motion for a preliminary injunction examines four factors: (1)  
13 the likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is  
14 not granted, (3) the balance of hardships, and (4) whether public policy favors granting the  
15 injunctive relief. *See Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021). The legal test is not an  
16 absolute scale, but a “sliding” one. *Id.* To meet their burden, “the moving party may  
17 establish either 1) probable success on the merits and the possibility of irreparable injury;  
18 or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply in  
19 favor of the moving party.” *Id.* (quoting *Smith v. Ariz. Citizens Clean Elections Comm’n*,  
20 212 Ariz. 407, 410 ¶ 10 (2006)). But a plaintiff who demonstrates, on a mandamus claim,  
21 that a public official has acted unlawfully “need not satisfy the standard for injunctive  
22 relief.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 64 ¶ 26.

## 23 ARGUMENT

### 24 I. This Court should grant a writ of mandamus compelling Defendants to count ballots in compliance with Arizona law.

#### 25 a. Plaintiffs have standing to seek a writ of mandamus.

26 Courts apply a particularly “relaxed standard for standing in mandamus actions.”  
27 *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶11. Under A.R.S. § 12-2021, a writ of mandamus  
28

1 allows a “party beneficially interested in an action to compel a public official to perform an  
2 act imposed by law.” *Id.* (quotation omitted). The mandamus statute “reflects the  
3 Legislature’s desire to broadly afford standing to members of the public to bring lawsuits  
4 to compel officials to perform their public duties.” *Id.* (citing *Ariz. Dep’t of Water Res. v.*  
5 *McClennen*, 238 Ariz. 371, 377 ¶ 32 (2015)).

6 The Arizona Alliance for Retired Americans, which has over 1,200 members in  
7 Cochise County, and Ms. Stephenson, a Cochise County voter, have standing to pursue their  
8 mandamus action for the same reasons that Arizona voters and citizens had standing to  
9 pursue their mandamus action concerning unlawful voting procedures in *Arizona Public*  
10 *Integrity Alliance*. In that case, a voting organization and voter sued the Maricopa County  
11 Recorder to enjoin him from including an instruction with mail-in ballots which they alleged  
12 did not comply with his duties under Arizona law. *See id.* at 60-61. The Arizona Supreme  
13 Court held that both plaintiffs had standing because “as *Arizona citizens and voters*,  
14 seek[ing] to compel the Recorder to perform his *non-discretionary duty* to provide ballot  
15 instructions that comply with Arizona law . . . they have shown a sufficient beneficial  
16 interest to establish standing.” *Id.* at 62 ¶ 12 (emphases added). The same is true of Plaintiffs  
17 here, who have a sufficient beneficial interest in ensuring Defendants conduct the general  
18 election in accordance with Arizona law, and specifically that they count early ballots in  
19 accordance with Arizona law.

20 **b. Defendants have a non-discretionary duty to conduct hand counts only**  
21 **in limited circumstances and under certain procedures.**

22 A writ of mandamus is appropriate where a public official has a non-discretionary  
23 duty and fails to act in accordance with the law. *See Stagecoach Trails MHC, L.L.C. v. City*  
24 *of Benson*, 231 Ariz. 366, 370 ¶ 19 (2013). Here, Defendants do not intend to conduct an  
25 audit that is consistent with Arizona law and Plaintiffs are accordingly entitled to a writ of  
26 mandamus, just as the Plaintiffs in *Arizona Public Integrity Alliance* were entitled to the  
27 writ after they showed Recorder Fontes did not intend “to provide ballot instructions that  
28 comply with Arizona law” as required. *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 12. Here,

1 Defendants have a statutory obligation to count ballots and conduct audits only as  
2 prescribed by Arizona law. They may not exceed their statutory authority and invent new  
3 audit procedures beyond those prescribed by law.

4 The basic procedures under state law for counting and auditing early ballots are clear.  
5 All early ballots and ballots cast in polling places must be tabulated in the first instance by  
6 electronic tabulators: “The result printed by the vote tabulating equipment, to which have  
7 been added write-in and early votes, shall, when certified by the board of supervisors or  
8 other officer in charge, constitute the official canvass of each precinct or election district.”  
9 A.R.S. § 16-622(A). Ballots may be counted manually only if “it becomes impracticable to  
10 count all or a part of the ballots with tabulating equipment.” *Id.* § 16-621(C). To confirm  
11 that electronic tabulation is accurate, A.R.S. § 16-602 provides detailed procedures for  
12 auditing votes “cast on an electronic voting machine or tabulator.” *Id.* § 16-602(A). Those  
13 procedures are mandatory: “The hand count shall be conducted as prescribed by this section  
14 and in accordance with hand count procedures established by the secretary of state in the  
15 official instructions and procedures manual adopted pursuant to § 16-452.” *Id.* § 16-602(B).  
16 A.R.S. § 16-602 is also the sole authorization for hand count audits. No other provision of  
17 Arizona law allows for separate hand count audits.

18 Under A.R.S. § 16-602, a hand count of all early ballots is not permitted. Rather, the  
19 statute requires that hand count audits start with small samples and expand *only* on an  
20 individual race basis and *only* if hand counts repeatedly differ from electronic tabulations  
21 for that race by more than a designated margin for error. *See* A.R.S. § 16-602(F) (“If at any  
22 point in the manual audit of early ballots the difference between any manual count of early  
23 ballots is less than the designated margin when compared to the electronic tabulation of  
24 those ballots, the electronic tabulation shall be included in the canvass *and no further*  
25 *manual audit of the early ballots shall be conducted.*” (emphasis added)).

26 Under Arizona law, an early ballot audit cannot begin with all early ballots. To the  
27 contrary, at the outset, election workers “shall *randomly select* one or more batches of early  
28 ballots” that were counted by each tabulation machine and sequester them, and then “shall

1 randomly select” from those sequestered ballots a sample of one percent of all early ballots  
2 cast, or five thousand ballots, “*whichever is less.*” *Id.* (Emphases added). This language is  
3 not ambiguous: Election workers are permitted to hand count audit, in the first instance, no  
4 more than 5,000 early ballots. While the Attorney General’s office appears to have  
5 determined, in an “informal” opinion—which admitted it skipped the “several layers of  
6 review” that a more reasoned opinion would typically undergo—that this language is  
7 ambiguous, *see supra* at p. 6; Ex. F, the statute is clear.<sup>5</sup>

8 Nor does the EPM provide legitimate authorization for Defendants to conduct a hand  
9 count audit of all early ballots. While the EPM purports to authorize counties to “audit a  
10 higher number of [early] ballots at their discretion,” all other relevant provisions of the EPM  
11 require counties to undertake a limited hand count audit of early ballots. Moreover, that one  
12 sentence of the EPM directly conflicts with the statute, which makes explicit that “no further  
13 manual audit of the early ballot shall be conducted” beyond that provided for in the statute.  
14 A.R.S. § 16-602(F). “[A]n EPM regulation that contradicts statutory requirements does not  
15 have the force of law.” *Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz. 2022) (citing *Leach*  
16 *v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021)). As the Arizona Supreme Court has explained,  
17 “it is this Court’s role, not the Secretary’s, to interpret [a statute’s] meaning.” *Id.* Even if  
18 the EPM could be read consistently with statute to authorize, in the first instance, an audit  
19 of a higher *percentage* of early ballots, which is still facially inconsistent with A.R.S. § 16-  
20 602(F), that provision of the EPM cannot plausibly be read to authorize a pre-emptive audit  
21 of *all* early ballots. *See Leach*, 250 Ariz. at 576 ¶ 21 (“[A]n EPM regulation that . . .  
22 contravenes an election statute’s purpose does not have the force of law.”).<sup>6</sup>

23 <sup>5</sup> Even “formal” Attorney General opinions that receive the standard “several layers of  
24 review” are not binding. *See Ruiz v. Hull*, 191 Ariz. 441, 449 ¶ 28 (1998) (“Opinions of the  
25 Attorney General are advisory, and are not binding.”); *see also* Office of the Arizona  
26 Attorney General, Attorney General Opinions (“Opinions of the Attorney General are  
27 advisory, and do not have the same effect as decisions of a court of law.”) (last visited Oct.  
28 30, 2022), available at: <https://www.azag.gov/opinions>.

<sup>6</sup> Other provisions of the EPM also align with A.R.S. § 16-602(F) in limiting the number of  
early ballots to be audited. *See* EPM at 230 (“On Election Day, the officer in charge of  
elections shall calculate the exact number of early ballots tallied up to that point in time.

1 Finally, while Defendants have not explained their precise procedures for conducting  
2 their Full Early Ballot Audit, any audit must comply with all other requirements under  
3 Arizona law, including conducting the audit at a secure facility, maintaining a proper chain  
4 of custody of the ballots, and having the elections director oversee the audit. *See* A.R.S.  
5 § 16-602(H); *see also* EPM at 225 (“Throughout the hand count, the officer in charge of  
6 elections must retain custody and control of all hand counted ballots.”). Accordingly,  
7 Defendant Marra must retain custody of the ballots during any audit.

8 Defendants have no authority to create new procedures. They have only those powers  
9 “expressly conferred by statute” and “may exercise no powers except those specifically  
10 granted by statute and in the manner fixed by statute.” *Hancock v. McCarroll*, 188 Ariz.  
11 492, 498 (App. 1996) (quotation omitted); *see Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14  
12 (Defendants’ powers “[are] limited to those powers expressly or impliedly delegated to  
13 [them] by the state constitution or statutes.”). Indeed, “[a]ctions taken by a board of  
14 supervisors by methods unrecognized by statute are without jurisdiction and wholly void  
15 [because] [a] governmental body may not do indirectly what a statute does not give it the  
16 power to do directly. *Hancock*, 188 Ariz. at 498 (internal quotations omitted). And “[t]he  
17 absence of a statutory prohibition does not mean the county has inherent authority to engage  
18 in certain conduct.” *Id.* (internal quotations omitted); *see also Maricopa Cnty. v. Black*, 19  
19 Ariz. App. 239, 241 (1973).

20 **c. This Court may grant a writ of mandamus without considering the**  
21 **other traditional injunction factors.**

22 Where Plaintiffs have shown that a public official has acted unlawfully and outside  
23 the scope of their authority, “they need not satisfy the standard for injunctive relief.” *Ariz.*  
24 *Pub. Integrity All.*, 250 Ariz. at 64 ¶ 26; *see also Burton v. Celentano*, 134 Ariz. 594, 596  
25 (App. 1982) (“[W]hen the acts sought to be enjoined have been declared unlawful . . .  
26 plaintiff need show neither irreparable injury nor a balance of hardship in his favor.”)

27 \_\_\_\_\_  
28 From this number, the officer in charge of elections shall calculate a number equaling 1%  
of the total early ballots. This shall serve as the number of ballots to audit.”).

1 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §  
2 2948 (3d ed. 1998))). Thus, while Plaintiffs have separately shown an entitlement to an  
3 injunction, *see infra* at Section II, if this Court finds Defendants have a non-discretionary  
4 duty to act—here to conduct a hand count audit of early ballots in accordance with A.R.S.  
5 § 16-602—but will fail to do so, this Court need not consider whether the other traditional  
6 preliminary injunction factors weigh in their favor before granting the writ.

7 **II. In the alternative, Plaintiffs are entitled to a preliminary injunction enjoining**  
8 **Defendants from conducting a full hand count audit.**

9 **a. Plaintiffs have standing to seek an injunction under the Uniform**  
10 **Declaratory Judgment Act.**

11 A plaintiff may seek relief under the Uniform Declaratory Judgment Act if they can  
12 show the issue is ripe and they have standing. *See Mills v. Ariz. Bd. of Tech. Registration*,  
13 514 P.3d 915, 923 ¶ 24 (Ariz. 2022). Both requirements are met here. A case is ripe if “there  
14 is an actual controversy between the parties.” *Id.* at 923 ¶ 24. Because Defendants have  
15 already voted on a hand count audit procedure, which they now insist will include all early  
16 ballots (despite prior representations that they will comply with the law), this issue is ripe.  
17 Plaintiffs also have standing. In particular, Plaintiff Stephenson, a Cochise County voter  
18 whose early ballot has already been received and accepted for counting, *see Verified Compl.*  
19 at ¶ 12, has standing as a voter whose ballot will be subject to unlawful counting procedures.

20 The Alliance also has standing as a membership organization whose members  
21 include more than 1,200 voters in Cochise County. *See Verified Compl.* at ¶ 11. An  
22 organization has representational standing if it has “a legitimate interest in an actual  
23 controversy involving its members” and “judicial economy and administration will be  
24 promoted” by conferring standing. *Armory Park Neighborhood Ass’n v. Episcopal Cmty.*  
25 *Servs. in Ariz.*, 148 Ariz. 1, 6 (1985). Here, the Alliance, as a 501(c)(4) organization  
26 dedicated to ensuring the voting rights of its members, has a legitimate interest in ensuring  
27 its Cochise County members’ early ballots are cast and counted in accordance with Arizona  
28 law. *See Verified Compl.* at ¶ 11. Moreover, because the Alliance seeks only injunctive  
relief, and not damages, judicial economy favors “allowing the issues to be settled in a

1 single action rather than in a multitude of individual actions because the relief sought is  
2 universal to all of its members and requires no individual quantification by the court.”  
3 *Armory Park*, 148 Ariz. at 6.

4 The Alliance also has direct standing as well because the Full Audit will require the  
5 Alliance to divert resources. Arizona courts find federal case law instructive on the matter  
6 of standing. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 ¶ 11 (2005) (quotation  
7 omitted). In federal court, an organization has direct standing if it must divert resources to  
8 public education aimed at counteracting a defendant’s actions that are contrary to the  
9 organization’s mission. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879–80  
10 (9th Cir. 2022). Here, the Alliance accomplishes its mission by ensuring its members have  
11 access to the franchise and can meaningfully participate in Arizona’s elections. *See Verified*  
12 *Compl.* at ¶ 10. The Full Early Ballot Audit directly frustrates the Alliance’s mission by  
13 sowing confusion and doubt about the election results. *See id.* Consequently, to restore  
14 public confidence in Arizona’s electoral system, the Alliance will have to divert resources  
15 to a public education campaign and answer questions about the limitations of the Full Early  
16 Ballot Audit, *see id.*, which is sufficient to establish standing.

17 **b. Plaintiffs are likely to show the Full Early Ballot Audit is unlawful.**

18 For all the reasons that Plaintiffs have explained *supra* at Section I(b), the Full Early  
19 Ballot Audit directly conflicts with the Board’s non-discretionary legal duties under A.R.S.  
20 § 16-602, and the Board does not have the authority to adopt new audit rules in the first  
21 place. For the sake of brevity, Plaintiffs do not repeat those arguments here.

22 **c. Plaintiffs are likely to suffer irreparable harm absent relief.**

23 Absent this Court’s intervention, Defendants will proceed to conduct a hand count  
24 audit of all early ballots in Cochise County, which is directly contrary to Arizona law. While  
25 Defendants’ actions do not affect Plaintiff Stephenson’s or the Alliance members’ ability  
26 to *cast* their ballots, they do affect how those ballots will be *counted*, which is an essential  
27 part of the right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (“The right to  
28 vote includes the right to have the ballot counted.”). And if the right to have one’s ballot

1 counted means anything, surely it means having one's ballot counted in accordance with  
2 the laws of the state, and not at whims of county officials who have invented a new (and  
3 unlawful) process for counting ballots on the eve of the election. This kind of injury cannot  
4 be remedied after the election. *See, e.g., League of Women Voters of N.C. v. North Carolina*,  
5 769 F.3d 224, 247 (4th Cir. 2014) (finding irreparable injury on the basis that "once the  
6 election occurs, there can be no do-over and no redress").

7 This risk of injury is heightened given the County's decision to create brand new  
8 procedures for the audit without sufficient resources or trained volunteers to do so. As the  
9 Secretary of State's Election Services Director explained to Defendants, it would be  
10 "impossible to complete an accurate hand count of an election . . . in time to comply with  
11 applicable statutory deadlines, including the county canvass deadline." Ex. A (citing A.R.S.  
12 § 16-642(A)). In any event, Plaintiffs need not show irreparable injury is certain, or even  
13 likely, where they have shown "probable success" on the merits of their claims, as they have  
14 here. *See Fann*, 251 Ariz. at 432 ¶ 16. Under such circumstances, a "possibility" of  
15 irreparable harm is all that is required, *see id.*, which Plaintiffs have shown.

16 **d. The balance of harms and public interest tips sharply in Plaintiffs'**  
17 **favor.**

18 Defendants are plainly not harmed if they are restrained from conducting a full hand  
19 count audit in the immediate aftermath of the general election. Granting Plaintiffs' motion  
20 would simply retain Arizona's existing requirements for ballot auditing and counting, which  
21 involve machine counting that is more accurate, less expensive, and less time consuming  
22 than hand-counting. *See Ex. A*. And because all ballots must be preserved in Arizona for 24  
23 months following the election, *see A.R.S. § 16-624*, if there is later a lawful reason to  
24 conduct a recount of all ballots, including all early ballots, Defendants will be able to do so.

25 But if Defendants are permitted to move forward with their new plan to conduct a  
26 hand count all early ballots before the canvass, there is unlimited opportunity for electoral  
27 chaos. Defendants' plan is a recipe for "two sets" of election results, where only one count  
28 is legally valid. Moreover, additional counties have begun to consider following suit, which



1 will lead to uncertainty across Arizona as election officials attempt to implement illegal full  
2 audits on the eve of the election. See Bob Christie, *Arizona AG gives county OK for full*  
3 *ballot hand counts*, AP News (Oct. 29, 2022), [https://apnews.com/article/2022-midterm-](https://apnews.com/article/2022-midterm-elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23)  
4 [elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23](https://apnews.com/article/2022-midterm-elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23). There is plainly  
5 no public interest in allowing for such chaos, and there is no public interest in the use of a  
6 less accurate method of vote counting that is contrary to Arizona law.

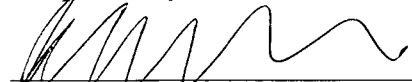
7 Finally, the public interest cuts against changing election procedures at the last  
8 moment. “[W]hen public officials, in the middle of an election, change the law based on  
9 their own perceptions of what they think it *should* be, they undermine public confidence in  
10 our democratic system and destroy the integrity of the electoral process.” *Ariz. Pub.*  
11 *Integrity All.*, 250 Ariz. at 61.

## 12 CONCLUSION

13 For the foregoing reasons, Plaintiffs’ Petition for a Writ of Mandamus and Motion  
14 for a Preliminary Injunction should be GRANTED.

1  
2 Dated: October 31, 2022  
3

Respectfully submitted,



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

ARIZONA ALLIANCE OF RETIRED  
AMERICANS, INC. and STEPHANI  
STEPHENSON,

Plaintiffs,

v.

No. **CV 202200518**

**APPLICATION FOR ORDER TO  
SHOW CAUSE**

**(Expedited relief requested)**

FILED  
2022 OCT 31 PM 3:04  
CLERK OF SUPERIOR COURT  
PHOENIX, ARIZONA

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

8 Defendants.

9 Pursuant to Rule 4(c) of the Arizona Rules of Procedure for Special Actions, Plaintiff  
10 hereby applies for the issuance of an order to show cause why the relief sought in Plaintiffs'  
11 Verified Special Action Complaint (the "Complaint") should not be granted. Because Rule  
12 4(c) requires that "the court shall set a speedy return date" where the show cause procedure  
13 is used, Plaintiff moves for the Court to issue an order requiring Defendants immediately to  
14 show cause why the relief sought in the Complaint should not be granted.  
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1 Dated: October 31, 2022

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22  
 23 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA  
 IN AND FOR THE COUNTY OF COCHISE

24 ARIZONA ALLIANCE OF RETIRED  
 25 AMERICANS, INC. and STEPHANI  
 26 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           3.     A.R.S. § 16-602(F) provides detailed, *mandatory* instructions for auditing the  
2 electronic tabulation of early ballots. Under Arizona law, election officials must first audit  
3 small samples of ballots for select races. If, and only if, the hand count for these limited  
4 audits differs by a statutorily defined margin from the electronic tabulation results are  
5 election officials then authorized to conduct additional hand count audits, incrementally  
6 increasing the size of the audit pool in each subsequent round, as prescribed by law. But if  
7 the first hand count audit, or any audit thereafter, falls within the prescribed margin of error,  
8 no further hand count audits may occur. Defendants, however, have opted to ignore this  
9 mandatory procedure and violate state law by planning a Full Early Ballot Audit. Such  
10 violations of Arizona law cannot stand.

11           4.     Additionally, Arizona law requires that only Defendant Elections Director  
12 Marra, as the chief elections officer of the county, may conduct and oversee any hand count  
13 ballot audits and that ballots must remain in her sole possession during these audits.  
14 Ignoring the law again, the Board has suggested that Defendant Stevens, Cochise County  
15 Recorder, can usurp Defendant Marra's powers and duties to conduct the unlawful Full  
16 Early Ballot Audit.

17           5.     Plaintiff the Arizona Alliance of Retired Americans, Inc. and its members who  
18 are Arizona residents and voters, as well as voter Plaintiff Stephani Stephenson, have a  
19 significant interest in ensuring that the Board performs its non-discretionary legal duties in  
20 compliance with state election law to prevent disruption of the certification process and the  
21 accompanying blow to the integrity of the democratic process.

22           6.     The Court should therefore order Defendants to conduct a hand count audit of  
23 early ballots only as permitted by Arizona law, declare that the Full Early Ballot Audit is  
24 unlawful, and prohibit Defendants from conducting the Full Early Ballot Audit.

### JURISDICTION AND VENUE

25  
26           7.     This Court has jurisdiction under Article 6, § 14 of the Arizona Constitution,  
27 A.R.S. §§ 12-123, 12-1801, 12-1803, 12-1831, 12-2021, and Rule 4(a) of the Arizona Rules  
28 of Procedure for Special Actions.



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).<sup>1</sup>  
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

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24 <sup>1</sup> 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\\_APPROVED.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  
28

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.”).<sup>2</sup>

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).<sup>3</sup> 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

29                  \_\_\_\_\_  
30                  <sup>2</sup> 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                  <sup>3</sup> 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.<sup>4</sup>

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.*

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28 <sup>4</sup> 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.”).<sup>5</sup>

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.<sup>6</sup>

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.

23  
24  
25 <sup>5</sup> 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.

<sup>6</sup> *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 “wische[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 11:47–12:44<sup>7</sup>; *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.

25  
26  
27  
28           <sup>7</sup> 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).<sup>8</sup> 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.

24  
25 \_\_\_\_\_  
26 <sup>8</sup> The Board and the Attorney General appear to be relying on a single sentence in the EPM  
27 to claim that all early ballots may be audited. *See* EPM at 215 (“Counties may elect to audit  
28 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 56. Arizona law does not allow for Defendant County Recorder Stevens to take  
2 custody of any ballots to conduct any hand count audits—those powers and duties lie  
3 exclusively with Defendant Elections Director Marra. *See supra* Section A.1, 2; *see also*  
4 October 28 Board Work Session Video at 36:33–38:15, 43:29–43:56. Nonetheless, on  
5 October 28th, the Board repeatedly stated Defendant County Recorder Stevens could take  
6 possession of the ballots and perform the Full Early Ballot Audit. *See, e.g.*, October 28  
7 Board Work Session Video at 21:08-23:00; 29:58-30:58; 44:53–45:58. This is plainly  
8 unlawful.

9 57. Defendants have thus made clear that they will not comply with their non-  
10 discretionary legal duties. In doing so, Defendants are exceeding their statutory powers by  
11 authorizing and implementing the Full Early Ballot Audit and violating state law.

## 12 COUNT I

### 13 **Writ of Mandamus (A.R.S. § 12-2021) – Violation of A.R.S. § 16-602 and the EPM**

14 58. Paragraphs 1–57 are incorporated by reference herein.

15 59. Courts may issue a writ of mandamus to any “person [or] corporation . . . on  
16 the verified complaint of the party beneficially interested, to compel, when there is not a  
17 plain, adequate and speedy remedy at law, performance of an act which the law specially  
18 imposes as a duty resulting from an office . . . .” A.R.S. § 12-2021. Accordingly, under  
19 A.R.S. § 12-2021, members of the public who are “beneficially interested” in an action can  
20 sue to compel officials to perform their non-discretionary duties. *Ariz. Pub. Integrity All.*,  
21 250 Ariz. at 62 ¶ 11. “The phrase ‘party beneficially interested’ is ‘applied liberally to  
22 promote the ends of justice.’” *Id.* (quoting *Barry v. Phx. Union High Sch.*, 67 Ariz. 384, 387  
23 (1948)).

24 60. As Arizona citizens and voters, the Alliance’s members and Plaintiff  
25 Stephenson have a beneficial interest in compelling elections officials to comply with their  
26 non-discretionary duty to comply with Arizona election law. *See id.* at 63 ¶ 12.

27 61. In such actions, courts “may direct, order, or prohibit specified action by the  
28 defendant” as judgment. Arizona Rules of Procedure for Special Actions, Rule 6.

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.

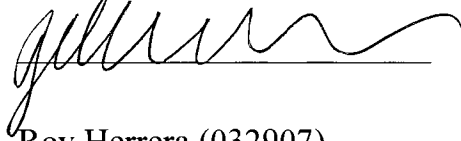
### 17 **DEMAND FOR RELIEF**

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,

2 

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\* *Pro Hac Vice* Motion forthcoming

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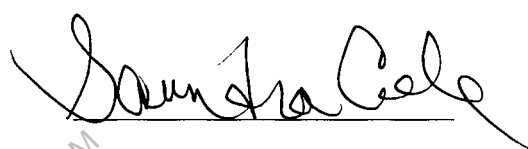
**VERIFICATION**

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, [tcrosby@cochise.az.gov](mailto:tcrosby@cochise.az.gov)  
Ann English, [aenglish@cochise.az.gov](mailto:aenglish@cochise.az.gov)  
Peggy Judd, [pjudd@cochise.az.gov](mailto: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

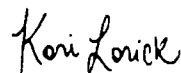
through careful consideration and with sufficient time to prepare for an upcoming election. In fact, Cochise County has already filed its election program and emergency contingency plan for the General Election with the Secretary of State, confirming its usage of electronic equipment for this election. 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](mailto:klorick@azsos.gov)

cc

Tim Mattix, Clerk of the Board  
[tmattix@cochise.az.gov](mailto:tmattix@cochise.az.gov)

Christine Roberts, Chief Civil County Attorney  
[croberts@cochise.az.gov](mailto:croberts@cochise.az.gov)

Richard Karwaczka, County Administrator  
[rkarwaczka@cochise.az.gov](mailto:rkarwaczka@cochise.az.gov)

Sharon Gilman, Deputy County Administrator,  
[sgilman@cochise.az.gov](mailto:sgilman@cochise.az.gov)

Lisa Marra, Elections Director  
[lmarra@cochise.az.gov](mailto:lmarra@cochise.az.gov)

David Stevens, County Recorder  
[dstevens@cochise.az.gov](mailto:dstevens@cochise.az.gov)

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# EXHIBIT B

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**PRINT AGENDA****RETURN TO THE SEARCH PAGE**

## 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

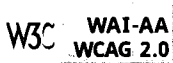
The undersigned hereby certifies that a copy of this notice was duly posted at the address listed above in accordance with the statement filed by the Cochise County Board of Supervisors.

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:**

Appx.0051

**Account Code(s) for Available Funds**

**1:**

**Fund Transfers  
Attachments**

ARS 11-532

Recorder Oct. 11 Presentation

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# EXHIBIT D

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**KATIE HOBBS**  
SECRETARY OF STATE

October 25, 2022

*Via Email*

Cochise County Board of Supervisors  
Tom Crosby, [tcrosby@cochise.az.gov](mailto:tcrosby@cochise.az.gov)  
Ann English, [aenglish@cochise.az.gov](mailto:aenglish@cochise.az.gov)  
Peggy Judd, [pjudd@cochise.az.gov](mailto: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.

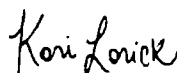
**The Secretary thus requests that the Board confirm in writing, no later than 5:00 p.m. on October 26, that:**

- 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](mailto:tmattix@cochise.az.gov)

Christine Roberts, Chief Civil County Attorney  
[croberts@cochise.az.gov](mailto:croberts@cochise.az.gov)

Richard Karwaczka, County Administrator  
[rkarwaczka@cochise.az.gov](mailto:rkarwaczka@cochise.az.gov)

Sharon Gilman, Deputy County Administrator,  
[sgilman@cochise.az.gov](mailto:sgilman@cochise.az.gov)

Lisa Marra, Elections Director  
[lmarra@cochise.az.gov](mailto:lmarra@cochise.az.gov)

David Stevens, County Recorder  
[dstevens@cochise.az.gov](mailto:dstevens@cochise.az.gov)

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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).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2020014553

12/21/2020

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 chairs<sup>1</sup> 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).

---

<sup>1</sup> 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).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2020014553

12/21/2020

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).<sup>2</sup> 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.”<sup>3</sup>

---

<sup>2</sup> 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).

<sup>3</sup> 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.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV2020014553

12/21/2020

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.<sup>4</sup> *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.

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<sup>4</sup> 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

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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](mailto: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*

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

Tom Crosby  
Supervisor, District 1

*Peggy Judd*

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](mailto: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.<sup>1</sup>

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

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<sup>1</sup> 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 elections<sup>2</sup> 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.”

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<sup>2</sup> 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. § 16-602<sup>3</sup>, (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.

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<sup>3</sup> 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  
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Sincerely,

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

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.<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup> This prompted the Secretary of State's Office to take legal action,<sup>3</sup> 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.

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<sup>2</sup> 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](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).

<sup>3</sup> 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:<sup>4</sup>

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%).<sup>5</sup>

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,<sup>6</sup> and was performed by the Secretary of State’s staff. It was overseen by qualified election staff of different political parties.<sup>7</sup> 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.<sup>8</sup>

<sup>4</sup> 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>

<sup>5</sup> *Id.*

<sup>6</sup> 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>.

<sup>7</sup> Maricopa County, *supra* note 5.

<sup>8</sup> 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.<sup>9</sup> Accordingly, on October 6, 2020, the Secretary of State certified that the voting equipment was errorless and ready for use in the election.<sup>10</sup>

## 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).<sup>11</sup>

Statute directs political party chairs (or their designees) to select which ballots will be counted by hand after an election.<sup>12</sup> 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,<sup>13</sup> five races from the election that will be subjected to the recount.<sup>14</sup> In the same manner, those officials are also required to select at least 2% of precincts in the

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*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/>.

<sup>9</sup> Maricopa County, *supra* note 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; Maricopa County, Arizona, *Hand Count/Audit Report* at 1, [https://azsos.gov/sites/default/files/2020\\_General\\_Maricopa\\_Hand\\_Count.pdf](https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf)

<sup>12</sup> A.R.S. § 16-602(B)(1-2).

<sup>13</sup> A.R.S. § 16-602(B)(1)

<sup>14</sup> A.R.S. § 16-602(B)(2)

county, or two precincts, whichever is greater, from which ballots will be hand recounted.<sup>15</sup> Additionally, those officials also select at least one batch<sup>16</sup> 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.<sup>17</sup>

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,<sup>18</sup> after the participants took an oath to uphold the constitutions of the United States and Arizona.<sup>19</sup> 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.<sup>20</sup> The party representatives then selected five races across four precincts and 26 batches of early voting ballots for hand counting.<sup>21</sup>

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.<sup>22</sup> The 26 early voting batches contained 5,165 ballots.<sup>23</sup>

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.<sup>24</sup> The audit boards are composed of people appointed by the Republican, Democratic and Libertarian party chairs.<sup>25</sup>

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

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<sup>15</sup> A.R.S. § 16-602(B)(1)

<sup>16</sup> In the 2020 election, batches ranged from 192-200 ballots.

<sup>17</sup> A.R.S. § 16-602(F)(1).

<sup>18</sup> Maricopa County, *supra* note 10, at 1.

<sup>19</sup> 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>

<sup>20</sup> Maricopa County, *supra* note 10, at 1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1-2, 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> Maricopa County, *supra* note 5.

<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup>

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.<sup>29</sup> This test was open to the public and a press advisory was sent beforehand.<sup>30</sup> 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.<sup>31</sup>

## 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.”<sup>32</sup> 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).<sup>33</sup> The field audit and compliance audit were focused on the

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<sup>27</sup> Arizona Election Manual, Chapter 12, Section II

<sup>28</sup> Arizona Election Manual, Chapter 4, Section II

<sup>29</sup> 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/>.

<sup>30</sup> 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/2acfffb>.

<sup>31</sup> Maricopa County, *supra* note 28; Arizona Republic, *supra* note 28.

<sup>32</sup> Maricopa County. *Auditing elections equipment In Maricopa County*. <https://www.maricopa.gov/5681/Elections-Equipment-Audit>.

<sup>33</sup> *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.<sup>34</sup>

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.”<sup>35</sup>

## 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.”<sup>36</sup> On

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<sup>34</sup> *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.”)

<sup>35</sup> Jarrett & Valenzuela, *supra* note 32.

<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.”<sup>41</sup> It remains unclear how Fann chose Cyber Ninjas, as the company has no documented election experience and did not submit a formal bid.<sup>42</sup> 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.<sup>43</sup> This followed an earlier report that the

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

<sup>37</sup> *Id.*

<sup>38</sup> 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/>

<sup>39</sup> 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/>.

<sup>40</sup> *Id.*

<sup>41</sup> 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/>.

<sup>42</sup> 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>.

<sup>43</sup> 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 million<sup>44</sup>, and a judge indicating that the Arizona Senate cannot keep information regarding the funding sources private.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> This disruption led to a new company, StratTech Solutions, an Arizona internet technology company with no election auditing experience, replacing Wake.<sup>48</sup>

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."<sup>49</sup> 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.<sup>50</sup> 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

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<sup>44</sup> Pulitzer, J. *How do you feel about today in #Maricopa*. (2021). <https://www.facebook.com/JovanHuttonPulitzer/videos/985248078942100/?t=19>.

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

<sup>46</sup> 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/>.

<sup>47</sup> 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/>.

<sup>48</sup> *Id.*

<sup>49</sup> 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>.

<sup>50</sup> 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.<sup>51</sup> 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.”<sup>52</sup>

### **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.<sup>53</sup> Citing the proprietary interests, they prevented independent nonpartisan experts and press from observing the process at the Coliseum.<sup>54</sup> Initially, only One American News Network, a television network that helped to organize and fund the review, was granted access.<sup>55</sup>

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.<sup>56</sup> 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.”<sup>57</sup> 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

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<sup>51</sup> Fann, K. (2021, May 7). Fann Response to DOJ.

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

<sup>52</sup> 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>

<sup>53</sup> 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/>.

<sup>54</sup> 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/>.

<sup>55</sup> 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>.

<sup>56</sup> Hobbs, K. (2021, March 3) Letter to Karen Fann.

[https://azsos.gov/sites/default/files/Fann\\_Letter\\_3\\_3\\_2021.pdf](https://azsos.gov/sites/default/files/Fann_Letter_3_3_2021.pdf)

<sup>57</sup> *Id.* at 3.

("the Coliseum"), the venue selected for the exercise.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup>

The court subsequently ordered the Senate's contractors to file all policies and procedures relevant to the exercise by April 25, 2021.<sup>64</sup> Cyber Ninjas and the Senate defendants immediately appealed the order with the Arizona Supreme Court and were denied.<sup>65</sup> 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

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<sup>58</sup> 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>.

<sup>59</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> MacDonald-Evoy, *supra* note 52.

<sup>62</sup> 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>.

<sup>63</sup> *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).

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

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



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

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.<sup>68</sup> The Secretary of State's Office moved to intervene on April 27,<sup>69</sup> 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."<sup>70</sup> The court granted the Secretary's motion over the defendants' objections,<sup>71</sup> and following a hearing and negotiations,<sup>72</sup> all parties agreed that the Secretary's independent expert observers could observe the proceedings.<sup>73</sup>

The parties later reached a settlement on additional issues<sup>74</sup>, 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.<sup>75</sup>

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<sup>66</sup> *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.

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

<sup>68</sup> *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).

<sup>69</sup> *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.

<sup>70</sup> *Id.*

<sup>71</sup> *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>

<sup>72</sup> *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.

<sup>73</sup> 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>.

<sup>74</sup> *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>

<sup>75</sup> *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.”<sup>76</sup> 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.<sup>77</sup> 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.”<sup>78</sup> 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.”<sup>79</sup>

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.<sup>80</sup> 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.

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<sup>76</sup> 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](https://democracyfund.org/wp-content/uploads/2020/06/2019_DF_KnowingItsRight_Part1.pdf).

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

<sup>78</sup> 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](https://elections.maryland.gov/press_room/documents/Maryland_Pilot%20Election%20Audit_12-3-2008.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> 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.<sup>81</sup> “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.”<sup>82</sup> 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].”<sup>83</sup>

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.”<sup>84</sup> 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

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<sup>81</sup> 52 U.S.C. §§ 20701-20706.

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

<sup>83</sup> *Id.* at 90.

<sup>84</sup> 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.<sup>85</sup>

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.”

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<sup>85</sup> 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](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.<sup>86</sup>

### 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 agreement<sup>87</sup> and of Arizona law<sup>88</sup>.

### **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.

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<sup>86</sup> 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>.

<sup>87</sup> Settlement Agreement, *supra* note 73.

<sup>88</sup> 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.

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<sup>89</sup> Photograph: Courtney Pedroza/Getty Images

## 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.<sup>90</sup> 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

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<sup>90</sup> Arizona Election Procedures Manual Chapter 11, Section IX  
[https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](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.”<sup>91</sup>

## 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.<sup>92</sup> 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.

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<sup>91</sup> 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.

<sup>92</sup> 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.<sup>93</sup> 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%."<sup>94</sup> However, the explanatory text describes an error rate (of approximately) 3%—not .03%.<sup>95</sup> 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.)<sup>96</sup> Of course, when the number of ballots in a batch

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<sup>93</sup> 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.")

<sup>94</sup> Wake TSI. (2021). *Counting Floor Policies*.

<https://www.cyberninjas.com/static/20210429155650/Wake-TSI-Counting-Floor-Policies.pdf>.

<sup>95</sup> *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](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.")

<sup>96</sup> 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 not<sup>97</sup>. 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.

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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.

<sup>97</sup> 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.<sup>99</sup>

### Revised Hand Tally Procedures

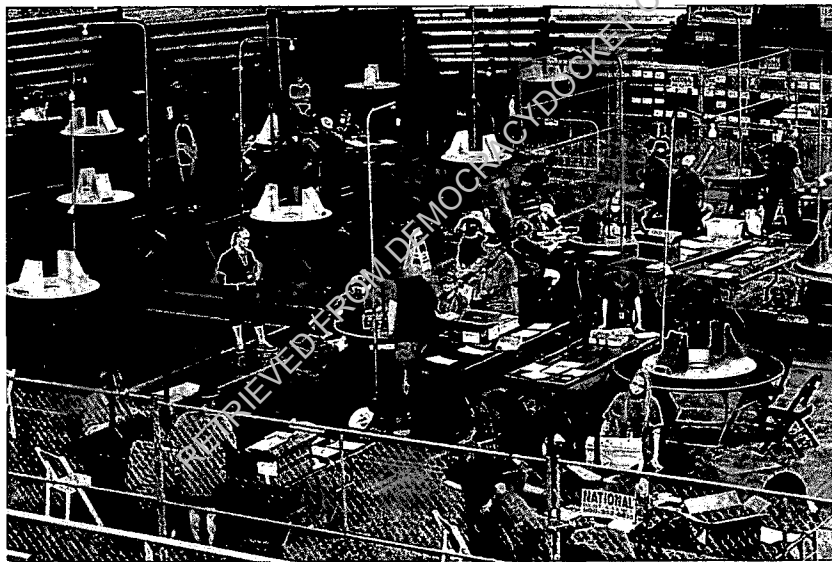
After ballot scanning ceased, the hand tally procedures relied solely upon review of individual paper ballots using a turntable, on which hundreds of ballots were spun past table counters who struggled to mark, on a tally sheet, each voter's selection for the presidential and Senate races. Each round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

<sup>98</sup> Thomas Hawthorne/The Republic

<sup>99</sup> 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.<sup>100</sup> Occasionally, a counter would look up, realize that they had missed a ballot, and then grab the wheel to stop it.<sup>101</sup> 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 *Policias*, 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).<sup>102</sup>



## Voter Intent

The staff performing the counting were not provided with a copy of the Arizona state laws or procedures<sup>104</sup> 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

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<sup>100</sup> Morrell, *supra* note 85.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Matt York/AP

<sup>104</sup> Arizona Procedures Manual Chapter 11, Section IX

[https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](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,<sup>105</sup> 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.<sup>106</sup> In these instances, ballots are generally duplicated by bipartisan teams<sup>107</sup> 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.<sup>108</sup>

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

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<sup>105</sup> ARS § 16-621(A)

<sup>106</sup> *Id.*

<sup>107</sup> 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").

<sup>108</sup> *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.<sup>109</sup>

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

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<sup>109</sup> 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>.

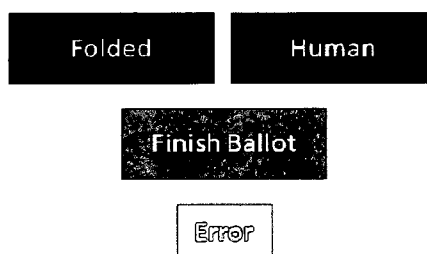
The areas on the ballot which the microscope cameras captured included:

- 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 Texture
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.

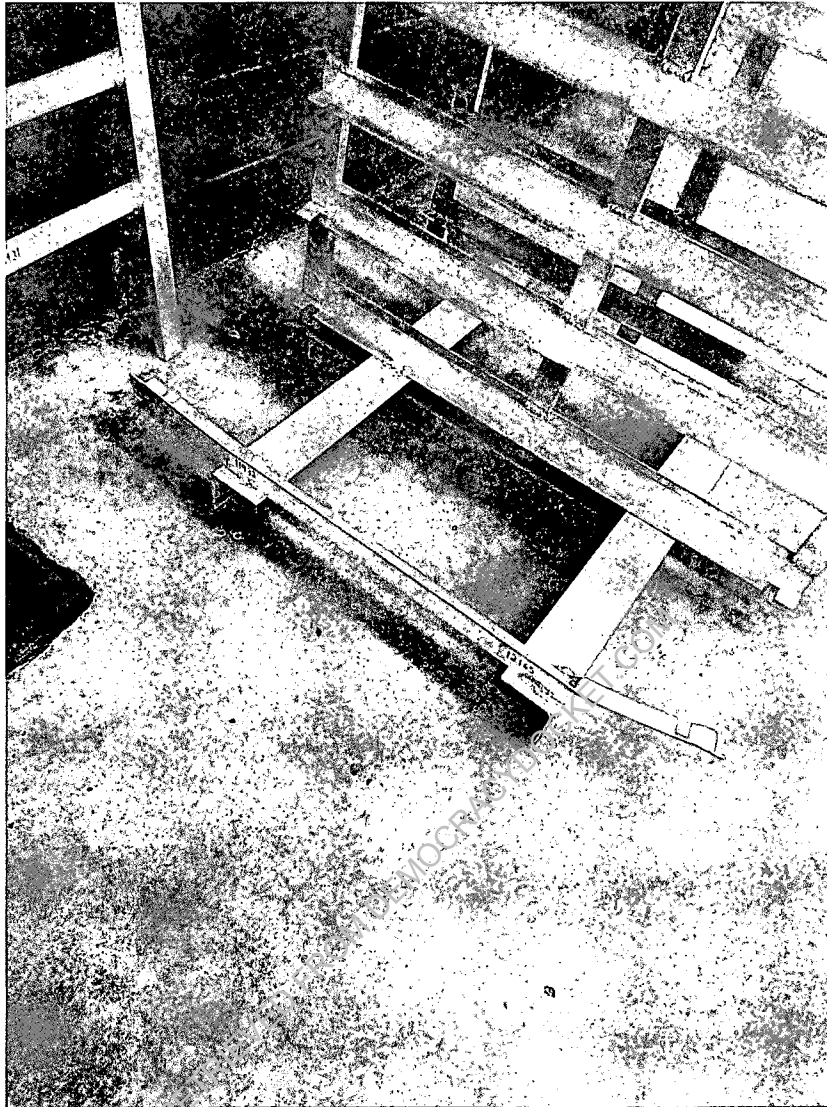
Bennett told observers that he did not know how Cotton had obtained the data, but he made a statement that Cotton was present on May 18, 2021, during a closed question and answer session with Senators Fann and Peterson. The physical examination of the machines remains unclear, as are the Senate's contractors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

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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
10  
11 **IN AND FOR THE COUNTY OF COCHISE**

12 Case No. CV202200518

13 **ARIZONA ALLIANCE OF RETIRED**  
14 **AMERICANS, INC. and STEPHANI**  
15 **STEPHENON,**

16 Plaintiffs,

17 v.

18 **TOM CROSBY, ANN ENGLISH, and**  
19 **PEGGY JUDD, in their official**  
20 **capacities as the Cochise County Board**  
21 **of Supervisors; DAVID STEVENS, in**  
22 **his official capacity as the Cochise**  
23 **County Recorder; and LISA MARRA,**  
24 **in her official capacity as the Cochise**  
25 **County Elections Director,**

26 Defendants.

**RESPONSE TO DEFENDANTS’**  
**PETITION FOR WRIT OF**  
**MANDAMUS, OR IN THE**  
**ALTERNATIVE MOTION FOR**  
**PRELIMINARY INJUNCTION**

(Assigned: Hon. Casey F. McGinley)

27 Defendants, TOM CROSBY, ANN ENGLISH, AND PEGGY JUDD (hereinafter  
28 “County Defendants”), by and through undersigned counsel, hereby file their Motion to  
Dismiss and Response to Defendants’ Petition for Writ of Mandamus, or in the Alternative  
Motion for Preliminary Injunction. Defendants deny that it’s hand recount of early ballots  
violates Arizona law and that Plaintiffs are entitled to a Preliminary Injunction. For its  
response to the Petition and Motion, Defendants submit the following Memorandum of Points  
and Authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The matter presently before this Court is not one of Cochise County violating Arizona  
4 election law. Rather, this matter is political, and it is intended to benefit a flailing gubernatorial  
5 candidate on the eve of Arizona’s 2022 election. As such, the Washington Democratic  
6 National Political machine recruited former Hillary Clinton attorney Mark Elias and his law  
7 firm to target Cochise County, a small rural Arizona County with an estimated population of  
8 approximately 125,000 people. This full-frontal assault is intended to generate publicity for  
9 Democratic candidates and not compel the Cochise Board of Supervisors to cease and desist  
10 for violating Arizona law. After all, Cochise County is not violating the law. This Court  
11 should see through the politics of Plaintiff’s Petition/Motion and deny each request made  
12 therein.

13 **BACKGROUND**

14 **I. ARIZONA VOTING MACHINES AND PRACTICES ARE NOT RELEVANT**  
15 **TO THE MATTER BEFORE THIS COURT**

16 In their Petition, Plaintiffs dedicate almost two full pages to a discussion of the use of  
17 machines to tabulate ballots, but such arguments have absolutely no bearing on the issue before  
18 this Court. Whether the machines are rigorously tested, retested, certified, or otherwise, the  
19 only issue before this Court is whether Cochise County can, under Arizona law, count its  
20 ballots by hand after they have been counted by the tabulators. Specifically, the issue is  
21 whether the county can audit by hand all early ballots.

22 The irrelevance of the tabulators in this case is amplified by the fact that no county in  
23 the State of Arizona is even obligated to use machines to count their ballots. Pursuant to  
24 A.R.S. 16-443, “ballots or votes *may be* cast, recorded and counted by voting or marking  
25 devises and vote tabulating devices as provided in this article.” (emphasis added). The  
26 operative language here is “may be” which allows but does not require counties to use  
27 machines. One might ask why a county that chose to use tabulators would be restricted in the  
28

1 number of ballots it could hand count in an audit when the county was not even obligated to  
2 use a tabulator in the first instance. The logic expressed in Plaintiff’s Petition/Motion  
3 demonstrates that politics is driving this matter and not questions of Arizona law.

4 **II. ARIZONA LAW DOES NOT PREVENT COCHISE COUNTY FROM**  
5 **COUNTING ALL EARLY BALLOTS BY HAND**

6 Although Board Defendants were warned by some that their proposed hand count audit  
7 was not allowed by Arizona law, there were many who disagreed. Foremost of those was the  
8 Chief Law Enforcement Officer in the State of Arizona, the Officer tasked with issuing legal  
9 opinions to elected officials and government bodies, the Attorney General (hereinafter  
10 “A.G.”). On November 4, 2020, A.G. Mark Brnovich issued one such opinion to the  
11 Honorable Clint Hickman of the Maricopa County Board of Supervisors. With respect to a  
12 hand recount of precincts and early ballots, the A.G. expressed that an “expand[ed] hand count  
13 may help alleviate concern and provide public confidence in the integrity of the vote tabulation  
14 process.” See Correspondence from Mark Brnovich, 11/4/2020, Exhibit A. There were no  
15 questions about the legal propriety of expanding the hand count raised by these Plaintiffs or  
16 other similarly situated plaintiffs at that time. The only difference is the media attention  
17 garnered by such a challenge on the eve of an election.

18 On October 28, 2022, in response to the Cochise County Board’s desire to hand count  
19 all ballots and a formal request from Senator David Gowan, the A.G. issued an informal  
20 opinion consistent with his November 4, 2020, opinion. Relying on statutes and language in  
21 the Elections Procedures Manual (hereinafter “EPM”), the A.G. found that “Counties may  
22 elect to audit a higher number of ballots at their discretion’.” See Correspondence of Mark  
23 Brnovich, 10/28/2022, Exhibit B.

24 **LEGAL STANDARD**

25 Plaintiffs, by slight of hand, seek to evade jurisdictional requirements on standing by  
26 tailoring their claim for relief as one for mandamus. Mandamus relief, however, seeks to  
27 compel an official to perform some act the official is obligated to perform. Here, Plaintiffs  
28

1 seek to compel Board Defendants to not do something. Because Plaintiffs have no colorable  
2 claim to mandamus relief, they must meet all jurisdictional standards for standing. With  
3 respect to standing, these Plaintiffs have none and are not entitled to injunctive relief.

4 **I. PLAINTIFFS' HAVE NO COLORABLE CLAIM FOR MANDAMUS AND**  
5 **THIS COURT LACKS JURISDICTION TO OFFER RELIEF.**

6 Plaintiffs' Complaint fails to state a mandamus claim upon which relief can be granted.  
7 Under Arizona law, a true writ of mandamus may be issued "to compel . . . performance of an  
8 act which the law specially imposes as a duty. . . ." ARS § 12-2021. Special Action Rule 3(A)  
9 sets forth traditional mandamus relief as allowing a challenge to a failure "to perform a duty  
10 required by law as to which [the public official has no discretion." *Home Builders Ass'n v.*  
11 *City of Apache Junction*, 198 Ariz. 493, 503 (Ct. App. 2000). The claims raised herein,  
12 however, are not mandamus claims. Rather, they fall under the auspices of Special Action  
13 Rule 3(B) under which plaintiffs are allowed to proceed on the basis that a public servant is  
14 doing something contrary to the law. *See also Law v. Superior Court*, 157 Ariz. 142, 146 (Ct.  
15 App. 1986).

16 Plaintiffs' reliance on *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58 is  
17 misplaced. In that matter, then Maricopa County Clerk and Recorder Adrian Fontes sought to  
18 include voter instructions inconsistent with Arizona law. *Id.* at 306. Plaintiffs sued to compel  
19 Recorder Fontes to provide ballot instructions compliant with Arizona law based on a non-  
20 discretionary duty to do so. *Id.* at 307. Unlike *Ariz. Pub. Integrity All.*, the relief plaintiffs  
21 seek from this Court is not mandamus relief as Plaintiffs do not seek to compel Board  
22 Defendants to perform a non-discretionary duty. Rather, they seek to prevent Board  
23 Defendants from acting, namely, from hand counting all early ballots. For this reason,  
24 Plaintiffs' Motion for Mandamus relief must be denied for failing to state a claim.

25 Even if we assume that the Board Defendants have a non-discretionary duty to  
26 audit hand count early ballots, which they do, Plaintiffs' mandamus claim still fails because  
27 the legal authority does not limit plaintiffs to counting only 5,000 early ballots. A.R.S. § 16-  
28 602(F), as recently interpreted by the A.G., is at worst ambiguous where the EPM is clear and



1 places no restrictions on the number of ballots counties can hand count. Further, the EPM’s  
2 language is consistent with A.R.S. § 16-602(B) with both allowing counties to count more but  
3 not less than the statutory requirement. Given the statutory authority and the EPM, Plaintiffs  
4 cannot show that the Board Defendants must count only 5,000 ballots and any claim for  
5 mandamus relief must fail.

6 In this matter, Plaintiffs allege not that the Board Defendants must conduct a  
7 hand count audit of early ballots. Rather, plaintiffs seek to prohibit Board Defendants from  
8 hand counting all early ballots. Accordingly, Plaintiffs’ mandamus claims must be dismissed  
9 for failure to state a claim.

10 **II. SHOULD THIS COURT ALLOW PLAINTIFFS TO PROCEED ON**  
11 **MANDAMUS, THE COMPLAINT MUST BE DISMISSED BECAUSE A**  
12 **COMPLETE HAND COUNT OF EARLY BALLOTS IS DISCRETIONARY**  
13 **UNDER ARIZONA LAW**

14 In Arizona, election requirements are set forth by statute and the EPM as two separate  
15 sources of law. The relevant statute, A.R.S. § 16-602(F), may lack clarity but the A.G.  
16 interpreted it to mean that there is no limit on the number of early ballots that can be hand  
17 counted. See Exhibit B. When statutes lack clarity, as in this case, the EPM provides clarity.  
18 See *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 418  
19 (2020). The EPM also has the force of law. *McKenna v. Soto*, 250 Ariz. 469, 473 (2021); see  
20 also *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (citing ARS § 16-452(C)) (“Once  
21 adopted, the EPM has the force of law.”).

22 Even if the parties can debate the statute’s clarity, there can be no debate over the EPM  
23 whose language is clear:

24 The officer in charge of elections is required to conduct a hand count of 1% of  
25 the total number of early ballots cast, or 5,000 early ballots, whichever is less.  
26 A.R.S. § 16-602(F). **Counties may elect to audit a higher number of ballots at**  
27 **their discretion.**

28 EPM pg. 215 (Emphasis added). Additionally, A.R.S. § 16-602(B), governing hand recounts  
of polling places and precincts clearly allows counties to count by hand as many ballots over  
the minimum as counties want to count. To construe the early ballot hand count section to

1 place maximum but not minimum limits would conflict with the rest of the statute. Such an  
2 interpretation of the statute is inconsistent with Arizona law. Because Arizona law does not  
3 impose maximum limits on the number of ballots counties can recount by hand, Plaintiffs'  
4 Complaint must be dismissed.

5 **III. PLAINTIFFS LACK STANDING, CANNOT ESTABLISH THE**  
6 **PRELIMINARY INJUNCTIVE RELIEF FACTORS, AND THEIR PETITION**  
7 **MUST BE DISMISSED**

8 **A. Plaintiffs Lack Standing and Their Petition For Injunctive Relief Must Be**  
9 **Denied.**

10 Plaintiffs must establish standing, which they cannot do. In order to establish  
11 standing, Plaintiffs must allege a particularized injury "fairly traceable to the defendant's  
12 allegedly unlawful conduct" which Plaintiffs here have not done. *Bennett v. Napolitano*, 206  
13 Ariz. 520, 525 (2003) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The right "to require  
14 that the government be administered according to the law is a generalized grievance." *Wood*  
15 *v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (citing *Chiles v. Thornburgh*, 865 F.2d  
16 1197, 1205-06 (11th Cir. 1989) and *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). A  
17 generalized grievance, "no matter how sincere," will not support standing. *Id.* Arizona case  
18 law has also been clear. To have standing, a plaintiff must allege a *distinct* and *palpable*  
19 injury." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16, 961 P.2d 1013, 1017 (1998) (emphasis added).

20 Because generalized grievances are common to all members of society, a  
21 plaintiff challenging the administration of law must show how their interest in compliance  
22 differs from other members of society. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir.  
23 2020). In this matter, Plaintiffs cannot show that their interests differ from other residents of  
24 Cochise County because each ballot will be counted in accordance with the same laws and the  
25 identity of each voter is unknown. Because the secret vote and the application of law in the  
26 tabulation procedure will treat all ballots, hence voters, equally, there can be no particularized  
27 grievance aside from a difference of opinion as to whether the ballots should have been  
28

1 counted in the first place. Accordingly, Plaintiffs lack standing and their Complaint must be  
2 dismissed.

3 **B. Plaintiffs Will Suffer No Harm If This Court Denies Their Petition For**  
4 **Injunctive Relief.**

5 Denying Plaintiffs' request for injunctive relief and allowing this matter to be  
6 briefed in full on the merits will cause Plaintiffs' no harm let alone irreparable harm. Counties  
7 routinely hand count ballots as a matter of course during elections, and Cochise County  
8 election administrators know how to do it. There has been no evidence presented to this Court  
9 that Cochise County will not meet all deadlines prescribed by law if it is allowed to begin its  
10 audit on time. Nor is there any evidence that the outcome will somehow instill a lack of  
11 confidence in our election systems. In fact, Plaintiffs concede that a large number of ballots  
12 can be counted accurately when they cite to the 2020 Maricopa County Election Audit, which  
13 had approximately 2,000,000 ballots cast. Plaintiffs' admission that it confirmed the machine  
14 count results can only help to instill public confidence in their elected officials, elections  
15 workers, and even the machine used to tabulate our ballots.

16 Furthermore, the application of Arizona law will be applied equally to each  
17 ballot. Because we use secret ballots in Arizona, those tabulating the ballots have no way of  
18 knowing whose ballot is whose and therefore no way to discriminate against these particular  
19 Plaintiffs or any others. Because there will be no harm, this Court must deny Plaintiffs  
20 injunctive relief.

21 **C. The Balance of Hardships Favors Defendants Over Plaintiffs**

22 Here, the hand count audit is set to begin in less than one week. Issuing an  
23 injunction will effectively prevent Cochise County from beginning the hand count process for  
24 all early ballots. To do so without a showing that the public will suffer irreparable harm would  
25 deny elected officials their public charge. Entering the injunction in such a politically charged  
26 case would also likely have the impact of instilling concerns and fear in the minds of voters.  
27 Why, voters may ask, aren't their elected officials allowed to verify their election results?  
28

1 Many voters may ask what they are hiding. Audits and the public counting of all ballots can  
2 only instill confidence in the system where public confidence is sorely lacking. After all each  
3 citizen’s right to vote, as represented by the ballot, is his/hers most basic and fundamental right  
4 as a citizen in a free society. If their own elected officials are precluded from conducting full  
5 audits of their elections, how do they know they can trust the results? It would be even more  
6 perplexing to voters how a large Washington D.C. law firm was able to throw all its weight at  
7 their small county and elected leaders to have their planned election audit shut down. This  
8 will only instill a lack of faith in the system and a lack of confidence in our elections. It will  
9 also exacerbate the fear of machines counting our ballots and increase the mistrust of  
10 Washington D.C.

11 **D. The Public’s Interest in Ensuring the Integrity of Elections Favors Board**  
12 **Defendants**

13 Plaintiffs in this matter seek to preclude elected county officials from  
14 conducting a full hand count audit of the early ballots. The question must be why? Why is  
15 auditing our elections an issue? Why should elected officials not seek to go beyond the bare  
16 minimum to ensure that the citizens elections are free and fair? There are no rational reasons  
17 to prevent people from auditing their elections in a free society. This is especially true when  
18 there are so many questions surrounding the integrity of election machines and whether they  
19 can manipulate the vote counts.

20 Arizona law clearly seeks to allow county leaders to determine whether they wish to  
21 exceed the minimum statutory ballot hand count whether early ballots or those cast in  
22 precincts or polling centers. As A.G. Brnovich stated to Maricopa County, “expand[ed]  
23 hand count may help alleviate concern and provide public confidence in the integrity of the  
24 vote tabulation process.” See Exhibit B. There should be absolutely no reason to limit the  
25 ability to audit our elections. Doing so has no logical rational and can only foster speculation  
26 by the public. When the audit involves our citizen’s most fundamental and basic right,  
27  
28



1 precluding expansive audits will cause more harm and will lead citizens to question our  
2 process and the very legitimacy of our elected government.

3 **IV. CONCLUSION**

4 Board Defendants ask that this Court deny Plaintiffs Petition for Mandamus and  
5 injunctive Relieve. Plaintiffs fail to make a claim for mandamus relief and even if construed  
6 in their favor, Board Defendants have no non-discretionary duty to limit the number of  
7 ballots audited by hand, whether early or otherwise. This Court must also deny Plaintiffs  
8 their requested injunctive relief. Plaintiffs lack standing under Arizona law and even if they  
9 had standing, the balance of legal equities lies in favor of Board Defendants and Plaintiffs  
10 will suffer no harm.

11 **RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of November, 2022.

12  
13 **THE VALLEY LAW GROUP, PLLC**

14 /s/ Bryan James Blehm  
15 Bryan James Blehm  
16 Attorney for Defendants

17 //

18 //

19 **ORIGINAL** of the foregoing e-filed  
20 with the clerk this 3<sup>rd</sup> day of November 2022.

21 **COPY** presumed delivered to:  
22 Honorable Casey McGinley \_\_\_\_\_  
23 Cochise County Superior Court

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10 By: /s/ TLM  
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# EXHIBIT “A”





MARK BRNOVICH  
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ARIZONA

November 4, 2020

*Via Email*

The Honorable Clint Hickman  
Maricopa County Board of Supervisors  
510 South 3rd Avenue  
Phoenix, Arizona 85003

Re: Hand Count Audit

Dear Chairman Hickman:

Maricopa County will soon begin the manual hand count of certain precincts and early voting batches in accordance with A.R.S. § 16-602. Because of widespread concern raised about the ballot marking procedure in Maricopa County election day voting centers, we suggest Maricopa County 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.

Although at this point in time we have no reason to believe the tabulation equipment did not work properly, an expanded hand count may help alleviate concern and provide public confidence in the integrity of the vote tabulation process. Thank you for your prompt attention to this matter.

Sincerely,

Joseph Kanefield  
Chief Deputy & Chief of Staff

cc: Scott Jarrett, Director of Elections Day and Emergency Voting, Maricopa County

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# EXHIBIT “B”





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](mailto: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.<sup>1</sup>

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

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<sup>1</sup> 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 elections<sup>2</sup> 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.”

---

<sup>2</sup> 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. § 16-602<sup>3</sup>, (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.

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<sup>3</sup> 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 extending to the right.

Michael S. Catlett  
Deputy Solicitor General

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18 [mai@statesuniteddemocracy.org](mailto:mai@statesuniteddemocracy.org)  
19 \*Application for Pro Hac Vice Forthcoming

20 *Attorneys for Proposed Amicus Curiae*  
21 *Arizona Secretary of State Katie Hobbs*

22 **ARIZONA SUPERIOR COURT**  
23 **COCHISE COUNTY**

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

Plaintiffs,

v.

27 TOM CROSBY, ANN ENGLISH, PEGGY  
28 JUDD, in their official capacities as members  
29 of the Cochise County Board of Supervisors;  
30 DAVID STEVENS, in his official capacity as  
31 the Cochise County Recorder; and LISA  
32 MARRA, in her official capacity as the  
33 Cochise County Elections Director,

Defendants.

) No. CV 2022-00518  
)  
) **ARIZONA SECRETARY OF STATE**  
) **KATIE HOBBS' MOTION FOR**  
) **LEAVE TO FILE AMICUS**  
) **CURIAE BRIEF AND PRESENT**  
) **ARGUMENT**

) (Assigned to Hon. Casey F. McGinley)

1 Arizona Secretary of State Katie Hobbs (“Secretary”), in her official capacity,  
2 respectfully moves, pursuant to this Court’s inherent authority, to file a brief as *amicus curiae*  
3 to provide her perspective on the legal and operational issues presented by Cochise County’s  
4 planned hand count audit of all ballots cast during the 2022 General Election. [See **Exhibit A**  
5 (proposed brief)] The Secretary also requests leave to present argument telephonically or by  
6 videoconference at the hearing scheduled for November 4, 2022. As Arizona’s Chief Election  
7 Officer, the Secretary is committed to overseeing free, fair, and secure elections and dispelling  
8 misinformation that undermines the hard work of Arizona’s election administrators, poll  
9 workers, and voters.

10 Plaintiffs and Defendant Lisa Marra do not object to the Secretary’s filing of a brief or  
11 request to present argument by telephone or videoconference. Counsel for Defendants Tom  
12 Crosby, Peggy Judd, Ann English, and David Stevens stated that he “cannot consent on behalf  
13 of [his] client until such time as they have held a meeting and voted on the issue.” The Secretary  
14 submits a proposed form of order granting this Motion.

15 **I. Trial Courts Have Inherent Authority to Accept *Amicus Curiae* Briefs.**

16 Courts have “inherent power to do all things reasonably necessary for administration of  
17 justice.” *Schavey v. Royston*, 8 Ariz. App. 574, 575 (1968). Consistent with this principle,  
18 Arizona trial courts have accepted amicus curiae briefs and permitted amici to present argument  
19 to assist the court even in the absence of a specific rule authorizing the appearance of amici. *See*  
20 *Home Builders Ass’n of Cent. Ariz. v. City of Apache Junction*, 198 Ariz. 493, 496 n.4 (App.  
21 2000) (“Several amici have appeared, both here and in the trial court, supporting the respective  
22 positions advanced by the appellants, the City, and the District.”).

23 **II. Interests of the *Amicus Curiae*.**

24 As the State’s Chief Election Officer, the Secretary oversees the administration of  
25 Arizona’s elections, including promulgating rules to ensure the maximum degree of accuracy,  
26 impartiality, uniformity, and efficiency in elections across the State, and is responsible for

1 certifying state election results. *See* A.R.S. §§ 16-142, 452, 648. The Board’s brazen disregard  
2 of Arizona law – including procedures to ensure the security of ballots and accuracy of the ballot  
3 count – threatens to disrupt and impede ballot processing and the timely completion of  
4 tabulation, canvassing, and certification of election results. This threat to the orderly  
5 administration of elections could extend beyond Cochise County to each of the other fifteen  
6 counties if Cochise County is permitted to proceed. To preserve these interests, the Secretary  
7 submits this amicus brief in support of Plaintiffs

8 **III. The Secretary’s Brief Will Assist the Court.**

9 Under the Arizona Rules of Civil Appellate Procedure, amicus briefs may be filed where  
10 a court determines that amici “can provide information, perspective, or argument that can help  
11 the appellate court beyond the help that the parties’ lawyers provide.” Ariz. R. Civ. App. P.  
12 16(b)(1)(C)(iii). While this rule is not binding on this Court, it provides guidance for determining  
13 when to accept amicus curiae briefs and allow the appearance of amici. This brief and argument  
14 from the Secretary will provide the court with useful background on Cochise County’s  
15 misunderstanding of election laws, the legal and logistical problems that Cochise County’s  
16 planned hand count will cause, and the importance of relevant election deadlines that are relevant  
17 to this case.

18 **IV. Conclusion.**

19 For all these reasons, the Secretary respectfully requests that the Court grant this Motion,  
20 consider the lodged amicus curiae brief, and permit the Secretary to present argument at the  
21 hearing set for November 4, 2022.

22 Respectfully submitted this 3rd day of November, 2022.

23 **COPPERSMITH BROCKELMAN PLC**

24 By /s/ D. Andrew Gaona  
25 D. Andrew Gaona

26 **STATES UNITED DEMOCRACY CENTER**  
Sambo (Bo) Dul

1 Maithreyi Ratakonda\*

2 \*Application for Pro Hac Vice Forthcoming

3 Attorneys for Proposed Amicus Curiae Arizona  
4 Secretary of State Katie Hobbs

5 ORIGINAL efiled and served via electronic  
6 means this 3rd day of November, 2022, upon:

7 Honorable Casey F. McGinley  
8 Pima County Superior Court  
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# **Exhibit A**

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21 *Arizona Secretary of State Katie Hobbs*

22 **ARIZONA SUPERIOR COURT**

23 **COCHISE COUNTY**

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

Plaintiffs,

v.

TOM CROSBY, ANN ENGLISH, PEGGY  
JUDD, in their official capacities as members  
of 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.

No. CV2022-00518

**AMICUS CURIAE BRIEF OF  
ARIZONA SECRETARY OF STATE  
KATIE HOBBS**

(Assigned to Hon. Casey F. McGinley)



1 **Introduction**

2 Nearly two years after courts across the country (including here in Arizona) rejected every  
3 baseless claim of fraud and misconduct related to the 2020 General Election, Arizona voters, our  
4 election system, and the dedicated public servants who administer it find themselves on the edge  
5 of a dangerous precipice. Some in power who refuse to acknowledge facts and accept the  
6 outcome of that long-since-past election now threaten the orderly administration and canvass of  
7 the 2022 General Election with election day less than a week away. They ignore the advice of  
8 elections officials and their own attorneys alike. And they do all this in service of unfounded  
9 conspiracy theories and to the detriment of voters who simply want their votes to be counted and  
10 winners to be declared as they have always been under longstanding provisions of law.

11 This lawsuit turns on the latest example of the pernicious effect that election denialism  
12 can have on an entire system and body of law. Last week, two members of the Cochise County  
13 Board of Supervisors (“Board”) voted to approve “a hand count audit of all County precincts for  
14 the 2022 General Election to assure agreement with the voting machine count” under a process  
15 controlled by A.R.S. § 16-602(B). But what is now clear is that the Board intends, in violation  
16 of Arizona law, to either (1) seek to conduct a full hand count audit of all ballots cast at vote  
17 centers and all early ballots, or (2) perform some form of post-canvass full hand count audit of  
18 that same universe of ballots. And as Arizona Secretary of State Katie Hobbs (“Secretary”)  
19 understands the facts, these tasks will be carried out by Cochise County Recorder David Stevens  
20 – who is not responsible for ballot tabulation, chain of custody, or auditing – instead of Cochise  
21 County Elections Director Lisa Marra, the “officer in charge of elections” in Cochise County.  
22 Neither of these contemplated steps are within the Board’s limited statutory powers, and both  
23 raise serious concerns about timing, accuracy, process, and ballot security and chain of custody.

24 Given these issues, the Secretary has devoted considerable resources to monitoring the  
25 situation in Cochise County to ensure that the County follows the law, and administers its  
26 election freely, fairly, and efficiently so that both the County and the Secretary can meet their

1 statutory deadlines to canvass the election. *See* A.R.S. §§ 16-642(A), 16-648(A). The Secretary  
2 files this brief as amicus curiae to make several overarching points.

3 **First**, counties have only those powers granted to them by the Legislature, which here  
4 means that the County must only conduct a limited post-election hand count audit, timely  
5 canvass its election, and conduct an automatic machine recount of ballots only for close races  
6 within the statutorily designated margin. Counties cannot conduct other hand counts, audits, or  
7 recounts that fall outside the statutory procedures, and the Attorney General’s cavalier  
8 suggestion to the contrary – in a hastily assembled “informal opinion” due no weight or  
9 deference – ignores a well-established body of law about the limits of county authority.

10 **Second**, any attempt at a full hand count of all ballots before the official canvass –  
11 particularly one conducted by untrained or barely trained individuals using an untested process  
12 – will be inaccurate, will threaten the County’s ability to timely canvass its election, and will  
13 endanger the security and chain of custody of ballots. Beyond that, a full hand count of all ballots  
14 at any time conflicts with other statutory requirements, and the real risk of loss, damage, and  
15 alteration of ballots during such an expansive and untested operation threatens the integrity of  
16 ballots for any subsequent statutorily required recounts or election contests. And relatedly, any  
17 attempt at a full hand count after the canvass would violate the statutory requirement that ballots  
18 be transferred to the custody of the County Treasurer and stored in a secure vault to be accessed  
19 only by court order after the canvass.

20 **Finally**, all these real concerns and dangers taken together threaten the County’s ability  
21 to administer a “free and equal” election as required by article II, § 21 of the Arizona  
22 Constitution. Allowing Cochise County to proceed with an unlawful full hand count – motivated  
23 by baseless conspiracy theories – would set a dangerous precedent and inject chaos, disruption,  
24 and insecurity in the middle of an election.

25 For these reasons, the Secretary urges the Court to provide clarity on this issue to ensure  
26 uniformity and equal protection for voters and ballots across the State, and to allow election

1 officials to focus on the orderly administration and certification of this election, without the  
2 distraction of further misguided and unlawful demands for full hand counts.

### 3 **Interest of Amicus Curiae**

4 As the State’s Chief Election Officer, the Secretary oversees the administration of  
5 Arizona’s elections, including promulgating rules to ensure the maximum degree of accuracy,  
6 impartiality, uniformity, and efficiency in elections across the State, and is responsible for  
7 certifying state election results. *See* A.R.S. §§ 16-142, 452, 648. The Board’s brazen disregard  
8 of Arizona law – including procedures to ensure the security of ballots and accuracy of the ballot  
9 count – threatens to disrupt and impede ballot processing and the timely completion of  
10 tabulation, canvassing, and certification of election results. This threat to the orderly  
11 administration of elections could extend beyond Cochise County to each of the other fifteen  
12 counties if Cochise County is permitted to proceed. To preserve these interests, the Secretary  
13 submits this amicus brief in support of Plaintiffs.

### 14 **Background**

15 Arizona has been using electronic voting systems to tally ballots since as early as 1966.  
16 H.B. 204, 27th Leg., 2d. Reg. Sess. (Ariz. 1966). All electronic voting systems undergo federal  
17 and state testing and certification before being used in Arizona elections. *See, e.g.*, A.R.S. §§ 16-  
18 442; 2019 Elections Procedures Manual<sup>1</sup> (“2019 EPM”) at 76-82. The federal Election  
19 Assistance Commission and the Secretary have certified each electronic voting system to be used  
20 in each county in 2022, including in Cochise County.<sup>2</sup> All counties perform logic and accuracy  
21 testing on all equipment before and after every election. *E.g.*, A.R.S. §§ 16-449, 16-602; 2019  
22 EPM at 86-100, 235. The Secretary also performs logic and accuracy testing on a sample of each  
23

24 <sup>1</sup> [https://azsos.gov/sites/default/files/2019\\_ELECTIONS  
25 PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)

26 <sup>2</sup> Arizona Secretary of State’s Office, *2022 Election Cycle/Voting Equipment*,  
[https://azsos.gov/sites/default/files/2022 Election Cycle Voting Equipment Aug.pdf](https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment_Aug.pdf).

1 county's equipment before every election with a federal, statewide, or legislative race. *See, e.g.*,  
2 A.R.S. §§ 16-449; 2019 EPM at 86-100. Following longstanding precedent, Cochise County  
3 used electronic equipment to tabulate votes in the 2022 August Primary Election. After the  
4 Primary, Cochise County performed a limited hand count audit under A.R.S. § 16-602 along  
5 with the chairs of the Cochise County Republican Party and the Cochise County Democratic  
6 Party. *See Cochise County 2022 Primary Election Hand Count Audit Results, Aug. 8, 2022,*  
7 <https://azsos.gov/sites/default/files/2022PrimaryHandCount-Cochise.pdf>. The hand count audit  
8 matched the machine tabulation results and there were no discrepancies in any race. In short,  
9 electronic voting systems are safe, secure, and accurate.

10 Over the past several months, several individuals have made unsupported claims that  
11 certain election equipment used in Arizona is vulnerable to security or other issues, and that a  
12 hand count is a better method for tallying ballots. For example, Kari Lake and Mark Finchem,  
13 candidates for Governor and Secretary of State respectively, sued in federal court challenging  
14 the use of electronic election equipment in Maricopa County and seeking a full hand count of  
15 ballots. *See Lake v. Hobbs et al.*, No. 2:22-cv-00677-JJT (D. Ariz.). The court rejected those  
16 claims and dismissed the lawsuit because the plaintiffs “fail[ed] to plausibly show that Arizona’s  
17 voting equipment even has [the alleged] security failures,” and their hypothetical “allegations  
18 that voting machines may be hackable” were far too speculative. Order, *Lake v. Hobbs et al.*,  
19 No. 2:22-cv-00677-JJT, Doc. 100 (D. Ariz.).

20 Against this backdrop, and despite strong public outcry and the advice of their own  
21 County Attorney, two members of the Board voted on October 24 to conduct “a hand count audit  
22 of all County precincts,” purportedly “pursuant to” A.R.S. § 16-602(B). The next day, the  
23 Secretary sent the Board a letter to express her serious concerns about the Board’s decision,  
24 particularly because of the lack of detail about how the Board intends to proceed with the  
25 contemplated action so close to the election. But because the Board voted to approve a statutory  
26 hand count of precincts under Arizona law, the Secretary informed the Board that any such hand



1 count audit must comply with the procedures required under A.R.S. § 16-602(B) and the 2019  
2 Election Procedures Manual (“EPM”). Despite these clear requirements, the Secretary  
3 understands that Recorder Stevens – and not Elections Director Marra – plans to conduct a hand  
4 count of all early ballots as part of the “hand count audit” approved by the Board, and also intends  
5 to conduct some form of full hand count of all other ballots. The Secretary, like the public,  
6 remains largely in the dark about precisely what the Board and Recorder Stevens are doing or  
7 plan to do because their public discussions about their plans are equal parts vague, confusing,  
8 and contradictory. They should be made to provide assurances about those plans under oath.

9 This lawsuit challenging the Board’s plan to conduct a full hand count audit of all ballots,  
10 including all early ballots, cast in Cochise County followed.

### 11 **Argument**

#### 12 **I. Any Hand Count Audit of Ballots By the County Must Follow A.R.S. § 16-602.**

##### 13 **A. The County’s planned full hand count is not authorized by law.**

14 Counties and their officers, including boards of supervisors and recorders, have only those  
15 powers and duties “expressly conferred by statute,” and they “may exercise no powers except  
16 those specifically granted by statute and in the manner fixed by statute.” *Hancock v. McCarroll*,  
17 188 Ariz. 492, 498 (App. 1996) (quotations omitted). No statute authorizes county boards of  
18 supervisors to ignore the statutory electronic tabulation procedures and instead conduct manual  
19 tabulation. Nor does any statute authorize the Board to tabulate votes electronically and  
20 separately conduct a full hand count only to “audit” those machine-tabulated results. And no  
21 Arizona statute grants the Board the power to unilaterally perform a full hand count audit of all  
22 ballots however they choose, subject to no statutory procedures.<sup>3</sup>

23 \_\_\_\_\_  
24 <sup>3</sup> On October 28, the Attorney General published an “informal opinion” that suggested in  
25 passing that the County might have authority to conduct an extra-statutory hand count of ballots.  
26 The Attorney General’s suggestion is erroneous, and disregards an unbroken line of case law  
(including *Hancock*) that limits the authority of counties to that specifically provided by law.  
While formal Attorney General Opinions are entitled to “respectful consideration,” they are

1 While A.R.S. § 16-602 and the EPM lay out procedures for a limited post-election hand  
2 count audit of a sampling of early and election day ballots, nothing in Arizona law authorizes  
3 the Board to conduct a full hand count outside of those procedures. Indeed, the limited hand  
4 count audit required under A.R.S. § 16-602 is subject to detailed procedures and significant  
5 preparation. A.R.S. § 16-602 (the audit must be “conducted as prescribed by this section and in  
6 accordance with hand count procedures established by the secretary of state in the official  
7 instructions and procedures manual adopted pursuant to section 16-452”); *see also* 2019 EPM at  
8 213-34 (detailed mandatory procedures for the limited hand count audit). Among other  
9 requirements, the limited precinct hand count audit under § 16-602(B) may include only regular  
10 ballots cast at vote centers on Election Day and may not include any early ballots. A.R.S. § 16-  
11 602(B)(1); 2019 EPM Ch. 11, III(A). The early ballot hand count audit is expressly limited to  
12 one percent of early ballots and controlled by A.R.S. § 16-602(F), a statute the Board did not –  
13 and could not invoke in approving an expanded precinct hand count audit.<sup>4</sup>

14  
15 merely advisory. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 469 (Ct. App. 2007) (*quoting*  
16 *Ruiz v. Hull*, 191 Ariz. 441, 449 (1998)). Courts and government agencies are therefore not  
17 obliged to accept them, *id.*, and an informal opinion like this is due even less weight (particularly  
18 given its complete failure to grapple with a conflicting body of law). Indeed, the Cochise County  
19 Attorney recently responded to the Attorney’s General informal opinion, stating that it  
20 “eviscerates the hand count audit process provided for in Arizona law.” [See **Exhibit 1**  
21 (11/2/2022 Letter from Cochise County Attorney Brian McIntyre to Assistant Solicitor General  
22 Michael Catlett)]

23  
24  
25  
26  
<sup>4</sup> The Secretary acknowledges that the EPM states that counties “may elect to audit a higher  
number of [early] ballots at their discretion.” 2019 EPM Ch. 11 § III(B). Since the issuance of  
the 2019 EPM, however, both the factual and legal landscape have changed in material ways.  
Factually, previously routine aspects of election administration have come under increasing  
attack by proponents of baseless election conspiracy theories. Beyond that, demands for farcical  
“hand counts” and extra-statutory “audits,” like that performed by the Arizona Senate and its  
“Cyber Ninjas,” exposed how such slipshod operations simultaneously endanger the security  
and integrity of ballots and fuel further election mis- and disinformation, eroding public  
confidence in the system. And legally, the Arizona Supreme Court has begun to scrutinize and  
invalidate specific EPM provisions that either conflict with a statute or do not have specific  
statutory authorization. *See, e.g., McKenna v. Soto*, 250 Ariz. 469 (2021). Here, the EPM’s

1 Next, A.R.S. § 11-251(3) gives the Board the power to canvass election returns, and  
2 Arizona law prescribes detailed procedures for how the Board must do so. Nothing about the  
3 Board’s authority to canvass its election provides the Board with any authority to conduct a hand  
4 count of any kind. And here, the Board must canvass its election – a purely ministerial act – no  
5 later than November 28, 2022. A.R.S. § 16-642(A).

6 Further, Arizona law provides that an automatic recount of specific races must occur only  
7 if the margin between two candidates or votes cast for and against a ballot measure “is less than  
8 or equal to one-half of one percent of the number of votes cast,” A.R.S. § 16-661(A). That  
9 recount can occur only by court order, A.R.S. § 16-662, and must be conducted “on an automated  
10 tabulating system” and not by hand, A.R.S. 16-664(A). Here again, nothing in the recount  
11 statutes provides the Board with any authority to conduct a full hand count of any kind.

12 Lastly, any attempt at a full hand count after the canvass would violate the statutory  
13 requirement that ballots be transferred to the custody of the County Treasurer for secure storage  
14 after the canvass is completed, A.R.S. § 16-624(A), to be removed only by court order, A.R.S.  
15 § 16-624(D).

16 **B. The Board’s last-minute decision to require a hand count could disrupt**  
17 **election deadlines.**

18 As noted above, the Board must “meet and canvass the election not less than six days nor  
19 more than twenty days following the election.” A.R.S. § 16-642(A). Once completed, the Board  
20 must transmit the canvass to the Secretary, who then must complete the statewide canvass on the  
21 fourth Monday following the election. A.R.S. § 16-648. These deadlines are mandatory. Failure  
22 to meet them would cause a catastrophic cascade of effects, jeopardize the finality of the election,  
23

---

24 statement that counties “may elect to audit a higher number of [early] ballots at their discretion”  
25 conflicts with A.R.S. § 16-602(F) and other EPM provisions and could be abused to impede  
26 counties’ ability to ensure ballot security, comply with other statutory requirements, and canvass  
returns on time. The Court should thus find the provision invalid and without the force and effect  
of law.

1 and undermine voter confidence in our election processes. If the Board does not timely canvass  
2 the election, it will prevent the Secretary from timely certifying the statewide canvass, which  
3 will prevent timely issuance of certificates of election to winning candidates. *See* A.R.S. §§ 16-  
4 648, -650. Counting just a few races, much less dozens of races, on tens of thousands of ballots  
5 by hand is extremely time-intensive, tedious, and prone to human error. This would be a massive  
6 project, for which the extensive planning and preparation required would have been a major  
7 effort even if it began months before the election. With Election Day less than a week away, and  
8 the county canvass deadline just twenty days later on November 28, it is impossible for Cochise  
9 County to plan, test, set up, and implement an orderly, secure, and accurate full hand count in  
10 this timeframe.

11 Election procedures are generally developed through careful consideration and long  
12 before an upcoming election so there is sufficient time to prepare for, test, and implement those  
13 procedures. Cochise County has already filed its election program and emergency contingency  
14 plan for the 2022 General Election with the Secretary, confirming its use of electronic equipment  
15 for this election. *See* A.R.S. § 16-445(A). But Cochise County has not in recent history  
16 conducted a full hand count, and the County does not appear to have any developed plans for  
17 how to complete its contemplated full hand count securely and accurately. Anything that  
18 threatens the timely canvass of the election is of extreme concern to the Secretary.

19 **C. A full hand count will produce inaccurate results.**

20 Electronic voting systems, which are used to conduct electronic tabulation, are secure and  
21 accurate. They are subject to rigorous state and federal certification requirements. They also  
22 undergo logic and accuracy testing, to ensure they are functioning as expected and accurately  
23 counting votes, both before and after the election. And limited post-election hand count audits,  
24 as specified under Arizona law, A.R.S. § 16-602, further serve as a check on the accuracy of  
25 electronic tabulation.



1 A full hand count, on the other hand, will be prone to error, leading to inaccurate results.<sup>5</sup>  
2 Risks of inaccurate results are especially severe where, as here, there is no indication that  
3 individuals have been selected or trained to perform the hand count, and there is no evidence of  
4 any protocols in place for how the hand count will proceed.<sup>6</sup>

5 Arizona law requires that the statutory hand count audit begin within 24 hours of the close  
6 of the polls and that it be completed before the county's official canvass. A.R.S. § 16-602(I). It  
7 will be impossible to properly design and successfully implement a plan to conduct a full hand  
8 count and to adequately train volunteers within this timeframe – with the election less than one  
9 week away and the counties' canvass deadline just 20 days later. Election officials across the  
10 state are currently in the middle of the busiest season of the election calendar. Right now, full  
11 time and temporary staff are fully occupied and often working overtime to ensure all statutory  
12 and operational procedures are being successfully implemented and it would not be possible,  
13 without dire consequences, to shift resources to planning, setting up, and implementing a new  
14 process as significant as a full hand count. This unlawful and misguided effort to implement a  
15 full hand count is therefore certain to end in an inaccurate result, and certain to sow confusion  
16 and distrust.

17 This is not mere speculation. Recent reports from a similar effort to conduct a full hand  
18 count of ballots by Nye County, Nevada serve as an instructive warning. There, officials and  
19 volunteers came face-to-face with the chaotic and disastrous reality of their unprecedented  
20

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21 <sup>5</sup> See Stephen N. Goggin, et al., *Post-Election Auditing: Effects of Procedure and Ballot Type*  
22 *on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 Election  
23 L.J 1, 50 (2012) (finding high error rates in hand counts despite study procedures being “very  
24 specific in their demands, and ambiguous ballots and other real-world problems [] not [being]  
25 present.”); *id.* at 46 (“Overall, 40.0% [] of groups provided an incorrect total number of valid  
26 ballots, and 46.7% [] of groups provided an incorrect count for at least one of the four  
candidates.”).

<sup>6</sup> See *id.* at 50 (“[W]ell-specified and consistent procedures help improve audits . . . highly  
specific procedures for manual auditing help reduce confusion and create a replicable, efficient  
audit.”).

1 hand-count effort, which, like Cochise County's, was inspired by unfounded voting machine  
2 conspiracy theories. Two groups of five spent about three hours each counting 50 ballots.  
3 Mismatched tallies led to recounts, and sometimes more recounts. Several noted how arduous  
4 the process was, with one volunteer lamenting: "I can't believe it's two hours to get through  
5 25" ballots. Another group found mismatched tallies during a verification period. A recount  
6 took nearly 40 minutes and two of the recounts still had different outcomes. Gabe Stern,  
7 *Nevada officials begin unprecedented hand count of ballots*, Associated Press, October 28,  
8 2022, [https://apnews.com/article/2022-midterm-elections-nevada-voting-las-vegas-](https://apnews.com/article/2022-midterm-elections-nevada-voting-las-vegas-617fc7a37e9cd8d1a512e4fb7be77574)  
9 [617fc7a37e9cd8d1a512e4fb7be77574](https://apnews.com/article/2022-midterm-elections-nevada-voting-las-vegas-617fc7a37e9cd8d1a512e4fb7be77574).

10 **D. A full hand count will create security and chain of custody concerns,**  
11 **jeopardizing the integrity of ballots before any subsequent and statutorily**  
12 **required recounts and contests.**

13 The limited post-election hand counts authorized by Arizona law require substantial time  
14 and investment from election officials to implement proper protocols and training to ensure that  
15 ballots are secure throughout the process. Necessary procedures include written certifications  
16 about the number of ballots cast and seals to ensure that ballots are not tampered with, requiring  
17 election officials to maintain possession of the ballots and establish a chain of custody.  
18 Particularly because these ballots may be subject to a statutorily mandated recount or election  
19 contest, adequate security and chain of custody procedures are critical to the integrity of the  
20 election. To date, the Board hasn't acknowledged or accounted for the significant staff time the  
21 hand count audit will require to oversee the operation and supervise the small army of necessary  
22 temporary staff and volunteers. This added burden on county staff – one they cannot reasonably  
23 assume at this stage of the election – should not be underestimated.

24 The security and ballot chain of custody risks that will result from a hastily implemented  
25 full hand count should also not be underestimated. Having insufficient time for adequate physical  
26 and cyber security planning and preparations is dangerous. Potentially hundreds of untrained or  
barely trained individuals would be handling voted ballots, under unprecedented conditions and

1 untested procedures. Any resulting loss, damage, or alteration of ballots (whether intentional or  
2 unintentional) would impair the ability to conduct (1) legal reviews during the election contest  
3 period and (2) automatic recounts required under A.R.S. § 16-661 when the margin between the  
4 top two candidates is less than or equal to one half of one percent.

5 **II. Cochise County’s Planned Full Hand Count Could Violate the Arizona**  
6 **Constitution.**

7 The Arizona Constitution provides that “[a]ll elections shall be free and equal, and no  
8 power, civil or military, shall at any time interfere to prevent the free exercise of the right of  
9 suffrage.” Ariz. Const. art. II, § 21. This constitutional guarantee “is implicated when votes are  
10 not properly counted.” *Chavez v. Brewer*, 222 Ariz. 309, 320 ¶ 34 (Ct. App. 2009); *Yazzie v.*  
11 *Hobbs*, No. CV-20-08222-PCT-GMS, 2020 WL 5834757, at \*5 (D. Ariz. Sept. 25, 2020), *aff’d*,  
12 977 F.3d 964 (9th Cir. 2020) (observing that “the [*Chavez*] court did not delineate the entire  
13 scope of what Arizona’s election clause covers but did conclude that the ‘free and equal’ clause  
14 is implicated when votes are not properly counted”).

15 Given the concerns outlined above – particularly the prospect of ballots being lost,  
16 damaged, or altered – any effort by Cochise County to conduct a full hand count of ballots would  
17 also violate the “free and equal” elections clause. Voters and candidates alike should have  
18 confidence that their votes will be accurately tabulated by bipartisan election boards operating  
19 in good faith, adhering to a solemn oath, and following established and tested operational and  
20 security procedures. They should also have confidence that ballots won’t be lost, damaged, or  
21 altered and that vote counts won’t be bungled or manipulated. The unprecedented full hand count  
22 contemplated by Cochise County would shatter that confidence. Two Board members have  
23 started the County down a dangerous path, and this Court should act to get them back on the  
24 right track for the sake of our election system and the voters who trust that it works in an impartial  
25 way to accurately tabulate votes and bring about their will.

1 **Conclusion**

2 County officials in Arizona play critical roles in the administration of our election system,  
3 a system carefully designed by the Legislature. Those officials can do no more and no less than  
4 what the Legislature prescribed. Yet in the wake of the 2020 General Election and the lies and  
5 conspiracy theories that followed, some of those officials, including in Cochise County, are  
6 pursuing misguided agendas. Whether borne in genuine belief or political calculation, these  
7 efforts have real world implications that threaten the free, fair, and orderly administration of  
8 elections in Arizona. The latest movement to jettison electronic voting systems (with no evidence  
9 that they are insecure or inaccurate) in favor of full hand counts (which experts and recent  
10 experience confirm are inherently inaccurate, and which jeopardize the security and chain of  
11 custody of ballots) is just one example.

12 Cochise County's planned full hand count of all ballots cast in the 2022 General Election  
13 is unprecedented and dangerous. This Court should rule in Plaintiffs' favor and ensure that the  
14 County complies with Arizona law and takes no action that would impair the orderly  
15 administration of the upcoming election or the timely canvass of that election by either the  
16 County or the Secretary.

17 Respectfully submitted this 3rd day of November, 2022.

18 **COPPERSMITH BROCKELMAN PLC**

19 By /s/ D. Andrew Gaona  
20 D. Andrew Gaona

21 **STATES UNITED DEMOCRACY CENTER**

22 Sambo (Bo) Dul  
23 Maithreyi Ratakonda\*

24 *\*Application for Pro Hac Vice Forthcoming*

25 *Attorneys for Amicus Curiae Arizona Secretary of*  
26 *State Katie Hobbs*



1 ORIGINAL efiled and served via electronic  
2 means this 3rd day of November, 2022, upon:

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4 Pima County Superior Court  
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15 Director Lisa Marra*

16 /s/ Diana J. Hanson \_\_\_\_\_  
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26

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# **Exhibit 1**



**COCHISE COUNTY  
ATTORNEY'S OFFICE**

*Public Programs. . . Personal Service*  
[www.cochise.az.gov](http://www.cochise.az.gov)

**Brian M. McIntyre  
COCHISE COUNTY ATTORNEY**

November 2, 2022

Michael S. Catlett  
Deputy Solicitor General and Chief Counsel of Special Litigation  
Office of the Attorney General  
Solicitor General's Office  
2005 N. Central Avenue  
Phoenix, AZ 85004  
Via email [Michael.Catlett@azag.gov](mailto:Michael.Catlett@azag.gov)

RE: "Informal" Opinion I22-004  
Election Hand Count

Dear Deputy Solicitor General Catlett,

This office is in receipt of your informal opinion issued October 28, 2022. As your opinion notes, it comes outside of the usual opinion process which involves vetting at multiple levels. I cannot help but note that though it was issued to Senator Gowan, it was carbon copied via email to multiple people, including my statutory clients, the Cochise County Board of Supervisors. This email came roughly thirty minutes prior to a Board meeting in which issues of legal representation regarding the hand count itself were to be addressed. Also, worth noting, the opinion is posted on the Attorney General's website and is only the fourth opinion issued in 2022 rendering its significance clear to not only the citizens of my county, but all over the State of Arizona.

Because of the gravity of the implications of the informal opinion issued, I requested my civil division conduct an analysis of the opinion. That analysis is attached. I understand that tight timelines were at hand, but I am particularly concerned with the failure to analyze the issue under well settled principles of statutory interpretation. As noted by my civil deputy, the opinion eviscerates the hand count audit process provided for in Arizona law.

Because of the discrepancy between your office's advisory informal opinion and our office's analysis of the issue, I respectfully request that the Attorney General's Office

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Drug Unit Fax: (520) 432-2487  
General Crimes Fax: (520) 432-4208  
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Catlett – Hand Count Opinion

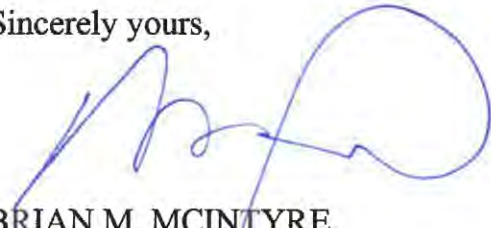
Page 2

November 2, 2022

remove the advisory opinion until such time as it has gone through the formal vetting process to ensure proper guidance to all interested parties now and in the future.

Thank you for your time.

Sincerely yours,



BRIAN M. MCINTYRE  
Cochise County Attorney

BMM/bmm

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**Cochise County  
Attorney's Office  
Civil Division**

Public Programs...Personal Service  
www.cochise.az.gov

**BRIAN M. McINTYRE**  
Cochise County Attorney

## Interoffice Memorandum

**To:** Brian McIntyre, County Attorney  
**From:** Kris Carlson, Deputy County Attorney  
**Date:** November 2, 2022  
**Subject:** Solicitor General Informal Opinion Regarding Hand Counts

Deputy Solicitor General Michael Catlett authored an informal opinion (“Opinion”), dated Oct. 28, 2022, that analyzed the legal authority of Cochise County to perform an expanded hand count audit. The Opinion is fundamentally incorrect. This memorandum addresses that error, which ranges from selective interpretation to misstatement of the law.

The Elections Procedure Manual (“EPM”) prescribes the process by which hand counts<sup>1</sup> are performed. The EPM addresses hand count audits of vote centers and hand count audits of early ballots. Generally, the process is a random sampling of a small set that escalates if discrepancies are found. If insufficient discrepancies are identified, then no expansion is triggered and the counting ceases. That the hand count audit requires sufficient error to be detected before expansion can occur is conspicuously absent from the Opinion’s analysis. The Opinion eviscerates the hand count audit guidance by ignoring essential procedural rules. A cardinal principle of statutory interpretation<sup>2</sup> is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544 (2005). The Opinion’s analysis, if followed, would lead to violation of the EPM. Violation of the EPM is a criminal act<sup>3</sup> pursuant to ARS 16-452(C.).

<sup>1</sup> Hand counts are authorized pursuant to ARS 16-602.

<sup>2</sup> Because the EPM is given force of law by statute, application of the canons of construction for statutory interpretation is appropriate when analyzing the EPM despite the EPM not being statute.

<sup>3</sup> Class 2 misdemeanor.

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Juvenile 520-417-0895  
Misdemeanor 520-432-8729  
Victim Witness 520-432-8777



## Voting Centers

The Opinion incorrectly states that Cochise County has discretion to perform an expanded hand count audit at 100% of the voting centers. This is wrong because a hand count audit of 100% of the vote centers is initiated by a specific trigger and is not discretionary. Cochise County does NOT have discretion and such an act would be violation of the EPM.

Hand count audits of voting centers are treated as hand count audits of precincts<sup>4</sup>, and that process is described in EPM, Chapter 11, VIII.(A.). The process consists of 4 stages: 1) Precinct Hand Count, 2) Second Precinct Hand Count, 3) Expanded Precinct Hand Count, and 4) Full Precinct Hand Count. Each subsequent stage is triggered when the previous stage's count equals or exceeds a designated margin of error. If at any stage the count is less than the margin of error; "the hand count will be concluded and the results of the electronic tabulation will constitute the official count for that race."<sup>5</sup> Accordingly, a 100% hand count audit of all voting centers is stage 4 of the process and can only occur if sufficient error was detected in stages 1,2, and 3.

The Opinion misleadingly states: "There is no provision of 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 myopically ignores that the hand count audit can only reach an increased ceiling if sufficient error was detected. If there is insufficient error, the counting concludes. The Opinion's error appears to be derived from selective interpretation. It is technically true that there is no ceiling, however, the steps necessary to expand the ceiling are omitted from the Opinion's analysis. As Attorney General Brnovich said: "A man hears what he wants to hear and disregards the rest."<sup>6</sup>

The Opinion inexplicably reasons that the lack of ceiling on the percentage of vote centers provides the Cochise County Board of Supervisors ("BOS") with discretion to conduct an expanded hand count from 100% of the voting centers. There is no discretion. The expansion is triggered by a designated margin of error. Absent the specified error, the expansion does not continue.

The Opinion claims that statutory text suggests the BOS should review all ballots cast at polling places. The Opinion offers ARS 16-602 as support because that statute states: "the selection of precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center." The Opinion misapprehends the intent. A more likely interpretation of statutory intent is that the audit cannot begin until the election is over. An audit undertaken while polling was still ongoing would be nonsensical. Additionally, if the Legislature intended the audit to consist of 100% of voting centers, ARS 16-602 would not specify a random sample. "At least 2% of the precincts in that county, or two precincts, whichever is greater, shall be selected at random ...."

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<sup>4</sup> EPM page 215.

<sup>5</sup> See EPM pages 225-228.

<sup>6</sup> Pelly, S. (2022, October 30). "Arizona AG Debunks 2020 Election Fraud Claims." *60 Minutes*. [Two Arizona Republicans on their fight for election facts - 60 Minutes - CBS News](#)

Random sampling, by definition, is less than 100%. The Opinion's claim produces an absurd result. There is no way to produce random sampling if all ballots are to be reviewed. "In interpreting a statute a sensible construction should be given which will accomplish the legislative intent and purpose and which will avoid an absurd conclusion or result." *Arnold Const. Co., Inc. v. Arizona Board of Regents*, 109 Ariz. 495, 512 P.2d 1229 (1973).

### Early Ballots

The Opinion incorrectly states that Cochise County has authority to audit 100% of early ballots cast. This is wrong because an Expanded Early Ballot Hand Count is initiated by a specific trigger similar to the process for the voting centers audit. Cochise County does NOT have discretion to expand the hand count unless sufficient error is first identified.

Hand count audits of early ballots are procedurally similar to audits of voting centers, and audits of early ballots are described in EPM, Chapter 11, VIII.(B.) The process consists of 3 stages: 1) Early Ballot Hand Count, 2) Second Early Ballot Hand Count, and 3) Expanded Early Ballot Hand Count. Just as with the voting center audit, each subsequent stage is triggered when the previous stage's count equals or exceeds a designated margin of error. Just as with the voting center audit, if at any stage the count is less than the margin of error, "no further hand count of the early ballots shall be conducted."<sup>7</sup> The final stage, Expanded Early Ballot Hand Count, continues in additional iterations of a random 1% of early ballots or 5000 early ballots, whichever is less, until the audit count results in a margin of error less than the designated margin.

The Opinion misleadingly states: "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." This myopically ignores that the hand count audit can only reach an increased ceiling if sufficient error was detected. If there is insufficient error, the counting concludes. Just as with the Opinion's analysis of the voting center audit, it is technically true that there is no maximum limit, however, the steps necessary to expand the limit are omitted from the Opinion's analysis.

It is worth noting that the EPM provides contradictory guidance with regard to the number of early ballots to be included in the first stage of the audit. The EPM, on page 215, states: "The officer in charge of elections is required to conduct a hand count of 1% of the total number of early ballot cast, or 5000 early ballots, whichever is less." ARS 16-602(F). *Counties may elect to audit a higher number of ballots at their discretion.* (emphasis added). However, subsequent references omit this discretion and set the amount as a fixed value. EPM page 228 states: "The number of early ballots to be counted is 1% of the total number of early ballots cast or 5000 early ballots, whichever is less." Additionally, the same page states: "Prior to the beginning of the tabulation of early ballots, the officer in charge of elections shall determine the total number of early ballots sent for the election. From this number, the officer in charge of elections shall calculate a number that equals 1% of the number or 5000, whichever is less." The value is fixed at 1% or 5000. Yet, this inconsistency does not affect

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<sup>7</sup> See EPM pages 231-232.



the analysis because even if a county elected to audit a higher number (seemingly in contradiction to further guidance contained in the EPM), any further counting could only occur if the audit count was equal to or exceeded the margin of error. Assuming arguendo that a county elected to audit 100%, that value would be in conflict with the statutory requirement of a random sample<sup>8</sup> and would be in conflict with procedural requirements to increase the audit by 1% if sufficient error is detected.

#### Purcell Principle

The Opinion does not address the Purcell Doctrine, but it is likely to be implicated if the BOS relied on the Opinion to alter Cochise County's hand count procedure. The Purcell Principle is a presumption against last-minute changes to election procedures. This originates in a Supreme Court of the United States review of a case originating in Arizona, *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006). Because states have a compelling interest in preserving the integrity of the election process, lower federal courts should ordinarily not alter the election rules on the eve of election. The Supreme Court of the State of Arizona does not appear to have addressed the Purcell Principle, but as federal races are part of our upcoming ballot, the possibility exists for the Purcell Principle to become part of the analysis. Given that the BOS is expressing a desire to alter Cochise County election rules and the election is already underway, the BOS would need to overcome the presumption against altering election rules.

#### Summary

The informal opinion of Deputy Solicitor General Michael Catlett incorrectly states that the Cochise County Board of Supervisors has legal authority to conduct a 100% audit of voting centers and a 100% audit of early ballots because the informal opinion ignores that the Elections Procedure Manual specifies an incremental procedure for escalating audits that is triggered by errors of margin. Absent the specified error, the audit does not expand.

If you have any questions, feel free to contact me at your convenience.



Kris Carlson  
Deputy County Attorney

---

<sup>8</sup> ARS 16-602(F)

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12 *Attorneys for Defendant Lisa Marra*

9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11 IN AND FOR THE COUNTY OF COCHISE

12 ARIZONA ALLIANCE OF RETIRED  
13 AMERICANS, INC. and STEPHANI  
14 STEPHENSON,

15 Plaintiffs,

16 v.

17 TOM CROSBY, ANN ENGLISH, and  
18 PEGGY JUDD, in their official  
19 capacities as the Cochise County  
20 Board of Supervisors; DAVID  
21 STEVENS, in his official capacity as  
22 the Cochise County Recorder; and  
23 LISA MARRA, in her official capacity  
24 as the Cochise County Elections  
25 Director,

26 Defendants.

Case No. S0200CV202200518

**DEFENDANT LISA MARRA'S ANSWER  
TO VERIFIED SPECIAL ACTION  
COMPLAINT**

**(Assigned to The Honorable Casey  
McGinley)**

25 Defendant Lisa Marra ("Marra") answers Plaintiffs' Verified Special Action  
26 Complaint as follows.









- 1           32.   Admits.
- 2           33.   Admits.
- 3           34.   Admits.
- 4           35.   Admits.
- 5           36.   Admits.
- 6           37.   Admits.
- 7           38.   Admits that some members of the public spoke against an audit of all ballots
- 8 cast.
- 9           39.   Admits.
- 10          40.   Admits.
- 11          41.   Admits.
- 12          42.   Admits.
- 13          43.   Admits.
- 14          44.   Upon information and belief, admits that the Board voted 2-1 to adopt the
- 15 measure, with Defendant Supervisor English opposing. Without sufficient information to
- 16 admit or deny the remaining allegations.
- 17          45.   Upon information and belief, admits that this paragraph accurately
- 18 summarizes the Secretary of State's October 25, 2022 letter.
- 19          46.   Upon information and belief, admits that this paragraph accurately
- 20 summarizes the Secretary of State's October 25, 2022 letter.
- 21          47.   Upon information and belief, admits that this paragraph accurately quotes
- 22 the Board's letter to the Secretary of State.
- 23          48.   Admits that during the October 28, 2022 Board meeting, a discussion of a
- 24 full hand count audit transpired, the full detail of which is publicly available.
- 25          49.   Admits that during the October 28, 2022 Board meeting, County Attorney
- 26 McIntyre provided further explanation to the Board, the full detail of which is publicly
- 27 available.



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70. Admits.

71. Admits.

72. Admits that declaratory and injunctive relief is necessary to ensure that the Defendant Supervisors and Defendant Recorder proceed in accordance with the law.

**AFFIRMATIVE DEFENSES**

Marra will assert affirmative defenses should she become aware of the need to assert such defenses during litigation or discovery.

WHEREFORE, having fully answered Plaintiff's Verified Special Action Complaint, Defendant respectfully requests that the Court:

A. Grant the relief requested in Plaintiff's Verified Special Action Complaint; and

B. Award such other relief as the Court deems just and appropriate under the circumstances.

DATED this 3<sup>rd</sup> day of November, 2022.

**PIERCE COLEMAN PLLC**

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*Attorneys for Defendant Marra*

/ / /  
/ / /  
/ / /

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2022, I electronically transmitted this document to the Clerk’s Office using the AZTurbo System for filing, and on this same day, served a copy via electronic mail upon the following:

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14 *Attorneys for Recorder David Stevens*

15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
16 **IN AND FOR THE COUNTY OF COCHISE**

17 ARIZONA ALLIANCE FOR RETIRED AMERICANS, INC. and STEPHANI STEPHENSON, CASE NO: CV2022-00518

18 *Plaintiffs,*

19 **RECORDER STEVENS' MOTION  
20 TO DISMISS AND RESPONSE TO  
21 PETITION**

22 v.

23 TOM CROSBY, ANN ENGLISH, and  
24 PEGGY JUDD, in their official capacities  
25 as the Cochise County Board of  
26 Supervisors; DAVID STEVENS, in his  
27 official capacity as the Cochise County  
28 Recorder; and LISA MARA, in her official  
capacity as the Cochise County Elections  
Director,

*Defendants.*



1 Every general election, each county in Arizona must count some ballots twice –  
2 once by machine and once by hand. Counties must meet certain minimums as to the  
3 number of ballots recounted, but have the discretion to count more if they wish. As  
4 Plaintiffs note, the elected Cochise County Board of Supervisors (“Board”) and the  
5 elected County Recorder intend to conduct an expanded hand count of all the ballots cast  
6 in the General Election to be completed prior to the canvas of election results. Petition  
7 5:16-18. No voter will be negatively impacted by this decision. All ballots the law  
8 requires to be counted by machine will still be counted in that fashion. The expanded  
9 hand count will merely serve as an additional confirmation of the accuracy of that  
10 process, consistent with Defendants’ legitimate interests in safeguarding our elections  
11 and reinforcing public confidence in the elections process. Indeed, all voters will be  
12 positively impacted by Defendants’ decision to behave as cautiously as the law **allows**  
13 instead of contenting themselves with behaving only as cautiously as it **requires**.  
14

15 As an initial matter, Plaintiffs’ suit suffers from a basic legal error. Unfortunately  
16 for them, this error is jurisdictional – they have confused a writ of mandamus with a writ  
17 of prohibition. Mandamus relief is easy to understand. As the name implies, a writ of  
18 mandamus is available to compel a public official do something the law requires them to  
19 do and which they have not done. A writ of prohibition, on the other hand, “prohibits” a  
20 public official from exceeding their authority. This is important because, as Defendants  
21 acknowledge, mandamus actions are subject to more lenient standing rules and plaintiffs  
22 in such actions need not satisfy the requirements for injunctive relief other than the  
23 likelihood of success on the merits. Actions to obtain a writ of prohibition, on the other  
24 hand, are not so favored. Therefore, Plaintiffs must satisfy normal standing requirements.  
25 However, they cannot do so because their suit amounts to generalized grievances about  
26 the election process insufficient to confer standing. And because Plaintiffs have failed to  
27 plead a claim for mandamus, they must also satisfy the traditional four factor test to obtain  
28 injunctive relief. But they cannot satisfy even one of those four factors.

1 Plaintiffs are also wrong when they assert that Defendants lack the authority to  
2 provide voters the peace of mind of knowing that the results have been fully double  
3 checked by a tri-partisan team of volunteers and election professionals. They are wrong,  
4 firstly, because they have made another basic mistake of Arizona election law and failed  
5 to realize that ARS 16-602 contemplates two entirely different types of hand counts, both  
6 of which are governed by different subparts of the statute. ARS 16-602(B) governs hand  
7 counts generally (“Type 1 Hand Counts”). ARS 16-602(F), on which Plaintiffs’ entire  
8 argument is based, only applies to hand counts of early ballots (“Type 2 Hand Counts”).  
9 Thus, it cannot be the case that the law prohibits Defendants from conducting a 100%  
10 hand count of ballots that are not early ballots.  
11

12 But even as to the Type 2 Hand Counts of early ballots contemplated by ARS 16-  
13 602(F), Plaintiffs are wrong. Though subpart (F) is unclear as to whether 1% or 5,000  
14 ballots is a floor or the exact number of early ballots that must be hand counted, the  
15 Elections Procedures Manual, which also has the force of law, makes clear that counties  
16 may elect to audit a higher number of ballots at their discretion, even for Type 2 Hand  
17 Counts. They are wrong on the law and their suit must be dismissed. Alternatively,  
18 plaintiffs are, at minimum, unlikely to succeed on the merits and injunctive relief should  
19 be denied.  
20

21 The remaining injunctive relief factors all tip sharply in Plaintiffs’ favor. Plaintiffs  
22 will suffer no harm, much less an irreparable one, if their requested injunction is denied.  
23 The only “harm” they will suffer is having a slightly higher chance of having their ballot  
24 counted twice, once by hand and once by machine. This is no harm at all, much less an  
25 irreparable one.

26 Similarly, the balance of the equities tips in Defendants’ favor because, in contrast  
27 to Plaintiffs, who stand to suffer no harm at all, Defendants will suffer irreparable harm  
28 if the injunction is granted. By law, both Type 1 and Type 2 hand counts must begin the  
day after the election, or they may not begin at all. And, by law, all hand counts must be

1 completed by the canvas. An injunction, even for a brief period of time, would make it  
2 more difficult for Defendants to fulfill these legal requirements.

3 Finally, the public interest favors Defendants. The most likely result if the  
4 expanded hand count is permitted to proceed is that the results will match those of the  
5 electronic tabulation, which will reinforce confidence in our elections. In contrast if the  
6 hand count is enjoined, especially given the absurdity of any claim that Plaintiffs will be  
7 “harmed” by a higher probability of having their ballots counted twice, voters will  
8 wonder what there is to hide and will become more distrustful of our elections.

9 For these reasons, Plaintiffs’ suit should be dismissed or, alternatively, injunctive  
10 relief should be denied.

### 11 **FACTUAL BACKGROUND**

#### 12 *The Recorder is Qualified and Competent to Manage a Hand Count*

13 Recorder David Stevens is an “officer in charge of elections” within the meaning  
14 of Title 16. *See e.g.*, ARS 16-411(A)(5) ([T]he board may authorize the county recorder  
15 or other officer in charge of elections to use emergency voting centers[.]”). Recorder  
16 David Stevens is qualified by experience and education to establish, oversee, and manage  
17 the hand count to a successful conclusion. He brings thirty years of experience in IT to  
18 the project as well as eight years of service in the Arizona House of Representatives as a  
19 legislator for what is now LD 14 (Jan. 2009-Jan. 2017), where he was Chairman of the  
20 House Ethics Committee and Rules Committee. In 2002, he graduated from the State  
21 University of New York with a degree in computer information systems/computer  
22 science. He is a veteran of the U.S. Army where he served as a computer operator at Fort  
23 Huachuca performing operation and maintenance on processors, disc drives, and printers.  
24 There, he also performed systems maintenance including backup and recovery, test/disk  
25 reformatting and archiving of data. He maintained records regarding output units and  
26 supply inventories, as well as system logs. He currently holds a “TS/SC” security  
27 clearance (“top secret/sensitive compartmented information”) from the U.S. Department  
28



1 of Defense. He also worked in internet security for the Army both in CONUS and Kuwait,  
2 supervising a database of over a billion entries.

3 *The Recorder has a Plan for the Hand Count That Comports with the Law and*  
4 *Preserves Election Integrity.*

5 The Recorder has put together a multi-level plan to establish the hand count. In  
6 overview, the plan consists of the following steps:

- 7 1. Mobilize the maximum number of volunteers as law allows (currently that number  
8 is 220).
- 9 2. House the counting activities in a secure facility large enough for everyone. The  
10 Recorder has identified three locations that are available.
- 11 3. Follow procedures set forth in statute and the Elections Procedures Manual  
12 (“EPM”), and start the process the within 24 hours of the polls closing draw the  
13 races the day after the elections.
- 14 4. Use the authorized three-person method for the count.
- 15 5. Use a batch size of 25 ballots.
- 16 6. Work deliberately and steadily to complete the hand count prior to the canvas in  
17 late November.
- 18 7. Use a three level of management style.
  - 19 a. The Recorder and the party chairs as principal managers;
  - 20 b. Using at least ten members as area supervisors over 6+ groups each; and
  - 21 c. Three member counting groups to count the ballots.
- 22
- 23
- 24

25 The detailed processes for such a hand count are set forth in Chapter 11 of the EPM (pgs.  
26 213-234), which the Recorder is very familiar with (as he was consulted extensively  
27 during drafting) and intends to follow. Section VIII of Chapter 11 of the EPM sets forth  
28 the detailed procedures for conducting the hand count. It sets out the detailed procedures

1 for precinct hand counts as well as the early ballot hand count which the Recorder intends  
2 to comply with.

3 *The Recorder's Plan Will Preserve the Chain of Custody and Bi-Partisan Access*

4 After the Recorder or his designee signs for the ballots, they will initially be stored  
5 in the Recorder's vault, which is the same vault in which he stores them for the signature  
6 verification process currently. The ballots will be transferred to the counting site under  
7 the supervision of law enforcement and Recorder employees in locked, weatherproof  
8 containers. The ballots at rest will remained locked and be stored in a location that  
9 provide the best security. While the ballots are in transit, they will be escorted by deputy  
10 Sherriff personnel.

11  
12 Overall access to the counting will be controlled by law enforcement officers on  
13 site and employees of the Recorder. All three parties have provided volunteers to work  
14 and the party chairs will be with me to oversee the entire operation. In addition, the  
15 Director of Elections will be welcome to attend, or her designee.

16 *Manageableness of the Count*

17 Hand counts of the volume of ballots expected in Cochise County are feasible. In  
18 Arizona, local officials meet no later than 20 days after the election to canvass and certify  
19 local election returns. The Secretary of State (in the presence of the Governor, Attorney  
20 General, and Chief Justice) canvasses and certifies results for state and federal offices on  
21 the fourth Monday following the election. The Secretary of State issues certificates of  
22 election. (A.R.S. 16-642; 648; 650). Thus, the rate of counting to count 60,000 votes in  
23 20 days would require a rate of 3,000 votes per day—a not unmanageable number  
24 depending on the number of persons employed. Indeed, with 220 volunteers this amounts  
25 to approximately 13.6 ballots per volunteer per day. And, as set forth above, turnout in  
26 presidential election years is usually far higher than in midterm elections making 60,000  
27 ballots an extraordinarily high-end estimate. To date, the Recorder has about 22,000 early  
28 ballots and is estimating approximately 35,000 total ballots will need counting. This will

1 be slightly fewer ballots than were cast in the last midterm.<sup>1</sup> With 35,000 ballots, 220  
2 volunteers could complete the hand count by counting approximately 8 ballots per  
3 volunteer per day.

4 *Hand counts are accurate and have long been used to check machine counts*

5 The State of Georgia conducted a full hand recount of the presidential vote from  
6 November 11, 2020, to November 19, 2020. The recount required counting a bit more  
7 than 5 million ballots from all of Georgia's 159 counties. The recount involved examining  
8 41,881 batches, hand-sorting them, and counting each ballot by hand. It was the largest  
9 hand count of ballots in the U.S.<sup>2</sup> Comparing the results of the machine count to the hand  
10 recount showed a variation in the statewide total vote count of 0.1053%. No county  
11 showed a variation in the margin between the machine count and the hand recount larger  
12 than 0.73% and 103 of the 159 counties showed a margin variation less than 0.05%. Thus,  
13 the Georgia experience from 2020 shows that hand counts are on par with machine counts  
14 as to accuracy.<sup>3</sup>

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21 <sup>1</sup> See <https://cochise.az.gov/DocumentCenter/View/683/Cumulative-Results-PDF> (45,927 ballots  
22 cast).

23 <sup>2</sup> See [https://sos.ga.gov/sites/default/files/2022-  
24 2/11.19\\_20\\_risk\\_limiting\\_audit\\_report\\_memo\\_1.pdf](https://sos.ga.gov/sites/default/files/2022-2/11.19_20_risk_limiting_audit_report_memo_1.pdf)

25 <sup>3</sup> France hand counted 32,077,401 votes to find Macron as the winner in the run-off election for  
26 president on April 24, 2022. [https://www.lemonde.fr/en/politics/article/2022/04/25/french-  
27 election-results-in-charts-and-maps-abstention-and-le-pen-gain-ground\\_5981592\\_5.html](https://www.lemonde.fr/en/politics/article/2022/04/25/french-election-results-in-charts-and-maps-abstention-and-le-pen-gain-ground_5981592_5.html). The  
28 results of the run-off election were announced on April 25, 2022, at 11:36 a.m. EDT.  
<https://www.cnn.com/2022/04/24/europe/french-election-results-macron-le-pen-intl/index.html>.  
Machine voting has been frozen since 2008 due to security concerns and only allowed on an  
experimental basis in 60 towns out of about 35,000 municipalities in the country. France uses  
paper ballots, hand counting, with no absentee voting and no early voting, according to the AP.  
[https://apnews.com/article/covid-health-business-elections-france-  
e06fab5cde84f23d682013e1661caf35](https://apnews.com/article/covid-health-business-elections-france-e06fab5cde84f23d682013e1661caf35).



1 Nor do recounts necessarily favor one party or the other. A survey of recounts  
2 from 2000-2019, showed that of 5,778 statewide elections 31 resulted in recounts. Only  
3 three of those recounts overturned the outcome in each case an originally declared  
4 winner, a Republican, was ultimately declared the loser to the Democrat candidate. In all  
5 three races, the original margin was less than 0.05%.<sup>4</sup>

6 The Ansolabehere Article relied on by Plaintiffs for the notion that “Vote counts  
7 by machines are more accurate than tallies by hand,” (Pet. 5, Comp. para. 31)<sup>5</sup> actually  
8 concluded that vote **recounts** by hand after the “hurly burly” of election night counting  
9 find errors committed by machine counts **on election night**. There, researchers compared  
10 machine counts on election night of two statewide elections in Wisconsin with the “more  
11 careful” recounts done mostly **by hand** afterwards. The hand recount of the 2016  
12 presidential race found that 0.59% of the ballots counted by machine on election night  
13 2016 were miscounted when compared to the recount afterwards, i.e., **one out of every**  
14 **170 ballots in 2016 was miscounted when checked by the hand recount**. (Id. at 105).  
15 Only 0.21% were miscounted on election night in a judicial race in 2011, i.e., one out of  
16 every 475 ballots. The difference in the error rates was “almost entirely” due to  
17 “miscounting of minor party and write-in ballots in 2016.” (Id. p. 101). In reflecting on  
18 their findings, the authors noted, “The fact that the average scanner is more accurate than  
19 the average human in counting ballots **on election night** is not an argument against  
20 checking the work of computers. Quite the opposite.” (Id. at 116). Thus, the article means  
21 that hand recounts after the machine counts under election night conditions are the  
22 standard against which the machine counts are checked.  
23  
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27 <sup>4</sup> [https://fairvote.org/report/a\\_survey\\_and\\_analysis\\_of\\_statewide\\_election\\_recounts/](https://fairvote.org/report/a_survey_and_analysis_of_statewide_election_recounts/)

28 <sup>5</sup> Stephen Ansolabehere, Barry C. Burden, Kenneth R. Mayer, & Charles Stewart III, Learning  
from Recounts, 17 Elec. Law J. 100, 115 (2018)[“Ansolabehere Article”],  
<https://www.liebertpub.com/doi/epdf/10.1089/e1j.2017.0440>

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**ARGUMENT**

**I. This Court lacks jurisdiction to hear Plaintiffs' mandamus claims. Alternatively, Plaintiffs have failed to state a claim for mandamus.**

Plaintiffs' Complaint does not state a claim for mandamus-type relief because it asks this Court to **prohibit Defendants from doing something** rather than **compel Defendants to do something**. ARS 12-2021 provides in pertinent part:

A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal, corporation or board ... on the verified complaint of the party beneficially interested, to **compel**, when there is not a plain, adequate and speedy remedy at law, **performance** of an act which the law specially imposes as a duty resulting from an office, trust or station[.]

The requirements of ARS 12-2021 are jurisdictional. *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 (2019), *Sears v. Hull*, 192 Ariz. 65, 68 (1998).

“[T]he traditional mandamus theory of relief [set forth in ARS 12-2021] is contained in [Special Action] Rule 3(a), which allows one to challenge the defendant's alleged failure "to perform a duty required by law as to which he has no discretion." *Home Builders Ass'n v. City of Apache Junction*, 198 Ariz. 493, 503 (Ct. App. 2000). In contrast, Plaintiffs' claims are properly raised under Special Action Rule 3(b), which provides for a cause of action where it is alleged that a “defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority[.]” *See also Law v. Superior Court*, 157 Ariz. 142, 146 (Ct. App. 1986) (“Rule 3(a) is mandamus; Rule 3(b) is certiorari and **prohibition**[.]”). Here the allegation is not that Defendants are unwilling to perform the hand counts the law requires them to perform. Rather, it is that they are “threatening to proceed without or in excess of jurisdiction or legal authority” by counting more ballots than the law allegedly allows in the course of performing those duties and should be **prohibited** from doing so. This is not a claim in the nature of mandamus.

1           *Fontes* supplies no exception. There, though the law at issue in that case stated  
2 that the Recorder “*must* supply printed instructions that . . . [i]nform voters that no votes  
3 will be counted for a particular office if they overvote,” and that voters “should contact  
4 the County Recorder to request a new ballot in the event of an overvote[.]” the Recorder  
5 failed to do so. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020) (italics in  
6 original). Mandamus relief was thus proper to **compel** the Recorder to propound those  
7 instructions. *Id.* at 62 (emphasis supplied).

8           For these reasons, this court lacks jurisdiction over Plaintiffs’ mandamus claims  
9 or, alternatively, Plaintiffs have failed to state a claim for mandamus.

10  
11       **II. In the absence of a claim for mandamus, Plaintiffs acknowledge that the**  
12 **traditional standing and preliminary injunctive factors apply. Plaintiffs lack**  
13 **standing and cannot establish the preliminary injunctive factors.**

14       **a. Plaintiffs lack standing.**

15           As set forth above, Plaintiffs’ mandamus claims must be dismissed. Plaintiffs  
16 acknowledge that outside of the mandamus context, they must establish both standing  
17 and the traditional injunctive relief factors. Petition 7:26-28, 11:20-21. Because Plaintiffs  
18 allege no injury particular to them, rather than common to all voters of the county, they  
19 cannot establish standing and their case should be dismissed.

20           “As a matter of judicial restraint” Arizona Courts have “traditionally required a  
21 party to establish standing.” *Arizonans for Second Chances, Rehab., & Pub. Safety v.*  
22 *Hobbs*, 249 Ariz. 396, 405 (2020). The Arizona Supreme Court is “informed” by federal  
23 case law regarding the issue of standing and finds such cases “instructive[.]” *Id.*; accord  
24 Petition 13:5-6 (“Arizona courts find federal case law instructive on the matter of  
25 standing.”).

26  
27           To establish standing, a party must allege a **particularized injury** “fairly traceable  
28 to the defendant’s allegedly unlawful conduct[.]” *Bennett v. Napolitano*, 206 Ariz. 520,



1 525 (2003) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). “An injury to the right ‘to  
2 require that the government be administered according to the law’ is  
3 a generalized grievance. And the [United States] Supreme Court has made clear that  
4 a generalized grievance, ‘no matter how sincere,’ cannot support standing.”  
5 *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (citing *Chiles v.*  
6 *Thornburgh*, 865 F.2d 1197, 1205-06 (11th Cir. 1989) and *Hollingsworth v. Perry*, 570  
7 U.S. 693, 706 (2013)).

8  
9 A generalized grievance is “undifferentiated and common to all members of the  
10 public.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992). Thus, a plaintiff who  
11 challenges the administration of election laws must explain how their “interest in  
12 compliance with state election laws is different from that of any other person.” *Wood v.*  
13 *Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020).

14 If the expanded hand count were to treat ballots cast by Plaintiffs’ members, and  
15 only those ballots, differently from those of other voters, Plaintiffs would perhaps have  
16 standing. But Defendants have expressed no intention to do so. Indeed, it is not **possible**  
17 for Defendants to do so since ballots contain no personally identifying information and  
18 so, once cast, cannot be tied back to any particular voter. ARS 16-502. But because “no  
19 single voter is specifically disadvantaged if [votes are] counted improperly, even if the  
20 error might have a mathematical impact on the final tally and thus on the proportional  
21 effect of every vote”, an allegation that election officials plan to count votes improperly  
22 is a “paradigmatic generalized grievance that cannot support standing.” *Wood v.*  
23 *Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) (cleaned up).

24  
25 Plaintiffs’ alleged harms of loss of confidence in the election process and the  
26 “need” to expend resources to address that also fail to provide standing because they are  
27 “abstract”, “conjectural”, or “hypothetical[.]” *Allen v. Wright*, 468 U.S. 737, 751 (1984).  
28 Additionally, the injury must be “fairly” traceable to the challenged action, and relief  
from the injury must be “likely” to follow from a favorable decision. *Allen v. Wright*, 468

1 U.S. 737, 751 (1984). But distrust in our elections is a national phenomena, not something  
2 fairly traceable to the challenged action. And indeed, while Plaintiffs think an expanded  
3 hand-count will undermine confidence in our elections, Defendants think that it will  
4 increase confidence in our elections. In deciding what will increase or undermine  
5 confidence in our elections, this Court should defer to those that the voting public of this  
6 County actually elects to represent their interests.

7       Because Plaintiffs lack standing, their case must be dismissed.

8  
9       **b. Even if Plaintiffs had standing (they don't), Plaintiffs fail to satisfy the**  
10       **four prerequisites for preliminary injunctive relief.**

11       To obtain injunctive relief, a party must demonstrate, a strong likelihood of  
12 success on the merits, the possibility of irreparable injury not remediable by damages,  
13 that the balance of hardships is in their favor, and that public policy favors the injunction.  
14 *Shoen v. Shoen*, 167 Ariz. 58, 63 (Ct. App. 1990). None of these factors is present here.  
15 Further, “[t]he critical element in this analysis is the relative hardship to the parties.” *Id.*  
16 Plaintiffs, however, face no harm at all if their requested relief is denied while Defendants  
17 will suffer irreparable harm if it is granted.

18       **i. Because Plaintiffs are wrong on the merits, their case should be**  
19       **dismissed. Alternatively, Plaintiffs are unlikely to succeed in**  
20       **demonstrating that a 100% hand count is clearly unlawful.**

21       Plaintiffs are unlikely to succeed on the merits, and not only because they lack  
22 standing. As the Attorney General has made clear, they are wrong on the law too. *See*  
23 *Exh. F to Verified Compl. [Informal Opinion of the Arizona Attorney General]*.

24       “It is a settled principle of law that official acts of public officers are presumed to  
25 be correct and legal, in the absence of clear and convincing evidence to the contrary.”  
26 *Burri v. Campbell*, 102 Ariz. 541, 543 (1967). Plaintiffs’ entire case hinges on the  
27 contention that ARS 16-602(F) clearly prohibits Defendants from hand counting more  
28 than 5,000 ballots. Petition 2:18-28. This is wrong for two reasons. *First*, ARS 16-602(F)



1 does not apply to all hand counts, only hand counts of early ballots. *Secondly*, the  
2 Elections Procedures Manual (“EPM”) which, like a statute, has the force of law, clearly  
3 permits counties to hand count more than 5,000 early ballots.  
4

5 **1. ARS 16-602(F) applies only to Type 2 Hand Counts of early**  
6 **ballots, not to Type 1 Hand Counts of election day ballots.**

7 ARS 16-602(B) provides: “For each countywide primary, special, general and  
8 presidential preference election, the county officer in charge of the election shall conduct  
9 a hand count at one or more secure facilities.” For such hand counts (“Type 1 Hand  
10 Counts”), the only numerical requirement is that Defendants count all the ballots in “**At**  
11 **least** two percent of the precincts in that county, or two precincts, whichever is  
12 greater[.]” 16-602(B)(1). “Provisional ballots, conditional provisional ballots and  
13 write-in votes shall not be included” in hand counts pursuant to ARS 16-602(B). *Id.*  
14 Instead, such ballots “shall be grouped separately by the officer in charge of elections  
15 for purposes of **a separate manual audit pursuant to subsection F** of this section.”  
16 *Id.* Accordingly, the rules in 16-602(F), apply to an entirely separate type of hand  
17 count. (“Type 2 Hand Counts”).  
18

19 This is important because there can be no argument that any 5,000 ballot  
20 limitation contained in 16-602(F) applies to Type 1 Hand Counts. But as set forth  
21 below 16-602(F) provides no such limit even for Type 2 Hand Counts.

22 **2. Defendants have discretion to count more than 5,000 early**  
23 **ballots in Type 2 Hand Counts.**

24 In contrast, to Type 1 Hand Counts, which require Defendants to count at least  
25 **two percent** of the ballots cast at precincts”, Type 2 Hand Counts require Defendants to  
26 hand count a number of early ballots “equal to **one percent** of the total number of early  
27 ballots cast or five thousand early ballots, whichever is less.” ARS 16-602(F).  
28 Recorder Stevens and the Attorney General both acknowledge that it is not obvious

1 from the statutory text alone whether this sets the **minimum number** of early ballots  
2 or the **exact number** of early ballots that must be counted. *See* Exh. F to Verified  
3 Compl. at pg. 4. Fortunately, however, another law provides the needed clarity.

4 Arizona has two sources of election law. One is statutory and primarily codified  
5 at ARS Title 16 (our election code). The other is the Elections Procedures Manual  
6 (“EPM”), which is jointly propounded by the Governor, Attorney General, and Secretary  
7 of State. *See* ARS 16-452(B). When prescribing rules regarding the “procedures for ...  
8 counting, tabulating and storing ballots[,]” the EPM has the force of statutory law.  
9 *McKenna v. Soto*, 250 Ariz. 469, 473 (2021); *see also Ariz. Pub. Integrity All. v. Fontes*,  
10 250 Ariz. 58, 63 (citing ARS 16-452(C)) (“Once adopted, the EPM has the force of  
11 law.”).<sup>6</sup> Because Arizona’s election laws are often ambiguous, the EPM is promulgated  
12 to “achieve and maintain the maximum degree of **correctness** ... [regarding] the  
13 procedures for early voting and voting, and of producing, distributing, collecting,  
14 counting, tabulating and storing ballots. ARS 16-452(A) (emphasis supplied); *see also*  
15 *Arizonans for Second Chances, Rehab, & Pub. Safety v. Hobbs*, 249 Ariz. 396, 418  
16 (2020) (looking to the EPM for clarity when statutory election law was unclear).

17  
18 Unlike 16-602(F), the EPM is clear:

19  
20 The officer in charge of elections is required to conduct a hand count of 1%  
21 of the total number of early ballots cast, or 5,000 early ballots, whichever is  
22 less. A.R.S. § 16-602(F). **Counties may elect to audit a higher number of  
23 ballots at their discretion.**

24 EPM pg. 215 (Emphasis supplied). “Any differences [between two laws] must be  
25 reconciled, if such is possible.” *Hughes v. Martin*, 203 Ariz. 165, 168 (2002). Here, it is  
26 entirely possible to reconcile the EPM with 16-602(F) simply by finding that subpart (F)  
27

28  

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<sup>6</sup> Available at:

[https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)

1 establishes a floor for the number of early ballots that must be hand counted instead of  
2 fixing the exact number of such ballots that must be hand counted.

3 This is entirely rational construction as it allows Counties to harmonize the  
4 percentage of ballots that are to be counted for both Type I and Type 2 hand-counts. Since  
5 these are often conducted at the same time and at the same facilities, to allow the  
6 percentage to be harmonized across both types serves the EPM's legislative mandate to  
7 provide rules allowing for the maximum degree of not only correctness, but "uniformity  
8 and efficiency[.]" ARS 16-452(A). Further, when construing a statute, the Court's goal  
9 is to fulfill the intent of the legislature. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 201, 150  
10 P.3d 773, 774 (Ct. App. 2007). The intent of ARS 16-602 is obviously to provide voters  
11 the added protection of ensuring that the initial machine count of ballots is checked by  
12 hand. It is rational for the legislature to require Defendants to hand count a smaller  
13 number of early ballots than regular ballots since there are far more of the former than  
14 the later. But it would be irrational for the legislature to **require** Defendants to audit **only**  
15 one percent of absentee ballots but **at least** two percent of early ballots. What would be  
16 the point of allowing Defendants to recount as many non-early ballots as they like but  
17 restricting them from counting as many early ballots as they like? ARS 16-602 exists  
18 because the Legislature thinks it is a good thing to provide voters added security by  
19 double checking the count. Counting more ballots can only advance this purpose and,  
20 certainly, it does not contravene that purpose.  
21

22 For these reasons, there is no conflict between subpart (F) and the EPM and  
23 Defendants clearly have the authority to conduct a Type 2 Hand Count of all early ballots.  
24 At the very least, it is hard to say that Plaintiffs are likely to succeed on the merits as to  
25 Type 2 Hand Counts, given that the law at issue is so complex that not even the Secretary  
26 and the Attorney General can agree on what it allows. Even in a normal case, such  
27 complexity would leave Plaintiffs unable to establish that they are likely to succeed on  
28



1 the merits. But this is not a normal case. As discussed above, absent a clear and  
2 convincing showing otherwise, the acts of public officials are presumed to be lawful.

3 In addition, courts disfavor having to “steamroll through ... delicate legal issues”  
4 before an election. *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993). Because of this and  
5 because, as set forth below, the other factors all tip in Defendants’ favor, this Court should  
6 at minimum deny injunctive relief and take the time it needs to allow for full briefing and  
7 adequate consideration of Plaintiffs’ prayer for declaratory relief so that any legal  
8 ambiguity regarding Type 2 Hand Counts may be thoughtfully clarified for future  
9 election cycles.  
10

11 **ii. Plaintiffs will suffer no harm absent an injunction, much**  
12 **less an irreparable one.**

13 It is undoubtably the case that “[t]he right to vote includes the right to have [one’s]  
14 ballot counted.” Petition 13:27-28 (citing *Reynolds v. Simms*). Regardless of the  
15 disposition of this case, all voters will have their ballots counted. If an injunction is not  
16 issued, Plaintiffs in Cochise County who vote by early ballot will simply have a higher  
17 chance of having their ballot **counted twice** than in previous years.

18 Under any interpretation of the law, at least some ballots must be counted twice –  
19 once by hand and once by machine. Accordingly, even under Plaintiffs’ preferred  
20 interpretation of the law, there is a chance that each voter will have their ballot counted  
21 twice **anyway**. If counting a voter’s ballot twice causes irreparable harm, then all  
22 Counties are causing voters irreparable harm each election because all counties must  
23 comply with ARS 16-602 and recount at least some ballots by hand. This is nonsensical.  
24 There is no harm to having one’s ballot counted by machine and then checked by hand,  
25 much less an irreparable one. And were there – somehow – some harm from doing so,  
26 then this harm would be easily reparable because, after the Type 1 and Type 2 hand counts  
27  
28

1 are complete, and the results canvassed, the County is required to deposit all ballots in its  
2 vault for twenty-four months. ARS 16-624(A).

3  
4 **iii. The balance of hardships tips in favor of Defendants.**  
5 **While Plaintiffs face no harm at all, Defendants would be**  
6 **irreparably harmed by an injunction.**

7 As set forth above, Plaintiffs will suffer no harm whatsoever if their requested  
8 injunction is denied. In contrast, Defendants will suffer irreparable harm if an injunction  
9 is granted because both Type 1 and Type 2 Hand Counts “**shall** begin within twenty-four  
10 hours after the closing of the polls and **shall** be completed before the canvassing of the  
11 election for that county.” ARS 16-602(I) (emphasis supplied). In other words, the hand  
12 count must begin on the November 9<sup>th</sup>, a mere six days from now, or it cannot begin at  
13 all.

14 Defendants are incorrect that the hand count cannot be completed in time for the  
15 canvas – if it is allowed to start on time. Cochise County is much smaller than Maricopa  
16 or Pima counties and has far few ballots to count. And unlike the “Cyber Ninjas” audit  
17 referenced by Plaintiffs, the Defendants have years of experience conducting hand counts  
18 and can do so much more efficiently. Further, they are not conducting a “full forensic  
19 audit” but rather a hand count. Their experience also allows Defendants to project how  
20 long the expanded hand count will take. Indeed, they are the people in the world in the  
21 best position to know.

22 In fact, Defendants must, by law, be prepared to conduct a full hand count of this  
23 magnitude **every year**. This is because under certain circumstances, ARS 16-602(F)  
24 **requires** them to recount, by hand, all early ballots cast in the county (which is the vast  
25 majority of ballots).<sup>7</sup>

26  
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28  

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<sup>7</sup> See <https://www.azcleanelections.gov/election-security/the-security-of-voting-by-m> (“approximately 80% of Arizona voters chose to vote by mail[.]”)

1           Nonetheless, this is an arduous task. Any delay will risk Defendants being unable  
2 to meet their statutorily required deadline.

3  
4                           **iv. The public interest favors Defendants.**

5           Defendants agree that the public interest is best served by reinforcing confidence  
6 in our elections. An injunction, especially one that prevents them from conducting a full  
7 hand count, will have the opposite effect. Average people will wonder, what in the world  
8 could Plaintiffs so desperately want to hide that justifies sending a team of nine lawyers,  
9 including five from Washington D.C., to this county to prevent Defendants from counting  
10 all the ballots twice?

11           In contrast, the most likely result if the injunction is not granted is that Defendants  
12 will count all the ballots, the results will match the machine count, and the people's  
13 confidence in our elections will be reinforced. At the very least, it will not have been  
14 undermined by the appearance that there is something to hide that remains lurking in the  
15 shadows – which will be the certain result if the injunction is granted.

16  
17           Ultimately, “courts owe significant deference to the judgments of elected  
18 officials” as to what is in the public interest. *Turken v. Gordon*, 223 Ariz. 342, 346-47  
19 (2010). This makes sense. Defendants, as elected officials, must be finely attuned to the  
20 sentiments of the public upon whom they depend on for their authority. Informed by that  
21 knowledge, Defendants have decided that the interests of election security and voter  
22 confidence are best served by going above and above the minimum requirements of the  
23 law. Deference is owed to this determination.

24   **CONCLUSION**

25           The Complaint should be dismissed. Alternatively, preliminary injunctive relief  
26 should be denied.

27  
28 *Respectfully submitted this 3<sup>rd</sup> day of November, 2022*

1 By: /s/Alexander Kolodin

2 Alexander Kolodin  
3 Roger Strassburg  
4 Veronica Lucero

5 **Davillier Law Group, LLC**  
6 4105 N. 20<sup>th</sup> St. Ste. 110  
7 Phoenix, AZ 85016

8 *Attorneys for Recorder David Stevens*

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that a copy of the forgoing has been served on the other parties to this  
11 matter pursuant to the applicable rules of procedure.

12 By: /s/Yuka Bacchus  
13 **Davillier Law Group, LLC**

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12 *Attorneys for Defendant Lisa Marra*

9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11 IN AND FOR THE COUNTY OF COCHISE

12 ARIZONA ALLIANCE OF RETIRED  
13 AMERICANS, INC. and STEPHANI  
14 STEPHENSON,

15 Plaintiffs,

16 v.

17 TOM CROSBY, ANN ENGLISH, and  
18 PEGGY JUDD, in their official  
19 capacities as the Cochise County  
20 Board of Supervisors; DAVID  
21 STEVENS, in his official capacity as  
22 the Cochise County Recorder; and  
23 LISA MARRA, in her official capacity  
24 as the Cochise County Elections  
25 Director,

26 Defendants.

Case No. S0200CV202200518

**DEFENDANT LISA MARRA'S  
RESPONSE TO PETITION FOR WRIT  
OF MANDAMUS, OR IN THE  
ALTERNATIVE, MOTION  
PRELIMINARY INJUNCTION**

**(Assigned to The Honorable Casey  
McGinley)**

25 Defendant, Lisa Marra, Director of the Cochise County Elections Department  
26 ("Marra") must not be compelled to violate state law by 1) participating in a hand count of  
27 all early ballots (the "Full Early Ballot Audit") or 2) relinquishing custody of the ballots to  
28

1 an unauthorized individual. Both would be required due to the decision of the Cochise  
2 County Board of Supervisors (the “Board”) to proceed with the Full Early Ballot Audit.  
3 The Board’s actions are in violation of A.R.S. § 16-602 and the Elections Procedure  
4 Manual (“EPM”) and place Marra, “a person charged with a duty under any law relating  
5 to elections,” in jeopardy of violating A.R.S. § 16-1010 (a class 6 felony) if she knowingly  
6 acts in violation of Arizona election law. Further, the Full Early Ballot Audit cannot be  
7 completed without significant additional resources – personnel, space, security – none of  
8 which cannot be provided less than a week before the general election to meet the  
9 County’s statutory canvass deadline.

10 **I. MANDAMUS RELIEF IS APPROPRIATE.**

11 Defendant Marra is the Elections Director for Cochise County tasked with the  
12 responsibility of preparing, administering and conducting the general election on  
13 November 8, 2022. Defendant Marra files this response to highlight the important legal –  
14 and practical – concerns for the Court in considering Plaintiffs’ Verified Special Action  
15 Complaint and Petition for Writ of Mandamus, or in the Alternative Motion for  
16 Preliminary Injunction. To be clear, Marra has no desire to be mired in any political  
17 struggle. Her sole goal is to comply with Arizona law in performing her duties this  
18 election cycle. As to preliminary matters, Marra does not dispute jurisdiction, venue,  
19 standing, and most importantly, the availability of a writ of mandamus.

20 Under A.R.S. § 12-2021, a writ of mandamus may be issued “to compel, when  
21 there is not a plain, adequate and speedy remedy at law, performance of an act which the  
22 law specially imposes as a duty resulting from an office, trust or station . . . .” The Rules  
23 of Procedure for Special Actions, Rule 3, limit the questions raised in this Special Action.  
24 Here, the questions before the Court are narrow:

- 25 (a) Whether the defendant has failed to exercise discretion which he has a duty  
26 to exercise; or to perform a duty required by law as to which he has no  
27 discretion; or

1 (b) Whether the defendant has proceeded or is threatening to proceed without  
2 or in excess of jurisdiction or legal authority.

3 Special Actions, Rules of Proc., Rule 3.

4 Arizona law prescribes non-discretionary duties for how to conduct hand counts.  
5 The Board's actions threaten to proceed in excess of this legal authority. This response is  
6 accordingly filed to affirm the importance of judicial determination of these issues prior to  
7 the November 8, 2022 general election.

8 **II. ARIZONA'S HAND COUNT STATUTE DOES NOT AUTHORIZE**  
9 **DEFENDANT MARRA TO CONDUCT A FULL EARLY BALLOT AUDIT.**

10 As Elections Director, Defendant Marra is the "county officer in charge of the  
11 election" who is authorized to proceed with the hand count pursuant to A.R.S. § 16-  
12 602(B), (F). The statute stipulates that the hand count must proceed as prescribed by  
13 A.R.S. § 16-602 and the EPM<sup>1</sup> adopted pursuant to A.R.S. § 16-452, which has the force  
14 and effect of law. *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16, 475 P.3d  
15 303, 308 (2020) ("Once adopted, the EPM has the force of law; any violation of an EPM  
16 rule is punishable as a class two misdemeanor."). Marra has prepared for the authorized  
17 hand count of ballots cast at voting centers pursuant to A.R.S. § 16-602(B) ("Precinct  
18 Hand Count") and the early ballots as prescribed by A.R.S. § 16-602(F).

19 For the early ballots, the political party chairman or designee randomly selects one  
20 or more batches of early ballots that have been tabulated (at least one batch of up to 400  
21 early ballots from each central counting machine and at least one accessible voting  
22 machine if those machines independently tabulate votes), and from those batches, the  
23 political party chairman or designee randomly selects one percent of the total number of  
24 early ballots cast or five thousand early ballots, whichever is less, for the same races as  
25 the Precinct Hand Count as set out in A.R.S. § 16-602(B)(2). A.R.S. § 16-602(F); EPM at  
26 215, 228. The statute authorizes a second manual audit of the races "[i]f the manual audit

27 <sup>1</sup> ARIZ. SEC'Y OF STATE, 2019 ELECTIONS PROCEDURES MANUAL (2019),  
28 [https://azsos.gov/sites/default/files/2019\\_elections\\_procedures\\_manual\\_approved.pdf](https://azsos.gov/sites/default/files/2019_elections_procedures_manual_approved.pdf).



1 of the early ballot results in a difference in any race that is equal to or greater than the  
2 designated margin when compared to the electronically tabulated results for those same  
3 early ballots . . . .” *Id.* The designated margin is established by the Vote Count  
4 Verification Committee, a statutorily authorized committee that determines the  
5 acceptable range. A.R.S. §16-602(K); EPM at 227.

6 If the first hand count audit does not produce this difference in the designated  
7 margin, the hand count is over. There is no further authorization for Defendant Marra to  
8 proceed with further audits of early ballots. If the second manual audit of the same races  
9 is triggered by the terms outlined in statute and results in a difference in the designated  
10 margins of that race when compared to the electronically tabulated results for those same  
11 early ballots, then, *and only then*, is the manual audit expanded. A.R.S. § 16-602(F).

12 The statute further limits the expanded audit “only for that race to a number of  
13 additional early ballots equal to one percent of the total early ballots cast or an additional  
14 five thousand ballots, whichever is less, to be randomly selected from the batch or  
15 batches of early ballots set aside for the audit.” *Id.* The manual counts are repeated for  
16 that race until a manual count satisfies the designated margin. *Id.* There is no  
17 authorization to expand to all early ballots and in fact, the statute is clear: once the  
18 manual count (whether initial, expanded or subsequent counts of the same race) is less  
19 than the designated margin as compared to the electronic tabulation of those early ballots,  
20 the hand counts is over – “no further manual audit of the early ballots shall be  
21 conducted.” *Id.*

22 The EPM outlines specific mathematical calculations based on the statutory  
23 formulas for determining the number and size of the batches and the final calculations of  
24 the totals for each race selected to be hand counted. EPM at 228-232. It is an extensive  
25 procedure. The Board disregards these EPM requirements by seeking Defendant Marra’s  
26 participation in the Full Early Ballot Audit. There is no authorization in the statute or the  
27 EPM that allows Defendant Marra to proceed with a Full Early Ballot Audit, nor does  
28

1 any statute or provision of the EPM prescribe procedures for how to conduct a Full Early  
2 Ballot Audit, if such an audit existed.

3 **III. CONDUCTING A FULL EARLY BALLOT AUDIT VIOLATES THE**  
4 **SEPARATION OF POWERS BETWEEN THE LEGISLATIVE AND**  
5 **EXECUTIVE BRANCH.**

6 Fundamental principles of separation of powers are that the legislature is charged  
7 with *law creation*, whereas the executive branch is charged with *law enforcement*. See  
8 *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928); *Crawford v. Hunt*, 17  
9 P.2d 802, 805 (1932). The separation of powers doctrine limits the legislative branch's  
10 ability to delegate its power of law creation to the executive, as well as the methods by  
11 which the power may be delegated. *Roberts v. State*, 253 Ariz. 259, 512 P.3d 1007, 1016  
12 (2022). Delegations are only permitted where plainly authorized for agency action. *Id.*

13 The State Legislature has not plainly authorized any county officials – whether the  
14 Cochise County election director or county recorder – to change or supplant the policies  
15 prescribed in the EPM regarding hand counts. See, e.g., *Arizona Pub. Integrity All. v.*  
16 *Fontes*, 250 Ariz. 58, 63, 475 P.3d 303 (2020) (holding that Maricopa County Recorder  
17 acted unlawfully by promulgating new instruction for mail-in ballots outside of procedure  
18 authorized in statute and EPM). Here, if the County Recorder oversaw the hand count  
19 sought by the County Board of Supervisors, he would, in effect, be required to fill in the  
20 gaps where there are no governing laws, rules, or procedures. This is nothing short of  
21 *secondary lawmaking* by an executive which is not only contrary to statute but is  
22 prohibited by the separation of powers doctrine. Ariz. Const. Art. III.

23 Moreover, to the extent the County intends to bypass the Defendant Marra as  
24 elections director, their actions improperly delegate her critical role to an unauthorized  
25 entity in violation of state law. This infringes on Marra's ability to oversee the election  
26 and ensure ballot security.

1 **IV. DEFENDANT MARRA IS PROHIBITED FROM RELINQUISHING**  
2 **CUSTODY OF BALLOTS WITHOUT A COURT ORDER.**

3 The statutory provisions for the early ballot hand count are clear: the early ballots  
4 selected for the hand count must “be securely sequestered.” A.R.S. § 16-602(F), EPM at  
5 215, 229-230, 232.

6 A.R.S. § 16-602(H) is more explicit: “the county officer in charge of elections  
7 shall retain the custody of the ballots for purposes of performing any required hand  
8 counts and the officer shall provide for security for those ballots.” Further, A.R.S. § 16-  
9 624(A) requires Marra, as the officer in charge of elections, after the adoption of the  
10 canvass, to deposit the ballots to the county treasurer where the ballots remain in a secure  
11 facility. The ballots are unopened and unaltered for twenty-four months (for elections  
12 with a federal office on the ballot) until destroyed “without opening or examining the  
13 contents” and can only be removed by court order to deliver into the court’s custody if a  
14 recount is ordered. A.R.S. § 16-624(A), (D); EPM at 248.

15 There is no authority – in the hand count statute or EPM – that authorizes  
16 Defendant Marra to relinquish custody of the early ballots to any individual. If the Board  
17 is allowed to proceed, early ballots will be placed in the possession of an unauthorized  
18 person without designated procedures since none exist for a 100% hand count of early  
19 ballots for the November 8, 2022 general election. Breaking the chain of custody to  
20 relinquish these early ballots poses substantial risk of harm which cannot be undone.

21 **V. THE COUNTY’S CANVASS DEADLINE CANNOT BE MET IF THE**  
22 **BOARD PROCEEDS WITH A FULL EARLY BALLOT AUDIT.**

23 Similar to most election processes, preparing for a hand count is a time-intensive  
24 undertaking that involves planning weeks in advance. Even if Defendant Marra did not  
25 believe the Full Early Ballot Audit was violating the law, she is simply *unable* to  
26 responsibly prepare and execute the Board’s directive and meet the County’s canvass  
27 deadline, which is scheduled for November 18, 2022. A.R.S. § 16-642(A) (requires  
28 canvass of the election between six days to twenty days after the election). Postponements

1 of the canvass are only allowed if precinct results are missing, not due to a Full Early  
2 Ballot Audit. A.R.S. § 16-642(C), EPM at 240.

3 Ultimately, a hand count is a labor-intensive process that requires those involved to  
4 be trained by County staff. Hand counts require Marra to contact the county chairpersons  
5 of each recognized political party at least fourteen days prior to the election to designate  
6 members participating in the hand count and the party chairpersons must designate  
7 members at least seven days before the election. EPM at 213. These deadlines have  
8 passed.

9 A.R.S. §16-602(I) specifies that hand counts must begin within twenty-four hours  
10 after the closing of the polls. Given the time-intensive nature of an authorized hand count  
11 which often takes one to two days to complete for the authorized hand count process, there  
12 is insufficient personnel to manage the process, space, and security issues that would need  
13 to be addressed to begin a hand count on November 9, 2022 and complete the hand count  
14 before the County's scheduled canvass on November 18, 2022. As the only designated  
15 official who administers the hand count process, Marra cannot proceed with the Full Early  
16 Ballot Audit in the time remaining before the election.

17 **VI. THE FULL EARLY BALLOT AUDIT JEOPARDIZES POST-ELECTION**  
18 **PROCESSES.**

19 Elections are time-sensitive and if disrupted, cause a chain reaction to other  
20 processes. A delay in the County's canvass will disrupt the State's canvass requirement  
21 (A.R.S. § 16-648(A)), automatic recounts (A.R.S. § 16-661), and impact candidates  
22 seeking election for federal, state and local offices who cannot be seated until the election  
23 process has concluded.

24 In addition to being against the plain language of the statute, the decision to require  
25 a Full Early Ballot Audit poses innumerable practical difficulties, throwing confusion and  
26 chaos into the general election. Defendant Marra, as the County Election Director, does  
27 not take the extraordinary remedy of mandamus lightly, recognizing the important roles  
28



1 the Cochise County Board of Supervisors and Recorder serve. However, in this instance,  
2 where state law is clear and the last-minute threats to the electoral process real, mandamus  
3 is appropriate. Defendant Marra supports Plaintiffs' request for mandamus relief to the  
4 extent it seeks an order compelling Cochise County officials to forgo the Full Early Ballot  
5 Audit proposed at this late hour and, instead, comply with their non-discretionary duties  
6 under A.R.S. § 16-602 and the EPM.

7 **VII. CONCLUSION.**

8 Defendant Marra must not be compelled to engage in the Full Early Ballot Audit  
9 because 1) the audit flies in the face of the plain language of state law and 2) jeopardizes  
10 the integrity of the ballots for the November 8, 2022 general election. Further, Defendant  
11 Marra faces a class 6 felony if forced to administer the Full Early Ballot Audit or  
12 relinquish control of the ballots to an unauthorized official at the Board's direction and a  
13 class 2 misdemeanor for violating the EPM. A.R.S. §§ 16-452(C), 16-1010. Defendant  
14 Marra respectfully requests the Court grant the request for mandamus, or in the  
15 alternative, issue an injunction to halt the Full Early Ballot Audit.

16 DATED this 3rd day of November, 2022.

17 **PIERCE COLEMAN PLLC**

18  
19 By: /s/ Christina Estes-Werther  
20 Christina Estes-Werther  
21 Aaron D. Arnson  
22 Trish Stuhan  
23 7730 East Greenway Road, Suite 105  
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25 *Attorneys for Defendant Marra*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2022, I electronically transmitted this document to the Clerk’s Office using the AZTurbo System for filing, and on this same day, served a copy via electronic mail upon the following:

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ARIZONA SUPERIOR COURT, PIMA COUNTY  
FOR THE COUNTY OF COCHISE

HON. CASEY F MCGINLEY

CASE NO. CV202200518  
DATE: November 01, 2022

ARIZONA ALLIANCE OF RETIRED AMERICANS,  
INC., ET AL.  
Plaintiffs

VS.

TOM CROSBY, ET AL.,  
Defendants

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**ORDER**

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**IN CHAMBERS**

By Order of the Cochise County Superior Court, this Division has been assigned the instant matter. Plaintiff having filed an Application for Order to Show Cause, as well as an Application for a Writ of Mandamus,

**IT IS ORDERED** setting an in person evidentiary hearing on said applications on Friday, November 4, 2022 at 9:00am in Cochise County Superior Court, Courtroom 4.

**IT IS FURTHER ORDERED** that Plaintiff shall serve all Defendants with a copy of their Verified Special Action Complaint Certificate of Compulsory Arbitration, Application for Order to Show Cause, Petition for Writ of Mandamus, or in the Alternative Motion for Preliminary Injunction, and this Order **no later than Wednesday, November 2, 2022 at 10:00am.**

**IT IS FURTHER ORDERED** that Defendants shall file their answer or any other responsive pleading no later than Thursday, November 3, at 12:00PM.

  
\_\_\_\_\_  
HON. CASEY F MCGINLEY

- cc: Brian M McIntyre, Esq.  
Jillian L Andrews, Esq.  
Shawneen Serrano - Cochise County Superior Court Admin., 100 Quality Hill Rd, Bisbee, AZ 85603  
Cochise County Board of Supervisors - 100 Quality Hill Rd, Bisbee, AZ 85603  
Cochise County Recorder - 100 Quality Hill Rd, Bisbee, AZ 85603  
Cochise County Elections Director - 100 Quality Hill Rd, Bisbee, AZ 85603

L. Kimes  
Judicial Administrative Assistant

ARIZONA SUPERIOR COURT, PIMA COUNTY  
FOR THE COUNTY OF COCHISE

HON. CASEY F MCGINLEY

CASE NO. CV202200518

DATE: November 03, 2022

ARIZONA ALLIANCE FOR RETIRED AMERICANS,  
INC., ET AL.  
Plaintiffs

VS.

TOM CROSBY, ET AL.  
Defendants

---

**ORDER**

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**IN CHAMBERS**

The Court is in receipt of Secretary of State Hobbs' Motion for leave to file Amicus Curiae Brief and Present Argument. In order to permit Defendants Crosby, English, and Judd sufficient time to consider the Motion,

IT IS ORDERED that the Court will consider Secretary Hobbs Motion at the beginning of the evidentiary hearing on November 4, 2022.

Because the Court has not yet determined whether it will permit Secretary Hobbs to present argument, her request to appear via videoconference is granted.

  
HON. CASEY F MCGINLEY

cc: Cochise County Superior Court – Shawneen D. Serrano  
Aaron D Arnson, Esq.  
Bryan James Blehm, Esq.  
Christina Estes-Werther, Esq.  
Jillian L Andrews, Esq.  
Roger W. Strassburg Jr, Esq.  
Timothy A La Sota, Esq.  
Trish Stuhan, Esq.  
Community Relations (Pima County Superior Court)

Lucas Kimes  
Judicial Administrative Assistant

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
In and for the County of Cochise**

**JUDGE: HONORABLE CASEY McGINLEY  
DIVISION: VII  
COURT REPORTER: LIBERTY DIGITAL  
INTERPRETER: -----**

**AMY J. HUNLEY, Clerk of the Superior Court**  
by: JENNIFER ANDERSON (11/8/2022), Deputy Clerk

**HEARING DATE: 11/04/2022**

**ARIZONA ALLIANCE FOR RETIRED AMERICANS, INC., and STEPHANI STEPHENSON,** Plaintiff,

**VS**

**TOM CROSBY, ANN ENGLISH, and PEGGY JUDD, COCHISE COUNTY BOARD OF SUPERVISORS; DAVID STEVENS, COCHISE COUNTY RECORDER; LISA MARRA, COCHISE COUNTY ELECTIONS DIRECTOR,** Defendant.

**CASE NO: S0200CV202200518**

**MINUTE ENTRY: EVIDENTIARY HEARING**

**HEARING START TIME: 9:00 AM  
HEARING END TIME: 4:45 PM**

**Plaintiffs, Stephani Stephenson, present in person and Dora Vasquez on behalf of Arizona Alliance for Retired Americans, Inc., via Zoom and by: Jillian L. Andrews, Esquire, Jane Ahern, Esquire, and Lalitha Madduri, Esquire, Pro Hac Vice**  
**Defendants, Tom Crosby and Peggy Judd, present in person and by Bryan Blehm, Esquire; David Stevens, present in person and by Alexander Kolodin, Esquire and Roger Strassburg, Esquire; Lisa Marra, present in person and by Christina Estes-Werther, Esquire and Aaron D. Arnson, Esquire**

Prior to proceedings, Defendant Marra Exhibit A and Defendants' Crosby, English, Judd Exhibits A and B were marked for identification purposes.

\*\*\*\*\*

This matter came before the Court this date for an Evidentiary Hearing on Plaintiffs' Petition for Writ of Mandamus, or in the alternative, Motion for Preliminary Injunction.

The Court addressed the parties and stated the issues have been well briefed in this case and does not believe opening statements are necessary. The Court wished to proceed with testimony and closing argument.

As a preliminary matter, the Court addressed the Motion for Consideration of Amicus Curiae Brief filed on behalf of Katie Hobbs. The Court has not read the brief presented and will allow the parties to provide argument as to the matter. The Court was informed the Plaintiffs do not object and Defendant, Ms. Marra does not object. Upon inquiry of the Court, the Defendant, Board of Supervisors and Defendant, Mr. Stevens took no position as to the matter. Based on the positions of the parties, **IT IS ORDERED** Ms. Hobbs shall be permitted to file the Amicus Curiae Brief but the Court FINDS it is inappropriate to allow Ms. Hobbs to provide argument as to the brief.

**Date: 11/4/2022 Case Number: S0200CV202200518**  
**Hearing: Evidentiary Hearing**

Ms. Andrews called as a witness, **STEPHANI STEPHENSON**, who being duly sworn, was direct examined, cross examined by Mr. Blehm, cross examined by Mr. Kolodin, re-direct examined, and excused from the stand.

Prior to the witness testimony of Dora Vasquez, Mr. Kolodin and Mr. Blehm presented objection to the witness for non-disclosure, the Court overruled the objection.

Ms. Andrews called as a witness, **DORA VASQUEZ** *via Zoom*, who being duly sworn, was direct examined, cross examined by Mr. Blehm, re-direct examined, inquired of by the Court, follow up questioned by Ms. Andrews, follow up questioned by Mr. Blehm, follow up questioned by Mr. Kolodin and excused from the stand.

Plaintiffs had no further evidence to present or witnesses to call.

Mr. Strassburg called as a witness, **DAVID STEVENS**, who being duly sworn, was direct examined, cross examined by Ms. Estes-Werther and cross examined by Ms. Madduri.

At 12:02 p.m., the Court called the lunch recess.

\*\*\*\*\*

At 1:18 p.m., the Court went back on the record with all parties previously mentioned present.

Witness, **DAVID STEVENS**, remaining under oath, re-took the witness stand, continued under cross examination by Ms. Madduri, cross examined by Mr. Blehm, re-direct examined by Mr. Kolodin, inquired of by the Court, follow up questioned by Mr. Kolodin and excused from the stand, subject to re-call.

At 2:12 p.m., the Court called a recess.

\*\*\*\*\*

At 2:19 p.m., the Court went back on the record with all parties previously mentioned present.

Ms. Estes-Werther called as a witness, **LISA MARRA**, who being duly sworn, was direct examined, cross examined by Ms. Madurri, and cross examined by Mr. Blehm. During this witness testimony, Ms. Estes-Werther moved for the admission of the Defendant Marra Exhibit A, over objection of Mr. Kolodin and Mr. Blehm, Defendant Marra Exhibit A was admitted into evidence.

At 3:26 p.m., the Court called a recess.

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At 3:36 p.m., the Court went back on the record with all parties previously mentioned present.

As a preliminary matter, the Court addressed a request by the media for pictures of this proceeding and for the reasons stated on the record, **IT IS ORDERED** the request is **DENIED** at this time.

**Date: 11/4/2022 Case Number: S0200CV202200518**  
**Hearing: Evidentiary Hearing**

Witness, **LISA MARRA**, remaining under oath, re-took the witness stand, was cross examined by Mr. Kolodin, re-direct examined by Ms. Estes-Werther, inquired of by the Court, follow up questioned by Mr. Blehm and excused from the witness stand.

The Court accepted a proffer of testimony from Mr. Kolodin regarding testimony from Mr. Stevens.

The Court inquired of Mr. Stevens.

The Court addressed the parties as to the prior preparation made for this hearing by the Court.

Ms. Madduri presented closing argument.

Mr. Blehm presented closing argument.

Mr. Kolodin presented closing argument.

Ms. Estes-Werther presented closing argument.

The Court addressed the matter.

**IT IS ORDERED** this matter shall be taken **UNDER ADVISEMENT** at this time. A written ruling will be made by the Court in this case.

Proceedings concluded.

xc: e-mailed (e) by: JLA date: 11/8/2022;

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Rebecca Porter (e)

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ARIZONA SUPERIOR COURT, PIMA COUNTY  
FOR THE COUNTY OF COCHISE

HON. CASEY F MCGINLEY

FILED

2022 NOV -7 PM 4:07 SCG

CASE NO. CV202200518  
CLG

DATE: DEPUTY November 07, 2022

ARIZONA ALLIANCE FOR RETIRED AMERICANS,  
INC., ET AL.  
Plaintiffs

VS.

TOM CROSBY, ET AL.  
Defendants

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**RULING**

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**IN CHAMBERS**

Pending before the Court is Plaintiffs' Petition for Writ of Mandamus, or in the Alternative, Motion for Preliminary Injunction, filed October 31, 2022. The Court held an all-day evidentiary hearing on November 4, 2022, and took the matter under advisement. The Court has considered the briefs supplied by counsel, including an amicus curiae brief submitted by the Arizona Secretary of State. It has also considered the testimony of the witnesses, the arguments of the parties, and the relevant law. Finding that the Plaintiffs are entitled to the relief they seek, the Court issues the writ and preliminary injunction as outlined below.

**FACTS AND HISTORY OF THE CASE**

On November 8, 2022, registered voters across the country will participate in the General Election. However, in Arizona, the General Election began on October 12, 2022, when county Recorders sent out early ballots to those who had requested them and made voting centers available for registered voters to vote early in person.

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A registered Arizona voter generally can cast their ballot in one of three ways. First, they can vote in person on Election Day at their assigned precinct or voting center (hereafter referred to as precinct ballots). Second, they may request an early ballot to fill out and return to election officials either by United States Mail or by utilizing a ballot drop box. Finally, during the early voting period, a registered voter can obtain an early ballot at specific locations, fill it out on site, and cast their vote as an early ballot.

Arizona uses certified electronic machines to count and report the results of its elections. To ensure that the electronic vote tally is accurate, statutes and the Election Procedures Manual promulgated by the Arizona Secretary of State require that elections officials audit a small percentage of ballots by hand. This process involves hand counting the results of a limited number of races and comparing that hand count to the electronically calculated results. If the hand count produces results within a designated margin of the electronic results, the audit ends, and the electronic tally becomes official. If the audit produces results which are greater than that margin, the process is repeated and expanded to ensure the accuracy of the election results is properly established.

On October 24, 2022, by a 2-1 vote the Cochise County Board of Supervisors, asserting that it was “widely known that many voters lacked confidence in the voting system” and finding that “[a] 100% County wide audit of the 2022 General Election [would] enhance voter confidence,” adopted a resolution requiring the County Recorder or other officer in charge of elections “to perform a hand count audit of all County precincts for the 2022 General Election....”

Plaintiff Arizona Alliance for Retired Americans, Inc., is a 504(c)(4) nonprofit organization which represents retired people from every county in Arizona on a variety of issues. Their membership includes 1,200 to 1,300 residents of Cochise County. They also provide support and education to retired individuals on topics pertaining to voting and elections. Plaintiff Stephani Stephenson is a Cochise County resident who cast an early ballot for the 2022 election. Her ballot has been accepted, validated, and is ready for tabulation. On October 31, 2022, Plaintiffs collectively filed a special action with the Cochise County Superior Court seeking a declaratory judgment and injunctive relief to prevent the full hand count audit. Additionally, they filed a

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Petition seeking either a writ of mandamus or a preliminary injunction to prevent the proposed full hand count audit of the election.

Defendant David Stevens (Defendant Stevens) is the duly elected County Recorder for Cochise County. His office is responsible for, among other statutory requirements, registering voters, providing early ballots, and ensuring that early ballots are properly provided to the County Elections Director for tabulation. He has never supervised an audit or hand count of an election. Defendant Lisa Marra (Defendant Marra) is the appointed Elections Director for Cochise County. She has served as the officer in charge of elections for various primary and general elections in Cochise County, most recently this year's primary election and the 2020 general election. She has already started the process of tabulating early ballots and sequestering ballots for the statutorily required audit. Defendants Tom Crosby, Ann English, and Peggy Judd (Defendant Board of Supervisors) are the duly elected members of the Cochise County Board of Supervisors, which voted to adopt the full hand count audit procedure challenged by Plaintiffs. Defendant Marra agrees that Plaintiffs are entitled to the relief they seek. The remaining Defendants contend that Plaintiffs lack standing to assert their claims or that Defendant Board of Supervisors' action was lawful. Defendants Stevens and the Board of Supervisors allege that Plaintiffs lack standing to raise the challenges pursued here.

### LEGAL STANDARDS

A party seeking a preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief. *Fann v. State*, 251 Ariz. 425, 432, 493 P.3d 246, 253 (2021), citing *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10, 132 P.3d 1187, 1190 (2006). This is a sliding scale, not a strict balancing of factors. *Id.* "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Id.*

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“A writ of mandamus may be issued by the supreme or superior court to any person...on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office...” A.R.S. § 12-2021. A plaintiff who establishes that a public official has acted unlawfully and exceeded their constitutional and statutory authority need not satisfy the standard for injunctive relief. *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. at 64, 475 P.3d at 307, citing *Burton v. Celentano*, 134 Ariz. 594, 596, 658 P.2d 247, 249 (App. 1982) (“[W]hen the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor.”)

### ANALYSIS

#### 1. Standing

The law usually requires a specific injury before a plaintiff has standing to a claim. See *Sears v. Hull*, 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998) (“To gain standing ... a plaintiff must allege a distinct and palpable injury.”) However, a more relaxed standard for standing exists in mandamus actions such as this one. The statute governing writs of mandamus allows a “party beneficially interested” in an action to compel a public official to perform an act imposed by law. See A.R.S. 12-2021; See also *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370, 295 P.3d 943, 947 (2013) (“An action is in the nature of mandamus if it seeks to compel a public official to perform a non-discretionary duty imposed by law.”).

The phrase “party beneficially interested” is “applied liberally to promote the ends of justice.” *Barry v. Phx. Union High School*, 67 Ariz. 384, 387, 197 P.2d 533 (1948). “Thus, the ‘mandamus statute [§ 12-2021] reflects the Legislature’s desire to broadly afford standing to members of the public to bring lawsuits to compel officials to perform their public duties.” *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62, 475 P.3d 303, 307 (2020), citing *Ariz. Dep’t of Water Resources v. McClennen*, 238 Ariz. 371, 377, 360 P.3d 1023, 1029 (2015).

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Plaintiffs are a registered voter in Cochise County who submitted an early ballot prior to the Board of Supervisors' Action, and an organization which represents other registered voters in Cochise County who are affected by said action. They seek to compel Defendants Marra and Stevens to perform her non-discretionary duty to conduct hand count and audit procedures which comply with A.R.S. §16-602 and the Elections Procedures Manual. In seeking to compel these public officials to perform their public duties, Plaintiffs have shown a sufficient beneficial interest to establish standing.

### 2. Legality of the Board's Action

The question before the Court is whether A.R.S. §16-602(B) or (F), as supplemented by the EPM, permit an election official to conduct a hand count or manual audit starting with and consisting solely of 100% of the ballots cast in an election, rather than by using the increments of ballots established by statute. The Court finds that they do not.

Laws pertaining to the tabulation of votes cast in an election are generally found in A.R.S. §16-602, et. Seq., However, the Arizona Legislature has also delegated to the Secretary of State certain rule-making authority regarding elections. Among others, this authority includes the ability to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting..." A.R.S. §16-452(A). Any rules promulgated by the Secretary of State are to be "prescribed in an official instructions and procedures manual" an updated version of which is to be issued before the last day of every odd-numbered year. A.R.S. §16-452(B). Before it can be issued, however, the manual (commonly referred to as an Elections Procedure Manual, or "EPM,") must be approved by both the Governor and Attorney General. "Once adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor." *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62, 475 P.3d 303, 307 (2020); see also A.R.S. §16-452(C). However, "an EPM regulation that contradicts statutory requirements does not have the force of the law." *Leibsohn v. Hobbs*, 76 Ariz. Cases Digest 16, 517 P.3d 45, (2022), citing *Leach v. Hobbs*, 250 Ariz. 572, 576, 483 P.3d 194, 198 (2021).

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When interpreting a statute, a Court should find and give effect to legislative intent. *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 47, 445 P.3d 2,4 (2019). “The best indicator of that intent is the statute’s plain language ... and when that language is unambiguous, we apply it without resorting to secondary statutory interpretation principles.” *SolarCity Corp. v. Ariz. Dep’t of Revenue*, 243 Ariz. 477, 480, 413 P.3d 678, 681 (2018). If a statute has only one reasonable meaning when considered in context, the Court applies that meaning without further analysis. *Leibsohn v. Hobbs*, 517 P.3d 45, 48 (Ariz. 2022), citing *Leach v. Reagan*, 245 Ariz. 430, 438, 430 P.3d 1241, 1249 (2018); see also *Glazer v. State*, 244 Ariz. 612, 614, 423 P.3d 993, 995 (2018). If the statute has more than one reasonable meaning, the Court should then apply secondary interpretive principles, including considering the statute’s subject matter and purpose, to identify legislative intent. “A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11, 432 P.3d 925, 927 (2019).

“The law-making powers of the county ... are entirely derivative. The Board of Supervisors can exercise only those powers specifically ceded to it by the legislature.” *Hart v. Bayless Investment & Trading Co.*, 86 Ariz. 379, 384, 346 P.2d 1101, 1105 (1959). A county board of supervisors has only those powers “expressly conferred by statute, or [as] necessarily implied therefrom.” *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363, 430 P.2d 122, 125 (1967). County supervisors “may exercise no powers except those specifically granted by statute and in the manner fixed by statute.” *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978) (citation omitted). Actions taken by a board of supervisors by methods unrecognized by statute are “without jurisdiction and wholly void.” *Id.*

State law requires election officials to conduct hand counts of electronically tabulated ballots to ensure the accuracy the results received. Such hand counts are governed by A.R.S. §16-602, as well as an Elections Procedures Manual. See A.R.S. §16-602(B). (“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....”). Precinct ballots are subjected to a hand count outlined in A.R.S. §16-

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602(B), whereas early ballots are grouped separately and subjected to a manual audit pursuant to A.R.S. §16-602(F). A simplified overview of those processes is important to describe here.

In conducting a hand count of precinct ballots, election officials randomly select 2% of the county's precincts, or two precincts total, whichever is greater, to begin the count. A.R.S. §16-602(B)(1). Officials then randomly select contested races meeting certain criteria in order to compare the hand counts against the electronically tabulated counts for those races on those ballots. A.R.S. §16-602(B)(2). If the hand count for any race is within an expected margin of the electronic tabulation for that same race, the electronic tabulation becomes the official count for that race in that jurisdiction. A.R.S. §16-602(C). If the difference is equal to or greater than the designated margin, a second hand count of the same ballots is required. *Id.* If that second count again meets or exceeds the designated margin, the number of ballots subjected to the hand count is doubled, with the additional precincts again chosen at random, and the process is repeated. *Id.* After this expanded hand count, if any race is still not within the designated margin, the hand count is once again expanded to consist of the entire jurisdiction of the county. A.R.S. §16-602(D).

The audit of early ballots proceeds differently. First, officials randomly select and sequester one or more batches of ballots that have already been tabulated. A.R.S. §16-602(F). Then, officials randomly select from those sequestered ballots "a number equal to one percent of the total number of early ballots cast, or five thousand ballots whichever is less" upon which to conduct the audit. *Id.* Officials count votes for the same races that were reviewed in the hand count of precinct ballots, and compare the votes counted in the audit to the unofficial electronic tally for the same ballots. *Id.* If the manual audit for any race is within the designated margin, then the electronic tabulation becomes the official count for that race. If the manual audit is greater than or equal to the designated margin, an additional 1% or 5,000 ballots, whichever is less, are added to the audit. *Id.* The process is repeated until the audit results in a ballot count within the designated margin. *Id.* "If at any point in the manual audit of early ballots the difference between any manual count of early ballots is less than the designated margin when compared to the electronic tabulation of those ballots, the electronic tabulation shall be included in the canvass and no further manual audit of the early ballots shall be conducted." *Id.*

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As permitted by the Legislature, the Secretary of State drafted an Elections Procedures Manual in 2019 which was approved by both the Governor and the Attorney General. A 2021 Manual was drafted, but never received approval. Accordingly, the 2019 EPM applies to the 2022 General Election. As far as the parameters of a hand count of precinct or vote center ballots is concerned, the 2019 EPM generally tracks A.R.S. §16-602(B). However, as it pertains to the manual audit of early ballots, the EPM adds additional direction. The EPM states that the officer in charge of the elections must “conduct a hand count of 1% of the total number of early ballots cast, or 5,000 ballots, whichever is less. *Counties may elect to audit a higher number of ballots at their discretion.*” EPM §III B, page 216 (citation omitted, emphasis added). The Board of Supervisors and Recorder Stevens rely on this last sentence to support their contention that a full hand count of all ballots cast is lawful. In support of their position, these Defendants provided the Court an informal opinion rendered by a Deputy Solicitor General from the Attorney General’s Office, which opined that the sentence at issue permitted a full hand count audit of all ballots cast in an election.

The precinct ballot hand count statute commands that “[a]t 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 the county...” (for the purpose of a hand count.) A.R.S. §16-602(B)(1). A plain reading of this language permits elections officials to lawfully choose to hand count a higher number of ballots simply by selecting a higher percentage of the precincts in that county.

However, in addition to the number requirement, there is a requirement that the ballots be *randomly* selected for a hand count. By common definition, a selection of precincts is not random if all precincts are chosen. In this regard, any directive to begin a hand count under A.R.S. §16-602(B) by counting votes cast exceeds the authority granted by statute.

Additionally, the statute establishes a mechanism under which small portions of precinct ballots are hand counted and compared to the electronic tabulation, expanding that hand count if necessary, and culminating in a jurisdiction wide hand count if required. *See* A.R.S. §16-602(C) through (D). This entire process would be rendered superfluous if the Court were to construe A.R.S. §16-602(B) to permit officials to initially select 100% of the precinct ballots as its starting

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point.<sup>1</sup> The Court cannot interpret any statute in any manner which renders a portion of that statute superfluous. *See Nicaise, supra*. Because the statute does not permit elections officials to begin the precinct hand count by counting all ballots cast, the Board's requirement that elections officials do so here is unlawful.

The early ballot manual audit statute utilizes a different procedure to determine what ballots will be audited. The law first requires the sequestration of batches of early ballots, and then requires the random selection from those sequestered batches "a number equal to one percent of the total number of early ballots or five thousand ballots, whichever is less." A.R.S. §16-602(F) (emphasis added). Thus, instead of establishing a minimum number of ballots which can be initially reviewed (as is the case with §16-602(B)) §16-604(F)'s plain language establishes that the maximum number of early ballots which can be initially audited in an election is 5,000.<sup>2</sup> Because the Board's directive would require the initial audit of approximately 30,000 early ballots, it is not permitted by the plain language of §16-602(F).

The 2019 EPM declaration that "[c]ounties may elect to audit a higher number of ballots at their discretion" is not found anywhere in A.R.S. §16-602, and has no basis or authority in any other statute. It is unclear why this provision was included in the EPM. Inasmuch as EPM permits a county to begin a hand count audit of early ballots by auditing 100% ballots cast, it runs afoul of A.R.S. §16-602(F) and its requirement that the initial hand count audit not exceed a review of 5,000 ballots. Because "an EPM regulation that contradicts statutory requirements does not have the force of the law," *Leibsohn, supra*, clause at issue cannot be relied upon to conduct a full hand count audit as proposed by the Board of Supervisors.

The language of the Board's Action of October 24, 2022, read in conjunction with the description provided, demonstrates that the proposed hand count cannot be lawfully conducted

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<sup>1</sup> County Recorder Stevens testified at the Evidentiary Hearing that performing a full hand count of all precinct votes and all early votes would necessarily mean that certain processes required by statutes or the EPM would no longer be needed. The fact that the Board's directive necessarily eliminates established statutory procedures casts further doubt on its lawfulness.

<sup>2</sup> For purposes of illustration, consider two hypothetical counties. In County A, 40,000 early ballots are cast. One percent of 40,000 is 400, and because 400 is less than 5,000, County A can only initially audit 400 ballots under §16-602(F). In County B, 800,000 early ballots are cast. One percent of 800,000 is 8,000. Since that number exceeds 5,000, only 5,000 early ballots could be initially selected for audit under the statute.

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as written. The Action directs the Recorder or other officer in charge of elections to perform a hand count audit of all votes cast “[p]ursuant to ARS 16-602 B...” The Action thus requires the Recorder (or other officer) to audit all ballots in the manner prescribed for precinct ballots despite the statutory requirement that early ballots be audited by a separate procedure outlined in A.R.S. §16-602(F). The Board’s Action therefore requires election officials to audit ballots in a manner not permitted by law. Even if the Board’s Action is interpreted to require all ballots to be counted pursuant to their proper statute, the requirement that the officer in charge of the election conduct a full hand count of all ballots cast is otherwise unlawful.

### CONCLUSION

Because Plaintiffs have established that the Board of Supervisors has acted unlawfully by ordering a full hand count, they need not satisfy the standard for injunctive relief here. *Arizona Public Integrity Alliance v. Fontes, supra*. Regardless, Plaintiffs have nonetheless satisfied the standard for injunctive relief in this case. Because the Board of Supervisors had no authority to order a full hand count audit of the electronic tabulation of votes cast in the general election, Plaintiffs are very likely to succeed on the merits of their special action. Additionally, because the proposed audit does not comply with clearly stated Arizona law, public policy and the public interest are served by enjoining the unlawful action. Plaintiffs have additionally established they are beneficially interested in compelling the Recorder or Elections Director to perform their non-discretionary legal duty of conducting an audit of votes only as permitted by statute, thus establishing their claim for mandamus under A.R.S § 12-2021.

Defendants urge the Court to consider that permitting a full hand count audit would help ameliorate fears that the electronic count was incorrect, and that it ensures that every vote is counted and counted correctly. However, there is no evidence before this Court that electronic tabulation is inaccurate in the first instance, or more importantly, that the audit system established by law is insufficient to detect any inaccuracy it may possess.

The Court understands and recognizes that many citizens believe that a full hand count is the only appropriate methodology to accurately count the people’s vote. However, the question of what methodology of vote counting is most appropriate, or most supported by the public, is not

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the question that is currently before this Court. The decision as to how to conduct and tabulate elections is appropriately in the domain of the State Legislature, supplemented by the delegated rule making authority of the Secretary of State. The Legislature has spoken clearly, and elected officials are required to follow its direction. As the Arizona Supreme Court has succinctly stated:

Election laws play an important role in protecting the integrity of the electoral process. Thus, public officials should, by their words and actions, seek to preserve and protect those laws. But 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.


*Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. at 61, 475 P.3d 306 (emphasis in original). In order to ensure public confidence in our democratic system and uphold the integrity of the duly enacted electoral process, this Court must grant Plaintiffs' requests for preliminary injunction and writ of mandamus.

Based on the foregoing,

**IT IS ORDERED** that the Petition for Writ of Mandamus or in the Alternative Motion for Preliminary Injunction is **GRANTED**.

**IT IS FURTHER ORDERED** directing the Cochise County Recorder, Cochise County Director of Elections, or any other officer in charge elections for Cochise County shall conduct any hand count of precinct ballots or hand count audit of early ballots strictly in accordance with A.R.S. 16-602, as described in this Ruling. Such audit or hand count shall not constitute a review of all ballots cast unless such methodology is required based on the results of the ongoing hand count or audit.

**IT IS FURTHER ORDERED** enjoining the Cochise County Board of Supervisors' Action requiring a full hand count audit of all votes cast in Cochise County in the 2022 General Election.

  
HON. CASEY F MCGINLEY

*Distribution on next page only*

L. Kimes

Judicial Administrative Assistant

**R U L I N G**

cc: Cochise County Superior Court – Shawneen D. Serrano  
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1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF COCHISE

3  
4 ARIZONA ALLIANCE OF RETIRED ) Case No. CV202200518  
5 AMERICANS, INC. and STEPHANI )  
6 STEPHENSON, )

7 Plaintiffs, )  
8 vs. )

9 TOM CROSBY, ANN ENGLISH, and PEGGY )  
10 JUDD, in their official capacities )  
11 as the Cochise County Board of )  
12 Supervisors; DAVID STEVENS, in his )  
13 official capacity as the Cochise )  
14 County Recorder; and LISA MARRA, in )  
15 her official capacity as the )  
16 Cochise County Elections Director )

17 Defendants. )  
18 )  
19 )

20  
21 TRANSCRIPT OF ELECTRONICALLY RECORDED MOTIONS HEARING

22 BEFORE THE HONORABLE CASEY McGINLEY

23 November 4, 2022

24 Prepared by:

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## I N D E X

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1 [Commencement of Motions Hearing on November 4,  
2 2022]

3 \* \* \*

4 THE COURT: Good morning, everyone. We are now  
5 on the record. Let's be on the record in the matter of  
6 Arizona Alliance For Retired Americans, Inc. and Stephani  
7 Stephenson versus Tom Crosby, Ann English, Peggy Judd, and  
8 David Stevens, and Lisa Marra.

9 Will the parties please announce their  
10 appearances.

11 MS. MADDURI: Good morning, Your Honor.  
12 Lalitha Madduri for the plaintiffs.

13 MS. ANDREWS: Good morning, Your Honor.  
14 Jillian Andrews and Gina Hearn of Herrera Arellano for the  
15 plaintiffs.

16 MR. KOLODIN: Good morning, Your Honor.  
17 Alexander Kolodin and Roger Strassburg on behalf of  
18 defendant Recorder David Stevens.

19 MR. BLEHM: Good morning, Your Honor. Bryan  
20 Blehm on behalf of the board defendants, Tom Crosby, Ann  
21 English, and Peggy Judd.

22 MS. ESTES-WERTHER: Good morning, Your Honor.  
23 On behalf of defendant Lisa Marra, Christina Estes-Werther  
24 and cocounsel Aaron Arnson.

25 THE COURT: I am just making sure that we get

1 everybody. Okay. Good morning, everyone. We are set to  
2 have a hearing today on the plaintiffs' various motions.  
3 There is an Order to Show Cause and there is also the  
4 petition for a writ of mandamus and the alternative motion  
5 for preliminary injunction.

6 Are we prepared to proceed today?

7 [Multiple speakers affirm.]

8 THE COURT: All right. It is not a trick  
9 question. All right. I thought what we could do is we  
10 could first kind of talk about what our scheduling and how  
11 we are going to proceed today and make sure that we are  
12 all on the same page.

13 My understanding is that plaintiff does have at  
14 least one witness; is that correct?

15 MS. MADDURI: That's right, Your Honor. We  
16 have one joining us by Zoom and one in the courtroom  
17 today.

18 THE COURT: Okay. So you are going to call two  
19 witnesses?

20 MS. MADDURI: That's right. And we would  
21 also -- we have also subpoenaed defendant County Recorder  
22 Stevens.

23 THE COURT: Mm-hmm.

24 MS. MADDURI: We would expect to take testimony  
25 from him.

1 THE COURT: All right. Are any of the  
2 defendants calling witnesses on today's date?

3 MR. BLEHM: None here, Your Honor, on behalf of  
4 the board.

5 THE COURT: Thank you, Mr. Blehm.

6 MR. KOLODIN: One, Judge. Mr. Stevens, the  
7 Recorder.

8 THE COURT: Very well.

9 MS. MADDURI: Your Honor, yes. The elections  
10 director, Lisa Marra.

11 THE COURT: Okay. Sounds good.

12 So what the Court intends to do, unless there  
13 is a strong objection to the contrary is this, I think the  
14 issues are pretty well briefed. I think what we are here  
15 to decide is pretty obvious. I don't think that we need  
16 to have opening statements, per se. What I would intend  
17 to do is we will go ahead and start with testimony, hear  
18 from all of the witnesses, and then we will do closing  
19 arguments.

20 I think the only issue that is before the Court  
21 that has not been addressed and I want to make a record on  
22 is that the secretary of state has filed a motion asking  
23 for the Court to consider an amicus brief. And I informed  
24 counsel yesterday, to the best of my ability, that what I  
25 intend to do is let you all make any position that you

1 have on it. I know some -- I know the plaintiffs do not  
2 object. I know that the defendant directions -- elections  
3 director does not object. I know the Board of Supervisors  
4 are unable to take a position, last I heard, Mr. Blehm?

5 MR. BLEHM: Yes, Your Honor. That is correct.  
6 Us meeting would violate the open meeting laws, so we  
7 can't do that. And so it is already on Twitter and so we  
8 have no objection, Your Honor.

9 THE COURT: Very well. And does the Defendant  
10 Stevens have any objection to the Court considering the  
11 brief?

12 MR. BLEHM: Your Honor, Defendant Stevens takes  
13 no position as to the Court considering the brief.

14 THE COURT: So what I will tell you I have done  
15 is I have only read the motion. I didn't think it  
16 appropriate to read the amicus brief. Unless and until I  
17 heard from you all what your official positions were.

18 So I am using the Court's authority to grant  
19 the request to file the amicus brief, but in consideration  
20 of the fact that we have parties who are pleading and who  
21 are presenting witnesses, the Court's belief is and the  
22 Court's finding is that it would be inappropriate to allow  
23 the Secretary of State to argue the amicus brief.

24 And the reason for that is the Court believes  
25 that if the Secretary of State wished to be a part of

1 these proceedings, she certainly had the right to either  
2 intervene or otherwise seek party status. And I don't  
3 think it is appropriate to allow an amicus party to argue  
4 the merits to the brief.

5 So I am going to read the brief and I am going  
6 to consider it a part of these proceedings, but I am not  
7 going to permit the secretary or her representative to  
8 argue any further merits to the brief or question  
9 witnesses or anything like that.

10 Are there any other preliminary matters that we  
11 need to address before we get to the hearing?

12 Hearing none, the plaintiff may call its first  
13 witness. Who do you wish to call?

14 MS. ANDREWS: Your Honor, plaintiffs call  
15 Stephani Stephenson.

16 THE COURT: Okay. If you will stand and be  
17 sworn by the clerk, and then take the stand.

18 THE WITNESS: [Indiscernible.]

19 THE COURT: You may.

20 Did you steal her seat?

21 FEMALE SPEAKER: I'm sorry. Yes.

22 THE COURT: It's not quite literally the stand.

23 FEMALE SPEAKER: Coming there first.

24 THE CLERK: Your first name is S-T-E-P-H-A-N-I?

25 THE WITNESS: Yes.

1 THE CLERK: Stephenson?

2 THE COURT: All counsel has permission to use  
3 the [indiscernible] as they see fit.

4  
5 STEPHANI STEPHENSON,  
6 having been called as a witness and being first duly  
7 sworn, testified as follows:

8  
9 THE WITNESS: I do.

10 THE CLERK: I'm going to get you a chair.

11  
12 DIRECT EXAMINATION

13 BY MS. ANDREWS:

14 Q. Good morning, Ms. Stephenson, thank you for  
15 being here today. I hopefully am not blocking too many  
16 peoples' view from the stand here. Can you please state  
17 and spell your name for the record?

18 A. My name is Stephani Stephenson;  
19 S-T-E-P-H-A-N-I, S-T-E-P-H-E-N-S-O-N.

20 Q. Thank you.

21 THE COURT: I can hear her. It sounds like it  
22 is fine.

23 THE CLERK: Because you are not in front of a  
24 mic.

25 MS. ANDREWS: Oh.



1 BY MS. ANDREWS:

2 Q. Ms. Stephenson, can you start today by telling  
3 us where you live?

4 A. I live in Saint David, Cochise County, Arizona.

5 Q. And how long have you lived in Cochise County?

6 A. Twelve and a half years.

7 Q. Are you registered to vote in Cochise County?

8 A. Yes, ma'am.

9 Q. Do you know how long you have been registered  
10 to vote in this county?

11 A. Yes. I registered in June 2010. So that is 12  
12 and a half years, almost.

13 Q. And do you typically vote by early ballot or in  
14 person?

15 A. I typically vote by early ballot.

16 Q. Did you vote in this election, the 2022 general  
17 election?

18 A. Yes.

19 Q. Did you vote by early ballot in this selection?

20 A. Yes.

21 Q. How did you drop off that early ballot?

22 A. I dropped off my ballot at the County building  
23 drop-off box in Benson, Arizona.

24 Q. And do you know what has happened to your  
25 ballot after that?

1 A. On checking the website, it indicates that my  
2 ballot has been accepted.

3 Q. Thank you. And I just want to ask some quick  
4 questions about your qualifications as a voter.

5 Are you at least 18 years old?

6 A. Yes.

7 Q. Are you a United States citizen?

8 A. Yes, ma'am.

9 Q. And you are indeed a resident of Arizona?

10 A. Yes.

11 Q. And of Cochise County?

12 A. Yes.

13 Q. Have you ever been convicted of a felony?

14 A. No.

15 Q. Have you ever been adjudicated, incapacitated  
16 by a court?

17 A. No.

18 Q. Okay. Thank you.

19 So obviously you know why we are here today, to  
20 talk about the potential hand-count audit of early  
21 ballots. Have you been following this matter?

22 A. Yes.

23 Q. Did you participate in any of the public  
24 meetings that the board of supervisors held where they  
25 discuss this?

1           A.    I participated in a public comment section on  
2 the meeting held on October 24th.

3           Q.    Great.  And do you remember generally what you  
4 said during public comment?  It doesn't need to be  
5 verbatim.

6           A.    I opposed the proposal at the time.

7           Q.    And why did you oppose the proposal?

8           A.    When I first heard the proposal, my first  
9 reaction was, this seems to be a very big, major change in  
10 the way we count ballots, which is happening at the very  
11 last minute.  You know, one minute to midnight, large  
12 change.  And to me, that seemed like it would be  
13 disruptive to the process of counting ballots.  And it  
14 seemed to me that it did not offer improved accuracy, that  
15 it would serve to delay the count or at least the report  
16 of the final count.

17                   I know that election officials work most of the  
18 year to work out a smooth, transparent process.  And this  
19 was so late and so disruptive and not well thought out, in  
20 my opinion.

21                   As a voter, I felt like I had the right to cast  
22 my ballot to have it counted with accuracy, to be audited.  
23 I know that the current election officials do a very good  
24 job of that.  I also felt that behind every ballot, I know  
25 we talk about 50,000 ballots, boxes of ballots, but behind

1 every single ballot is a real person, a real person who  
2 cast that vote. And I felt that my ballot, if subjected  
3 to this new proposal, would almost be held hostage to what  
4 I thought was a political move that would in no way  
5 improve the count. A political move.

6 I felt that it would be subject to a move that  
7 is possibly full of human error. It would be handled many  
8 more times. And also the fact is, I cast my ballot before  
9 this process was legally -- was legal. I -- my ballot was  
10 accepted before this was an acknowledged legal. So I  
11 think it is an illegal process that my ballot would be  
12 subjected to.

13 Q. I want to circle back to a couple of the  
14 specific concerns you talked about. One thing you  
15 mentioned is accuracy. Can you explain to me a little bit  
16 more of what your concerns are around accuracy if this  
17 hand-count audit were to move forward?

18 A. Well, I think when you are talking about  
19 especially large numbers of ballots, I think human error  
20 is kind of acknowledged. We have all -- I have certainly  
21 made human errors. I think that is pretty well common  
22 sense. And I have seen nothing that says that it is more  
23 accurate than less. So I am concerned about that we have  
24 a very established chain of custody of ballots. I am  
25 worried about the interruptions in that, especially

1    postelection.  And all of the things that concern human --  
2    extra human handling of the ballots, whether it's an  
3    innocent human error or, you know, otherwise.

4           Q.    So is it fair to say then you have concerns  
5    about your own vote being counted accurately in the  
6    hand-count audit?

7           A.    I do.  Especially since my vote would have  
8    already been counted under the legal process we have in  
9    place today.  And when I cast my ballot, you know, the  
10   certain expectation of how it is done, which I knew about,  
11   and now suddenly to have everything change, to expose it  
12   to another whole process, yes, I do have concerns.

13          Q.    And do you have concerns if the hand-count were  
14   to go forward, do you have concerns that you would feel  
15   any doubts about the results of that hand-count audit?

16          A.    Since I have never seen a clear proposal about  
17   exactly what is going to -- you know, I have never even  
18   seen a clear proposal yet of what will happen.  So, yes, I  
19   have doubts of how long it would take.

20          Q.    That's -- I wanted to circle back on something  
21   you said earlier and just now about delay.  Can you tell  
22   me a little bit more?  What are your specific concerns  
23   about any delays that would be caused here by this audit?

24          A.    When I cast a ballot, and I cast an early  
25   ballot because I know that those ballots will be counted

1 efficiently and in a timely manner, and reported as soon  
2 as possible. I want my ballot to be there too when  
3 elections are counted and decided. I want to be part of  
4 that. Whether I win or lose, I want my ballot to be  
5 there.

6 There is a certain amount of time between  
7 election day and when the results are finalized. It is  
8 not a very long time, I mean, maybe a month. A hand-count  
9 will delay it. I don't know what the amount of time will  
10 be, but I don't think anyone does. It could be a very  
11 long time in which my ballot will be held not countable.

12 Q. And do you feel you would be harmed if the  
13 results of the election were to be delayed such that  
14 winners aren't finalized?

15 A. Yes. And this I think comes -- when I said  
16 disruptive, I think this is disruptive in the normal  
17 process of an election. And to delay results is -- can be  
18 incredibly disruptive. Yes.

19 Q. Ms. Stephenson, is it fair to say that if this  
20 hand-count audit move forward, you will have less faith in  
21 the integrity of Cochise County's elections?

22 A. I would say so, yes. Because, you know, every  
23 county -- the state -- under the Secretary of State's  
24 office, all of the counties work together with the state  
25 to come up with a fairly standard process. So that I know

1 that no matter what county I live, my vote will be counted  
2 in a certain way that I have -- I have trust in. And I  
3 that know people have worked years to come up with the  
4 process that I can trust.

5 So suddenly, if my county is going down this  
6 other road, I -- at this point, no, I do not trust that.

7 Q. Thank you, Ms. Stephenson.

8 MS. ANDREWS: No further questions, Your Honor.

9 THE COURT: Thank you.

10 Counsel, I don't know if you all had a  
11 prearranged agreement as to who would you would go in what  
12 order. If you don't, I'm just going to kind of go around  
13 the room.

14 MR. BLEHM: We don't have a prearranged  
15 agreement that I am aware of, Your Honor.

16 THE COURT: All right. Let's go ahead and  
17 start with you then, Mr. Blehm.

18 MR. BLEHM: All right. Very good.

19

20 CROSS-EXAMINATION

21 BY MR. BLEHM:

22 Q. Good morning. How are you today?

23 A. Good.

24 Q. Are you having a good day?

25 THE CLERK: Sir, you need the microphone.



1 MR. BLEHM: I am sorry.

2 THE CLERK: You are not going to be on the  
3 record if -- thank you.

4 BY MR. BLEHM:

5 Q. Good morning. How are you today?

6 A. Good.

7 Q. My name is Bryan Blehm. I am counsel for the  
8 Board of Supervisors defendants. And you have some  
9 questions, a lot of them concern a chain of custody of the  
10 ballots; is that correct? I believe you said a chain of  
11 custody?

12 A. Yes, sir.

13 Q. Okay. Do you know what the chain of custody is  
14 for your ballot when you vote by mail?

15 A. When I vote by mail, it is mailed to the --  
16 well, I actually voted by Dropbox. So the Dropbox is  
17 collected by county personnel who accept the ballot, count  
18 the ballot, retain possession of the ballot, audit the  
19 ballot, until such a time when that ballot is turned -- is  
20 either put in storage or turned over to the Secretary of  
21 State. I am not an expert on that. I am, you know,  
22 obviously I am just a voter.

23 Q. All right. And the reason I ask that question  
24 is you also said you were very concerned --

25 A. Yes.

1 Q. -- about a full hand-count audit increasing  
2 the number of people that handle your ballot; is that  
3 correct?

4 A. I would say increasing the overall handling of  
5 the ballot, the number of times the ballot is handled.

6 Q. Okay.

7 A. And possibly -- well, we will leave with that.

8 Q. All right. And so you don't vote in person;  
9 correct?

10 A. Correct.

11 Q. Okay. And that is because you believe the  
12 system presently doesn't allow too many people to handle  
13 the ballots and there is a sufficient chain of custody?

14 A. No. I don't vote -- I don't vote in person  
15 because I actually enjoy the ability to vote in the  
16 privacy of my home.

17 Q. Okay. And so getting back to the chain of  
18 custody and the number of people that handle your  
19 ballots --

20 MR. BLEHM: And if I may ask a question real  
21 quick, Your Honor.

22 THE COURT: You may.

23 MR. BLEHM: How much time do we have?

24 THE COURT: We have as much time as we need. I  
25 have cleared the entire day.

1 MR. BLEHM: Oh, fantastic. Okay.

2 BY MR. BLEHM:

3 Q. Do you know what the chain of custody is  
4 between your ballot and the machine counting that ballot  
5 if you go to the polls and you vote in person?

6 A. I'm sorry. Can you repeat that?

7 Q. Do you know what the chain of custody is  
8 between you and your ballot being counted by that machine  
9 if you go to the polls and you vote in person?

10 A. I did work as a poll observer in the 2020  
11 election, in my precinct. And I observed in person that  
12 the ballots were kind of tallied up by a machine, and that  
13 county personnel came and collected those ballots. And I  
14 was there to observe that, sir.

15 Q. Okay. So the process was: The individual  
16 voter -- now, let's say this voter is you.

17 A. Yes, sir.

18 Q. You go to the polls, you get a ballot; correct?  
19 You take that ballot to the voting booth, the privacy  
20 booth where you vote that ballot; is that not correct?

21 A. Yes.

22 Q. And then you walk that ballot over to the  
23 voting machine; correct?

24 And then you stick that ballots into the voting  
25 machine; is that correct?

1 A. Mm-hmm.

2 Q. And then that voting machine when you put your  
3 ballot in tabulates your ballot. Yes?

4 A. I don't know the precise nature of all of that,  
5 sir.

6 Q. But the machines you put your ballot in counts  
7 the ballot?

8 MS. ANDREWS: Objection, Your Honor.

9 THE WITNESS: I don't know the terminology,  
10 sir.

11 MS. ANDREWS: Foundation.

12 BY MR. BLEHM:

13 Q. Okay. So now it is a matter of terminology.

14 MS. ANDREWS: Objection, Your Honor.

15 THE COURT: Sustained as to the form of the  
16 question.

17 BY MR. BLEHM:

18 Q. Between you and that machine, what is the chain  
19 of custody of that ballot?

20 A. Well, there are a number of --

21 Q. My question is between you and that machine,  
22 what is the chain of custody of your ballot?

23 A. You put your ballot in the machine.

24 Q. You, the individual voter is the person that is  
25 responsible for that ballot and its chain of custody;

1 correct?

2 MS. ANDREWS: Objection, Your Honor. Asked and  
3 answered.

4 THE COURT: Overruled.

5 You can answer that.

6 THE WITNESS: Yes.

7 BY MR. BLEHM:

8 Q. If you elect to get your vote by mail --

9 A. Yes.

10 Q. -- how many processes does that ballot go  
11 through? How many hands does that ballot touch before it  
12 gets to your door?

13 MS. ANDREWS: Objection, Your Honor.  
14 Foundation.

15 THE COURT: Overruled.

16 THE WITNESS: Well, I vote by -- I put my  
17 ballot in a Dropbox, sir, and it is picked up by county  
18 personnel.

19 BY MR. BLEHM:

20 Q. How do you get that ballot?

21 A. I get that ballot by mail.

22 Q. Okay.

23 A. And if I vote by mail, I return it to the post  
24 office.

25 Q. Do you know how many steps that ballot goes

1 through before it actually reaches your house so that you  
2 can vote in the privacy of your own home?

3 A. My ballot is enclosed in two envelopes when I  
4 do that, sir.

5 Q. My question is, do you know how many steps your  
6 live ballot goes through before it reaches your door?

7 A. I think that is beyond my knowledge as -- I  
8 don't -- I don't personally follow that ballot. No, sir.

9 Q. Okay. So who delivers your ballot?

10 A. The United States post office.

11 Q. Okay. So we have the county giving your ballot  
12 to the United States post office; correct?

13 A. Um --

14 Q. As far as you know?

15 A. As far as I know, yes.

16 Q. As far as you know.

17 A. Yes, sir.

18 Q. Okay. And so -- well, that is someone outside  
19 of the county that now has possession of your ballot;  
20 correct?

21 A. Yes, sir.

22 Q. Okay. Do you think that when the post office  
23 collects your ballot from the county that it is just given  
24 by the county directly to the little postal person who  
25 walks to your house and then puts it in your mailbox?

1 A. Well, I drop mine off in the Dropbox, sir.

2 Q. I am talking about getting to you. We will  
3 talk about heading back to the county after that.

4 A. Well, 80 percent of the voters in Arizona have  
5 been voting by mail for 30 years.

6 Q. My question is, not how many people have been  
7 voting by mail for 30 years. My question is this, does  
8 the county give your ballot directly to the postal  
9 employee who then takes it straight to your door?

10 MS. ANDREWS: Objection, Your Honor.

11 Foundation.

12 MR. BLEHM: Do you know?

13 THE COURT: The question is whether she knows.  
14 It's a foundational question.

15 THE WITNESS: It's delivered to the U.S.  
16 Postal Service. And I have no knowledge of anything other  
17 than that as far as how many people --

18 BY MR. BLEHM:

19 Q. As far as you know, 100 people might touch that  
20 ballot before it reaches your door; is that correct?

21 MS. ANDREWS: Objection, Your Honor.

22 THE WITNESS: That is an assumption.

23 MS. ANDREWS: Speculation.

24 THE COURT: Mr. Blehm, I think you've made your  
25 point as far as how the ballot gets to her.

1 MR. BLEHM: Okay.

2 BY MR. BLEHM:

3 Q. When you take your ballot and you voted, you  
4 said you drop it off in a Dropbox; is that correct?

5 A. Yes, sir.

6 Q. Okay. Do you know what happens to that ballot  
7 after it leaves the Dropbox?

8 A. It is picked up by the county.

9 Q. Do you know how many people at the county  
10 elections department process that ballot before it ever  
11 gets counted?

12 A. No, sir.

13 Q. Okay. So you gave testimony that said you were  
14 concerned about the chain of custody about your ballot.  
15 You gave testimony that said your concerned about more  
16 people touching these ballots than otherwise have to. And  
17 increasing the complexity of our vote tabulation. Okay.  
18 But yet, you vote by mail, which is a highly complex  
19 system and multiple people --

20 MS. ANDREWS: Objection, Your Honor.

21 BY MR. BLEHM:

22 Q. -- have control of your ballot.

23 MS. ANDREWS: Form of the question.

24 THE COURT: It is sustained as to  
25 argumentative.



1 MR. BLEHM: My question was -- I forgot on the  
2 objection. I apologize.

3 THE COURT: That is okay, Mr. Blehm.

4 BY MR. BLEHM:

5 Q. All right. So you chose a system that is  
6 highly complicated versus a system which you can walk into  
7 the polls and have individual chain of custody of your  
8 ballot; correct?

9 A. I choose a system which has been legally  
10 approved by the state of Arizona, sir.

11 Q. Okay. Okay. And you object to a full audit of  
12 the 2020 general election by the Board of Supervisors;  
13 correct?

14 A. Yes, I do, sir.

15 Q. Okay. And that is because of what we were just  
16 talking about; correct?

17 A. I believe I stated my reasons.

18 Q. Okay. And so do you know that your ballot  
19 might possibly be audited anyway?

20 A. Yes, sir. Under the rules that are already  
21 observed by the county and the state of Arizona, it could  
22 be.

23 Q. Okay. And what is the harm then from counting  
24 all of them?

25 A. I believe I stated my reasons.

1 Q. I am asking you how are you harmed? How are  
2 you harmed by the county counting all of the ballots as  
3 opposed to what you argue they should be limited to count?

4 A. I believe there are issues that -- I have not  
5 been shown anything that says it would be more accurate.  
6 I believe that it would delayed the count. And I believe  
7 this is a last-minute tactic which is illegal and has not  
8 been approved as a standard practice.

9 MR. BLEHM: I'm going to object to that last  
10 response. It's stating a legal conclusion, Your Honor,  
11 because it is one of the reasons we are here today.

12 THE WITNESS: Yeah. I'm going --

13 THE COURT: The objection was to me.

14 I'm going to overrule the objection. You asked  
15 her what her perceived harms were and she answered the  
16 question.

17 BY MR. BLEHM:

18 Q. All right. And so you believe then that this  
19 process, you know, stands to -- well, strike that. Strike  
20 that.

21 Okay. Let me look at my notes really quickly.

22 Can you tell me what the major change is that  
23 is being made? Because you testified that you think this  
24 is a major change to our --

25 A. Yes, sir. And over the past few weeks, it --

1 the proposal itself seems to have gone through many  
2 changes. As I understand it now, just as an individual,  
3 this would involve a hand-count audit of ballots,  
4 100 percent, after the election itself. I believe my  
5 understanding is that it would happen after the count and  
6 after the percentage audit has already taken place and  
7 attempt to be squeezed into that amount of time after the  
8 count, after the percentage audit, which is standard  
9 practice, but before the ballots can be -- the final  
10 result can be submitted to the Secretary of State. That  
11 is my understanding. And I believe my understanding is  
12 that it would be of 100 percent of the precincts.

13 And I -- what I am not clear of, mostly because  
14 it has been so many changes, if that would include  
15 election day ballots as well as early ballots or not.

16 Q. Okay. So I just want to sort of recite this so  
17 you can tell me if I'm clear on this. You believe that  
18 the process we are here arguing about today, is that we  
19 have the election where the votes are counted by machine;  
20 correct?

21 A. Correct.

22 Q. And then the county will perform its statutory  
23 audit; correct?

24 A. Mm-hmm.

25 Q. And then the county will subsequently perform a

1 second audit by counting all of the ballots; is that  
2 correct?

3 A. I think that is the proposal, yes.

4 Q. Okay. And so your concern is it will not leave  
5 enough time for them to count all of the ballots; is that  
6 correct?

7 A. My concern is more that it will delay the  
8 entire process.

9 Q. Okay. Would your concerns be relieved or  
10 changed at all if you knew that what was going to happen  
11 was the machines will count the ballots, pursuant to  
12 Arizona law, and then there will only be one audit. And  
13 that audit will count all of the ballots. Would that  
14 alleviate your concerns about --

15 A. That is something that I do not know.

16 Q. Okay. So you don't know that?

17 A. I do not know that.

18 Q. Okay. And because you don't know that, you  
19 have concerns that certification of this election may be  
20 delayed?

21 A. Yes, sir.

22 Q. Okay. My question again is, if you knew that,  
23 would that alleviate your concerns of delay?

24 A. No.

25 Q. It wouldn't? Why not?

1           A.    Well, again, what I don't know is how many --  
2   if we are talking about, you know, 50,000 ballots being  
3   hand-counted, being proposed at the last minute, not  
4   following standard procedure after I had already cast my  
5   ballot, yes, I am concerned about that.

6           Q.    Where do you get the information that the  
7   county does not plan to file -- to follow legal procedure?

8           A.    Right now, this is a proposal that has not been  
9   in use and that has been proposed at the last minute. So  
10  this is -- this is not the standard procedure that was in  
11  place when I cast my ballot. So, no, I don't -- I don't  
12  have faith in it, sir.

13          Q.    Okay.

14          A.    I have doubts about it.

15          Q.    Okay. The standard procedure -- the standard  
16  procedure that you support, can you give me the details of  
17  that standard procedure?

18          A.    Again?

19          Q.    Mm-hmm.

20          A.    Well, as I understand it, the ballots are -- my  
21  early ballot is accepted by the county, is tallied, and I  
22  believe -- I believe early ballots can be tallied by  
23  machine before election day so that those can be reported  
24  quite early. But all of the ballots are tallied by the  
25  county elections director and staff.

1           And after that, they do a standard audit which  
2 involves a -- I believe, again, I am not the expert. I  
3 believe a percentage of voting centers, a percentage of  
4 ballots, and a small percentage of ballots, small  
5 percentage of voting centers, small percentage of races; I  
6 believe also at that point if there are close races, there  
7 may be recounts, which the election director office must  
8 deal with. And then both -- that in those audits, there  
9 are at least both major parties submit small crew who goes  
10 in and does that small percentage audit, hand-count audit  
11 to verify the machine tabulation.

12           Q.    Okay. Do you know -- I'm sorry. Did I cut you  
13 off?

14           A.    No. And then it's -- when all of that is  
15 completed, it is submitted to the Secretary of State.

16           Q.    Okay. Do you know where they get the number  
17 for the ballot count and the audit?

18           A.    No, sir.

19           Q.    You don't know where that number comes from?

20           A.    Oh, the number that they are going to count? I  
21 believe it is a percentage.

22           Q.    Okay. Do you know where that number comes  
23 from?

24           A.    I am just guessing that it is coming from the  
25 standard practices.

1 MS. ANDREWS: Objection, Your Honor.

2 Relevance. She is not a legal expert.

3 MR. BLEHM: Understood.

4 THE WITNESS: I don't know.

5 BY MR. BLEHM:

6 Q. Just asking if she knew and she doesn't know.

7 And so do you trust -- do you trust Katie Hobbs  
8 in her opinions with regards to elections?

9 MS. ANDREWS: Objection, Your Honor.

10 Relevance.

11 THE COURT: Sustained.

12 BY MR. BLEHM:

13 Q. Okay. You trust the system with respect to  
14 election; correct?

15 A. It works. Yes.

16 MR. BLEHM: Okay. And the reason I ask that  
17 question, Your Honor, in terms of relevance is simply  
18 this, if I might argue before the Court briefly.

19 THE COURT: I am not accepting argument until  
20 the conclusion. If you want to make a proffer as to why  
21 you felt it was relevant, you may.

22 MR. BLEHM: The proffer I will make, Your  
23 Honor, is simply this. The Secretary of State of the  
24 state of Arizona is obligated by law to produce an  
25 elections procedure manual for use in the state of Arizona

1 in guiding elections. The Secretary of State has done so  
2 for the year of 2021, although that elections procedure  
3 manual was rejected by the governor and the Attorney  
4 General and has not become law.

5 Included, however, Your Honor, in that election  
6 procedure --

7 THE COURT: Mr. Blehm, if I might interrupt  
8 you. What I offered you is the opportunity to offer a  
9 proffer as to why her opinion of Secretary Hobbs was  
10 relevant. I understand the legal background.

11 MR. BLEHM: Okay.

12 THE COURT: I understand that the Elections  
13 Procedures Manual, and I am well aware that we are on the  
14 2019 versus not the 2021 Elections Procedures Manual. You  
15 all have briefed those issues quite extensively. So if  
16 you wish to offer a proffer as to why her opinion of  
17 Secretary Hobbs is relevant, I will hear it. Otherwise,  
18 please proceed.

19 MS. ESTES-WERTHER: Yes, Your Honor. I was on  
20 my way there, but just a roundabout way.

21 THE COURT: I tend -- I tend to go more direct,  
22 especially with a hearing as important as this, sir.

23 MR. BLEHM: I understand, Your Honor.

24 More directly to the point, Your Honor, Katie  
25 Hobbs, Secretary of State Hobbs, drafted an Elections



1 Procedures Manual and contained within that Elections  
2 Procedures Manual. And granted, it does not have the  
3 force of law, but it does have her opinion with respect to  
4 the interpretation of Arizona law and how many ballots  
5 counties may count in their audit.

6 And if I may read it to the Court really  
7 quickly --

8 THE COURT: You may.

9 MR. BLEHM: -- because I'm not sure I can put  
10 it on the screen.

11 THE COURT: That's fine.

12 MR. BLEHM: And I can submit this Elections  
13 Procedures Manual to the Court if you would like.

14 "The officer in charge of elections is required  
15 to conduct a hand-count of one percent of the total number  
16 of early ballots cast or 5,000 early ballots, whichever is  
17 less."

18 And then it gives the statute citation of  
19 602(S).

20 It then goes on, Your Honor, to state:  
21 "Counties may elect to audit a higher number of ballots at  
22 their discretion."

23 And this is the 2020 Elections Procedures  
24 Manual submitted by the Secretary of State, the individual  
25 in charge of Arizona elections.

1           And so my question to the witness, Your Honor,  
2           is whether or not she trusts the judgment of Katie Hobbs,  
3           the Secretary of State to run elections in the state of  
4           Arizona.

5           THE COURT: The proffer has been accepted. The  
6           ruling stands. The Court does not find her personal  
7           opinion about Secretary Hobbs to be relevant.

8           The issue that you have raised is more right to  
9           the argument that we are going to have at the end on the  
10          law.

11          MR. BLEHM: Okay. Understood, Your Honor.  
12          Thank you very much.

13          Let me look at my notes real quick before I go  
14          ahead and pass.

15          BY MR. BLEHM:

16          Q. Just really quickly, you said -- you made the  
17          comment behind every ballot is a real person; correct?

18          A. Correct.

19          Q. And do you believe that the ballot, the right  
20          to vote is that person's most basic and fundamental right?

21          A. It is certainly a right and responsibility that  
22          I exercise as part of my being a citizen and being a part  
23          of a democracy.

24          Q. Okay. Do you believe that their ballots should  
25          not be audited if they weren't selected in the limited

1 audit that you're here to support today?

2 A. I don't quite understand.

3 Q. Well, you testified that you don't mind if your  
4 ballot is audited so long as it is in accordance --

5 A. Yeah.

6 Q. -- with the law; is that correct?

7 A. Mm-hmm.

8 Q. Okay. Well, let me just strike that then and  
9 ask you this question. If this Court determines that my  
10 clients, the Cochise County Board of Supervisors, are  
11 proceeding in accordance with Arizona law in auditing  
12 100 percent of the ballots, would that change your  
13 opinion, and would you have a different opinion?

14 A. As a citizen, I tend to -- being part of the  
15 democratic process, I accept the decisions of the courts  
16 as well as the decisions of the election.

17 Q. Okay. So that would -- that would change your  
18 view moving forward. Okay.

19 MR. BLEHM: I believe, Your Honor, I have no  
20 further questions.

21 THE COURT: Mr. Kolodin. Did I pronounce it  
22 correctly, sir?

23 MR. KOLODIN: Mr. Kolodin. Yes, sir.

24 MR. BLEHM: Mr. Kolodin [indiscernible].

25 THE COURT: Okay. Thank you so much,

1 Mr. Blehm.

2  
3 CROSS-EXAMINATION

4 BY MR. KOLODIN:

5 Q. Ms. Stephenson, I am Alex Kolodin. I want to  
6 ask you, have you ever testified in court before?

7 A. No.

8 Q. It is pretty nerve-racking, isn't it?

9 A. Pardon?

10 Q. I said it is pretty nerve-racking, isn't it?

11 A. Yes.

12 Q. And I imagine you are just here because you're  
13 trying to do what you think is right for the state; right?

14 A. Yeah.

15 Q. I thought so. Let me ask you this, did you  
16 know that the law requires a hand-count audit every year?

17 A. I know that it -- well, I don't know what the  
18 law -- I'm a lawyer, I don't know what the law states.  
19 But my understanding is that a percentage hand-count audit  
20 is done every year.

21 Q. And has that percentage hand-count audit ever  
22 hurt you?

23 A. No, sir.

24 Q. Okay. Do you agree with me that democracy is  
25 important?

1 A. Yes, sir.

2 Q. Why?

3 A. Well, it is the foundation of how our  
4 government is run. It is the foundation of the way that  
5 we make decisions as to how we want our society to  
6 operate, I guess.

7 Q. And is the sort of fundamental concept that the  
8 people elect the representatives and then the  
9 representatives make the decisions?

10 A. To some extent, yes.

11 Q. Okay. And I imagine that you have a political  
12 disagreement with my client as to the scope of the  
13 hand-count audits. Is that more or less right?

14 MS. ANDREWS: Your Honor, political  
15 disagreement is irrelevant.

16 THE COURT: Overruled.

17 You can answer.

18 THE WITNESS: My concern is as a voter.

19 BY MR. KOLODIN:

20 Q. Okay.

21 A. Regardless of the party.

22 Q. But you would agree it is a question of policy,  
23 right, what is the policy of the county going to be?

24 A. I think that there is a process to where these  
25 decisions are made and it is not something that happens

1 four days before an election.

2 Q. Sure. Is -- I think you had mentioned to me  
3 that there is an Elections Procedures Manual that governs  
4 these sorts of counts; is that right?

5 A. I think the other attorney is the one that  
6 mentioned that.

7 Q. Oh. Did he mention that?

8 Are you aware that there is an Elections  
9 Procedures Manual that governs these sorts of counts?

10 A. I am aware of it, yes.

11 Q. Would you agree with me that that's part of the  
12 process of how these decisions get made?

13 A. Yes.

14 Q. Okay. And if I were to tell you that in that  
15 manual it says that my client can elect to count more than  
16 5,000 ballots if he thinks it is a good idea. Would you  
17 agree that well encompassed within the process?

18 A. That is not information I am -- that's what you  
19 say I guess.

20 MS. ANDREWS: Objection, Your Honor. Asking  
21 for a legal conclusion.

22 MR. KOLODIN: Okay.

23 THE COURT: Sustained as to legal conclusion.

24 BY MR. KOLODIN:

25 Q. If it were true, right, I am asking you just to

1 assume for a moment that it was true, that that manual  
2 said that my client can count more than 5,000 ballots if  
3 he likes.

4 MS. ANDREWS: Objection, Your Honor.

5 THE COURT: Let him finish the question,  
6 please.

7 MR. KOLODIN: Thank you.

8 BY MR. KOLODIN:

9 Q. Would you agree then that is part of the  
10 process?

11 MS. ANDREWS: Objection, Your Honor. Legal  
12 conclusion.

13 THE COURT: It's calling for a hypothetical.  
14 Overruled.

15 MR. KOLODIN: Okay. Well I --

16 THE COURT: Mr. Kolodin, I overruled.

17 MR. KOLODIN: Oh, I'm sorry. Okay.

18 THE COURT: That means she can answer.

19 MR. KOLODIN: Oh, okay. Sorry. I didn't hear  
20 that, Your Honor.

21 THE COURT: That's okay. We all get confused  
22 from time to time.

23 THE WITNESS: I -- could you repeat the  
24 question, please?

25 BY MR. KOLODIN:

1 Q. So if I were -- if I were to tell you, and,  
2 again, I know that you don't know that this is true, so I  
3 am just asking you to believe for the purpose of the  
4 question it is true. Obviously the Court will determine  
5 what is true. But if I were to tell you that the  
6 elections procedures manual contains language that says  
7 that my client can count more than 5,000 ballots if he  
8 wishes, would you agree with me that that is part of the  
9 process?

10 A. If that's what the parties -- if that's what it  
11 says and the parties agreed to and the law backs it up,  
12 you know --

13 Q. Okay. And in that case, you would agree with  
14 me that it would be a policy decision whether to count  
15 more than 5,000 ballots; right?

16 MS. ANDREWS: Objection, Your Honor. Still  
17 calls for a legal conclusion.

18 THE COURT: Sustained.

19 BY MR. KOLODIN:

20 Q. I will move on. Now, in asking this next  
21 question, I want to be very specific about what I am not  
22 asking. I am not asking you to tell me what you talked  
23 about or even the topics of the conversation.

24 Okay. With that in mind, I'm going to ask you  
25 the question. Did you meet with your lawyers before this



1 hearing?

2 A. In person?

3 Q. In person or virtually.

4 A. Yes.

5 Q. How many times?

6 A. One time.

7 Q. And for how long?

8 A. Half an hour.

9 Q. Was that before or after the suit was filed?

10 A. After.

11 Q. Okay. Did you get a chance to read the  
12 complaint in this matter?

13 A. Yes, sir.

14 Q. Okay. Would you say that you know its contents  
15 pretty well?

16 A. Yes. Somewhat. Yes.

17 Q. Okay. Have you gotten a chance to read the  
18 other briefing in this matter?

19 A. The other briefing?

20 Q. Yes. The other documents that the parties have  
21 filed, both our clients, Mr. Blehm's clients, and your  
22 attorneys?

23 A. Well, I certainly have not read all of the  
24 legal briefings, no.

25 Q. Sure. One final question. Is there anything

1 that my client, Recorder Stevens, could do to make you  
2 more comfortable about the expanded hand-count?

3 A. What would make me more comfortable is to  
4 conduct the election under the current guidelines that  
5 because the election is already underway. And if changes  
6 are to come, I would prefer to see that done in a  
7 methodical manner. Whether -- I don't -- and I don't know  
8 if the legislature, I don't know if the county, but I  
9 would like to see the election occur as it is already done  
10 underway right now.

11 Q. And you would agree with me that the EPM  
12 represents the current guidelines; correct?

13 MS. ANDREWS: Objection, Your Honor. Legal  
14 conclusion.

15 THE COURT: Sustained.

16 BY MR. KOLODIN:

17 Q. Let me rephrase the question slightly. When  
18 you say that you would like the election to be conducted  
19 under the current guidelines, what guidelines are you  
20 referring to?

21 A. The status quo.

22 Q. Status quo?

23 A. Yes, sir.

24 Q. Even if the law doesn't require that?

25 MS. ANDREWS: Objection, Your Honor. Legal

1 conclusion.

2 MR. KOLODIN: I am simply asking what she would  
3 like, the relief she is seeking.

4 THE COURT: The objection is sustained.

5 MR. KOLODIN: Okay. No further questions, Your  
6 Honor.

7 THE COURT: Cross-examination?

8 MS. ESTES-WERTHER: No questions, Your Honor.

9 THE COURT: Any redirect?

10 MS. ANDREWS: Yes, Your Honor.

11 THE COURT: You may proceed.

12

13 REDIRECT EXAMINATION

14 BY MS. ANDREWS:

15 Q. Ms. Stephenson, I just have a few brief  
16 follow-up questions for you. I want to get a little bit  
17 more specific about some of the harms we talked about and  
18 some that the defendants' counsel asked you about.

19 Now, you mentioned that you have concerns about  
20 the way your ballot might be handled in a hand-count  
21 audit; correct?

22 A. Correct.

23 Q. Would it be fair to say that you have concerns  
24 about the security of the ballots were they to be part of  
25 a 100 percent hand-count audit?

1 MR. BLEHM: Objection, Your Honor. She already  
2 asked the question. And this is counsel trying to get her  
3 to rephrase.

4 THE COURT: It is redirect. It is permitted.  
5 Overruled.

6 THE WITNESS: Yes. Well, I think any change --  
7 any changes which, you know, could involve moving ballots  
8 to different locations, whether they are dispersed  
9 locations or not, any interruption in that, especially  
10 large numbers of ballots, large numbers of volunteers,  
11 yes.

12 BY MS. ANDREWS:

13 Q. So if it were part of the procedures that the  
14 county moves forward with, if part of it involved moving  
15 your ballot from one physical location to another for the  
16 purposes of the expanded hand-count audit, would you have  
17 concerns about that?

18 A. Yes.

19 Q. Can you explain a little bit?

20 A. I think every step that you introduce that is  
21 last-minute, not -- you know, new, not standard, you know,  
22 it is like every step is like a -- every new step that is  
23 involved. If it's change to the location, whether it's  
24 the number of people handling it, whether a hand-count of  
25 that magnitude, you know, it has to -- might have to be

1 done more than once. There might be errors so it might  
2 have to be done, who knows how many times. And each step  
3 of the way, the physical ballot can be deteriorated, human  
4 error can be introduced. I mean, all of those things --  
5 though I, of course, can't say for certain how long, all  
6 of those things introduce another element.

7 And I know when you are trying to do  
8 something -- when you have any system, you derived a way  
9 to do this process and then suddenly you introduce all of  
10 these other elements, that there are potentials for errors  
11 and mishandling.

12 Q. And would it be -- would it be fair to say that  
13 under current law, what Cochise County has done in past  
14 elections, I think you referred to it as the status quo,  
15 if that hand-count audit only calls for an audit of 10,000  
16 ballots at most, is it fair to say you don't know whether  
17 your ballot would be included in the hand-count audit?

18 A. I do not know.

19 Q. And if a hand-count audit included 100 percent  
20 of early ballots, would you feel confident that your  
21 ballot would be included in that 100 percent?

22 A. Probably would, yes.

23 Q. And I just want to circle back to one thing you  
24 mentioned, which is human error. If you were to know that  
25 the people involved in any hand-count audit of your ballot

1 were volunteers who had been recruited and trained in the  
2 last few weeks, would that give you concerns?

3 A. Yes.

4 Q. Can you tell me why?

5 A. Well, because this is a new process. The  
6 volunteers, I don't know, you know, I don't know who they  
7 are. I guess. I don't know how well the training would  
8 be. But it is basically something that is not established  
9 and that I don't know. So I have -- I have doubts and  
10 concerns whether those -- that's all I --

11 Q. To be clear, you don't know all of the  
12 volunteers who participate in the regular status quo  
13 hand-counts; correct?

14 A. No.

15 Q. So what gives you more concern about the  
16 volunteers that would be involved in this proposed  
17 100 percent hand-count audit?

18 A. Sheer numbers is one thing. Representation  
19 might be another of the parties.

20 Q. Great. That's all that I have. Thank you,  
21 Ms. Stephenson.

22 THE COURT: Thank you.

23 Ms. Stephenson, that will conclude your  
24 testimony. You are free to --

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: -- sit back in the jury box. You're  
2 welcome.

3 Just so everyone knows kind of how I do breaks  
4 and things like that, I tend to take a break every 90  
5 minutes. So let's go into our next witness and then go  
6 until about 10:30.

7 Who is your next witness, please?

8 MS. ANDREWS: Your Honor, plaintiff calls Dora  
9 Vasquez, who I believe is with us on zoom.

10 THE COURT: Can you invite the witness into the  
11 room, please?

12 [Pause in the proceedings.]

13 THE COURT: Good morning. Are you Ms. Vasquez?  
14 You are on mute. Can you take us off of mute?

15 THE WITNESS: My apologies. Yes, I am  
16 Ms. Vasquez.

17 THE COURT: That's okay. Will you please raise  
18 your right hand and be sworn in by our clerk.

19  
20 DORA VASQUEZ,  
21 having been called as a witness and being first duly  
22 sworn, testified as follows:

23  
24 THE WITNESS: I do.

25 THE COURT: Thank you. You may proceed.

1 MS. ANDREWS: How would it be best for me to  
2 present with the Zoom, Your Honor?

3 THE CLERK: I forgot to mention. I apologize,  
4 the microphones are on the tables there. So the minute  
5 you guys start walking away from them, we lose you.

6 MS. ANDREWS: Okay. So if I sit here I am  
7 fine? Okay. Great. Thank you.

8 MR. KOLODIN: Your Honor, I am going to lodge  
9 an objection in the record to this witness for  
10 nondisclosure. She is not a party. She hasn't been  
11 disclosed as a witness. I understand these proceedings  
12 can be very fast, but I at least wanted to make that for  
13 the record.

14 MR. BLEHM: I'm going to second that objection,  
15 Your Honor.

16 THE COURT: Thank you, Mr. Blehm.

17 Did you all receive the notice or the motion  
18 where they asked to permit the witness to testify  
19 telephonically?

20 MR. KOLODIN: I don't recall receiving it, Your  
21 Honor, which is not to say that we weren't sent it as  
22 these things move extremely quickly. And if I am wrong  
23 about that, I sincerely apologize, but I don't recall  
24 that.

25 THE COURT: Understood.



1 Mr. Blehm?

2 MR. BLEHM: And, Your Honor, I don't recall  
3 receiving it either. But like Mr. Kolodin who is driving  
4 here from Phoenix, I am not reading my e-mail while  
5 driving. I am at least not going to admit it in court.  
6 So I have not seen it, Your Honor.

7 THE COURT: Understood. The objection is noted  
8 for the record. It is overruled.

9 You may proceed.

10 MS. ANDREWS: Thank you, Your Honor.

11

12 DIRECT EXAMINATION

13 BY MS. ANDREWS:

14 Q. Ms. Vasquez, good morning. Thank you for  
15 joining us today.

16 A. Good morning.

17 Q. I don't know if you can see me. I am here.  
18 Would you please state and spell your full name for the  
19 record. I know it is up on your Zoom, but it is quite  
20 small.

21 A. Dora Vasquez; D-O-R-A, V-A-S-Q-U-E-Z.

22 Q. Thank you. And are you here today on behalf of  
23 the Arizona Alliance of Retired Americans?

24 A. Yes.

25 Q. What is your role with the alliance?

1 A. I am the executive director.

2 Q. And how long have you been the executive  
3 director of the alliance?

4 A. Four and a half years.

5 Q. Are you based here in Arizona?

6 A. Yes.

7 Q. Great. Can you tell us a little bit about what  
8 the alliance is and what its mission is?

9 A. The alliance has a membership of approximately  
10 50,000 retirees here in Arizona, and we represent private  
11 sector unions, community organizations, and individuals in  
12 every county in Arizona.

13 Our mission is to ensure social and economic  
14 justice and to protect the civil rights of retirees after  
15 a lifetime of work. You know, the way we accomplish this  
16 mission by ensuring that our members have access to voting  
17 and may participate in Arizona's elections.

18 Q. Thank you, Ms. Vasquez. And am I -- is it fair  
19 to say that as executive director of the alliance, you  
20 give that elevator speech fairly frequently?

21 A. Yes.

22 Q. Thank you. So now that you've told us a little  
23 bit about what the alliance is, you also mentioned that  
24 you have about 50,000 members, is that what I heard?

25 A. Yes.

1 Q. And what's the general age range of members in  
2 the alliance?

3 A. The age range is 55 to 90. We have active  
4 members who are 90 years old.

5 Q. And all of your members live in Arizona; is  
6 that correct?

7 A. That's correct.

8 Q. And I think you said that you have members in  
9 every county in the state; is that correct?

10 A. Yes. That's correct.

11 Q. Do you know how many members of the alliance  
12 are from Cochise County?

13 A. We have approximately 1200 to 1300 members in  
14 Cochise County.

15 Q. Great. Thank you. Can you tell me is -- based  
16 on the mission you -- that you just provided to us, is it  
17 important to the mission of the alliance that its members  
18 are civically engaged?

19 A. Yes.

20 Q. And so is an important to the mission of the  
21 alliance that your members are active voters in Arizona?

22 A. Yes.

23 Q. Does the alliance encourage its members to  
24 vote?

25 A. Yes.

1 Q. And are you familiar, as executive director,  
2 are you familiar with the methods by which your members  
3 vote?

4 A. Yes. We use the phone banking to reach out to  
5 many of our members to encourage them to have a voting  
6 plan. And many of our members vote by early ballot.

7 Q. Does the alliance specifically encourage  
8 members to vote by early ballot?

9 A. Yes.

10 Q. Why?

11 A. You know, many of our members, as we are all  
12 older, have mobility issues. Election day may be hard on  
13 them to stand at the polls, so we encourage them to vote  
14 early so that -- also so that in some counties, they are  
15 able to track their ballots. And that helps to kind of  
16 ease them and knowing that their vote is counted.

17 Q. And so you said that the alliance does phone  
18 banking where you talk with members about their plan to  
19 vote. When you are having those conversations about  
20 voting plans, does that include a conversation about  
21 voting by early ballot?

22 A. Yes. They encourage early voting by mail.

23 Q. That's -- to your knowledge, is that something  
24 that the alliance's phone bankers talk with voting members  
25 about directly?

1           A.     Absolutely.  We talk with them about having a  
2 plan to vote.  If they are not able to -- if they haven't  
3 registered for an early ballot, we ask them what their  
4 plan is, who is going to take them to the poll, how are  
5 they going to get there.  So we encourage them to sign up  
6 for early ballots.

7           Q.     And when does this phone banking occur?  Are --  
8 is the alliance currently phone banking?

9           A.     Yes.

10          Q.     When did the phone banking begin?

11          A.     We began phone banking in July.

12          Q.     In July of 2022?

13          A.     Yes.  That's correct.

14          Q.     And is the phone banking mostly focused on the  
15 2022 election?

16          A.     Yes.  That is the focus of the phone banking.

17          Q.     And did you talk with folks about the 2022  
18 primary election?

19          A.     Yes.

20          Q.     And then after the primary, have you been  
21 talking with folks about the 2022 general election which  
22 is this coming Tuesday?

23          A.     Yes.

24          Q.     Ms. Vasquez, can you tell me a little bit about  
25 whether the alliance has concerns about the -- first, I

1 assume you, you know, the reason we are here today. And  
2 I, you know, I don't need you to provide a summary or  
3 anything like that, but I am wondering if you can tell me  
4 whether the alliance has concerns about a potential  
5 hand-count audit of 100 percent of the early ballots in  
6 Cochise County?

7 A. Yes. Our concern is that it is going to cause  
8 confusion for our members. And it is going to cause them  
9 to have a lack of confidence in the process. And when  
10 that lack of confidence occurs, it has the potential to  
11 decrease participation in future voting.

12 Q. Can you give me a little bit more detail? Why  
13 do you think this proposed hand-count might cause a lack  
14 of confidence in voters?

15 MR. KOLODIN: Objection. Calls for  
16 speculation.

17 THE COURT: Was the question as to why she  
18 believes --

19 MS. ANDREWS: Yes, Your Honor.

20 MR. KOLODIN: Withdrawn.

21 THE COURT: Okay.

22 BY MS. ANDREWS:

23 Q. Yes. Ms. Vasquez, to repeat, my question was  
24 why do you think or why do you believe that this proposed  
25 hand-count audit might cause confusion or concern about

1 elections with your members?

2 A. Our members may not understand or they may  
3 believe that their votes did not count because it did not  
4 follow the regular process.

5 Q. Can you say a little bit more about that. What  
6 do you -- what do you mean by it didn't follow the regular  
7 process?

8 A. Well, you know, there is a process of  
9 procedures in place for elections. And this is outside of  
10 that process. And so some of them may wonder what is  
11 going on, was it worth my effort to get out there and vote  
12 and send my ballot early. And now they are challenging --  
13 you know, they are asking does my vote, did I really send  
14 it in or you know, what's going on. So it is going to  
15 cause confusion for our members.

16 Q. And if it indeed causes confusion for the  
17 alliance's members, will the alliance work to address that  
18 confusion with members?

19 MR. KOLODIN: Again, objection. Calls for  
20 speculation if it indeed causes confusion.

21 THE COURT: Sustained as to the form of the  
22 question and speculation. You can try to rephrase if you  
23 would like.

24 BY MS. ANDREWS:

25 Q. Ms. Vasquez, knowing that you believe that

1 alliance members may be confused by an expanded hand-count  
2 audit, if the audit were to move forward, would the  
3 alliance try to address that confusion with its members?

4 MR. KOLODIN: Reiterate the objection. If it  
5 were to move forward would the alliance -- this is  
6 speculative.

7 THE COURT: Overruled.

8 You can answer that, Ms. Vasquez.

9 THE WITNESS: Yes. We would have to take steps  
10 to educate our members.

11 BY MS. ANDREWS:

12 Q. And can you tell me what those steps might be?

13 A. Well, the steps could be -- we would have to  
14 extend our phone banking to call specific areas where this  
15 is occurring and inform them of the process and what is  
16 going on. We will have to educate them. We will have to  
17 use social media and various social media platforms to get  
18 the word out about what is happening.

19 You know, many of our members are isolated and  
20 sometimes they listen to news that may not be true, so we  
21 want them to have accurate information available to them.  
22 And then it may cause us to even further, you know, have a  
23 communications plan in place on how we would instruct them  
24 this may include having to travel to Cochise County  
25 setting up meetings, setting up Zoom meetings and various



1 other ways that we can make sure that our members are  
2 informed and educated.

3 Q. And who would normally be responsible for those  
4 efforts? Would it be staff or volunteers of the alliance?

5 A. In formulating a communication plan, it is the  
6 staff, myself and another part-time [indiscernible].

7 Q. How many staff members does the alliance have?

8 A. We have two part-time staff members, myself and  
9 a social media coordinator.

10 Q. And you said a revised communications plan  
11 would require effort from both you and the other part-time  
12 staffer?

13 A. Yes. It would divert from what we have already  
14 planning to do after the election. You know, we are very  
15 strategic with limited resources and making sure that we  
16 are focused on what our members and Arizona seniors in  
17 general need to be aware of.

18 Q. You just mentioned what you would normally do  
19 after the election. What would the alliance be planning  
20 to do after next Tuesday if this hand-count does not move  
21 forward?

22 A. We would normally begin to engage with the  
23 Arizona legislative process and our congressional  
24 delegation and identify areas where legislation could have  
25 impact seniors, for example, lowering drug prices or

1 nursing home issues, and those types of issues. We would  
2 move on to gathering that information, being prepared for  
3 both the legislative sessions to begin.

4 Q. And do you feel that the alliance or its  
5 members would be harmed if you were not able to engage in  
6 the legislative process as you had planned?

7 A. Yes.

8 Q. I want to circle back quickly to the phone  
9 banking. Who actually makes the calls in the phone bank?

10 A. Volunteers.

11 Q. Volunteers of the alliance?

12 A. Yes.

13 Q. Okay. Do you know about how many volunteers  
14 participate in the phone banking?

15 A. No. I don't because we have them in various  
16 counties and it depends on which group is phone banking at  
17 the time.

18 Our main phone banks do just reach out to all  
19 of the counties. But we have members everywhere who are  
20 able to login on their own to phone bank.

21 Q. Okay. So any member of the alliance might be  
22 able to log in and undertake phone banking efforts?

23 A. That is correct.

24 Q. When a member of the alliance goes to phone  
25 bank, do they receive any sort of training or instruction

1 from the alliance before they make calls?

2 A. Yes.

3 Q. And in the event that this 100 percent  
4 hand-count audit moves forward, would you need to provide  
5 new instruction to volunteers who are phone banking?

6 A. Yes.

7 Q. Do you provide scripts to phone bankers or  
8 talking points?

9 A. Yes. Scripts.

10 Q. Scripts. And if the hand-count audit were to  
11 move forward, would you need to provide volunteers with a  
12 script on this issue?

13 A. Yes, we would. We would create a script  
14 specifically.

15 Q. So the script has not yet been written?

16 A. That is correct.

17 Q. But you anticipate that if the 100 percent  
18 hand-count audit moves forward in Cochise County, you  
19 would -- the alliance would draft a new phone banking  
20 script?

21 A. Correct.

22 Q. And who would draft that script?

23 A. Myself. Myself and some of our board members  
24 are engaged in that effort.

25 Q. Okay. And I just want to circle back very

1 quickly. This will be my last question for you,  
2 Ms. Vasquez. If you were to undertake communications via  
3 phone bank or social media or newsletters about this  
4 expanded hand-count audit, would those communications go  
5 to all 50,000 members of the alliance?

6 A. No. We would have to tailor it specifically to  
7 our Cochise County members. So this would be outside of  
8 the scope of what we do. What we usually do is we provide  
9 general information to all members. And so it would be  
10 more work for us to both create the script and reach out  
11 to a specific population.

12 And as I said before, we have very limited  
13 resources, we are a very small [indiscernible] with the  
14 part-time staff to accomplish that.

15 Q. All right. Thank you, Ms. Vasquez.

16 MS. ANDREWS: No further questions, Your Honor.

17 THE COURT: Thank you.

18 Mr. Blehm?

19 MR. BLEHM: We haven't reached the 90-minute  
20 mark yet, Your Honor?

21 THE COURT: Not quite, sir. We have about 26  
22 more.

23 MR. BLEHM: Because I had that coffee this  
24 morning.

25 THE COURT: Okay.

## 1 CROSS-EXAMINATION

2 BY MR. BLEHM:

3 Q. Good morning. How are you doing today?

4 A. I am well. Thank you.

5 Q. I am going to stand up here because I am  
6 enjoying your view. It is quite beautiful. And -- okay.  
7 You have a small organization; correct?

8 A. Correct.

9 Q. What type of organization is it?

10 A. It's a nonprofit.

11 Q. A 501(c)(3)?

12 A. 501(c)(4).

13 Q. Okay. You are a c(4). And does your  
14 organization engage in any political activities?

15 MS. ANDREWS: Objection, Your Honor.

16 Relevance.

17 THE COURT: Overruled.

18 You can answer, Ms. Vasquez.

19 THE WITNESS: Okay. We are a Grass Roots  
20 senior organization and we engage in political efforts to  
21 protect and preserve programs vital to, you know, the  
22 health and economic security of older Americans.

23 BY MR. BLEHM:

24 Q. Okay. And you do get out the vote efforts;  
25 correct?

1 A. Correct.

2 Q. And do you -- do you send your members any  
3 flyers or leaflets on voting?

4 A. No.

5 Q. No? Do you endorse candidates? I am sorry. I  
6 think we are talking over each other and we have lost  
7 communication.

8 THE COURT: I don't think she -- I think she  
9 was trying to answer. Can you go to the one before the  
10 endorsing candidates and ask that question again.

11 MR. BLEHM: All right. Yes.

12 THE COURT: I think it is about pamphlets and  
13 flyers, if I recall.

14 BY MR. BLEHM:

15 Q. Do you send to your members pamphlets and  
16 flyers or other documents regarding elections?

17 A. Yes.

18 Q. Okay. And do you endorse candidates in those  
19 flyers?

20 A. No. Not in flyers. No.

21 Q. Okay. You said not in the flyers, do you  
22 endorse candidates as an organization?

23 A. Yes.

24 Q. Okay. Can you tell me who you and your  
25 organization -- well, your organization have endorsed for

1 the governor's race in the state of Arizona in the 2022  
2 general election?

3 MS. ANDREWS: Objection, Your Honor.  
4 Relevance.

5 THE COURT: Overruled.

6 You can answer that, Ms. Vasquez.

7 THE WITNESS: We have endorsed Katie Hobbs.

8 BY MR. BLEHM:

9 Q. Okay. Do your member's work on behalf of Katie  
10 Hobbs?

11 A. Can you clarify the question?

12 Q. Okay. Let me -- let me rephrase that and maybe  
13 try to break it into a couple of questions.

14 Do your members run and operate phone banks to  
15 get out the vote on behalf of Katie Hobbs?

16 A. Yes.

17 Q. Yes, they do.

18 Do they send flyers out to voters that are not  
19 members to vote on behalf of Katie Hobbs?

20 A. No.

21 Q. Do they organize and walk in precincts or other  
22 neighborhoods, I am not sure if you know what a precinct  
23 is. I am sure you do. But do they walk and precincts or  
24 neighborhoods knocking on doors asking voters to get out  
25 and vote on behalf of Katie Hobbs?

1 A. Yes.

2 Q. Okay. And so as -- you are a supporter of  
3 Katie Hobbs; is that correct?

4 A. Yes.

5 Q. Do you believe her opinions with respect to  
6 Arizona elections are important?

7 MS. ANDREWS: Objection, Your Honor. Relevance  
8 and foundation.

9 THE COURT: Overruled.

10 You can answer that, Ms. Hobbs -- I mean,  
11 Ms. Vasquez.

12 THE WITNESS: Could you repeat the question,  
13 please?

14 BY MR. BLEHM:

15 Q. Do you believe that Secretary Katie Hobbs'  
16 opinions with respect to the operation of elections are  
17 important?

18 A. In the capacity of Secretary of State, yes, I  
19 believe they are important.

20 Q. Okay. And so if she were to issue an opinion  
21 say in 2021 that supported counties, such as Cochise  
22 County, counting more ballots than the minimum required by  
23 law, would you support that?

24 A. Can you repeat the question?

25 Q. If Secretary Hobbs in her capacity as the



1 Secretary of State were to issue an elections procedure  
2 manual in 2021 that specifically and very clearly allowed  
3 counties, such as Cochise County, to count more ballots  
4 than a minimum required by law in an audit, would you  
5 support that?

6 A. Yes.

7 Q. Yes, you would. Okay.

8 And so may I take the time to read you  
9 something very quickly?

10 And I am not sure, Your Honor, I didn't get the  
11 memo about using video --

12 THE COURT: Hold on just a second.

13 [Pause in the proceedings.]

14 THE COURT: At least the county hold music is  
15 the same here as [indiscernible].

16 THE CLERK: Is it okay if I just --

17 THE COURT: Sure.

18 THE CLERK: Excuse me. Any participants on the  
19 conference line Meet-Me, please do not put us on hold.  
20 And please mute your calls. Thank you.

21 THE COURT: Go ahead, Mr. Blehm.

22 BY MR. BLEHM:

23 Q. All right. Are you aware of the procedures  
24 with respect to the drafting and submission of Elections  
25 Procedures Manual in the state of Arizona?

1 A. No.

2 Q. Okay. And so you don't know that the Secretary  
3 of State is obligated by law to submit an Elections  
4 Procedures Manual to the governor and attorney general for  
5 approval in the state of Arizona?

6 A. Repeat the question.

7 Q. So you do not know that the Secretary of State  
8 is obligated under Arizona law to draft and submit to the  
9 governor of the state of Arizona and its attorney general  
10 an elections procedure manual to govern Arizona elections?

11 A. What I do know that there are procedures in  
12 place to protect the integrity of an election.

13 Q. Okay. And do you know what the specific  
14 procedure in place with respect to counties and their  
15 ability to hand-count ballots after an election?

16 A. No.

17 Q. You do not know what that procedure is?

18 A. I know that there are procedures in place, and  
19 I trust that procedures that are in place.

20 Q. Okay. And so if Secretary of State Katie Hobbs  
21 in the Elections Procedures Manual she drafted wrote the  
22 following, I'm going to read the following and then ask  
23 the rest of the question. Is that fair?

24 A. Yes.

25 Q. If Secretary of State proposed the following to

1 govern Arizona elections: "The accuracy certification  
2 board consists of two elections official -- I'm sorry, I  
3 am reading the wrong part. I think I went to the wrong  
4 page.

5 All right. If Katie Hobbs wrote: "The officer  
6 in charge of elections is required to conduct the  
7 hand-count of one percent of the total number of early  
8 ballots cast or 5,000 early ballots, whichever is less."

9 Then it cites the Statute 602(F). But then she  
10 adds: "Counties may -- counties may elect to audit a  
11 higher number of ballots at their discretion."

12 MS. ANDREWS: Objection, Your Honor. Calls for  
13 speculation. She doesn't have the document. She doesn't  
14 know that's what it says.

15 THE COURT: Overruled.

16 You can answer, Ms. Vasquez.

17 BY MR. BLEHM:

18 Q. Would you support counties in their ability to  
19 do a 100 percent hand-count audit pursuant to the law as  
20 suggested by Katie Hobbs?

21 MS. ANDREWS: Objection, Your Honor. Legal  
22 conclusion.

23 THE COURT: Overruled.

24 You can answer, Ms. Vasquez.

25 THE WITNESS: Can you repeat that?

1 BY MR. BLEHM:

2 Q. Would you support a county in the state of  
3 Arizona conducting a 100 percent hand-count audit as  
4 allowed for my Secretary of State Katie Hobbs?

5 A. Now, can you read that back to me because --  
6 can you read where it says that it is 100 percent?

7 Q. Can I read words is what? I apologize.

8 A. You read me -- you read from the policy or the  
9 procedure, and did the procedure say 100 percent?

10 Q. The procedure says: "Counties may elect to  
11 audit a higher number of ballots at their discretion."

12 Would you agree that a higher number of ballots  
13 would include everything up from the minimum requirement  
14 numbered to 100 percent?

15 MS. ANDREWS: Objection, Your Honor. Legal  
16 conclusion.

17 THE COURT: Overruled.

18 THE WITNESS: I do not have the expertise to  
19 answer that interpretation. I do not have the expertise  
20 to answer your interpretation of that.

21 BY MR. BLEHM:

22 Q. Well, this does not -- the question did not  
23 require expertise. And so -- let me try it again.

24 If I have one dozen eggs and my wife tells me I  
25 must cook at least two eggs for breakfast, at least two

1 eggs for breakfast, but I can cook as many eggs as I want,  
2 would you believe it would be proper for me to cook the  
3 entire dozen of eggs for breakfast?

4 THE WITNESS: I am trying to see how that  
5 connects to the other, cooking the eggs and what that law  
6 reads.

7 BY MR. BLEHM:

8 Q. Would you agree, though, that I could cook the  
9 entire dozen of eggs for breakfast? Please answer the  
10 question.

11 A. Yes.

12 Q. Yes. All right. And so let's say I have a  
13 dozen voters in my county and Arizona law and Secretary of  
14 State Katie Hobbs mandate that I hand audit two of those  
15 ballots, but then they tell me I can count as many above  
16 that number as I want. Would you agree with I could count  
17 all 12 ballots?

18 A. If that was the actual language that is  
19 provided, yes.

20 Q. All right. Thank you very much.

21 And so you were talking about how your  
22 organization may be harmed; is that correct?

23 A. Yes.

24 Q. Okay. And I believe you are talking about you  
25 might have to do a little bit more social media, things of

1 that nature; is that correct?

2 A. That's correct.

3 Q. All right. I'm going to ask you a specific  
4 question about social media. What methods of social media  
5 do you use?

6 A. Well, I -- when I say social media, because I  
7 am not a communications expert, I also mean a  
8 communications plan. And that means also newsletters that  
9 we might send out, e-mail, digital advertisements, all of  
10 that I include the word "social media."

11 Q. Okay. I understand. So then let me -- I  
12 apologize. I think I cut you off again. I am sorry.

13 But let me be more specific. Do you use  
14 Twitter as an organization?

15 A. Yes.

16 Q. Okay. Did you by chance retweet Secretary of  
17 State Hobbs' pleading that was filed in this action on  
18 behalf of your organization?

19 A. No.

20 Q. You haven't retweeted that?

21 A. No.

22 Q. Okay. Have you seen it?

23 A. No.

24 Q. Okay. So you haven't even seen it.

25 What other methods of social media do you use?

1 A. Well, seniors are more likely to use Facebook.

2 Q. Facebook. Okay. Have you posted anything on  
3 Facebook recently in relation to this matter?

4 A. No.

5 Q. No. Okay. All right. And so the harm to you  
6 if, I understand correctly, is you would have to organize  
7 phone banks to tell your members what is happening in  
8 Cochise County; correct?

9 A. The harm is that we would have to educate and  
10 use all means available to us to educate.

11 Q. Have you already educated your members as to  
12 the process relating to election audits as required by  
13 Arizona law?

14 A. Election audits? No. Not specifically because  
15 it has not been an issue.

16 Q. Okay. So -- and this is important that you  
17 answer this question. You educate your members as to how  
18 elections take place and how they vote; correct?

19 A. We educate our members -- yes, on how the  
20 elections take place and how to vote and how to have a  
21 plan to vote.

22 Q. Okay. Aside from how to vote, have you ever  
23 educated your member -- your members on any step of the  
24 process after that point in time?

25 A. Ask that question again, please.

1 Q. Aside from educating members on how to vote,  
2 getting their ballot to the county and that machine,  
3 right, have you ever spent any time educating your members  
4 on the electoral process after that point in time? What  
5 happens after their ballot goes in that machine?

6 A. In the 2020 election, I believe we -- I would  
7 have to look back, but I think we did inform folks about  
8 what was going on in the process. Yes.

9 Q. All right. And so what was going on in what  
10 part of the process? The post-voting process?

11 A. Yes. As you are aware, after the 2020  
12 election, there was some controversy, and we needed to  
13 make sure that our members were aware that their ballots  
14 were being counted.

15 Q. Okay. You seem fairly politically astute; is  
16 that correct?

17 A. That I am politically astute?

18 Q. Yeah.

19 A. [Indiscernible.]

20 Q. You seem pretty politically astute.

21 A. Well, I --

22 MS. ANDREWS: Objection. Form.

23 THE COURT: Sustained as to form.

24 MR. BLEHM: All right.

25



1 BY MR. BLEHM:

2 Q. Do you consider yourself to be politically  
3 astute?

4 A. Yes.

5 Q. Yes. Okay. I would agree with that in our  
6 conversation so far today.

7 So after the 2020 election you were very  
8 involved; is that correct?

9 A. After the -- in what capacity do you mean I was  
10 involved?

11 Q. Well, you followed what was taking place and  
12 you educated your members as to what was happening; is  
13 that correct?

14 A. That is correct.

15 Q. Did you follow the Maricopa County election  
16 audit in 2021?

17 A. Yes.

18 Q. Okay. Did your organization take a position on  
19 whether or not the senate audit should move forward or  
20 not?

21 A. No.

22 Q. No. Okay. Did you personally support it?

23 A. Did I personally support the audits?

24 Q. Yes.

25 A. No.

1 Q. No. Why not?

2 A. Because we already have an election process in  
3 place.

4 Q. Okay. And so your point is that Arizona must  
5 simply follow the law; is that correct? That is in place?

6 A. Yes.

7 Q. All right. So if the law that is in place says  
8 that counties may elect to audit a higher number of  
9 ballots at their discretion, in other words, the 12  
10 ballots and 12 eggs, then you would be happy with that;  
11 correct?

12 MS. ANDREWS: Objection. Legal conclusion.

13 THE COURT: Overruled.

14 You may answer, Ms. Vasquez.

15 THE WITNESS: Yes.

16 MR. BLEHM: Thank you very much. I have no  
17 further questions.

18 THE COURT: Thank you, Mr. Blehm.

19 Mr. Kolodin?

20 MR. KOLODIN: We have no questions, Your Honor.

21 THE COURT: Ms. Estes-Werther?

22 MS. ESTES-WERTHER: No questions.

23 THE COURT: All right. Any redirect?

24 MS. ANDREWS: Just a couple, Your Honor.

25 THE COURT: Yes, ma'am.

## 1 REDIRECT EXAMINATION

2 BY MS. ANDREWS:

3 Q. Ms. Vasquez, I am going to ask you just a  
4 couple of follow-up questions.

5 Oh, I think I already got this one. Thank you.

6 Do you as executive director of the alliance  
7 know who your members vote for in elections?

8 A. [Indiscernible.]

9 Q. I'm sorry?

10 A. We have a bipartisan organization. So we look  
11 at all candidates and recommend based -- endorse based on  
12 what candidates are doing for seniors. For example, in  
13 regard to social security or lowering the consumer  
14 protection, voting rights.15 Q. That's how the alliance chooses which  
16 candidates to endorse?

17 A. Right.

18 Q. Okay.

19 A. And whether they are Democrat or Republican, we  
20 would endorse those candidates who are protecting our  
21 voting rights, social security, Medicare, and those kinds  
22 of things.23 Q. But do you as executive director know which  
24 candidates your members end up -- actually end up voting  
25 for?

1 A. Oh, never. No.

2 Q. And if your membership were to -- if you were  
3 to know that your members were voting for candidates other  
4 than those endorsed by the alliance, would you still  
5 provide them with voter education?

6 A. Yes.

7 Q. Why is that?

8 A. Because we are working for the social and  
9 economic justice for all Arizonans, older Arizonans.

10 Q. And so I want to touch on something you that  
11 mentioned before. Specifically that you anticipate your  
12 members might be confused if the hand-count audit moves  
13 forward. So if members were to ask you questions about  
14 the hand-count or were to direct questions to the  
15 alliance, would the alliance take time to answer those  
16 questions?

17 A. Yes.

18 Q. And it sounded like before, the alliance  
19 doesn't generally use resources to educate voters on the  
20 process after voting or at least you haven't so far in  
21 2022; is that correct?

22 A. Yes. That's correct.

23 Q. But if this 100 percent hand-count audit in  
24 Cochise County were to move forward, do you anticipate  
25 that the alliance would have to use resources for

1 education about that aspect of the election?

2 A. Yes.

3 Q. Thank you, Ms. Vasquez.

4 MS. ANDREWS: I have no further questions, Your  
5 Honor.

6 THE COURT: Counsel, I have a couple of  
7 follow-up questions. I will give you all the opportunity  
8 to ask questions if there is.

9 Ms. Vasquez, can you hear me okay?

10 THE WITNESS: I can.

11 THE COURT: Thank you. One of the questions  
12 you are asked was -- one of the things you said was that  
13 you have a concern that if this plan or this voting, the  
14 full hand-count audit goes forward, that you -- it would  
15 cause confusion amongst your members. You would have to  
16 educate, answer questions, and things like that. Do I  
17 understand that correctly?

18 THE WITNESS: Yes.

19 THE COURT: I understand that the Board of  
20 Supervisors' vote was quite recent. But in the past week  
21 or 10 days that this has apparently been on the table and  
22 been in the mix, so to speak, have any of your members  
23 reach out to you with confusion or concern or questions  
24 about what this means for them in their vote?

25 THE WITNESS: No. [Indiscernible] some of our

1 members.

2 THE COURT: Okay. When you say members, what  
3 do you mean?

4 THE WITNESS: Our board members.

5 THE COURT: Okay. So other than board members  
6 who I would consider they are staff of the alliance; is  
7 that correct?

8 THE WITNESS: They are staff of the alliance?

9 THE COURT: When you say board members, are you  
10 talking about, like, your volunteer board or are you  
11 talking about the folks who kind of are elected to  
12 represent the full will of the alliance itself?

13 THE WITNESS: They are board members. They are  
14 volunteers.

15 THE COURT: Okay. Are they -- have you  
16 received any communication from a Cochise County voter who  
17 is a member of the alliance, meaning one of the people  
18 that you represent, one to the 12 to 1300 folks who has  
19 reached out to you with questions or concerns or issues or  
20 confusion about what the Board of Supervisors has proposed  
21 and what it means to their vote?

22 THE WITNESS: No.

23 THE COURT: Ms. Andrews, any follow-up to the  
24 Court's questions?

25 MS. ANDREWS: Thank you, Your Honor.

## 1 REDIRECT EXAMINATION

2 BY MS. ANDREWS:

3 Q. I just want to clarify, Ms. Vasquez. You have  
4 a board of directors and you said they are volunteers;  
5 correct.

6 A. That is correct.

7 Q. So are they an elected board?

8 A. Yes.

9 Q. So is there a role to represent the interest of  
10 the membership on the board?

11 A. Yes.

12 Q. And you mentioned that some members of your  
13 board of directors have had questions about this  
14 hand-count audit; is that correct?

15 A. That is correct.

16 Q. Would it be fair to say they asked those  
17 questions in their capacity as representatives of your  
18 membership?

19 A. Yes.

20 Q. Thank you.

21 MS. ANDREWS: That is all that I have, Your  
22 Honor.

23 THE COURT: Thank you.

24 Mr. Blehm, follow-up?

25 MR. BLEHM: Yes. I have a few questions for me

1 if you tolerate me for just a little bit longer.

2  
3 RECROSS-EXAMINATION

4 BY MR. BLEHM:

5 Q. Can you please tell this Court how many board  
6 members you have.

7 A. Currently we have 15 board members.

8 Q. Fifteen board members. And where are most of  
9 those board members?

10 A. Most are in Maricopa County, and we have four  
11 board members in Pima County.

12 Q. Okay. So most are in Maricopa. You have four  
13 board members in Pima County. Do you have any board  
14 members in Cochise County?

15 A. No. We represent North in Southern Arizona and  
16 all of Arizona.

17 Q. Well, okay. But Cochise County is in a  
18 Southern Arizona; correct?

19 A. That is correct.

20 Q. All right. Okay. And so you -- okay. Your  
21 board members are not from this county, but some did reach  
22 out to you about concerns, I believe you said?

23 A. Yes. We discussed this incident.

24 Q. Okay. When they reached out to you, did they  
25 reach out and say I am concerned about this taking place?



1 Or did they say, hey, can you give me some information on  
2 what is going on in Cochise County? I see there is some,  
3 you know, political stuff happening?

4 A. Repeat the question, please.

5 THE COURT: She asked if you could restate the  
6 question, Mr. Blehm.

7 MR. BLEHM: Oh, I am sorry. Can I -- I just --  
8 I have to look at her [indiscernible], Your Honor, I  
9 apologize.

10 THE COURT: There is a TV screen right there  
11 too.

12 MR. BLEHM: Oh, wow. I could have just turned  
13 to my side. I am not very observant, aren't I? I am  
14 focused on this TV because, yep. I don't know. All  
15 right.

16 BY MR. BLEHM:

17 Q. But anyway. The question was when these board  
18 members -- well, first of all, how many board members  
19 reached out to you with concerns?

20 A. Is that a different question from the original  
21 question?

22 Q. Just -- yeah. I am sorry. I had to relocate,  
23 and sometimes I lose my train of thought. I am like a cat  
24 with a laser pointer.

25 But how many board members reached out to you

1 with concerns? Was it one? Two? Fifteen?

2 A. We have all discussed concerns.

3 Q. But I believe the question this Honorable Court  
4 asked you was have any of your members reached out to you  
5 with concerns about what is happening in Cochise County.  
6 And I believe your response was some board members did; is  
7 that fair?

8 A. Yes. I would say that all of our board members  
9 have expressed concern or reached out with concern.

10 Q. Okay. And is that why you all decided to file  
11 this petition?

12 A. Yes.

13 Q. Let me ask you this question, did you decide to  
14 file this petition or did somebody contact you from  
15 Washington DC and ask you to file this petition?

16 MS. ANDREWS: Objection, Your Honor.  
17 Relevance.

18 THE COURT: Sustained.

19 MR. BLEHM: All right. Well, strike that  
20 question then.

21 BY MR. BLEHM:

22 Q. How many board members expressed concern to  
23 you, reached out to you after they read what they read in  
24 the paper, and said, hey, I have got concerns about this?  
25 Any? Or was this a general dialogue at a board meeting?

1 MS. ANDREWS: Objection. Form.

2 THE COURT: Overruled.

3 You can answer, Ms. Vasquez.

4 THE WITNESS: Both.

5 BY MR. BLEHM:

6 Q. Both. And then how many reached out to you  
7 individually and said I have concerns about this?

8 A. Well, I would have to say three to five.

9 Q. Three to five.

10 A. Three to five, it could be more.

11 Q. Okay. And none of them were from Cochise  
12 County; is that correct?

13 A. Correct.

14 Q. All right. In fact, I believe your testimony  
15 was that not a single member of your organization from the  
16 beautiful County of Cochise has reached out to you to  
17 express concerns; is that correct?

18 A. Yes.

19 Q. All right. Thank you very much.

20 MR. BLEHM: I have no further questions.

21 THE COURT: Mr. Kolodin?

22 MR. KOLODIN: Briefly, Your Honor.

23 Where is the camera that can see me, by the  
24 way?

25 THE COURT: There is one there and there is --

1 MR. KOLODIN: Nothing close up. No. You know,  
2 for my beauty shot. But no, if I want to show something  
3 to the witness.

4 THE COURT: If you look up, there is a camera  
5 right above me, and it is pointed right at you right now.

6 MR. KOLODIN: Okay. Very good.

7 THE COURT: Whether she can see it from your  
8 vantage point is another question. You can see the angle.

9 MR. KOLODIN: Okay. Very good.

10  
11 CROSS-EXAMINATION

12 BY MR. KOLODIN:

13 Q. Ms. Vasquez, in 2020, isn't it true that  
14 Maricopa County did an expanded hand-count audit?

15 A. Yes.

16 Q. Did your organization oppose that?

17 A. Not formally. No.

18 Q. Did you -- did your organization oppose it  
19 informally?

20 A. No.

21 MR. KOLODIN: No further questions, Your Honor.

22 THE COURT: May the witness be excused?

23 MS. ANDREWS: Yes, Your Honor. Thank you.

24 THE COURT: Ms. Vasquez, thanks for sticking  
25 with us. We are going to go ahead and excuse you at this

1 time, and you are free to go. Thank you.

2 Ladies and gentlemen, we are going to go ahead  
3 and take our morning break at this time. It will be 15  
4 minutes. And we will start back up at a quarter till. We  
5 will stand at recess until that time.

6 [Recess taken.]

7 THE COURT: All right. We are back on the  
8 record and the parties are present. We will continue with  
9 the evidentiary hearing.

10 Ms. Andrews, did you have any other witnesses  
11 you wish to call?

12 MS. ANDREWS: Your Honor, at this point my  
13 co-counsel is going to take over.

14 THE COURT: Ms. Madduri?

15 MS. MADDURI: I have one administrative thing.  
16 I just want to note for the record that we did, in fact,  
17 serve the motion for Ms. Vasquez to appear remotely as  
18 well as the Court's order granting that motion.

19 THE COURT: Right. I have no question whether  
20 it was served, and I understand the explanation. We are  
21 dealing very quickly.

22 It was more for the Court's edification about  
23 notice and when the motion could have been raised. So I  
24 appreciate the clarification.

25 Any other -- Ms. Madduri, anything else?

1 MS. MADDURI: During the break, I spoke with  
2 defense counsel, the recorder, and while we do expect to  
3 examine both Mr. County Recorder as well as Director  
4 Marra, since they are adverse parties, we think it would  
5 probably make sense for them to take their direct  
6 testimony and then for us to ask any questions as we did  
7 on cross.

8 THE COURT: Very well.

9 Okay. Mr. Blehm, do you wish to call any  
10 witnesses?

11 MR. BLEHM: Yeah. I didn't hear all of that.  
12 I apologize.

13 THE COURT: Basically what she said is she is  
14 going to let you all call your own clients and they will  
15 cross-examine at the appropriate time.

16 MR. KOLODIN: Your Honor, one point of  
17 clarification. What we had said since we represent the  
18 recorder is that we plan to call him as a witness after  
19 the close of their case and they are welcome to cross.  
20 Director Marra I don't believe we discussed.

21 MS. MADDURI: Oh, I am sorry. I spoke  
22 separately with the counsel for Director Marra.

23 MR. KOLODIN: My apologies.

24 THE COURT: Okay. So long and short of it is,  
25 are you done with your witnesses?

1 MS. MADDURI: Yes, Your Honor.

2 THE COURT: Okay. Mr. Blehm, did you have any  
3 witnesses?

4 MR. BLEHM: Board defendants have no witnesses,  
5 Your Honor.

6 THE COURT: Thank you, sir.

7 Mr. Kolodin, do you have any witnesses you wish  
8 to call at this time?

9 MR. KOLODIN: Yes, Judge. We would like to  
10 call the recorder.

11 THE COURT: Okay.

12 Sir, if you will please come up to the clerk,  
13 be sworn in, and then take the stand.

14  
15 DAVID STEVENS,  
16 having been called as a witness and being first duly  
17 sworn, testified as follows:

18  
19 THE WITNESS: I do.

20 [Pause in the proceedings.]

21 MR. KOLODIN: Your Honor, a question before we  
22 begin with our direct. We understand Director Marra,  
23 although she is a nominal defendant, is adverse to our  
24 client's position in this case. If he presents testimony,  
25 will we have an opportunity to recall him at the

1 appropriate subsequent to Director Marra's testimony for  
2 rebuttal?

3 THE COURT: You are essentially asking for  
4 rebuttal of the defense case depending on what Director  
5 Marra has -- testifies about?

6 MR. KOLODIN: Because we understand that the  
7 nominally defendant, her position is in conformity with  
8 plaintiffs.

9 THE COURT: I will give you -- you can do one  
10 or two things. You can wait and have Recorder Stevens  
11 testify at the end after everybody else has testified, or  
12 you can have him testify now and based on the Director's  
13 testimony, if you think there are areas that you could not  
14 have -- what I would rather do is know what it is you want  
15 to examine the witness about before I open it up for  
16 recalling him as a witness. I don't know if you have a  
17 preference.

18 MR. KOLODIN: May I have a moment?

19 [Pause in the proceedings.]

20 THE COURT: What would you like to do?

21 MR. KOLODIN: I think we would like to call  
22 him -- reserve the right to call -- reserve the right to  
23 call after Marra.

24 THE COURT: That's fine. I want to be clear.  
25 I'm not going to be really difficult about it. It's just



1 that I am not inclined to allow us to rehash things that  
2 have already been discussed.

3 If there are certain areas that the director  
4 testifies about that he can address, I'm going to give you  
5 that opportunity. I just don't want it to be essentially  
6 rehashing of what he is going to testify about here.

7 MR. KOLODIN: Thank you, Your Honor.

8 THE COURT: Go ahead whenever you are ready,  
9 sir.

10 MR. STRASSBURG: Thank you, Judge.

11  
12 DIRECT EXAMINATION

13 BY MR. STRASSBURG:

14 Q. Can I have your name, please.

15 A. Excuse me? My name?

16 Q. Can I have your name, please.

17 A. David Stevens.

18 Q. How old of a man are you?

19 A. How old of a man?

20 Q. Yeah.

21 A. 61.

22 Q. Family?

23 A. I am. Yes. Wife and children and  
24 grandchildren.

25 Q. I see you have an emblem on your lapel, would

1 you tell us what those signify?

2 A. Oh, yes. Eagle Scout and the Cochise County  
3 emblem.

4 Q. And what is your employment?

5 A. I am the elected County recorder for Cochise  
6 County.

7 Q. And how long have you had that job?

8 A. This January will be six years.

9 Q. Are you familiar with the proposal to  
10 hand-count all of the ballots in Cochise County's general  
11 election?

12 A. I am. Yes.

13 Q. And how did you get that familiarity?

14 A. Going through the procedures manual and the  
15 statutes.

16 Q. Do you have any -- any experience from your  
17 almost six years as county recorder that you think will  
18 help you do a good job in this proposed hand count?

19 A. Yes. The normal course of work I do now with  
20 early ballots is pretty similar with the organization of  
21 the ballots, the way we process them, and then we transfer  
22 them and provide the chain of custody.

23 Q. And could you describe in a little more detail,  
24 what is the process followed now in Cochise County for  
25 hand-counts and recounts?

1 A. For the two percent audit hand count?

2 Q. Yeah.

3 A. It is -- it starts 24 hours after the election  
4 is over, which is Wednesday. And then typically the  
5 process of actually counting ballots will be on a  
6 Saturday.

7 So -- and there are volunteers are both -- two  
8 parties of the state, recognized parties, have to be  
9 present to execute the hand count. And those party chairs  
10 will present a list of workers that will do the hand count  
11 itself. And like I said, it happens on Saturday,  
12 typically.

13 Q. Is there a mic for you?

14 A. It is right here. It won't move either.

15 THE COURT: No. It is attached.

16 MR. STRASSBURG: Can you --

17 THE WITNESS: I can do this.

18 MR. KOLODIN: That might be better.

19 THE COURT: If it is better for you, but you  
20 will need to be in an area where you are next to a  
21 microphone either at your counsel table or somewhere else.  
22 That's why we --

23 THE WITNESS: I can try to --

24 MR. KOLODIN: Could you kind of lean over so  
25 everybody --

1 MR. STRASSBURG: Everybody can hear you?

2 THE COURT: And certainly don't be afraid to  
3 speak loudly. It will be okay.

4 THE WITNESS: Okay.

5 THE COURT: Much better.

6 THE WITNESS: Much better.

7 BY MR. STRASSBURG:

8 Q. Do you have any familiarity with the EPM?

9 A. I do. I do.

10 Q. And just so we are clear, this is -- we are  
11 talking about the 2019 EPM?

12 A. Correct. That is the only one legal to use  
13 right now?

14 Q. And how did you gain your familiarity with the  
15 2019 EPM?

16 A. Every two years, the process is the Secretary  
17 of State must -- is required to produce a new electric  
18 procedure manual. And that process involves recorders and  
19 election directors, which is basically the first step, to  
20 go through it chapter by chapter to address any changes  
21 primarily in statute order and procedure that we may or  
22 may not have.

23 Q. And what was your involvement in that  
24 consultation procedure for the 2019 EPM?

25 A. We had numerous meetings that lasted basically

1 all day. So 30 to 36 hours of in-person consultation  
2 going through, like I said, chapter one through the end of  
3 the EPM.

4 Q. And what was your personal involvement in those  
5 meetings?

6 A. I was there. We -- when discussions came up,  
7 some chapters didn't require a lot of discussion, some  
8 did. But we were there and went through each chapter and  
9 each paragraph of each chapter.

10 Q. And were you there just as a recipient of the  
11 word from Phoenix? Or were you there in a meaningful  
12 capacity?

13 A. Meaningful capacity.

14 Q. Tell us what you mean by that.

15 A. Well, they rejected my proposal. I don't think  
16 the campaign finance chapter should be an EPM. And I have  
17 objected to that numerous times, but it is still there.  
18 Other recorders rejected to other parts of it, and then we  
19 take votes and it either stays and or it comes out. I  
20 lost that vote.

21 Q. Were there any restrictions on what substance  
22 in the EPM could be discussed?

23 A. No. It was an open forum of discussion.

24 Q. Now, you have been sitting in the courtroom  
25 patiently, and do you recollect any discussion about this

1 language that we have been talking about, the EPM  
2 provision on page 215 that allows discretion in the  
3 selection of recount ballots?

4 A. No. I totally agree that it is part of the law  
5 and the board was right in making a vote to expand the  
6 hand-count.

7 Q. Now, in your job as county recorder, do you  
8 have any occasion to consult the EPM personally or is that  
9 something that you delegate to staff?

10 A. Primarily it is me. My chief deputies is  
11 knee-deep in the procedures manual also. But if questions  
12 arise on how we do our job, they come to me and we go to  
13 the documentation.

14 Q. And do you have any familiarity with the 2021  
15 draft EPM?

16 A. Yes. That one was done virtually so it was all  
17 Zoom calls.

18 Q. Because of COVID?

19 A. Yeah. Yes.

20 Q. And did you -- were you involved in those?

21 A. We were on the line, yes.

22 Q. Do you -- I mean, it is true, isn't it, that  
23 with respect to this provision on the discretion to  
24 increase the count size, that same provision was in the  
25 2021?

1 A. To the best of my knowledge, yes.

2 Q. And nobody objected to it?

3 A. It not that I recall. No.

4 Q. It wasn't a bow in the contention?

5 A. Not that I recall. No.

6 Q. The representatives from the secretary -- from  
7 Secretary of State Katie Hobbs' office participated?

8 A. And my opinion, ultimately it's the Secretary  
9 of State to put something in or take something out, so --

10 Q. And it is still there?

11 A. It is still there.

12 Q. I will direct your attention just a little  
13 longer to your qualifications. Do you have any election  
14 certifications?

15 A. I do.

16 Q. Could you tell us what they are and what they  
17 mean?

18 A. Every two years with the state -- the Secretary  
19 of State puts on a training course to be state certified  
20 election official. I have gone through that training  
21 three times. I have three diplomas in my office. I have  
22 completed all of the courses for the CERA program which is  
23 a Certified Election Resource Administrator, it is a  
24 national certification.

25 Q. Do you have any involvement in the signature

1 verification process for the early mail-in ballots?

2 A. That is exactly my authority, is to signature  
3 verify every ballot that comes back in. And, yes, I do  
4 personally participate in that.

5 Q. Now, do you have -- can you think of any  
6 objective reason -- well, let me ask it this way. Do you  
7 have full and complete confidence in the United States  
8 mail to deliver all mail-in ballots committed to their  
9 charge?

10 A. I do not.

11 Q. Do you have any reason for that you could point  
12 to?

13 A. I have got a couple of reasons. In the 2018  
14 election, we were contacting the post offices in the  
15 county. And I contacted one, it was the Friday before the  
16 election, and they said they had a ballot -- a tray of  
17 over 400 ballots they were not going to deliver to my  
18 office because they missed the deadline.

19 I inquired about what was the deadline they  
20 were referring to. They said October 31st. And my  
21 response was that was a suggested mail by date. Your job  
22 is to take the mail from A and deliver it to B, so you  
23 need to bring those ballots down to me.

24 In my opinion, had I not called them, those  
25 400 -- roughly 400 people would not have had their ballots



1 counted.

2 Q. Do you have -- thank you. Do you have complete  
3 confidence in the ability of the post office to deliver  
4 mail addressed to you, to you?

5 A. I do not.

6 Q. And what do you base that on?

7 A. A letter a constituent brought in just this  
8 last week where he tried to mail me a letter and the post  
9 office had marked it as undeliverable.

10 Q. And that is a letter that you first showed to  
11 me during the break; right?

12 A. Correct.

13 Q. Could you -- let me show it to you. Could you  
14 describe this envelope?

15 A. It is just a standard letter-type envelope.  
16 They redacted out who sent it to me, but you can clearly  
17 see my name and address.

18 Q. Is the address correct?

19 A. It is.

20 Q. And the stamp in yellow?

21 A. That is what the post office puts on when there  
22 is an issue with it. This says, "Return to sender. Not  
23 deliverable as addressed."

24 Q. And how did you find out about this letter  
25 addressed to you that was returned to sender?

1           A.    The individual that actually tried to mail it  
2 to me brought it in my office to show it to me.

3           Q.    Now, in your -- do you have any experience in  
4 government, generally?

5           A.    About 30 years, yes.

6           Q.    All right. Do you have any experience in the  
7 legislature?

8           A.    Eight years.

9           Q.    From when to when?

10          A.    The election cycle 2008 to 2006 or I served  
11 from 2009 to 2017.

12          Q.    As a member of the legislature, did you have  
13 any occasion to consider your vote on bills regarding  
14 elections?

15          A.    Constantly. Yes.

16          Q.    And election procedures too?

17          A.    Yes. And I actually drafted and sponsored some  
18 election bills.

19          Q.    All right. You drafted them yourself or did  
20 you farm that out to someone else?

21          A.    Well, we have leg (phonetic) counsel. It is a  
22 group of lawyers in a bullpen that draft what we want  
23 done. But it is up to the sponsor to approve the language  
24 that comes out.

25          Q.    So it sounds like you had to read election

1 legislation as part of your job and decide whether to vote  
2 on it or not?

3 A. Every day. I probably made over 10,000 votes  
4 in my eight-year career there.

5 Q. And it sounds like, correct me if I am wrong,  
6 that when you would review election legislation as a  
7 legislator voting on it, you had to form some sort of  
8 meaningful understanding of its provisions?

9 A. Correct.

10 Q. Did you have any committee chairmanships?

11 A. I did. For four years, I was the chairman of  
12 IT, information technology and transportation. And my  
13 last two years, I was a rules chairman and an ethics  
14 chairman.

15 Q. Now, what made you think you were the guy to be  
16 chairman of the IT committee?

17 A. My 30 years of IT experience before I got  
18 elected.

19 Q. Without going on too long, could you just give  
20 the judge a recap of your IT experience, explaining how it  
21 relates to elections?

22 A. Sure. I started off in 1979 with 3rd ID as a  
23 computer operator worker on the IBM 36030.

24 Q. So you are an Army guy?

25 A. I am an Army guy, 10 year veteran.

1           Migrated into the SPARCstation. We did GIS  
2 mapping for commanders on the battlefield, real-time  
3 simulations. And then I spent 15 years in Norco BBA. The  
4 last five years doing Internet security for DOD in  
5 Department of the Army.

6           I had a database of 1.2 billion records online  
7 that I had to maintain and keep available.

8           Q. Okay. Thank you.

9           A. I could go on, but --

10          Q. No. No. I'm good. That's good. I think we  
11 all get a flavor.

12          On the rules committee, what were your  
13 responsibilities regarding votes on election legislation?

14          A. Every bill that got passed through a normal  
15 committee or a subcommittee had to go through rules to  
16 make sure it was legal in nature and conform to the  
17 Constitution. That was my job. I didn't take public  
18 testimony. I dealt specifically with the legal staff on  
19 the constitutionality of the bills. And with my opinion  
20 of it, they would either go through or not.

21          Q. So it sounds like you had to have some working  
22 knowledge of the Arizona Constitution to do that job; is  
23 that right?

24          A. Correct. And believe it or not, I read it  
25 every bill that went across my desk.

1 Q. Now, you also were chairman, you said, of  
2 ethics.

3 A. Correct.

4 Q. What were your responsibilities there, to the  
5 extent you can discuss them. I realize that is a lot of  
6 sensitive confidential information.

7 A. It could be. Whenever there was a complaint  
8 brought up against the legislature, it would go to the  
9 ethics committee. And then we would have to adjudicate it  
10 whether to go actually have a committee hearing or not.

11 Fortunately for me in my two years, we never  
12 had to have a committee hearing. We were able to take  
13 care of the situation elsewhere.

14 Q. All right. Now, let me ask, do you have any  
15 familiarity with this proposed hand count in Cochise  
16 County?

17 A. I do. Yes. Now.

18 Q. And how did you become familiar?

19 A. Going through the Elections Procedures Manual  
20 and referencing statute.

21 Q. So do you have as a recorder, do you have any  
22 involvement in that recount? I'm sorry. Proposed recount  
23 of all of the ballots?

24 A. Of what we are -- of why we are here? Yes.

25 Q. What is your responsibility?

1           A.    The board has asked me to lead the effort to do  
2 the 100 percent hand count.

3           Q.    Does the board have authority, in your view, to  
4 ask you that?

5           A.    I believe they do.

6           Q.    And is there any kind of plan for this or are  
7 you just going to wing it?

8           A.    No.  There is a plan.  We are going to follow  
9 the Elections Procedures Manual by the letter.  It is  
10 going to be the same as the two percent count, just more  
11 ballots.

12          Q.    What do you mean by the two percent count?

13          A.    That is typically what we have done in the past  
14 was to do a two percent audit.  That was two percent of  
15 the election day or one percent or 5,000 of the early  
16 ballots.  So the procedure would be exactly the same, it's  
17 just going to be in a larger scale.

18          Q.    So it sounds like you are saying you are going  
19 to use the same EPM procedures you have used before except  
20 for the volume of ballots involved?

21          A.    Correct.

22          Q.    So let me ask you about that.  Have you thought  
23 about how you are going to staff this operation?

24          A.    Yes.  There is actually a procedure in the  
25 procedure manual of how to get workers.  I put out the

1 call to the party chairs, and I am happy to announce that  
2 we are over 300 volunteers. And that was in less than a  
3 week. Three of the -- the three recognized parties will  
4 all be in attendance: Republican, Democrat, and  
5 Libertarians, their chairs will be there. And as I said,  
6 over 300 volunteers.

7 Q. So can anybody participate in this recount?

8 A. There are two restrictions. One is you have to  
9 be a registered voter in Arizona. And the other one is  
10 one party can't have more than 75 percent of the total  
11 amount of volunteers, and we are under that 75 percent  
12 mark.

13 Q. Do you have any Democrat volunteers?

14 A. We do. I have six parties that will be  
15 represented.

16 Q. And can you estimate for us the number of  
17 Democrat volunteers?

18 A. Yeah. 55.

19 Q. How about Libertarian?

20 A. It is right around 45 or 50.

21 Q. Okay. And so it sounds like Ms. Vasquez could  
22 be a volunteer for this; right?

23 A. Could be.

24 Q. Even if she lives in Phoenix?

25 A. Correct.

1 Q. So as long as she -- as you said, to summarize,  
2 she is a registered voter in the state, she can volunteer  
3 to participate in the hand count?

4 A. Correct. The list comes through the party  
5 chairs, so she would have had to contacted one of the  
6 chairs and had them put them on the list. But, yes.

7 Q. If she wanted to?

8 A. If she wanted to. Correct.

9 Q. And that would -- she would have to come to  
10 Bisbee for that?

11 A. It looks like the location will be Sierra  
12 Vista.

13 Q. Okay. Let's talk about the location. It  
14 sounds like -- well, I should ask you. Do your  
15 responsibilities that include selecting the location for  
16 the hand count and making sure that it is secure?

17 A. Yes, I do.

18 Q. And how have you gone about discharging that  
19 responsibility?

20 A. I have identified four possible locations. I  
21 am waiting pending the outcome of this trial to select one  
22 of them. All four are in Sierra Vista. I have only gone  
23 to two of them. I haven't walked through the other two  
24 yet, but I plan on doing that tomorrow.

25 Q. So the two that you walked through, which are



1 candidates for the location, could you describe them and  
2 tell us what makes you think they are secure for this?

3 A. Well, one building is totally by itself with  
4 its own parking lot. And the other one is a closed-out  
5 department store which has a lot of square footage and  
6 limited access from the outside.

7 Q. But to get a closed-out department store, that  
8 is going to cost you a lot of money, isn't it?

9 A. It is going to be a donation.

10 Q. From who?

11 A. The owner.

12 Q. You have talked to him?

13 A. I have. I talked to him yesterday on the  
14 phone.

15 Q. Okay. What are you going to do to make sure  
16 the building is secure?

17 A. We are probably going to use deputy sheriffs.

18 Q. Do they carry guns?

19 A. They do, yes.

20 Q. And how are you going to get deputy sheriffs?

21 A. I have already contacted the sheriff himself  
22 and he is committed to helping out.

23 Q. And that -- who is the sheriff?

24 A. Mark Daniels.

25 Q. I see. All right. And how are you going to --

1 let's talk the security of the logistics. How do you plan  
2 to get these paper ballots from where they are to your  
3 secure facility for the hand count?

4 A. Currently, when we transfer the ballots from my  
5 office of the elections director we use lockable  
6 weathertight containers. Those same containers will be  
7 used to transport these to the other location.

8 Q. And how many of those containers do you have?

9 A. I have 12 right now.

10 Q. And how big are they?

11 A. Footlocker size. If you are in the military  
12 you know what that is, but --

13 THE COURT: It has something to do with the  
14 telephone line. We are okay.

15 MR. STRASSBURG: Sorry.

16 THE COURT: It is just checking to make sure  
17 you are paying attention.

18 MR. STRASSBURG: Whenever I hear a bell I stop.

19 THE COURT: You are well trained, sir.

20 BY MR. STRASSBURG:

21 Q. So how many -- can you give us an estimate of  
22 how many of these paper ballots you are expecting?

23 A. Well, when I presented to the board last time,  
24 I used the estimation of 35,000.

25 Q. Where did you get that?

1           A.     That was the center point of the 2020 election  
2 and the '22 primary. I took the turn out of those two,  
3 added them, divided them by two and I came up with 35,000.

4           Q.     So have you been receiving early ballots for  
5 the November 8th general?

6           A.     We have.

7           Q.     And is that amount kind of enabling you to give  
8 a gauge of what to expect, do you factor that?

9           A.     It is getting closer than last time. I don't  
10 think we are going to hit 35,000. We process and send  
11 over to the elections roughly 20,000 ballots and I have  
12 got 4,000 in my vault, also pending whatever the post  
13 office dropped off today.

14          Q.     Okay. Let's talk about, once we get the  
15 lockboxes into the big, secure room guarded by armed  
16 sheriff deputies, so then do you expect to have happen?

17          A.     We will have a very select group of people that  
18 actually operate in that area. Because you will have to  
19 transport the ballots to the working tables in back. So  
20 we will work in a small group, maybe six people that their  
21 primary duty will be standing with the ballots themselves.

22          Q.     Will that select group be all Republicans, or  
23 are you going to have kind of a tri-partisan group? Or  
24 how are you going to do that?

25          A.     That's the goal is to have at least three

1 parties there. As this process goes forward, I will be  
2 maneuvering around the entire facility with the three  
3 party chairs. So whenever I see they will see.

4 Q. And the three parties would be, what,  
5 Republican, Democrat, Libertarian?

6 A. Libertarian.

7 Q. And you have got three others?

8 A. I have got the party of non designated,  
9 independent, and other.

10 Q. Okay. And they are going to be there as well?

11 A. They will be. Yes.

12 Q. All right. Tell us about your -- the quality  
13 of communication you are having as the recorder with these  
14 party chairman in Cochise County. How would you  
15 characterize it? Is it -- is it cooperative? Is it  
16 frosty? Is it something in the middle? What?

17 A. I think it is very cooperative.

18 Q. What makes you think so?

19 A. I have had no issues that have been brought up  
20 about the process to date. It was a little accelerated,  
21 but they have all responded to all of my e-mails that I  
22 sent out in a timely manner.

23 I requested initially at 5 p.m. on Tuesday the  
24 initial list of workers. I had the authority to go two  
25 days longer if I think I need more people, so I gave the

1 parties more time. And basically it went from 162 to over  
2 300, so --

3 Q. Now, other than getting sued by these lawyers,  
4 has anybody else pushed back on you? Any of the county  
5 chairman said wait a minute, there is going to be mass  
6 confusion. It is going to be awful. You will never get  
7 it done in time. You can't do this. You don't have the  
8 authority.

9 Has there been any pushback like that?

10 A. From the county chairs, no.

11 Q. Let's talk about the actual procedures of the  
12 count.

13 Okay. Got it.

14 Are you going to make those up yourself or are  
15 you going to follow an establish standard authority on  
16 that?

17 A. The policies are in the procedure manual. They  
18 give accepted processes for counting the ballots.

19 Q. Which one are you going to use?

20 A. The three-person method.

21 Q. Okay. Tell us how that works.

22 A. Basically you have one person call out the  
23 race. Something that wasn't brought up is we are only  
24 looking at four races on the ballot. There is one federal  
25 race, one statewide race, one legislative race, and one

1 initiative. And it cannot be uncontested, that have to be  
2 contested races.

3 Q. Why just four and why --

4 A. That is the procedure manual.

5 Q. I see.

6 A. It would have been a fifth one had we had the  
7 presidential race on this. Since we don't, there is only  
8 the four. So those are the only four races that will be  
9 drawn by lots on Wednesday the day after the election. We  
10 will draw those out so we know what races we are looking  
11 at. We can drive on.

12 The forms that are going to be used, they are  
13 examples in the procedure manual. We are going to follow  
14 with those.

15 But on the three-person method, you have  
16 someone who calls it out. I will use me as an example.  
17 We will call out and you go, Recorder Stevens, those two  
18 people will markdown that I got a vote. They will go  
19 through a batch so I am looking at batching 25 ballots at  
20 a time.

21 Q. Is that standard?

22 A. That is in the procedure manual. There is a  
23 variable. You can go to 100, I guess, if you want. But  
24 25 seems like a very easy number to work with, because if  
25 there is an error, you come down and someone gets 23 and

1 someone gets 24, you back and start over. But if you have  
2 100 or 200 of those, then it takes a longer process time.

3 So once those four races are done and the 25  
4 ballots have gone through, you compare the numbers. If  
5 they match up, it is considered good. You batch them back  
6 up and you move to the next batch.

7 Q. All right. And how are you going to -- well,  
8 let me ask it this way. How long do you estimate this  
9 process is going to take to count all of these 30,000 some  
10 ballots?

11 A. Okay. My mic is okay.

12 Q. I know. Just kind of leaned forward.

13 A. There is two variables. That is how many early  
14 ballots will I get? And when I presented to the board  
15 last week, I used 35,000, so I expect that number to be  
16 less.

17 The other one is how many are voted on election  
18 day? So we are not going to know that until Wednesday,  
19 but the estimation is roughly 10,000.

20 So I am looking at maybe 30,000 now for early  
21 ballots because all I have got is Friday, Monday, and  
22 Tuesday and what is dropped off on election day, so there  
23 is not much time left to get them back in.

24 Q. How do you know how many of these early ballots  
25 you have?

1           A.    Well, as -- we document them as we verify the  
2 signatures going through them. We batch them in batches  
3 of 200, and then we transfer them over to the elections  
4 department. We are currently averaging about 2,000 a day  
5 that goes over. It tends to be a good process to go  
6 through, but when you have a lot of phone calls and that  
7 kind of thing, it tends to get slower.

8           Q.    Okay. So just roughly, could you run the  
9 numbers for us that makes you think you can get through  
10 these 35 -- first of all, I should ask, how much time do  
11 you have to do this?

12           A.    This has to -- it starts the day after the  
13 election and the board was concerned that it needs to be  
14 done by the date of canvas. So that is my end date.

15                   Statute says it's 10 business days, so that is  
16 the 22nd of November. So there is plenty of time to do  
17 this.

18                   To give you an example, this is a large one I  
19 had before. Say you have 60 tables and each table gets  
20 four batches of 25, so they have to count 100 ballots in  
21 an hour. So if they do that, every hour you do 6,000  
22 ballots. So in four hours you have done 24,000 ballots.  
23 So it seems very doable to do it. If it is not done in a  
24 day, come back and do the second day and it should be  
25 done.



1 Q. So where are you going to get the tables and  
2 chairs?

3 A. Volunteers. I am contacting the -- like the  
4 Knights of Columbus, the church I go to, we are grabbing  
5 tables and chairs from them. Maybe contact the Rotary,  
6 Kiwanis, see what they have got. I think I can get them  
7 all from the churches.

8 Q. So how would you characterize your personal  
9 level of confidence as county recorder charged with the  
10 duty to do this correctly, what is your level of  
11 confidence that you can do this hand-count within the time  
12 allotted?

13 A. I have a high level of confidence. It's a --  
14 at the basic level, it is a very simple process. And then  
15 you just have to scale up the process.

16 I have got a lot of people that want to work  
17 with me. I have got a lot of volunteers that want to  
18 volunteer to do this job. I have got locations that we  
19 can do this in now. And I have got plenty of time to  
20 complete this task. So I have a very high level of  
21 confidence we can get it done within the time frame and be  
22 very accurate with it.

23 Q. Now, how are you going to manage this whole  
24 process? Is that in the procedure manual too or do you  
25 make that up as you go?

1           A.    Well, there is some things in the procedure  
2 manual, but what I decided to do is a couple levels of  
3 management. I am going to have a group of tables, we will  
4 say six, and then I will have a supervisor over those six  
5 tables. And I have got 60 tables working, I will have 10  
6 supervisors. Those people work directly with me and the  
7 chairs and they will be the conduit between us and the  
8 actual workers. Because you don't want 60 groups of  
9 people getting up and moving around and trying to get  
10 things done.

11                   They will be transporting ballots  
12 back and forth, letting me know if there is an issue. It  
13 will be very difficult for 180 people to be texting me  
14 that my foot hurts or the light went out or whatever.

15                   So they multi-level management process, which  
16 was well taught in the military, seems to work out very  
17 well. It should work out in this case for me.

18           Q.    Let me direct your attention to another matter.  
19 I see it in your eyes. Training. These are just  
20 volunteers. They are not going to know nothing about the  
21 stuff. It is going to be a total mess because none of  
22 them are going to be trained; true?

23           A.    They will be trained before they start working.

24           Q.    Tell us about the training you anticipate. Who  
25 is going to do it? Who is going to do it?

1           A.    Who is going to actually do the training? The  
2 goal is from Wednesday to Saturday, I will get that second  
3 level of management trained up and then we will move out  
4 and train the workers themselves. So now one person  
5 doesn't have to train 300, they only have to train 25  
6 people at a time.

7                    It is not incredibly difficult because you are  
8 counting to 25 and you are marking it off. So I don't --  
9 I don't expect a lot of issue with it.

10           Q.    So the training, is it all going to be oral or  
11 will there be written handouts or copies of the rules or  
12 something else?

13           A.    It will be written. I have got everybody's  
14 e-mail addresses, I will be sending it to them.

15                    If I have time, I will do a YouTube video. I  
16 am an IT guy, so that kind of thing works well for me.  
17 But they will have written instructions that they can  
18 bring in with them, and hopefully they will have with them  
19 and we will have extra copies. But, again, it's not a  
20 difficult process.

21           Q.    Now, let me ask you this. It is kind of the  
22 heart of the matter you have been in the courtroom for the  
23 testimony of Ms. Stephenson?

24           A.    No relation but, yes.

25           Q.    Stephenson?

1 A. [Indiscernible.]

2 Q. And you have been here for the video testimony  
3 of Ms. Vasquez; right?

4 A. Correct.

5 Q. Did it seem to you that the basis for their  
6 concerns was that they believe there is some important  
7 difference between how you're going to do this proposed  
8 recount, and how recounts have been done in the past, and  
9 will be done for the November general election. Do you  
10 agree with that?

11 A. I would tell you that I will follow the  
12 procedures in the procedure manual and the statute to the  
13 letter.

14 Q. I am asking you a different question. It is  
15 about the difference

16 Do you see that there is going to be a  
17 difference, an important difference between how recounts  
18 have been done previously under the EPM that Secretary  
19 Hobbs wrote and you reviewed, and how you're going to do  
20 this proposed recounts?

21 A. I see no difference.

22 Q. Now, what provision, if any, are you going to  
23 make to give access to the county's director of elections?  
24 Will she be excluded? Will she be allowed? What were  
25 what will her role be?

1           A.    No.  I don't want to exclude anybody,  
2 especially her because she has some experience in doing  
3 this also.

4           But there still has to be order in the room.  
5 And there is something in the procedure manual that, say,  
6 workers gets disorderly, I will have the authority to  
7 remove them.  But I don't foresee that being an issue, not  
8 at all.  Totally welcome her support and her help.

9           Q.    Thank you, sir.

10           Now, let me ask you, are you familiar with  
11 Title 16, Section 602(B)?

12           A.    I am.

13           Q.    And how did you get familiarity with that  
14 specific statutory provision?

15           A.    Reading it.  And going through it.  It is very  
16 easy to follow.

17           Q.    Okay.  And this -- also we have been talking  
18 about a provision in the EPM of 2019 that says about the  
19 discretion to increase the count size.  Are you familiar  
20 with that?

21           A.    I am.

22           Q.    And how did you get familiar with that  
23 provision?

24           A.    Reading it also.

25           Q.    All right.  And as a public official charged

1 with the duty of complying with the EPM and the statute,  
2 can you tell us, does it --

3 THE COURT: Two beeps means nothing else.

4 BY MR. STRASSBURG:

5 Q. Does it seem to you that there is any conflict  
6 between those two provisions?

7 A. None whatsoever.

8 MR. STRASSBURG: Judge, may I have a moment  
9 to --

10 THE COURT: Okay. Of course. Absolutely.

11 [Pause in the proceedings.]

12 MR. STRASSBURG: You know, that's a great  
13 question. He is the brains of the operation. I am just  
14 the eye candy.

15 Thanks for laughing, Judge. You could have  
16 fought me on that.

17 THE COURT: You know we have a record of this;  
18 right?

19 MR. STRASSBURG: Yeah. But it doesn't have to  
20 be boring; right?

21 THE COURT: That's true.

22 BY MR. STRASSBURG:

23 Q. The volunteers, is it unusual to utilize  
24 volunteers for this purpose or do you do it all of the  
25 time?

1           A.    No.  Volunteers are used all of the time in  
2 election cycles.

3           MR. STRASSBURG:  I think that is it.  Thank  
4 you, Judge.

5           Wait a while.  There might be questions for  
6 you.

7           [Pause in the proceedings.]

8           MR. BLEHM:  May I just ask a clarifying  
9 question?

10          THE COURT:  Yes, Mr. Blehm?

11          MR. BLEHM:  Does she go next and then do I go  
12 next or --

13          THE COURT:  I am going in the same circle.

14          MR. BLEHM:  Okay.  So I will go after  
15 plaintiff.

16          THE COURT:  The way I am -- you are  
17 representing specific defendants, they are representing  
18 specific defendants.  The way I am going is in the same  
19 circle.

20          MR. BLEHM:  Okay.

21          THE COURT:  So it is the same order of  
22 questioning for every witness.

23          MR. BLEHM:  Thank you, Your Honor.

24          THE COURT:  You bet.

25

## 1 CROSS-EXAMINATION

2 BY MS. ESTES-WERTHER:

3 Q. Mr. Stevens, Christina Estes-Werther for Lisa  
4 Marra. Have you conducted a hand count before in the past  
5 six years?

6 A. For a county election, no.

7 Q. Are you aware that Lisa Marra is the statutory  
8 officer in charge of the hand-count process?9 A. Yes. And I argue that she should have been  
10 doing this.11 Q. So you have proposed -- the board has proposed  
12 a plan of which you are going to proceed with a hand  
13 count. How are you going to retrieve those ballots from  
14 Ms. Marra?

15 A. Through the chain of custody process.

16 Q. And when you say the chain of custody  
17 process --18 A. It is going to be the same as we give her the  
19 ballots from the early voting.

20 Q. And where are you getting that authority?

21 A. From the chain of -- through the board by  
22 putting me in charge of this process.23 Q. So is there a statute or the procedure that  
24 specifies that this particular procedure of retrieving  
25 ballots for a full hand count, is that in the statute?



1 A. I would have to look.

2 Q. And did you consult with Ms. Marra at all about  
3 any of these plans?

4 A. No.

5 MS. ESTES-WERTHER: That is all the questions  
6 that I have, Your Honor.

7 THE COURT: Thank you.

8 Ms. Andrews?

9 Oh, I'm sorry. Ms. Madduri; right?

10 MS. MADDURI: That's right. Thank you.

11 MR. BLEHM: It's three together.

12 MS. MADDURI: I will introduce myself so you  
13 know who you are talking to. My name is Lalitha Madduri,  
14 and I represent the plaintiffs in the case.

15 THE WITNESS: Okay.

16

17 CROSS-EXAMINATION

18 BY MS. MADDURI:

19 Q. Good morning, Recorder Stevens. Thank you for  
20 being here. I know it is an election.

21 A. Nowhere else to go.

22 Q. I know how busy you all are. I also want to  
23 thank you for your service.

24 A. Thank you.

25 Q. How -- you have been the Cochise County

1 recorder since 2017; is that correct?

2 A. January of, yes.

3 Q. And how many election-related ballot audits  
4 have you performed in your capacity since then?

5 A. 0.

6 Q. Have you overseen any hand-count audits of  
7 ballots in the time that you have been in office?

8 A. For official county elections?

9 Q. That's right?

10 A. No.

11 Q. What about for any other election?

12 A. Yes.

13 Q. What is that?

14 A. County elections for like the Cochise County  
15 Republican committee election -- election of the officers.  
16 I have been part of the statewide election.

17 Q. I see. Okay. But nothing -- nothing in  
18 Cochise County, no statewide elections that are voted in  
19 by the general public of the county?

20 A. Yes.

21 Q. Have you trained volunteers to conduct  
22 hand-count audits of ballots for countywide or statewide  
23 election that all voters participate in?

24 A. Not yet.

25 Q. Who has conducted those audits in Cochise

1 County since you have been in office?

2 A. The election director.

3 Q. And currently that would be Director Marra?

4 A. Correct.

5 Q. So in 2020, Director Marra conducted these  
6 hand-count audits?

7 A. To the best of my knowledge, yes.

8 Q. Okay. You -- I think you explained this  
9 extensively on your direct. But you were previously a  
10 state legislator; is that right?

11 A. Correct.

12 Q. Okay. So you have read and drafted and passed  
13 your fair share of statutes, whether related to elections  
14 or otherwise; is that fair?

15 A. Only the best law available. Yes.

16 Q. And I assume in drafting those, you have been  
17 become familiar with some of the statutory text and sort  
18 of how to these things are drafted, a general -- I assume  
19 you have developed a general knowledge of all of that in  
20 that capacity?

21 A. You'd be correct, yes.

22 Q. Okay. Have you -- is it your general  
23 understanding that when the word "shall" is used, that is  
24 a mandatory provision?

25 A. Yes.

1 Q. And that that does not allow for any discretion  
2 beyond what the statute says?

3 A. That's correct.

4 Q. And I think you testified about this, but are  
5 you familiar with the statutory requirements that are laid  
6 out in 16-602 for hand-count audits?

7 A. There is two of them. Yes.

8 Q. There is 16-602, and what is the other statute  
9 you referring to?

10 A. No. You have two paragraphs, there is B and F.

11 Q. Right. Certainly.

12 A. Yes.

13 Q. And there are other sections as well of that  
14 statute. But 16-602, it is your understanding that that  
15 is the provision of Arizona law that governs these  
16 hand-count audits that way are discussing today?

17 A. Correct.

18 Q. And I think you are alluding to this, but  
19 Section F is the one that specifically relates to the  
20 audits of early ballots; correct?

21 A. Correct.

22 Q. It sounds like you have studied this provision.  
23 You are very familiar with it?

24 A. I am getting better.

25 Q. So you -- at least it is familiar to you or you

1 do recall that Section 16-602(F) provides for a random  
2 sampling and hand audit of early ballots at, quote, a  
3 number equal to one percent of the total number of early  
4 ballots cast or 5,000 early ballots, whichever is less;  
5 correct?

6 A. Correct.

7 Q. But you don't intend to follow that part of the  
8 provision; correct?

9 MR. KOLODIN: Objection.

10 THE COURT: What is the basis of the objection?

11 MR. KOLODIN: I would say calls for a legal  
12 conclusion, but argumentative; right? She is actually  
13 trying to make an argument with respect to her meaning of  
14 the statute that he doesn't intend to follow it. I guess  
15 vagueness would be the proper objection.

16 THE COURT: The way the Court understood the  
17 question, and I apologize for interrupting at the end, is  
18 that she is asking this witness in his proposed role  
19 overseeing the audit hand-count, whether his audit  
20 hand-count follows the statute requirement of a random  
21 sample. He is in perfect position to be able to answer  
22 that.

23 That objection is overruled.

24 MR. KOLODIN: Thank you.

25 THE COURT: Thank you.

1           If you need to have her --

2           THE WITNESS: No. I am good.

3           THE COURT: Okay. Go ahead, sir.

4           THE WITNESS: In conjunction with the EPM, yes.

5 I will follow the law.

6 BY MS. MADDURI:

7           Q. Is it not your intention to hand-count all of  
8 the early ballots?

9           A. Rephrase?

10          Q. Is it -- when you are conducting the audit --

11          A. I intend to count every ballot.

12          Q. Okay. So that means that you do not intend to  
13 use a random sample for the hand audit of early ballots at  
14 a number equal to the percent of the total number of early  
15 ballots cast or 5,000 early ballots, whichever is less;  
16 correct?

17          A. I would follow that if that is what the board  
18 wanted. The board voted to up it to 100 percent. And  
19 there is one line in the EPM it states that at their  
20 discretion, they can increase that value.

21          Q. I understand.

22          A. And the board did.

23          Q. I am asking you about the statute and what it  
24 says and whether you intend to follow what the statute  
25 says?

1           A.    I am required by law to follow the statute and  
2 the Elections Procedures Manual.

3           Q.    But it is not your intention to conduct -- to  
4 use a random sample; is that fair?

5           A.    The random sample would be 100 percent.

6           Q.    Okay.  So the random sample will not be one  
7 percent of early ballots cast or 5,000 ballots, whichever  
8 is less; correct?

9           A.    Right.

10          Q.    Are you aware also that 16-602(F) only provides  
11 for increasing that number beyond the 5,000 maximum, if  
12 any race is, quote, equal to -- if any race is, quote,  
13 equal to or greater than the designated margin when  
14 compared to electronically tabulated results.

15                   Are you familiar with that?

16          A.    That statute is correct.  But the procedure  
17 manual has extended that to the counties to evaluate that  
18 count to as high as they want.

19          Q.    Okay.  So it sounds like you understand what  
20 the statute says?

21          A.    Which has happened in the past.  Correct.

22          Q.    Okay.  I am just asking about the statute.  I  
23 understand that there is an EPM.

24          A.    Okay.

25          Q.    And that is how the procedure is, but right

1 now, I'm just going to ask you about the statute.

2 A. I am just confused because you are asking me  
3 about part of the question, not the entire thing. I have  
4 to follow statute and the procedure manual. So you can't  
5 take one from the other and ask me to do one thing or the  
6 other. They both work in conjunction with each other.

7 Q. Okay. Are you familiar with the part of  
8 16-602(F) that states: "If at any point in the manual  
9 audit of early ballots the difference between the manual  
10 count of early ballots is less than the designated margin  
11 when compared to the electronic tabulation of those  
12 ballots, the electronic tabulation shall be included in  
13 the canvas and no further manual audit of the early  
14 ballots shall be conducted."

15 A. I don't have it in front of me, but I agree  
16 with what you just read.

17 Q. Okay. And you would agree that you won't be  
18 following that provision as you have planned for this  
19 early -- for the audit of early ballots; right?

20 A. Again, you are asking me to separate the two  
21 parts.

22 Q. I am. I am.

23 A. I can't do that. Because I have to follow the  
24 procedure manual by law also. The board voted to go to  
25 100 percent. They voted for me to do it, so to maintain



1 within the bounds of law, that's what I have got to do.

2 Q. Okay. So your authorization or sort of why you  
3 are doing the hand-count audit the way you plan to do it  
4 is because you believe that the board has authorized to do  
5 that; is that right?

6 A. No. The board did authorize me to do it. The  
7 Court will decide if it is legal or not, but they did  
8 vote. It was a two-to-one vote. They voted for me to do  
9 this and 100 percent count.

10 Q. Okay. So that -- that's where you derive your  
11 understanding that you have the authority to do this is  
12 because the board voted on it; is that correct?

13 A. That and the procedure manual allows them to  
14 vote on it.

15 Q. Can you point me to where in the Elections  
16 Procedures Manual that the board?

17 A. It is yellow.

18 THE COURT: That's okay.

19 THE WITNESS: That line right there.

20 BY MS. MADDURI:

21 Q. Okay. I understand.

22 THE COURT: Could you state the line for me so  
23 I know which one you are referring to.

24 THE WITNESS: It states: "Counties may elect  
25 to audit a higher number of ballots at their discretion."

1 THE COURT: Thank you, sir.

2 BY MS. MADDURI:

3 Q. Okay. I would like to talk to a little bit  
4 about the plan that you were discussing with your counsel  
5 for how the audit is going to proceed. How did you  
6 develop the plan?

7 A. Which part? The whole plan?

8 Q. The whole thing. How did you go about  
9 developing this plan?

10 A. I went through the procedure manual to  
11 determine what they required. And when they were vague or  
12 holes in the plan, I used my experience to put into play  
13 the rest of the plan, i.e., the multiple levels of  
14 management.

15 Q. Okay. So it is it fair to say you didn't  
16 consult anybody who has previously conducted a hand-count  
17 audit of ballots in developing your plan?

18 A. That is not fair to say.

19 Q. Okay. Who did you consult?

20 A. A couple of people in Phoenix.

21 Q. Who was that?

22 A. Gina Zavota (phonetic), former elections  
23 director, Secretary of State. And former recorder officer  
24 staff, I don't know if she wants her name read out loud.

25 Q. When did you start developing this plan?

1           A.     Shortly after the first vote. Like I said, it  
2 was two Mondays ago. So what, 14, 12 days ago.

3           Q.     To the best of your knowledge, has a full  
4 hand-count audit of the early ballots ever been conducted  
5 in Cochise County?

6           A.     To the best of my knowledge, I don't know. I  
7 am only 61.

8           Q.     Certainly not in the time that you have been  
9 County recorder; is that fair to say?

10          A.     Correct. Fair to say.

11          Q.     Is your plan written down somewhere or  
12 published or available to the public?

13          A.     It is in draft form, yes.

14          Q.     Where is that accessible?

15          A.     I can get you a copy.

16          Q.     Okay. That would be great.

17          A.     Give me your e-mail address.

18          Q.     I will get it. I think for counsel, later.

19          MR. KOLODIN: We as counsel, we would also like  
20 a copy.

21          THE WITNESS: Sure. I will give it to  
22 everybody.

23          MR. BLEHM: Agreed, Your Honor.

24          THE WITNESS: Transparency is key.

25          THE COURT: Over the lunch break, e-mail it to

1 your counsel, and your counsel will e-mail it to everyone  
2 else.

3 THE WITNESS: If they give me an e-mail, I  
4 will.

5 THE COURT: Thank you.

6 BY MS. MADDURI:

7 Q. Okay. I think for the counting you mentioned a  
8 three-person method for the account; is that right?

9 A. Yes.

10 Q. Okay. And is that the three-person call-out  
11 method that is described in the EPM?

12 A. It is.

13 Q. So am I correct in understanding that it would  
14 be a three-person team that would count each ballot?

15 A. Yes.

16 Q. Okay. And they would do that for each race  
17 that you are auditing on the ballot; is that right?

18 A. Correct. Four races, yes.

19 Q. So that means that three people would count  
20 each ballot four times; is that right?

21 A. No. You would go down the list. If you look  
22 at procedure manual in the back, they have got several  
23 forms. Any form will have all four races already on it.  
24 So they will go through the ballot one time for all four  
25 races, and then the next ballot for all four.

1           It wouldn't be 24 ballots for the federal race  
2 and then you start over again for the state race. You  
3 would do all four races, so you do the ballot one time.

4           Q.    Okay. And what is your plan to verify that  
5 that count was accurate?

6           A.    When their totals match up.

7           Q.    Whose totals?

8           A.    The two people that are writing down who got  
9 the votes.

10          Q.    Okay. So you plan to do that?

11          A.    One calls, two write. Those to match up, it's  
12 deemed valid.

13          Q.    Okay. So once you have done that, will you do  
14 any further verification that the count was correct?

15          A.    I am not planning on it. No.

16          Q.    Okay. And how will you tally?

17          A.    Using a sample form in the procedure manual,  
18 the tally sheet.

19          Q.    I think you also mentioned that there would be  
20 six individuals, a select group of six individuals who  
21 would be with the ballots at all times. Can you tell me  
22 more about that?

23          A.    Yeah. I am going to find six that I have the  
24 most confidence in and have them do that job. I don't  
25 even know who they are right now.

1 Q. So those six people are the only six people who  
2 are going to count the ballots?

3 A. No. No. No. They are going to maintain the  
4 security of the ballots off to the side. The volunteers  
5 are going to count them.

6 Q. What does it mean that they will maintain the  
7 security of the ballots?

8 A. They will sequester the ballots in one area and  
9 nobody but those six will have access to it. It could be  
10 four people also, I just use six.

11 Q. Do you mean when the ballots are not being  
12 counted?

13 A. That is called ballots at rest.

14 Q. So while the ballots are out on the 60 tables,  
15 they wouldn't be subject to that sort of security?

16 A. Well, no. Because they have to be counting  
17 them.

18 Q. Okay. You mentioned that you have received  
19 names for 300 volunteers; is that right?

20 A. I have.

21 Q. But I think you wrote in your brief that the  
22 maximum number of volunteers is 220; is that right?

23 A. That's the minimum and the statute, four per  
24 precinct. We have 55 precincts, it's actually 54. We  
25 have one with nobody that lives in it.

1 Q. Okay. And I think you went over this, I just  
2 want to get the numbers right. Did you say there were  
3 about 55 Democrats that --

4 A. Yes.

5 Q. -- that had been provided to you as potential  
6 volunteers for this?

7 A. Correct.

8 Q. And then I think you said there were another 45  
9 or 50 libertarians?

10 A. Correct.

11 Q. Does that mean that the remaining 200 people  
12 who would be involved in the count identify as  
13 Republicans?

14 A. No.

15 Q. So what is the breakdown for the remaining 200?

16 A. We have P and D, party non designated, other,  
17 and Independents. I haven't had time to collate the list.  
18 The chairs all e-mail them to me, so I am still working  
19 through that.

20 Q. Okay. So you don't know what the composition  
21 for the other 200 individuals are?

22 A. No. I can tell you the other three parties  
23 were under 10 each before the last e-mail I got last  
24 night.

25 Q. Okay. So it is fair to say that the majority

1 are Republican?

2 A. Yes.

3 Q. Have you verified that each of these  
4 individuals is a registered voter in Arizona?

5 A. I have not yet. No.

6 Q. And how many of these volunteers have prior  
7 ballot audit hand-counting experience?

8 A. I do not know.

9 Q. So it could be the case that none of them have  
10 experience in this?

11 A. Some do because the party chairs have been  
12 involved with this.

13 Q. Okay. So the six party chairs, I assume?

14 A. No. Three party chairs.

15 Q. Three parties. Okay. So you know that three  
16 of these individuals --

17 A. Well, I know at least two of them.

18 Q. I'm sorry. I am no I am talking quickly, but  
19 we should make sure that we don't speak over each other,  
20 so the record is clear. So I will also slow down. I  
21 apologize.

22 A. Okay.

23 Q. It can get very conversational.

24 A. I don't think the Libertarians participated  
25 previously. They are this time. But I know the



1 Republicans and Democrats did. I don't know who the 6 or  
2 12 that have done it in the past are, but I am pretty sure  
3 they are probably on this list, but I can't guarantee  
4 that.

5 Q. Okay. I understand. So it's fair to say that  
6 you are confident only in that about 12 of these  
7 individuals have previously done a hand-count audit of  
8 ballots; is that right?

9 A. That is probably fair to say. Yes.

10 Q. Okay. So hundreds of these people have never  
11 done this?

12 A. I would say correct. Yes.

13 Q. Okay. Have you conducted any training with  
14 these volunteers so far?

15 A. Not yet. No.

16 Q. Okay. What is -- you started to touch on this  
17 but I want to get a little more details on your plan for  
18 training them. What sessions have been scheduled for  
19 training?

20 A. None of them have.

21 Q. Okay. And when do you plan to start the  
22 training?

23 A. It will be between Wednesday and Saturday of  
24 next week.

25 Q. So Wednesday after the election; is that

1 correct?

2 A. Correct. That's when this process has to  
3 start.

4 Q. That's when the training will start though; is  
5 that right?

6 A. Potentially yes.

7 Q. Okay. So between Wednesday and Saturday, you  
8 plan to conduct training, and I think you said this to  
9 your counsel, but I would just like to clarify. Those are  
10 the people -- that's sort of a smaller, select group of  
11 individuals who will then go out and train more  
12 volunteers?

13 A. No.

14 Are you done?

15 Two types managerial type will have different  
16 training. The workers will have their own type of  
17 training. So the second level of management I am looking  
18 at will be trained first. And then the workers will be  
19 trained next.

20 Q. Okay. And do you anticipate that both of those  
21 trainings are going to be taking place between Wednesday  
22 and Saturday of next week?

23 A. That is the goal. Yes.

24 Q. Are you developing the materials for these  
25 trainings?

1 A. I will. Yes.

2 Q. Okay. Have you begun that process?

3 A. I have not.

4 Q. Okay. Have you previously prepared any  
5 training materials to train individuals on how to conduct  
6 hand-count ballot audits?

7 A. I have extensive training in training people  
8 how to do a job. In hand-count auditing, no.

9 Does that make sense.

10 THE COURT: I understood what you meant.

11 THE WITNESS: Okay.

12 BY MS. MADDURI:

13 Q. I think I did as well.

14 A. That's okay.

15 Q. Sorry. I am looking at my phone because I am  
16 getting confused about the dates here. Okay.

17 So the training, you believe, will conclude  
18 around November 12th; is that correct?

19 A. That's the goal, but I have until the 22nd to  
20 finish. So it may slip into the next week.

21 Q. So the training might slip into the next week?

22 A. That's highly possible, yes.

23 Q. Okay. And I assume that no one will count  
24 these ballots until after they are trained; correct?

25 A. For the audit?

1 Q. Yes.

2 A. No.

3 Q. Okay. So at the earliest then, you anticipate  
4 that the audit of the ballots, the hand-count of the early  
5 ballots will start on Sunday the 13th; is that right?

6 A. We don't work on Sunday.

7 Q. Okay. So it will start at the earliest on  
8 Monday the 14th?

9 A. It could be the 12th.

10 Q. It could be Saturday if you finish. Okay.

11 It is fair to say about Saturday is the  
12 earliest you anticipate starting?

13 A. Yes.

14 Q. Is it also fair to say then that you don't  
15 anticipate any counting on weekends or is it just Sundays?

16 A. Just Sundays.

17 Q. Okay. So the 13th won't be one of the days  
18 that you count. Okay. So is it right then that you have  
19 six days, the 12th, and then the 14th to the 18th to  
20 finish the audit?

21 A. No. The 22nd.

22 Q. The 22nd. Okay. So you have the 12th, the  
23 14th through the 18th, the 21st, and the 22nd. Let me  
24 start that over. So you have -- okay. So you have  
25 between the 12th and the 22nd, and there are two

1 Saturdays -- sorry, to Sundays in there. Which I think  
2 leaves eight days; is that right?

3 A. I would go with eight days because the board  
4 has to canvas on the 22nd. It should be done before the.

5 Q. Have you confirmed that all of the 300  
6 volunteers that have been identified are available for  
7 every one of those eight days?

8 A. No.

9 Q. Have you confirmed that they are available for  
10 every one of the training days?

11 A. No.

12 Q. Okay. So it is possible that they are not  
13 actually available for all of the days that you anticipate  
14 doing the hand-count --

15 A. I don't anticipate needing all of them for all  
16 eight days either.

17 Q. So is that -- no, you don't know if they are  
18 available for all of the days?

19 A. No, I do not know.

20 Q. Okay. You would agree that the audit that you  
21 are planning for early ballots cannot take place if  
22 75 percent of the volunteers are from one political party;  
23 correct?

24 A. Correct.

25 Q. Are you familiar with the fact that in the past

1 when Cochise County has conducted its audits, it has taken  
2 between about one and two days to do the hand-count audit  
3 of these ballots?

4 A. I think that sounds about right. Yes.

5 Q. Okay. And you are also familiar that those  
6 audits were conducted on much, much smaller sample of  
7 ballots than what you are proposing to do here?

8 A. Yes.

9 Q. Okay. Is it your understanding that  
10 individuals from the Democratic Party who have been  
11 identified, if they don't show up for the audit, is it  
12 your understanding that the audit can't move forward?

13 A. No, it can. It requires two recognized  
14 parties.

15 Q. Okay. I would like to talk about the secure  
16 facility that you were describing. Have any of those  
17 facilities previously been used to conduct a hand-count  
18 ballot audit?

19 A. No. Not to my knowledge?

20 Q. Are they all privately-owned facilities?

21 A. No. One is Cochise College.

22 Q. The two -- you mentioned that you had sort of  
23 talk to or secured two of them so far; is that right?

24 A. As possible locations. Yes. They were all  
25 vacant and they have the ability to be used.

1 Q. Okay. Have you engaged in any sort of contract  
2 or other official --

3 A. No.

4 Q. -- agreement to use the facilities?

5 A. No.

6 Q. Okay. So that doesn't exist at this time?

7 A. Correct.

8 Q. Where did the audit take place in 2020?

9 A. Where did it take place?

10 Q. Yes.

11 A. The elections department.

12 Q. Would you agree that if you are not able to  
13 secure a secure facility, that this audit can't continue  
14 or take place rather?

15 A. No. I won't contend to that.

16 Q. So it would be your position that you may  
17 conduct this audit even if you are unable to secure a  
18 secure facility?

19 A. No. I could probably find another secure  
20 facility.

21 Q. Okay. So you would agree that if you cannot  
22 find a secure facility, the audit can't move forward?

23 A. Technically. Probably, yes.

24 Q. Have you signed any contracts or any formal  
25 agreements about the security that anticipate being

1 provided at the facility once it's secured?

2 A. No.

3 Q. Is it your intention that these facilities are  
4 guarded 24 hours a day by armed personnel?

5 A. No. And they don't need to be.

6 Q. But either way, you haven't actually made a  
7 plan for how that would look?

8 A. I don't need 24/7 security. When we are done  
9 counting the ballots, we come back to my office into my  
10 vaults, which is secure.

11 Q. Okay. So your intention is that each day, the  
12 ballots will be moved from the facility to your vault; is  
13 that right?

14 A. They will be housed in my vault to begin with,  
15 then moved to the facility for count, and then moved back  
16 to the vault until 100 percent count is complete.

17 Q. Just to make sure I understand. So is that  
18 happening on a daily basis? You are moving the ballots  
19 from your vault to the facility and then back at the end  
20 of the day?

21 A. Yes.

22 Q. How many cars or trucks or -- what's the plan  
23 for the transportation?

24 A. County vehicles.

25 Q. Okay. And how many vehicles do you anticipate



1 needing?

2 A. I don't know yet. Probably two.

3 Q. Okay. And you haven't secured those vehicles  
4 yet?

5 A. Not yet.

6 It's a lot of questions.

7 THE COURT: We still have at least one more  
8 person.

9 THE WITNESS: I know.

10 BY MS. MADDURI:

11 Q. I would like to talk to you briefly about the  
12 chain of custody of the ballots, which we sort of started  
13 talking about but I had a few more questions about that.

14 Is it your understanding that 16-602(H), which  
15 is one of the provisions of the statute that you have been  
16 studying, is it your understanding that that statute  
17 requires that the county officer in charge of elections  
18 shall retain custody of the ballots for purposes of  
19 performing any required hand counts?

20 A. I will agree that's what the statute says.

21 Yes.

22 Q. But you, of course, plan to take custody of the  
23 ballots from Director Marra; is that right?

24 A. Through the voting -- the legal voting of the  
25 board. Yes.

1 Q. In 2021, did you ever obtain custody of the  
2 ballots after the hand count -- for the hand count?

3 A. One more time?

4 Q. Did you ever obtain custody of the ballots for  
5 a hand count in prior elections?

6 A. No.

7 THE COURT: Ms. Madduri, I don't want to  
8 interrupt you. But we are getting close to lunchtime. I  
9 was hoping to allow you to finish your questions, but if  
10 you think it is going to be a bit --

11 THE WITNESS: I am here all day.

12 THE COURT: So am I.

13 MS. MADDURI: Me too.

14 THE COURT: All right. Let's go ahead and take  
15 our lunch break at this time.

16 We are going to come back at 1:15, everybody.  
17 I want to make sure that everybody -- all of us from out  
18 of town have plenty of time to make sure that we have the  
19 opportunity to get some lunch. We will start back up  
20 promptly at 1:15. We will stand at recess until that  
21 time. Thank you all.

22 [Recess taken.]

23 THE COURT: We'll go back on the record. We  
24 are back on the record to reflect the presence of same  
25 counsel, same parties as previously. Mr. Stevens is still

1 on the stand, previously sworn. You may continue your  
2 examination.

3 MS. MADDURI: Thank you, Your Honor.

4 Thank you, Your Honor.

5  
6 CROSS-EXAMINATION (CONT'D)

7 BY MS. MADDURI:

8 Q. Good afternoon, Recorder Stevens.

9 A. How are you doing?

10 Q. I'm doing well. I will try not to keep you too  
11 much longer here. One clarification. I wanted to make  
12 sure I understood one of your answers. So you plan to  
13 start the process that you're going to engage in on  
14 Wednesday; correct?

15 A. By statute, yes.

16 Q. Okay. If on Wednesday 75 percent of the  
17 individuals who appear are from one party, you would agree  
18 that you cannot proceed with the planned hand-count audit;  
19 correct?

20 MR. KOLODIN: Objection; asked and answered.

21 THE COURT: Overruled.

22 THE WITNESS: I'm not planning on having  
23 everybody there on Wednesday. Just the chairs to the  
24 draw.

25 BY MS. MADDURI:

1 Q. So I can clarify. So on the first day of  
2 counting when you're actually doing the counting, would  
3 you agree with me that if 75 percent of the individuals  
4 that appeared that day are from one party, then you would  
5 agree that you cannot proceed with the planned audit; is  
6 that correct?

7 A. No. I would have to take one party down to 75  
8 percent. So if all the other parties equal 25 people, the  
9 one party could have 75 people, then I could proceed.  
10 They couldn't have 85 or 95.

11 Q. So in theory it's over 100 people. They  
12 couldn't have 76 people out of the 100?

13 A. Correct.

14 Q. You mentioned that about the board meeting that  
15 took place you said I think two Mondays ago?

16 A. Yes.

17 Q. So that's I think October 24th?

18 A. I'll go with that.

19 Q. Are you familiar with the resolution that the  
20 board passed that day?

21 A. Yes, to the best of my knowledge, yes, they  
22 passed item number two. Is that the one you're talking  
23 about?

24 Q. That is the one. And that's the resolution  
25 that it's your understanding the board passed that

1 authorizes the hand-count audit that you're planning; is  
2 that right?

3 A. Correct.

4 Q. So let's take a look at that briefly. So that  
5 measure that passed, you said it was number two, and  
6 that's right. It says pursuant to A.R.S. 16-602(B), the  
7 county recorder or other officer in charge of elections  
8 shall take action necessary to perform a hand-count audit  
9 of all county precincts for the 2020 general election to  
10 assure agreement with the voting machine count. Such  
11 audit shall be completed prior to the canvass of general  
12 election results by the Board of Supervisors. Does that  
13 sound correct based on what your recollection of that  
14 measure is?

15 A. Yes.

16 Q. So that measure that was passed, it  
17 specifically cited A.R.S. 16-602(B); is that right?

18 A. Yes. I don't have it in front of me, but yes,  
19 I think so.

20 Q. I can represent to you that it only mentions  
21 16-602(B). So by definition it does not mention  
22 16-602(F). Would you agree?

23 A. Sure.

24 Q. And F is the provision that governs the recount  
25 of early ballots; is that right?

1 A. F is, yes.

2 Q. And to the best of your recollection, 16-602(B)  
3 doesn't mention early ballots; correct?

4 A. Correct.

5 Q. So is it fair to say then that the board has  
6 not authorized your recount of the early ballots?

7 A. That's not my interpretation. I think that's  
8 what the Court is going to decide today.

9 Q. In past elections, can you describe what your  
10 role is with early ballots?

11 A. Sure. How far back do you want to go? They --  
12 we provide a list of everybody who is going to get an  
13 early ballot to our vendor, which is Runbeck out of  
14 Phoenix. They print and fold and stuff the envelopes that  
15 get mailed out. They all mail out of the mail house out  
16 of Phoenix. The voters get them. They vote them,  
17 hopefully, and they have two options of bringing them back  
18 in. They can use it for all three [indiscernible]. Drop  
19 off at my office, use the drop box, or put them in the  
20 mail.

21 I receive them back in one of those forms, and  
22 then we process those. We have to remove the security  
23 envelope on the outside. For our county it's green. The  
24 signature affidavit envelope is yellow, exposing that. We  
25 put them in batches of 200. We verify the signature of

1 those. When those batches are done and completed, we scan  
2 the affidavit envelopes, and then we transfer them over to  
3 elections department.

4 Q. So -- and you -- so you -- just to make sure I  
5 understand, so there's one outside envelope that the  
6 ballot, plus another envelope are mailed in; is that  
7 right?

8 A. Yeah. One is provided to protect the  
9 signature.

10 Q. And so you open that outer envelope?

11 A. Yes.

12 Q. And then you examine the envelope that contains  
13 the ballot?

14 A. Correct.

15 Q. So at no point do you open that envelope or  
16 examine the ballot itself; is that right?

17 A. Out of those, yes. The process is a little  
18 different for UOCAVAs.

19 Q. So these are for regular early ballots that are  
20 voted?

21 A. Yes.

22 Q. How does the process differ for UOCAVA ballots?

23 A. There's emailing that goes on. We have issues  
24 with maybe the federal write-in ballot. So it's minimal  
25 for us. A couple hundred. It's not a lot.

1 Q. So for the vast majority of the ballots --

2 A. Yeah.

3 Q. -- the early ballots, you -- once you have  
4 looked at that the interior envelope that contains the  
5 witness's signature, you pass on that ballot to the other  
6 county election administrators who are going to open it  
7 and count it?

8 A. Once we have accepted it, yes.

9 Q. Once you've verified the signature. Okay. So  
10 in past elections, you've never handled an early voted  
11 ballot itself then that is out of that envelope; is that  
12 right?

13 A. That's not totally true. Sometimes people  
14 don't put them in the envelope.

15 Q. But assuming --

16 A. It's a rare case.

17 Q. Sorry. I didn't mean to interrupt. Assuming  
18 that the voter sort of did it in the proper way and it's  
19 in the correct envelope --

20 A. We never see the ballot; correct.

21 Q. So you don't have any experience then making  
22 sure that that ballot doesn't get damaged in your care; is  
23 that right?

24 A. Again, sometimes they get to us damaged.

25 But --



1 Q. Sure, but assuming it came in sort of the  
2 proper form and the proper envelope, you don't have any  
3 responsibility to make sure that that ballot itself  
4 doesn't otherwise deteriorate in some way?

5 A. Not at all.

6 Q. Or that it isn't altered in some way?

7 A. No.

8 Q. So you don't have any experience doing that?

9 A. No. It's not my authority, no.

10 Q. I promise I'm getting to the end here. And I  
11 just want to revisit the statute to understand a couple of  
12 things. And again, you've already testified that you've  
13 studied the statute, so I'm going to talk to you  
14 specifically about 16-602(F) which I think we have agreed  
15 governs the recount of the early ballots. I shouldn't say  
16 recount, but a hand audit of the early ballots?

17 A. Yes.

18 Q. And I'll just preface, I understand that  
19 there's also the Elections Procedures Manual, but I'm just  
20 going to ask you about the statute for now.

21 A. I will try to answer your question, but I have  
22 to utilize both.

23 Q. I understand, but I'm just going to ask about  
24 the statute. Okay. So the statute, I think we have  
25 already decided, it says that for the selection of the

1 early ballots that are going to be audited, the elections  
2 officials, quote, shall randomly select one or more  
3 batches of early ballots that have been tabulated to  
4 include at least one batch from each machine. Does that  
5 sound right to you?

6 A. Uh-huh.

7 Q. And to clarify, during your audit, there won't  
8 be any such random selection; correct?

9 A. Correct.

10 Q. And then it also says that the election  
11 workers, quote, shall randomly select from those  
12 sequestered early ballots a number equal to 1 percent of  
13 the total number of early ballots cast or 5,000 early  
14 ballots, whichever is less. Does that sound right?

15 A. Are you still reading B or are you reading F?

16 Q. I'm reading F.

17 A. That's correct.

18 Q. And again, your planned hand-count audit of the  
19 early ballots will not do that; correct?

20 A. Correct.

21 Q. And I think you said that you expect 35,000 or  
22 so early ballots; is that right?

23 A. That was my estimation a few days ago. Now  
24 it's 30,000, early ballots, yes.

25 Q. So 30,000. We can take your number. Do you

1 agree with me that 1 percent of 30,000 ballots is 300  
2 ballots?

3 A. Okay.

4 Q. I can represent to you that I did that on my  
5 calculator.

6 THE COURT: If you want to take out your  
7 calculator.

8 Q. I don't trust my math.

9 And so is it your understanding in Cochise  
10 County, has there ever been an audit of more than  
11 1 percent of the early ballots by hand?

12 A. In my experience, I don't know.

13 Q. Okay. So you don't know. But since you have  
14 been recorder, has there been an instance where the early  
15 ballot hand-count audit has gone past that 1 percent  
16 number?

17 A. Not to my recollection, no.

18 Q. So it's fair to say that typically in Cochise  
19 County that hand-count audit of early ballots is roughly  
20 anywhere from 300 to say 600 ballots if there were a very  
21 large number of early ballots in a particular election?

22 A. I would say yes.

23 Q. And in this audit, you expect to count  
24 approximately 30,000 early ballots; right?

25 A. Correct.

1 Q. And then one more part of the statute I'd like  
2 to speak with you about, which is again at 16-602, and  
3 this is going to be Section I. And it says the hand  
4 counts prescribed by this section shall begin within 24  
5 hours after the closing of the polls and shall be  
6 completed before the canvassing of the election for that  
7 county. Does that sound right to you?

8 A. Yes.

9 Q. And my question for you is, you plan to start  
10 training for the hand count on Wednesday after the  
11 election; correct?

12 A. Wednesday or Thursday, yes.

13 Q. So that's not actually starting to count the  
14 ballots. It's just training; is that right?

15 A. Yes.

16 Q. So your audit isn't going to comply with  
17 Section I --

18 A. Yes, it is. We will start the process within  
19 24 hours.

20 Q. I see. And you're defining process as training  
21 to count the ballots; is that right?

22 A. Yes. It starts with pulling the lots of which  
23 races you're going to check.

24 Q. So the step you are going to take on Wednesday  
25 is to pull the lots?

1 A. Yes.

2 Q. If you just give me one second.

3 A. Take your time.

4 Q. Sorry. I have one last thing I want to ask you  
5 about. Are you familiar with the hand counts going on in  
6 Nye County, Nevada?

7 A. No.

8 Q. What about Esmeralda County, Nevada?

9 A. No.

10 Q. Would it surprise you to learn that in those  
11 counties these hand counts are consistently producing  
12 inconsistent results that need to be reaudited?

13 A. Without knowing the procedures, I can't give  
14 you an answer, no.

15 Q. Would it surprise you to learn that in  
16 Esmeralda County it's been taking about seven hours for  
17 every 300 ballots to be counted?

18 A. Again, I don't know what the procedures are.

19 MS. MADDURI: I don't have any more questions,  
20 Your Honor.

21 THE COURT: Thank you. Mr. Blehm?

22 MS. MADDURI: Thank you for your time. I know  
23 you're very busy.

24 THE WITNESS: I have got all day.

25 MR. BLEHM: All right. Good afternoon. I'm



1 A. About 150 feet.

2 Q. 150. Is it in the same building?

3 A. No.

4 Q. Okay. And so your participation in the  
5 election in 2020 was not to count ballots; is that  
6 correct?

7 A. Correct.

8 Q. And do you know anything about how many ballots  
9 were received in 2020?

10 A. Early ballots? Roughly 48,000.

11 Q. 48,000 early ballots. And you I believe  
12 testified earlier that you anticipate 35,000 this time?

13 A. It's down to 30, but yeah.

14 Q. Down to 30. How many in-person ballots were  
15 voted in 2020 in Cochise County that you are aware of?

16 A. Right around 33, 3400.

17 Q. 33, 3400. So approximately 80,000 people voted  
18 in Cochise County?

19 A. No, no, no. Of the early votes, the 38,000  
20 included the in-office. We had roughly 12,000 on election  
21 day.

22 Q. Okay, 12,000 on election day.

23 A. Total was north of 61,000.

24 Q. And are you familiar at all with the process  
25 they used for conducting the hand audit during that time?

1 A. No, I did not participate.

2 Q. Are you aware of whether or not they met the  
3 deadline to certify the election?

4 A. Yes, they did.

5 Q. They did. By how long, do you know?

6 A. I do not know.

7 Q. All right. And I guess we will have the  
8 election director testify as to that I suppose if you  
9 don't have any knowledge.

10 You testified that you worked on the Elections  
11 Procedures Manual in 2019?

12 A. Yes.

13 Q. In 2019 it included that language, did it not,  
14 that says counties can count more?

15 A. I did.

16 Q. But they can't count less?

17 A. What?

18 Q. But they cannot count less; correct?

19 A. Correct.

20 Q. So were you part of the process through the  
21 Secretary of State's office to prepare revisions for the  
22 2020 Elections Procedures Manual? I mean, I'm sorry,  
23 2021?

24 A. Yes. To the best of my knowledge, that was  
25 totally done online.



1 Q. Okay. At any time during that process, did  
2 anybody make any recommendations whatsoever to change the  
3 language regarding hand-count audit of early ballots?

4 A. My recollection, no.

5 Q. No; okay. Did anybody from the Secretary of  
6 State's office that you're aware of criticize that  
7 provision in the Elections Procedures Manual?

8 A. No.

9 Q. And the Elections Procedures Manual was  
10 finished and sent to the Governor and Attorney General?

11 A. Yes, it was.

12 Q. That was rejected; correct?

13 A. Yes.

14 Q. So it's your understanding we're currently  
15 working under the 2019 EPM?

16 A. Correct.

17 Q. All right. And when you performed this audit,  
18 do you plan on doing anything in violation of the  
19 Elections Procedures Manual?

20 A. No.

21 Q. Do you intend to do anything in violation of  
22 Arizona election law?

23 A. No.

24 Q. Do you intend to violate Arizona law in any  
25 manner?

1 A. No.

2 Q. And so are you comfortable with the process  
3 that you have put in place to conduct this audit?

4 A. It's not complete, but yes, I am.

5 Q. All right. And how long do you anticipate it  
6 will take you to complete that audit in total?

7 A. I initially estimated two to three days when I  
8 presented to the board.

9 Q. Has that changed at all?

10 A. It's changing, yes, because the amount of  
11 ballots are dropping.

12 Q. The amount of ballots are actually -- the  
13 amount of ballots you projected are actually decreasing?

14 A. Yes.

15 Q. And so it will take less time. Is that your  
16 understanding?

17 A. Yes, and when I gave my estimate, I was using a  
18 six-hour workday.

19 Q. Okay. And if need be, can you count that --  
20 push that up to eight or 10 hours?

21 A. I can, yes, depending on the volunteers.

22 Q. And so I believe you also testified that as you  
23 get the ballots in, you yourself, you remove them from the  
24 yellow outer envelope?

25 A. No. It's green.

1 Q. A green envelope?

2 A. Yes.

3 Q. The inner envelope is yellow?

4 A. Yes.

5 Q. I'm sorry. I'm thinking Maricopa. But you  
6 remove them from the green envelope, and then you sort  
7 them into batches; is that correct?

8 A. Yes.

9 Q. And then they're signature verified?

10 A. Correct.

11 Q. And your department does that?

12 A. Yep.

13 Q. Are your employees competent at doing that?

14 A. Yep. We're all trained.

15 Q. So you do play a role in the elections;  
16 correct?

17 A. Yes.

18 Q. So it's not as if you have absolutely no  
19 experience participating in elections or doing  
20 election-related work?

21 A. Correct.

22 Q. Have you ever been accused of violating Arizona  
23 election law or the Elections Procedures Manual before?

24 A. Not to my knowledge.

25 Q. So it's your understanding that you have

1 complied with the law during your tenure in your position?

2 A. Correct.

3 Q. So once you get those sorted into batches, do  
4 you put them in trays or something?

5 A. They're in watertight lockable containers.

6 Q. How many per batch?

7 A. 200 -- 200 ballots in a batch, and we send the  
8 containers over roughly five batches in them, a thousand  
9 ballots.

10 Q. A thousand ballots. All right. When they get  
11 to the Department of Elections, then he's responsible for  
12 opening them and processing the ballots; correct?

13 A. Correct.

14 Q. Do you think you can handle a ballot without  
15 damaging it?

16 A. I think -- well, yes, I do.

17 Q. Do you and your department handle early ballots  
18 all the time without damaging them in the envelopes they  
19 come in?

20 A. To a degree, yes. Sometimes the machine that  
21 opens them slices the yellow one open a little bit.

22 Q. Okay.

23 A. But other than that, yes.

24 Q. Do ballots get damaged in other ways?

25 A. Yeah, they generally come in damaged if they

1 are. We'll have water-soaked ones. Sometimes they're  
2 just mangled by the post office.

3 Q. But you believe you're competent to handle  
4 these ballots --

5 A. Yes.

6 Q. -- without causing damage or, you know, doing  
7 anything like that?

8 A. Yes.

9 Q. You don't intend to change any votes; correct?

10 A. No.

11 Q. Now, when you handle these ballots during the  
12 audit, do you intend to sort them by Democrat versus  
13 Republican voter?

14 A. No.

15 Q. Why not?

16 A. They're not identified that way.

17 Q. That would be impossible, would it not?

18 A. Yes.

19 Q. You don't know what individual voted what  
20 ballot; correct?

21 A. Correct.

22 Q. So you cannot -- you cannot sort these ballots,  
23 you deny anybody their vote based on their political  
24 affiliation or based on who they are; correct?

25 A. Correct.

1 Q. Now, do you intend to apply the law disparately  
2 with respect to different ballots?

3 A. No. Be equally across all.

4 Q. So you're going to apply Arizona law equally to  
5 each ballot that is counted under your authority?

6 A. Yes.

7 Q. Thank you very much. And you were here when  
8 the plaintiffs' witnesses testified; is that correct?

9 A. Yes.

10 Q. And those witnesses expressed some concerns  
11 with regards to changing and policies and procedures and  
12 things of that nature; is that correct?

13 A. They did, yes.

14 Q. Do you know if the Department of Elections here  
15 counts ballots pursuant to the terms of Arizona statutory  
16 law and the Elections Procedures Manual?

17 A. I'm more than confident they do.

18 Q. Do you intend to do anything differently?

19 A. No.

20 Q. And so the only difference then, the only  
21 difference is the number of ballots to be counted;  
22 correct?

23 A. Yes.

24 Q. And do you think that's going to be an issue  
25 for you?

1 A. No.

2 Q. You said you've been certified three times by  
3 the Secretary of State?

4 A. Yes.

5 Q. Does your certification deal with the counting  
6 of ballots?

7 A. I believe it does.

8 Q. Does it deal with all issues found in the  
9 Elections Procedures Manual?

10 A. Yes.

11 Q. Which involves counting ballots; is that  
12 correct?

13 A. Yes.

14 Q. So even though you have not participated in the  
15 counting of ballots yet, you have been trained through  
16 your certifications with the Secretary of State to do so?

17 A. Yes.

18 Q. What about your national certification? Does  
19 that deal with counting ballots in any way?

20 A. No. That's more on a higher level.

21 Q. A higher level?

22 A. Of running elections.

23 Q. Okay. So elections management?

24 A. Yeah, there's a couple of courses in history of  
25 elections. There's new projects and such things, getting

1 out the vote.

2 Q. Any election management?

3 A. Yes.

4 Q. And so you currently manage the department;  
5 right?

6 A. My office, yes.

7 Q. Your office?

8 A. Uh-huh.

9 Q. And so will this be much different than you in  
10 your managerial role of the County Recorder's office?

11 A. I don't know so, no.

12 Q. You don't believe so. With respect to the  
13 ballots when you move them, I believe you testified you  
14 plan to move them each and every day. These are going to  
15 be moved in the storage trunks that they are stored in?

16 A. Yes.

17 Q. Are these storage trunks individually locked?

18 A. Yes.

19 Q. Do you intend to secure the vehicles in which  
20 you transport them every day?

21 A. Yes.

22 Q. Under your role leading this audit, do voters  
23 need to be concerned at all about how you perform this  
24 audit and how you treat their ballots?

25 A. I don't believe so, no.



1 Q. Are the concerns raised by the witnesses who  
2 testified for plaintiffs here today, are they real  
3 concerns that they should have?

4 A. No.

5 Q. No? Okay. Well, I have no further questions.  
6 I'm not sure who gets the mic now.

7 THE COURT: It would be Mr. Strassburg if you  
8 wish to redirect or Mr. Kolodin, either one.

9 MR. STRASSBURG: With your permission Mr.  
10 Kolodin will redirect.

11 THE COURT: That's fine. Absolutely.

12  
13 REDIRECT EXAMINATION

14 BY MR. KOLODIN:

15 Q. Recorder Stevens, do you know what the point of  
16 the random sample portion of a random sample hand-count  
17 audit is?

18 A. Yes. It's used to prevent bias.

19 Q. Explain to me how it prevents bias.

20 A. Well, that's the definition of random. You  
21 just go out and you pick something at random. If you have  
22 a chance to look at things, you may pick more of one party  
23 or the other. But a random thing could be every third  
24 ballot.

25 Q. And so it's really important that the

1 percentage that is going to be selected be selected before  
2 any ballots are counted; right?

3 A. If you're doing -- yes.

4 Q. Is there any possibility of bias if 100 percent  
5 of the ballots are hand counted?

6 A. I don't see how there could be, no.

7 Q. Explain to me, how could there not be?

8 A. Well, bias would mean you have to reject some  
9 of them and select others. If you're selecting them all,  
10 there is no bias involved.

11 Q. Makes sense to me. Recorder Stevens, can you  
12 tell me, the county's director of elections, are they  
13 themselves elected?

14 A. No, they are not.

15 Q. They're not. From where do they derive their  
16 authority?

17 A. My understanding is the Board of Supervisors.

18 Q. Ah. So it's the Board of Supervisors who  
19 designates who is to be the officer in charge of elections  
20 for a particular task?

21 A. That is my understanding, yes.

22 Q. And under statute, for small counties like this  
23 at least, is not the default officer in charge of  
24 elections the county recorder?

25 MS. MADDURI: Objection; calls for a legal

1 conclusion.

2 Q. I'm asking if he knows his role.

3 THE COURT: Hold on. He can answer.

4 THE WITNESS: Please repeat.

5 BY MR. KOLODIN:

6 Q. I said by default, at least in small counties  
7 such as this, is not the county recorder the default  
8 officer in charge of elections?

9 A. We are listed throughout Title 16 first. In  
10 most statutes I would say probably yes.

11 Q. When you say you're listed throughout Title 16,  
12 you're referring to the portions of Title 16 that say the  
13 county recorder or other officer in charge of elections?

14 A. Correct.

15 Q. So do I understand correctly then that you  
16 derive some of your authority at least from the board?

17 A. The board has some action in elections, which  
18 is for them only. I think my authority derives from my  
19 office and being duly elected.

20 Q. Okay. That makes sense. But if the board told  
21 you not to do 100 percent hand-count audit, would you  
22 comply with that instruction?

23 A. It depends on what their exact reasonings are,  
24 but they don't control my office. I do.

25 Q. That makes sense. Has the board told you not

1 to do 100 percent hand-count audits?

2 A. One-third of them has.

3 Q. Well, okay, but the majority; right?

4 A. The majority.

5 Q. That's the way a republic works; right?

6 A. Right.

7 Q. The majority has not?

8 A. Right.

9 Q. In fact, they're here today. Their attorney is  
10 here today to say if they told you otherwise; right?

11 A. Yes.

12 Q. Now, every year -- sorry, strike the question.

13 You've talked a little bit about in response to  
14 opposing counsel's questions about how a lot of these  
15 volunteers are going to be first-time volunteers that have  
16 to be trained; right?

17 A. Correct.

18 Q. What about in prior years when you conducted  
19 hand count audits or when the county conducted hand-count  
20 audits? Were a lot of those volunteers also first-time  
21 volunteers that had to be trained?

22 A. I would have to assume so, but I don't know.

23 Q. But it's the same pool of volunteers; right?

24 A. Typically, yeah. The ones that are always  
25 there are the party chairs. And then they provide the

1 list. So as party chairs changes, the list would change  
2 probably.

3 Q. Okay. So in prior years, it's volunteers of a  
4 list provided by the party chairs. This year it's a list  
5 of volunteers provided by [indiscernible]? Is that yes?

6 A. Yes.

7 Q. And there's no reason to think that the  
8 volunteers provided this year would be any more or less  
9 experienced than those in prior years?

10 A. Correct.

11 Q. One moment. No further questions at this time,  
12 Your Honor.

13  
14 EXAMINATION

15 BY THE COURT:

16 Q. I have a few questions for you as you probably  
17 would surmise. And as a preface, some of these are very  
18 basic, but I want to make sure I understand everything  
19 correctly. I first want to ask you about your proposed  
20 process. The way I understand 16-602 is there are two  
21 different audit processes depending on whether it's what I  
22 refer to as a precinct vote versus an early ballot. Do I  
23 have a correct understanding so far?

24 A. Yes.

25 Q. 16-602(B) deals with the precinct vote, which I

1 read to mean any in-person vote or perhaps a provisional  
2 ballot that was done at a precinct or in Cochise County, a  
3 voting center; is that correct?

4 A. Not totally but --

5 Q. Correct me then.

6 A. Provisional votes won't be part of the count.  
7 And then you can bring it down to be election day votes  
8 because they vote in my office early, and those are  
9 separate.

10 Q. Is there anything that is -- any ballot that is  
11 cast by an individual that is not for some reason  
12 detained, for example, as a provisional vote until they  
13 can figure out whether it's validly cast? Those would  
14 fall under 16-602(B) and the processes of selecting the  
15 number of precincts and that process; is that correct?

16 A. That's my understanding, yes.

17 Q. And then 602(F) deals with early ballots?

18 A. Correct.

19 Q. I further understand, and please correct me if  
20 I'm wrong, if a person like, for example, when I go vote,  
21 I actually have my early vote, but I wait until the day of  
22 the election to drop it off because I like to see it go  
23 into the box. Those early ballots dropped off at a  
24 precinct place or a voting station or whatever or  
25 recorder's office, wherever it might be, those still,

1 because they're early ballots they still fall under  
2 602(F); is that correct?

3 A. Yes. We all them late earlies.

4 Q. Late earlies, on times; right?

5 A. Yes.

6 Q. So if I understand correctly, your -- the  
7 action taken by the board and how you intend to fulfill  
8 the action that they have placed onto your shoulders is  
9 that you would follow the process listed under 602(F) for  
10 all early count -- early vote ballots no matter how they  
11 came into your possession and not touch any of the  
12 precinct votes; is that correct?

13 A. No. My understanding is do both: B and F.

14 Q. Wouldn't that result in 100 percent audit,  
15 hand-count audit of every vote cast in Cochise County in  
16 this election?

17 A. Yes.

18 Q. When you are -- when you are proposing your  
19 plan as to how you're going to get this work done, one of  
20 the things that you have to follow under both the  
21 Elections Procedures Manual and by statute is you have to  
22 compare the results that you get to what's called the  
23 designated margin, I think it is; is that correct?

24 A. Yes.

25 Q. Explain for me what the designated margin is so

1 that the record is clear.

2 A. I don't know if I can. But if you do the 100  
3 percent and you don't have that issue from  
4 being [indiscernible] that margin is defined by the  
5 Secretary of State.

6 Q. Okay.

7 A. But I don't know what it is off the top of my  
8 head.

9 Q. Understood. Perhaps walk me -- it might be  
10 better to walk me through this. Tell me where I'm wrong,  
11 because there's probably something. Under 602(F), let's  
12 just focus on those. Even though the process as far as  
13 the elections, the races that you're going to choose and  
14 all those other things are somewhat similar, let's focus  
15 on 602(F) first. If you were to follow exactly what the  
16 statute and the Elections Procedures Manual said, you take  
17 a random sample, and then you take a random sample of the  
18 random sample. You'd have batches. You'd have all these  
19 things, but basically what you'd be counting is either  
20 1 percent of the ballots or 5,000 ballots, whichever is  
21 fewer, and that is your first number of ballots that  
22 you're going to count by hand; is that correct?

23 A. That's not my understanding. My understanding  
24 was the board voted to go to 100 percent.

25 Q. I'm not asking about what the board voted yet.



1 I'm asking, let's suspend for a second what the board  
2 ordered you to do.

3 A. Okay.

4 Q. And let's say instead of the board ordering you  
5 to do what, they said, Recorder Stevens, what we want you  
6 to do is we actually want you to be in the place of the  
7 elections director. Instead of you doing 100 percent, we  
8 want you to follow to the letter of the EPM. Okay? So  
9 with that understanding, the first count would be  
10 1 percent or 5,000 ballots whichever is fewer because  
11 we're dealing with early ballots; correct?

12 A. Correct.

13 Q. By EPM and by statute, what a -- I'm going to  
14 call you an auditor for lack of a better word. Whoever is  
15 in charge, the elections officer in charge. What they're  
16 supposed to do is, they're supposed to take that hand  
17 tally and compare it against the designated margin. And  
18 what I understand is the designated margin is based on the  
19 way that these votes have been tallied, this is the  
20 prediction of what these ballots should be; right? If  
21 that number is less than the designated margin, the audit  
22 stops, and by law under the EPM as written, not as  
23 designated by the board, the election audit stops, and the  
24 electric tabulation is the [indiscernible]; right?

25 A. Finalized. [Indiscernible.]

1 Q. But if it's not, if it's greater, there's a  
2 recount of those same ballots to make sure that they got  
3 counted correctly; right?

4 A. My understanding, yes.

5 Q. And again if it's more than the designated  
6 margin, then you have to double the batch and do the whole  
7 thing over again?

8 A. I think the doubling of the batch is in B, not  
9 in F.

10 Q. Is it your understanding that under 602(F) that  
11 you only do 1 percent and you don't go any further?

12 A. I'd have to look back at it. I don't have it  
13 memorized.

14 Q. Like I said, it's not a pop quiz, or if I  
15 didn't say it, it's not. But at some point would you  
16 agree that the statute and the Elections Procedures Manual  
17 all say if it's greater than the expected margin, you have  
18 to do something to keep going to validate the results. If  
19 it's ever less than the expected margin, thou shalt stop  
20 and the election is certified; right?

21 A. It is valid, yes.

22 Q. How are you going to compare 100 percent of the  
23 ballots versus the election -- the tabulation if there is  
24 no expected margin?

25 A. I think it would come out. There would be no

1 remedy after that first audit.

2 Q. Right.

3 A. So what -- if the number came below and you  
4 would still take the tabulation anyway.

5 Q. Walk me through this. You have 30,000 ballots  
6 that are cast. You have -- and they have -- they break  
7 down to certain percentages. You have 30,000 votes that  
8 are led by -- that are looked at by hand. And the early  
9 ballot hand audit says that candidate A in state-wide  
10 election B got 7,005 votes. And then the electronic  
11 tabulation said no, they got 7,002 votes. Which one is  
12 the right answer?

13 A. That remedy is not in statute anywhere. The  
14 hand count is greater than the tabulation.

15 Q. Under your audit, and perhaps I'm  
16 [indiscernible], because you're the one that is in charge  
17 of this audit, you are the one that has to be able to  
18 certify to the Secretary of State that the results are  
19 correct; right?

20 A. Yes.

21 Q. Which one of those numbers -- if there is no  
22 remedy in law or in the Elections Procedures Manual, which  
23 one of those numbers do you report?

24 A. I would report the number that the audit  
25 produced.

1 Q. What if candidate A got 7,005 in the written,  
2 like I said, the hand ballot, 7,002 in the tabulation.  
3 Candidate B got 7,004, so it changes the outcome of the  
4 election. Would you --

5 A. Technically at that point it would go into a  
6 recount.

7 Q. Understood, but before it can go into a  
8 recount, you have to certify -- you have to do something  
9 to make it the official count; correct?

10 A. Correct.

11 Q. It would go into a recount. Are you saying  
12 that under your proposed plan, you would report a result  
13 even if it appeared to change the official electronic  
14 tally because the number was different?

15 A. I feel I'd be bound to report what the audit  
16 produced. What happens after that would be out of my  
17 hands.

18 Q. If the Elections Procedures Manual requires,  
19 for example, and I'm not saying it does -- like you, I  
20 have read this -- you all have had a little time to read  
21 the statutes. I have had about 72 hours, and I feel like  
22 I have done a good job. But let's assume for a second,  
23 and I believe it does. The Elections Procedures Manual  
24 says the number is greater than what the expected result  
25 is, and I think it's not unreasonable that if the hand

1 count is greater than what the electronic is, that that  
2 might be a reasonable conclusion.

3 Let's say it says that you're supposed to count  
4 it all again to make sure that your numbers is right.  
5 Would you do that?

6 A. Sure.

7 Q. Is there a reason why you cannot do -- have  
8 this whole process occur in the office of elections  
9 director like it has in years past?

10 A. Space. I can't put 300 people in there. I  
11 don't think I can put 50 people in there.

12 Q. So previous audits run by statute and the EPM  
13 are capable to be done in a smaller space because the  
14 fewer number of ballots that are expected to be audited;  
15 is that fair?

16 A. Yes. They are required to have four members  
17 for every precinct that they are going to audit. If we  
18 only audit two state people [indiscernible].

19 Q. Do you know how many machines are going to be  
20 used in this election to tabulate votes?

21 A. To tabulate votes?

22 Q. Uh-huh. Because the statute talks about  
23 machines in the tabulation, I'm trying to use the lingo to  
24 make myself --

25 A. You have 17 tabulators at the votes on election

1 day. You have two in the elections department that are  
2 tabulating the early ballots right now.

3 Q. Are you intending to use those numbers, the 19  
4 total I guess the tabulators as ways of figuring out how  
5 to do a batch? And the reason I ask is in the elections  
6 manual it talks about that one of the ways that you can  
7 decide how to make a batch is to figure out the number of  
8 tabulators and you do the math, the percentage of math and  
9 all that. Are you intending to do it that way?

10 A. I am not because the intent was to do 100  
11 percent. So there's more reason to devolve down to  
12 batches.

13 Q. So if I understand correctly, if this is  
14 allowed to proceed, because you are counting all of the  
15 ballots, all of the ballots, and I want to be clear,  
16 you're intending to count every ballot, early or  
17 otherwise?

18 A. Correct.

19 Q. Some of the things that the Elections  
20 Procedures Manual no longer apply?

21 A. For the -- correct, because they're in their in  
22 statute and the procedure manual for doing 2 percent, and  
23 then if there's an error on the 2 percent, then they have  
24 remedies for it. There's nothing in there for 100  
25 percent.

1 Q. How can you be sure that there won't be an  
2 error at the 100 percent?

3 A. As batches go through, if the numbers don't  
4 match up, they go back and start over again. That's why  
5 you have two lines in one column. So once they go through  
6 it and the numbers match up it's deemed correct and you  
7 move on to the next batch.

8 Q. But then you also have to add the batches and  
9 count those?

10 A. Correct. Yes.

11 Q. Are you aware of any portion of the Elections  
12 Procedures Manual or the statute that allows an elections  
13 official to use a three-tiered management system in  
14 organizing how this works?

15 A. No.

16 Q. To be fair, is there anything that prohibits it  
17 that you're aware of?

18 A. No.

19 Q. One of the things that was talked about in the  
20 2019 EPM that we're using is obviously this sentence about  
21 how the county may designate a higher percentage at their  
22 discretion?

23 A. Correct.

24 Q. You've been a legislator. You've been a  
25 recorder. You know election law very well. Is that

1 sentence anywhere in any of these statutes?

2 A. In the statutes, no.

3 Q. And so essentially, and as we all know, the  
4 Elections Procedures Manual is given the force of law as  
5 far as elections are concerned, but so the whole basis for  
6 the ability to do this is essentially that sentence in the  
7 Elections Procedures Manual; is that correct?

8 A. That is how I read it, yes.

9 Q. Okay. Are you aware of anything in either  
10 statutes or the Elections Procedures Manual that permits  
11 you to have additional written instructions or draft your  
12 own instructions on how things are supposed to be either  
13 trained or conducted or modified? Because we talked about  
14 how you can send a draft to everybody. Is there anything  
15 in the EPM or of the statutes that permits the elections  
16 official to oversee to essentially draft their own  
17 instructions?

18 A. Not that I recall, but anything out of draft is  
19 in compliance with the EPM or statute.

20 Q. So, and again, there's nothing that prohibits  
21 it?

22 A. No.

23 Q. So essentially whatever you draft, your  
24 intention would be that it either mimics, mirrors or  
25 complies with the language either in statute or the EPM?



1 A. Yes.

2 Q. Forgive what I think might be a very dense  
3 question. Why do you need additional instructions if  
4 you're just going to mimic or instruct? Why doesn't the  
5 EPM stand on its own?

6 A. I think the word additional has been used. It  
7 doesn't require to be used, but has instructions for the  
8 workers on how to perform it, but mirror the law. So the  
9 fact that they're additional is just a word that got used.

10 Q. So I apologize if I added that or somebody  
11 else.

12 A. No. I --

13 Q. So scratch additional. But essentially -- but  
14 if the Elections Procedures Manual is 200 and -- almost  
15 300 pages, and I have read the section that's relevant to  
16 audits. And I have scanned the rest of it. It has  
17 instructions for everything, including how to create the  
18 designated margin, how to do the counts, how to do the  
19 tally sheets, how to have callers and judges; right? All  
20 of these things?

21 A. Yes.

22 Q. Why would there be a need for additional  
23 instruction if the Elections Procedures Manual basically  
24 outlines it all?

25 A. It wouldn't be. There's be a need for

1 instructions [indiscernible].

2 Q. I just want to make sure I asked all the ones I  
3 had. I know this was asked twice, but I want to make sure  
4 I get the timing down. If you are permitted to proceed in  
5 the way that the board has directed you to proceed, what I  
6 understand is you will begin the audit process, not  
7 necessarily by counting these ballots within 24 hours or  
8 beginning to count the ballots within the 24 hours, but  
9 within the first 24 hours you will be selecting -- you'll  
10 be pulling the lots, which will be the lots of the  
11 contested races that are being audited?

12 A. Correct.

13 Q. You'll be conducting some training for that  
14 number of people?

15 A. Correct.

16 Q. And that's going to take a couple of days, and  
17 so perhaps Friday is when you could start counting  
18 ballots, or Saturday?

19 A. Typically in our county the way I remember it  
20 we start on Saturday to do the counts.

21 Q. And I'm sure you're aware that Friday is also  
22 Veteran's Day. Are you intending to work on Veteran's Day  
23 as well --

24 A. No.

25 Q. So that might play into it as well?

1 A. Could, yes.

2 Q. So if you are permitted to proceed in the way  
3 directed by the board, even in the best possible  
4 circumstance, you are not in a position where you could  
5 actually start auditing the ballots proper by counting  
6 them, looking at them, having calls, et cetera, on  
7 Wednesday the 5th -- I'm sorry, Wednesday, the 9th?

8 A. Oh, not at all. There's too many in play.

9 Q. Understood. And I'm not -- I'm not challenging  
10 whether you should have been. I'm just asking. I just  
11 want to clarify.

12 In your opinion has the election already begun?

13 A. Yes.

14 Q. And for the purposes of the recorder's office,  
15 when did the election actually begin?

16 A. The day we sent out early ballots.

17 Q. Because that is the first day that someone in  
18 theory could return an early ballot and make their voice  
19 mail?

20 A. Or they could come down to my office and  
21 actually vote.

22 Q. I'm sure other folks have questions.

23 Mr. Kolodin, I don't know who's taking the charge for your  
24 table, but if you have any questions based on the Court's  
25 questions.

1 MR. KOLODIN: Yes, Your Honor.

2  
3 RE-REDIRECT EXAMINATION

4 BY MR. KOLODIN:

5 Q. Recorder Stevens, to your knowledge is there  
6 anything in Title 16 that requires counties to count  
7 ballots by machine at all?

8 A. I believe that it is stated that the statewide  
9 procedure is electronic tabulation.

10 Q. In Title 16?

11 A. I believe so. Could be EPM, but  
12 [indiscernible].

13 Q. Title 16, certainly we can talk about what the  
14 procedure might be, but at the very least I think opposing  
15 counsel has conceded that if for any reason it becomes  
16 impractical to count all ballots by machine, it's  
17 authorized for counties to count them all by hand;  
18 correct?

19 A. Yes.

20 Q. So why do we typically do the first count by  
21 machine?

22 A. Typically speed. We allow -- I say we. The  
23 legislature has allowed the early ballots to be tabulated  
24 well before the election day, and that provides them with  
25 a good number that comes out at roughly 8:05 p.m.

1 Q. Now, I want to talk to you about these  
2 escalators in 16-602(F) where it says you count a certain  
3 portion, and if it's within the designated margin, you  
4 keep counting. If it's not within the designated margin,  
5 you stop counting; right?

6 A. Uh-huh.

7 Q. What is the purpose, if you know, tell me if  
8 you know, of controlling the discretion of elections  
9 officials in this way?

10 A. I only know speculation. A lot of people  
11 didn't want to do that at first at all, the audit count,  
12 but some people wanted it, and this was a compromise, the  
13 low percentage.

14 Q. Let me ask the question a different way. Let's  
15 say that requirement was not in the law. An election was  
16 held. You're a Republican; right?

17 A. Yes.

18 Q. I'm just going to say that. It doesn't matter  
19 for sure or not. You're a Republican. Hypothetical.  
20 Kari Lake is within the designated margin on the first  
21 count; right -- for the first batch. In the second batch  
22 she falls short of the designated margin and Katie Hobbs  
23 pulls ahead by more; right? If your discretion is not  
24 controlled by 16-602(F), then you could choose to count  
25 more in the hopes that it might help your preferred

1 candidate; right?

2 A. That sounds right, yes.

3 Q. Oh, okay. But if -- and so this mandatory  
4 escalator provision, we'll call it 16-602(F), it serves a  
5 very important purpose; right?

6 A. Yes.

7 Q. And the very important purpose is to prevent  
8 elections officials from putting their thumb in the scale  
9 after they have counted some votes for their preferred  
10 candidate; right?

11 A. Sounds fair enough.

12 Q. Can you think of any other logical purpose?  
13 You're an elections administrator. Can you think of any  
14 other logical purpose it would be in there?

15 A. Nothing right now, no.

16 Q. I can't either. So if you choose in advance of  
17 an election, in advance of knowing any of the results  
18 because you cannot access those results prior to election  
19 day; right?

20 A. Correct, I cannot.

21 Q. You have no idea who is ahead in this county?

22 A. Right.

23 Q. If you choose prior to election day to count --  
24 recount by hand 100 percent of ballots, does that  
25 potential conflict of interest consideration apply?

1 A. I don't think so.

2 Q. Right, because you can't know what number of  
3 ballots to count to help your preferred candidate even if  
4 you wanted to; right?

5 A. Correct.

6 Q. So the reason for that safeguard is not present  
7 in this case; right?

8 A. Sounds right.

9 Q. What's that?

10 (Background speaking.)

11 Q. No further questions. Thank you.

12 THE COURT: Did you have any further questions?  
13 Ms. [Indiscernible], any other questions? Mr. Blehm, any  
14 other questions?

15 MR. BLEHM: No, Your Honor.

16 THE COURT: That concludes your testimony. I  
17 have been asking the parties to stay -- and I kind of  
18 figured you would. Thank you so much. That will conclude  
19 your testimony. Mr. Blehm, I saw you move. It's like an  
20 auction. Is there something?

21 MR. BLEHM: Yes, Your Honor. May I step out  
22 just real quick?

23 THE COURT: Why don't we take a five-minute  
24 comfort break. Let's take a five-minute break. We'll  
25 come back in five.

1 (A recess was taken.)

2 MS. ANDREWS: We are back on the record. The  
3 record will reflect presence of counsel, presence of the  
4 parties. Ms. Stevens just stepped out for a moment to  
5 grab something out of her vehicle and she will be back  
6 shortly, but I figured we should go ahead and continue on  
7 with the case.

8 Mr. Kolodin, any other witnesses at this time?

9 MS. MADDURI: We reserve the right to re-call,  
10 but no further witnesses at this time.

11 MS. ANDREWS: Thank you. Ms. [Indiscernible].

12 MS. ESTES-WERTHER: Yes. I would like to call  
13 Lisa Marra.

14 MS. ANDREWS: If you will please approach the  
15 clerk to be sworn in.

16  
17 LISA MARRA,  
18 having been first duly sworn to tell the truth, the whole  
19 truth, and nothing but the truth, was examined and  
20 testified as follows:

21  
22 DIRECT EXAMINATION

23 BY MS. ESTES-WERTHER:

24 Q. Good afternoon. Could you please state your  
25 name for the record.



1 A. Lisa Marra.

2 Q. And what is your position for the county?

3 A. I am the director of elections.

4 Q. And how long have you served in that capacity?

5 A. I have been the director since 2017. I have  
6 been employed by the county since 2012.

7 Q. And who is it that you report to?

8 A. I report to the county administrator.

9 Q. So you do not report to the Board of  
10 Supervisors?

11 A. That is correct.

12 Q. And what are your certifications or call  
13 indications for your position?

14 A. I am a certified election official with the  
15 State of Arizona, renewed every two years since 2017. I  
16 do already have my certificate as a CERA. That's the  
17 national certification through Auburn University and the  
18 election center. I am certified public manager through  
19 ASU. I am in my third term as the president of the  
20 election official association representing all 15 county  
21 election directors. I serve on the U.S. Election  
22 Assistance Commission on a public board, and I think  
23 that's about it, unless you really want to go back many  
24 years to college, but that's too many years.

25 Q. Thank you. What are your responsibilities and

1 duties in your position?

2 A. So as the election official I am the filing  
3 officer for county candidates, for special district  
4 candidates. I also handle campaign finance. Our office  
5 creates the ballot. We design the election program. We  
6 tabulate the ballots. We are in charge of election day  
7 voting, so that's managing over 200 pole workers, vote  
8 centers, 17 of those in the county, so securing those  
9 locations. And then we are in charge of the political  
10 party hand count, and then the canvass of the election.

11 MS. ESTES-WERTHER: And, Your Honor, I had an  
12 exhibit that I had wanted to enter if I can approach the  
13 witness?

14 MS. ANDREWS: Sure.

15 MS. ESTES-WERTHER: I had already given it to  
16 the parties.

17 MS. ANDREWS: And it's already been marked?

18 MS. ESTES-WERTHER: Yes.

19 MS. ANDREWS: Is it Defendant Marra -- Marra;  
20 correct?

21 THE WITNESS: Correct.

22 MS. ANDREWS: Okay. Sorry. I want to make  
23 sure I pronounce everyone's names correct.

24 BY MS. ESTES-WERTHER:

25 Q. And do you know -- do you recognize what this

1 document is?

2 A. I do.

3 Q. And what is it?

4 A. It is the 2019 Elections Procedures Manual, at  
5 least the cover and table of contents, probably a chapter  
6 or two.

7 Q. And can you actually flip -- I think it's  
8 probably about six pages in, past the table of contents.

9 And then on the bottom -- it says page 228, but  
10 on the bottom can you read just what that section is, how  
11 it's labeled?

12 A. The early ballot hand-count process?

13 Q. Yes.

14 MS. ESTES-WERTHER: Your Honor, I would like to  
15 admit this into the record.

16 MS. ANDREWS: Any objection to Exhibit A?

17 MS. MADDURI: We do have an objection to  
18 Exhibit A on a couple of bases. The first that this is  
19 legal theory, which is not proper as an exhibit, right,  
20 just as you wouldn't admit statutes into the record. The  
21 second is that it's impartial. It excludes, for example,  
22 the portion with the language that we have been talking  
23 about all day, and so we do have an objection to the  
24 admission of this partial portion of the legal authority  
25 to correct.

1 MR. BLEHM: I would join with Mr. Kolodin's  
2 objection, Your Honor.

3 MS. ANDREWS: Ms. Andrews, any objection? Oh,  
4 I'm sorry.

5 MS. ANDREWS: No objections.

6 MS. ANDREWS: The objection is respectfully  
7 overruled. I will let you all know I think it's quite  
8 appropriate for The Court to review the election  
9 additional refer to the Elections Procedures Manual in  
10 some. It's been cited by all of the counsel. The Court  
11 is going to review it all in total and not just rely on  
12 the exhibit. So any issue that it might be with just  
13 being a partial version of the entirety of the exhibit is  
14 irrelevant, and the Court is not aware of any reason why  
15 it cannot be otherwise admitted.

16 So it is admitted over the objection, which is  
17 preserved for the record.

18 MS. ESTES-WERTHER: Thank you, Your Honor.

19 BY MS. ESTES-WERTHER:

20 Q. Ms. Marra, you can refer to this as we kind of  
21 walkthrough. For the early ballot hand-count process, who  
22 is responsible for conducting the hand count?

23 A. That is me as the election official.

24 Q. Okay. And is there any other individual that  
25 you are aware of that's authorized to conduct the hand

1 count?

2 A. No.

3 Q. And then what are your duties relating to the  
4 hand count for early ballots?

5 A. So the hand-count process for us starts months  
6 ahead, six to eight months, by meeting with the party  
7 chairs from the Democratic and Republican party, so we  
8 meet early in the year every election cycle and outline  
9 the whole calendar of the year. So through the primary --  
10 the PPE, the primary, the general election. So we look at  
11 the last dates candidates can file, first day of early  
12 voting, all those details, and then the dates when the  
13 hand count members are due from the party chairs and when  
14 their political party observer letters are due from the  
15 chairs, so the whole calendar is outlined for them early  
16 that year, so that starts our process.

17 Q. And so how are the early ballots selected for  
18 the hand count?

19 A. So the early ballots -- we do the math formula,  
20 and we look at the numbers sent. We look at past  
21 elections, and we look at the statute and the procedures  
22 manual. So because we are a vote center counting, we look  
23 at percentages and then minimums, because we are not a  
24 huge county with thousands and thousands of votes.

25 We pulled two -- it's two batches of 400 is our

1 minimum. That's our minimum. And then we also have to  
2 make sure that if the hand count were to expand, that we  
3 have enough of those ballots sequestered, and that whole  
4 process is outlined.

5 So what we do is the first four batches and our  
6 batches are -- the recorder was absolutely correct,  
7 roughly 200 in a batch. And that batch it's very  
8 important that that batch stay together from beginning to  
9 end, from when they scan it in to when we get it, to when  
10 it's stored.

11 So we take the first four batches every day  
12 from whatever tabulators we are using. We do have two.  
13 Mostly we just use one. And then when we get to the  
14 number that we are sent at, then we stop sequestering  
15 those ballot batches. So right now in this election, when  
16 we did the math early on, it was 40,000 early ballots.  
17 Now, we know we are down some, but we still have to make  
18 sure that we have enough in case it expands. So those 10  
19 batches have been sequestered for the hand-count draw.

20 Q. You mentioned the number that it's set at. So  
21 how is that number established of the early ballots you  
22 need to sequester?

23 A. In statute with the percentage or a minimum of  
24 400, as the batch to start with.

25 Q. Okay. And you heard some testimony earlier

1 about early ballots that were being dropped off on  
2 election day. Do you include those in your early ballot  
3 hand count?

4 A. No, we do not. In the procedures manual it  
5 outlines on the day -- you look at how many ballots --  
6 early ballots you tabulated on the day of election, and we  
7 haven't obviously tabulated those yet.

8 Q. And so where are your early ballots  
9 sequestered?

10 A. So they are broken out of the batch -- the  
11 numerical batches in their own separate box labeled with  
12 the security seal and their batch result reports waiting  
13 for the hand count drawn which starts the day after the  
14 election.

15 Q. And once the hand count is concluded, where do  
16 those ballots go?

17 A. Those are always kept in that same box. They  
18 just are always kept sequestered with the other ballots in  
19 our ballot cage in our warehouse.

20 Q. And then following the conclusion of the  
21 election, where do those ballots go?

22 A. Those are delivered to the county treasurer for  
23 storage in the treasurer's vault for the retention period.

24 Q. And so you mentioned I think already -- so the  
25 hand count begins the day after the election?

1 A. Correct.

2 Q. And so is that when you are actually  
3 counting -- do you start beginning the hand count  
4 yourself?

5 A. No. That is when the two party chairs or their  
6 designees show up, and then we draw the vote center  
7 batches. And, again, because we are a vote center -- we  
8 are not precinct-based -- it's a minimum of two vote  
9 centers. We have 17 total, so all 17 numbers are put into  
10 a hat, and they do two draws. And then we do the early  
11 batches, so we have 10 batches sequestered now, so 1  
12 through 10 will go in a hat, and they pull out the two  
13 that we start with. And then we pull the races because in  
14 the general election it's four races basically.

15 Q. So please describe a little bit about -- like,  
16 what is it that you are comparing it to, the hand count,  
17 yourself?

18 A. So in order to prove anything you need to have  
19 a source document. And so when we do those batches in the  
20 tabulators, we print out a batch result report, and our  
21 process for that is we tabulate the batch ballots, the  
22 report is printed, folded in half so it's sight unseen,  
23 stapled and put into that batch, which is sealed with a  
24 seal and stored in its box. So that's -- when they pull  
25 those batches, that's how they would know what to compare



1 with to the hand count, to the machine count.

2 Q. So when they are concluding their hand count  
3 and get their results, they are comparing it to that batch  
4 results report that's included with that batch?

5 A. Correct.

6 Q. And is that batch report -- batch results  
7 report done for all early ballots?

8 A. No, ma'am. It's only done for the ones that  
9 are going to be sequestered for the hand count, so all the  
10 other batches are tabulated, and they are sealed with  
11 their security seal and stored in the boxes that they go  
12 in and there's no batch report in those, no batch result  
13 report, so there would be nothing to tie those results  
14 into per batch.

15 Q. So just to confirm, you currently have the  
16 batch results reports for the early ballots that you have  
17 already sequestered according to the Elections Procedures  
18 Manual based on that percentage, but not for all early  
19 ballots?

20 A. That is correct.

21 Q. And so just really briefly, what are the  
22 circumstances that lead to a second or expanded early  
23 ballot hand count?

24 A. That would be if the numbers were off, and the  
25 numbers are set every election by the Secretary of State

1 by the vote verification committee, so it's a percentage  
2 or right now it's three. And many times they are off one  
3 or two on a race, so they will recount that in order to  
4 get the right number.

5 And if they were not at that point, we would  
6 look at expanding it, so that's why we sequester enough  
7 ballots to make sure we can do that, because if it's 400,  
8 then it would be 800 and 1,600. And we have not ever had  
9 to do that since I have been in this position, at least.  
10 I don't know prior to that.

11 Q. Okay. So just for clarity, you haven't ever  
12 had to do the expanded early ballot hand count past --

13 A. No.

14 Q. -- just a recount?

15 Okay. I think you heard testimony today, but  
16 are you aware of the board's plans for this full early  
17 ballot audit?

18 A. Yes, I am.

19 Q. And then are you aware of what state law or  
20 rule would allow the ballots to be transferred into the  
21 custody of the County Recorder?

22 A. I am not aware that that would be possible.

23 Q. And if those ballots are transferred into his  
24 custody, will you be able to perform your statutory hand  
25 count?

1           A.     We -- that depends on timing because it doesn't  
2 necessarily have to start on Saturday. As long as you  
3 start within 24 hours, which we comply with doing the  
4 draw. We start counting on Saturday with the parties  
5 because we have a staff of three, and we are extremely  
6 busy between election day -- we have been extremely busy  
7 for months. And we are four days out from election, in  
8 case anybody forgot. And so we are still -- we are doing  
9 audits. We are processing -- we are bringing back  
10 equipment, so we start counting on Saturday, so depending  
11 on when they are going to start, that would be a problem.

12                     And then I am concerned about future statutory  
13 duties because the hand count is just one thing. The  
14 canvass and audit are just one thing. We had changes in  
15 the law that reduced the margins for recounts, and I  
16 highly anticipate anywhere from two to three, four  
17 possibly recounts across the state.

18                     So this isn't just a Cochise County issue.  
19 It's statewide that I am very concerned about if we have a  
20 recount.

21           Q.     And so how would this hand count of all early  
22 ballots impact a recount?

23           A.     The chain of custody is a huge concern and we  
24 operate in good faith. So even if I were to get the  
25 ballots back, I still don't know from that gap, are they

1 still in the same batch, are they damaged. And it's not  
2 that -- ballots are very fragile. This is a long ballot.  
3 It's 19 inches. It has three folds. The timing marks,  
4 every time people handle them, it gets to be where the  
5 ballot becomes more fragile.

6 So if you have to hand count those and then you  
7 have to recount them in the tabulators, we can have a  
8 whole lot more duplications of those ballots, which that's  
9 a whole process. I don't know The Court really wants to  
10 get into, but opposite parties and they duplicate the  
11 whole ballot so the tabulator can count it because if  
12 there's any kind of damage, a tear, a rip, it won't count  
13 it.

14 Q. So when you talk about duplication, it is a  
15 matter of just those two parties team having to  
16 essentially move those ballots -- or those over to a new  
17 ballot so it can run through the tabulator?

18 A. Correct. Yeah, there's a whole process.  
19 There's a log. They are numbered. They are separated.

20 Q. So in terms of just in your experience with  
21 hand counts, how many staff are in the elections  
22 department to assist you?

23 A. We are a staff of three, including me.

24 Q. And how many staff are necessary to conduct the  
25 hand count, the one that you performed?

1           A.     We start out with all three in the morning and  
2 go through taking the oath, signing the people in, doing  
3 the training, which lasts about an hour, and we have 12  
4 people that do this from the parties. That's the number  
5 that we have all worked out because again this is a party  
6 process that we go through throughout the year. And so  
7 that three people at each table for four teams because we  
8 have two batches of 200 in two vote centers, so it's 12  
9 people. And then it takes two staff all day to just  
10 manage those four tables of people.

11           Q.     Okay. Speaking of the four tables, can you  
12 describe a little bit about the space that is necessary  
13 for the hand count?

14           A.     It is a room about half this size, which works  
15 fine, four tables. But to get more people in there, that  
16 would not be possible.

17           Q.     Do you know how much space would be necessary  
18 to do a full hand count of all the ballots?

19           A.     I haven't actually done the math on that  
20 because I have been busy trying to get this election done,  
21 but there's no -- there's no space in the [indiscernible]  
22 complex, which is the main county complex that would even  
23 have that remotely available.

24           Q.     And what are the current security measures when  
25 the hand-count process is being conducted?

1           A.     So our building is under camera security and  
2 alarm all the time. So we are basically closed to the  
3 public because the public doesn't need an elections  
4 department. They need the recorder because they need to  
5 do voter registration. Only candidates need us.

6                     So during the hand count the two staff are  
7 always available with the batches. Again, understanding  
8 we operate in, you know, a mode of trust, they are still  
9 under our care and custody and control, so we are in there  
10 the whole time. And part of the training is we use  
11 colored pens and there's no photography, and no putting  
12 extra marks on the ballot, that kind of thing.

13           Q.     Now, I believe that Recorder Stevens had  
14 mentioned something about using a three-person method. Is  
15 that the method that you use for hand counts?

16           A.     It is not. When we -- excuse me. When we --  
17 when I took over and we first started doing hand counts,  
18 we tried the three person call out method, and we found it  
19 very distracting because the people were together in a  
20 room and indoor voices sometimes get louder and louder.  
21 And the accuracy rate was not very well, so we moved to  
22 the stack method, which has been a lot more accurate for  
23 folks.

24           Q.     And what is the stack method?

25           A.     So that's where you call out yes or no. So

1 this is yes Mary Smith, no Mary Smith. So you have a pile  
2 of yeses and a pile of noes. You count the pile of yeses  
3 for Mary Smith. That's what you put on the tally sheet  
4 and that's what's verified against the batch result  
5 report.

6 And then you go to your no stack, like I am  
7 thinking in the office, Corporation Commission where you  
8 may have four candidates. So you go through the no stack  
9 and do the same thing. And that has been a lot quieter  
10 for them, and it has also been a lot more accurate for  
11 them.

12 Q. And I think we talked a little bit about chain  
13 of custody. In your experience have you ever had to  
14 relinquish custody of the early ballots to any other sort  
15 of third party?

16 A. No.

17 Q. And do you have any concerns about that chain  
18 of custody?

19 MS. MADDURI: Foundation, Your Honor.

20 THE WITNESS: That concerns me very much.

21 MS. ANDREWS: Overruled.

22 THE WITNESS: Yes, that concerns me very much  
23 because ultimately the officer in charge of elections is  
24 responsible until the time I sign them off to the  
25 treasurer's vault.

1 BY MS. ESTES-WERTHER:

2 Q. Are you aware of any penalties under state law  
3 as your duty as an election official?

4 A. This would be a Class 6 felony, I believe.

5 Q. And then are you also aware of the Elections  
6 Procedure Manual and violation of that manual?

7 A. Yes.

8 Q. Do you happen to know what that penalty is if  
9 you violate?

10 A. Off the top of my head, I don't, but I believe  
11 that's a felony as well.

12 FEMALE SPEAKER: (Inaudible.)

13 MS. ANDREWS: Thank you. Ms. Madduri.

14 MALE SPEAKER: (Inaudible.)

15 MS. ANDREWS: I'm still going in the same  
16 circle; right? I called on Ms. Madduri.

17 MALE SPEAKER: You were going backwards so I  
18 thought you had switched.

19 MS. ANDREWS: Ms. Madduri -- I like to keep --  
20 this makes sure my head goes in the right order. You  
21 don't want to confuse me. You can confuse yourself all  
22 you want. Okay? You may proceed whenever you are ready.

23

24 CROSS-EXAMINATION

25 BY MS. MADDURI:



1 Q. Good afternoon.

2 A. Good afternoon.

3 Q. Thank you for being here. I know it's not a  
4 good time for you, so I will keep this very brief. I just  
5 was hoping you could explain a little bit more about sort  
6 of what happens if the candidates deadline isn't meant and  
7 kind of what happens after that and sort of -- yeah, what  
8 happens if the candidates' deadline is not meant by your  
9 count?

10 A. Well, I like to say that has never happened, so  
11 I am not sure. All the repercussions, but it would be  
12 ungood, I think. Because there are such strict dead  
13 lines, we have got to make sure a county canvass is able  
14 to meet the deadlines for a state canvass. That is why  
15 they are set by statute.

16 So we -- we are always within two to four days  
17 of the deadline. There are so many audits, so many things  
18 that have to be done. We don't have the luxury of having  
19 off on Veterans Day or Sunday. We are working seven days  
20 a week and have been for many weeks now because of just  
21 the sheer amount of checks and balances that need to be  
22 done so that I can say, yes, this was a good election.

23 Q. And I understand that there are many different  
24 steps that you have to engage in once the polls close on  
25 election day.

1           But just to confirm, the hand-count audits that  
2 you have overseen in the past, just so it's not early  
3 ballots, I think you have said that those have never --  
4 you have never gone past the first round of that audit,  
5 which has the statutory minimum and maximum that you are  
6 permitted to do in that first round; is that right?

7           A.     Correct, we have never had to expand the hand  
8 count. And the hand count for us takes anywhere from four  
9 to nine hours on that Saturday. And so we have been lucky  
10 that we are able to work with the parties with the people  
11 they send that can get that done in that day. If we  
12 didn't get it done in that day, we would have to carry it  
13 over to Sunday, because by the time Monday comes around,  
14 then we have got equipment that's coming back that needs  
15 to be audited and checked and so many different things.  
16 That was part of the issue of trying to expand it, to do a  
17 full hand count, and just the time is not there for us.

18          Q.     Okay. And you said that typically finishes all  
19 of its processes that it needs to do for the canvass two  
20 to four days before the deadline; is that right?

21          A.     Before the state deadline, yes, so that we have  
22 the canvass set. And then our -- right when the board  
23 canvass, then that canvass gets sent to the state.

24          Q.     Okay. Based on your experience doing these  
25 hand-count audits and all of the other things that you

1 have had to do in past elections, does conducting the  
2 proposed full audit of early ballots, are you concerned  
3 that you -- your county overall would not be able to meet  
4 those deadlines?

5 A. I don't see how that could be done, but that's  
6 part of my concern with our staff of three doing it and  
7 trying to hire additional people and train them at this  
8 late of date because that wasn't brought up until just  
9 recently.

10 Q. Okay. In your role as elections director, do  
11 you believe that that would cause any concerns among  
12 voters in Cochise County?

13 A. I believe people have spoke at the public  
14 meeting that indicated that, that they were concerned  
15 about the proposed full hand count, absolutely.

16 Q. Is it important to you that the election is  
17 conducted by the letter of the law, such that it is kind  
18 of lives up to the standards that you have previously  
19 conducted, the elections?

20 A. Absolutely.

21 Q. And are you concerned that the hand audit would  
22 comprise that?

23 A. I am concerned it could comprise the chain of  
24 custody and the position that I am put in by Staff Shoot.

25 Q. I don't think I have any other questions for

1 Director Marra. Thank you for your time.

2 MS. ANDREWS: Thank you. Mr. Blehm.

3

4

CROSS-EXAMINATION

5

BY MR. BLEHM:

6

Q. All right. Good afternoon.

7

A. Good afternoon.

8

Q. Who is your boss? Who do you answer to?

9

A. I report to Rich Karwaczka, the county

10 administrator.

11

Q. The county administrator. Who does he report

12

to?

13

A. He reports to the Board of Supervisors.

14

Q. All right. So I believe you testified earlier

15

that you don't report to the Board of Supervisors. Are

16

they superior to you?

17

A. Yes, absolutely.

18

Q. And so do they dictate what work you can and

19

cannot do?

20

A. Through the county administrator and through

21

statute, sure.

22

Q. Okay. So through the county administrator and

23

through statute they pass a law on the instructions on

24

what you can and cannot do; correct?

25

A. Correct.

1 Q. Okay. And by statute are you aware that the  
2 County Board of Supervisors can also dictate that the  
3 County Recorder can conduct an audit of the ballots.

4 FEMALE SPEAKER: Objection; legal conclusion.

5 MS. ANDREWS: Overruled. The witness may  
6 answer.

7 THE WITNESS: I imagine the Board can put any  
8 motions and pass anything that they would like. That's  
9 their -- that's their prerogative.

10 BY MR. BLEHM:

11 Q. That's their job; right?

12 A. Correct.

13 Q. To run the county?

14 A. Correct.

15 Q. And you can't -- you can't really do anything  
16 about that, can you?

17 A. I'm an employee.

18 Q. Okay. Are you upset that the County Recorder  
19 was chosen to conduct this hand recount?

20 A. I am not upset. I am concerned that we have  
21 legal issues.

22 Q. Okay. And I believe you said one of these  
23 legal issues related to the chain of custody of the  
24 ballots; is that correct?

25 A. Correct.

1 Q. Okay. The early ballots, let's talk about the  
2 early ballots. Who do you get those from?

3 A. The County Recorder's office.

4 Q. The County Recorder's office. And that's who  
5 you would give them back to for this audit; is that  
6 correct?

7 A. I haven't actually had a plan or seen a formal  
8 chain of command, but that is the proposal, yes.

9 Q. All right. And so I will just shorten that  
10 question up for you to a yes or no. If this audit moves  
11 forward and the County Recorder is in charge of running  
12 this audit, you will transfer the early ballots in your  
13 possession to the County Recorder; correct?

14 A. Yes.

15 Q. Thank you. All right. How do you receive  
16 those ballots currently from the County Recorder?

17 A. So they are transported and locked secured  
18 plastic tubs with two people of opposite party that either  
19 we pick them up from them or they deliver them to us, and  
20 there's a chain of custody that's signed off on.

21 Q. Oh, okay. So there is a chain of custody that  
22 your employees, I presume -- it's not you personal, but  
23 your employees assume responsibility for those ballots and  
24 you execute formal legal documents to transfer that chain  
25 of custody; is that correct?

1 A. Correct.

2 Q. Okay. So are you supposing that the County  
3 Recorder is just going to ask you to return all of those  
4 ballots without executing a chain of custody for them?

5 A. I have no idea. I imagine not.

6 Q. Do you know if the Elections Procedures Manual  
7 requires that these ballots be handled and transferred  
8 with chain of custody documentation?

9 A. Uh-huh. Yes.

10 Q. Why is that?

11 A. Security of the ballots.

12 Q. Security of the ballots. Okay.

13 And so you execute those documents because it's  
14 your duty under the law when you accept those ballots;  
15 correct?

16 A. We accept the ballots with the chain of custody  
17 forms provided by the recorder, so the recorder does the  
18 forms for that part, so, yes, we sign the form.

19 Q. You sign the forms and your employees declare  
20 that we have received X number of ballots from the  
21 recorder?

22 A. Correct.

23 Q. Correct. Okay. And so you don't know as you  
24 sit here today whether or not the County Recorder will  
25 follow the same process and procedure when receiving those

1 ballots back from you?

2 A. I don't have any doubt that he would have a  
3 procedure. I just don't know what it is.

4 Q. Okay. All right. But in your mind you do  
5 believe that you will have to provide and compute  
6 additional chain of custody documents when you transfer  
7 those ballots to him?

8 A. Yes.

9 Q. I believe you said not doing so is a felony  
10 under the Elections Procedures Manual?

11 A. I don't know all the actual legal repercussions  
12 for every single thing, but I take that -- you know, any  
13 time I would violate, I am consider it to be a felony  
14 offense, if it's an intentional act, then yes.

15 Q. Well, so the testimony you gave -- well, strike  
16 that.

17 Do you have any reason to believe that the  
18 County Recorder when he conducts this audit intends to  
19 violate Arizona law?

20 A. I don't have any idea one way or the other.  
21 Knowing his reputation, I would hope not.

22 Q. Knowing his reputation do you believe that in  
23 conducting this hand-count audit he intends to violate the  
24 law?

25 A. Again, I think that's why we are here in court



1 today because I think a big part of the issue is who is  
2 responsible for that and can that duty be delegated to  
3 someone else.

4 Q. I think we just discussed who is responsible  
5 for doing what in the county when you agreed that the  
6 county Board of Supervisors is ultimately responsible for  
7 deciding who does what.

8 You sit in your office at the pleasure of the  
9 county Board of Supervisors?

10 A. I report to the county administrator.

11 Q. Who reports to whom?

12 A. The Board of Supervisors.

13 Q. The Board of Supervisors. Okay.

14 And so if the Board of Supervisors wanted to  
15 remove you in your capacity as the director of elections,  
16 could they do that?

17 A. They could do that through the county  
18 administrator I would imagine.

19 Q. But they could do that?

20 A. I'm an employee.

21 Q. Okay. And so what would lead you to suspect  
22 they do not have the authority to task the County Recorder  
23 with leading a hand-count audit of the ballots in this  
24 election?

25 A. It's not a question of their authority to put

1 that demand out and make that motion and require that.

2 That's not my question. They have absolutely the right to  
3 do that.

4 Q. They have the right to do that.

5 Then what's your question with regard to the  
6 legality of this hand-count audit?

7 A. The concern that that is able to be a delegated  
8 duty to someone other than the election official in  
9 charge.

10 Q. Okay. So you believe that this is your baby,  
11 don't you?

12 A. I don't believe that. I am taking advice from  
13 the county attorney who interprets that statute.

14 Q. Okay. But you are not happy that the County  
15 Board of Supervisors selected the County Recorder to lead  
16 this audit, are you?

17 A. I'm still doing the actual statutory duty I am  
18 supposed to do, so I am doing the same hand count I have  
19 always done. I don't know that that's happy or unhappy.  
20 My duty hasn't changed.

21 Q. Are you currently doing a hand-count audit?

22 A. We will be starting, at least, unless I am  
23 informed otherwise from this court or someone else in that  
24 authority, that -- they made it clear our hand count  
25 starts 24 hours after the election.

1 Q. Will be, you said. My question was, are you  
2 currently conducting a hand-count audit?

3 A. I am going to say we are in the middle of the  
4 election. The batches have been sequestered ready for the  
5 hand-count audit, so I would say we are in the process of  
6 it.

7 Q. Are you counting ballots?

8 A. We are not counting them for the hand-count  
9 purpose. We are tabulating ballots.

10 Q. The ballots that are sequestered we'll just go  
11 with 100 percent of ballots that are hand counted then;  
12 correct?

13 A. If that's where they go, then yes.

14 Q. All right. And so let's talk a little bit  
15 about ballots. You produce the ballots; correct?

16 A. We create the election and design the ballot,  
17 yes. I actually don't print them myself. We have a  
18 printer for that, but, yes, that's part of our job.

19 Q. Who do you use to print them?

20 A. Runbeck prints our ballots.

21 Q. Runbeck prints your ballots. I presume you do  
22 not stuff them in little envelopes and mail them to  
23 voters, do you?

24 A. I do not. That's the Recorder's responsibility  
25 to mail the ballots.

1 Q. All right. So now we learn more about the  
2 Recorder's responsibility with respect to his  
3 participation in elections.

4 The County Recorder is responsible for ensuring  
5 ballots are mailed to early voters; correct?

6 A. Correct.

7 Q. So you don't do that job?

8 A. Correct.

9 Q. You simply design the ballot?

10 A. Correct.

11 Q. You have held a ballot? You have voted; right?

12 A. I sure did.

13 Q. All right. You have talked about these ballots  
14 being fragile. When you go vote, is your ballot fragile?

15 A. So in Cochise County --

16 Q. My question is, when you go vote, is your  
17 ballot fragile?

18 A. No.

19 Q. No. How thick is the ballot paper?

20 A. When you go vote or early ballots?

21 Q. When you get an early ballot, how thick is the  
22 ballot paper?

23 A. That's fairly thick.

24 Q. The ballot paper is fairly thick. Is it  
25 thicker than this little piece of paper I have got in my

1 hand?

2 A. It is.

3 Q. It's thicker, and you don't even have to touch  
4 this paper to know that, do you?

5 A. Uh-huh.

6 Q. And so you talk about these ballots as being  
7 fragile, especially the early ballots I think you were  
8 making reference to as being fragile. So this is sort of  
9 I'm going to go down two roads with you at the same time.  
10 One of them is to sort of address a concern of the  
11 plaintiffs' witnesses, and the other is to talk about the  
12 fragility of these ballots.

13 Now, what is your understanding of the process  
14 when the County Recorder -- well, the County Recorder  
15 doesn't mail ballots, does he, do you know?

16 A. They contract with Runbeck to mail them on  
17 their behalf.

18 Q. So the County Recorder contracts with Runbeck  
19 to print the ballots and the ballot envelopes; is that  
20 correct?

21 A. No. The elections department is in charge of  
22 paying to have them printed.

23 Q. You pay to have them printed. Who do you pay  
24 to have them printed?

25 A. Runbeck prints them.

1 Q. Runbeck. So you pay Runbeck to have the ballot  
2 and the ballot envelopes printed; correct?

3 A. The ballots.

4 Q. The ballots. Who does the ballot envelopes?

5 A. The recorder's office.

6 Q. The recorder does. What about the envelope,  
7 the yellow envelope, the return envelope?

8 A. That's the affidavit envelope and the green  
9 outer envelope are the responsibility of the recorder's  
10 office.

11 Q. Okay. And so the recorder is responsible for  
12 both envelopes?

13 A. Correct.

14 Q. All right. Does Runbeck print those?

15 A. I believe so.

16 Q. You believe so. So Runbeck prints everything;  
17 right?

18 A. They print the ballots. I'm not sure about  
19 anything else, but I would imagine they would print those  
20 envelopes.

21 Q. After everything is printed by Runbeck, do your  
22 elections volunteers and employees sit around on the  
23 weekend stuffing all that into ballot envelopes that the  
24 County Recorder then mails?

25 A. No.

1 Q. That is done by who?

2 A. Runbeck.

3 Q. Is that done by machine or by hand, do you  
4 know?

5 A. I believe machine.

6 Q. It's done by machine. Okay. And so these  
7 ballots that are fragile are printed by these huge  
8 machines, and then the machines stuff both the ballot and  
9 the affidavit envelope into the mailing envelope; correct?

10 A. I believe so.

11 Q. And then Runbeck gives them to the postal  
12 service; is that correct?

13 A. I really don't know their process beyond that,  
14 but yes, they do mail them.

15 Q. They mail them. Where do they get the  
16 information to send them to? From the County Recorder?

17 A. Correct.

18 Q. So the first step of the process I guess is  
19 two-part. You design the ballots, send the information  
20 over to Runbeck to have printed; correct?

21 A. Correct.

22 Q. And then the County Recorder sends voter  
23 registration information, voter data to Runbeck on which  
24 to print these envelopes; is that correct?

25 A. Correct.

1 Q. All right. And so then these big machines  
2 print these ballots, and then other big machines stuff  
3 them all into envelopes, and then other machines sort them  
4 and send them out to the postal service; correct?

5 A. I would imagine. I again don't know their  
6 step-by-step process.

7 Q. Have you ever worked for the postal service?

8 A. I have not.

9 Q. Neither have I, but I can imagine they have big  
10 machines too, don't they, that handle these ballots that  
11 sort everything and process, or is it all people back  
12 there in the back room, do you think?

13 A. I have no idea. I have no idea.

14 Q. So these ballots then, by the time they get to  
15 the voters who are intended to vote these ballots, have  
16 been handled how many times, by how many people, do you  
17 think?

18 A. I couldn't even guess.

19 Q. It could be hundreds?

20 A. I have no idea.

21 Q. Couldn't it?

22 A. Perhaps.

23 Q. Perhaps. Okay. And they are all produced and  
24 dealt with with large machines; correct?

25 UNIDENTIFIED SPEAKER: Objection; calls for



1 speculation.

2 THE COURT: Overruled. If the witness knows,  
3 she may answer.

4 THE WITNESS: I would imagine. I think you  
5 print on machines, and I don't know the postal service  
6 process.

7 BY MR. BLEHM:

8 Q. So the voter then pulls it out of the envelope,  
9 and the voter votes it, and they can either put it in the  
10 mail for the postal employee to take back, at which point  
11 it's sorted again at the postal facility before it's taken  
12 to who?

13 A. They're delivered to the recorder's office.

14 Q. The recorder's office?

15 A. Uh-huh.

16 Q. And that's where then the signature  
17 verification takes place?

18 A. Correct.

19 Q. Okay. And they're not removed from the  
20 affidavit envelope at that time; correct?

21 A. Correct.

22 Q. You do that?

23 A. Well, early boards do that, but yes, the  
24 elections department does that, yes.

25 Q. And so by the time these fragile ballots have

1 left Runbeck and get back to you, right, they have been  
2 through a lot, haven't they? I'm not sure I'd want to be  
3 a ballot.

4 A. Well, they're in packets, and they're in double  
5 envelopes all that time, so they're fairly secure at that  
6 point.

7 Q. It isn't true, is it? They're not always in a  
8 double envelope, are they?

9 A. Well, they're mailed in an envelope that's  
10 mailed in a packet, so there's -- there's two envelopes in  
11 there.

12 Q. There are two envelopes and a ballot in the  
13 packet, but the ballot is not stuffed into the affidavit  
14 envelope and mailed, is it?

15 A. No, not in the affidavit envelope.

16 Q. No. So technically these ballots are only in  
17 one envelope the entire time?

18 A. I suppose.

19 Q. And so the voter can also elect to do what with  
20 that ballot? The voter can take that ballot and drop it  
21 off at the county recorder's office or a drop box?

22 A. They can use a drop box, yes. They have more  
23 than one.

24 Q. Do you know what the process is after it's  
25 dropped off at the drop box?

1           A.     That's the recorder's responsibility. I'm not  
2     sure of their exact process.

3           Q.     Understood. And so we won't ask you that  
4     question then.

5                     So the ballots nevertheless, they're made to be  
6     durable; correct?

7           A.     Correct.

8           Q.     And they're made to be durable because they go  
9     through a lot; correct?

10          A.     Correct.

11          Q.     And then you sequester them after you count  
12     them, and you store them in a separate box in your cage, I  
13     called it; correct?

14          A.     Correct.

15          Q.     And then when you go and do your hand-count  
16     audit after a general election of any type, let's say, you  
17     pull them out of the cage, and they're being handled  
18     again, aren't they?

19          A.     They are.

20          Q.     Okay. How many more times are these ballots  
21     going to be handled if this audit moves forward?

22          A.     I have no idea, but if we're looking at 300  
23     people and three people to a table, I have no idea how  
24     many people will touch them at that point.

25          Q.     Okay. That's the audit itself that was

1 described to you, but what about getting to the audit?  
2 Are they going to touch a lot of different hands, or are  
3 you simply going to sign these ballots over on the chain  
4 of custody form so everything can be done legal to the  
5 County Recorder, who will then put them in his vault so  
6 that he can process them in his hand-count audit?

7 A. I'm not sure what your question is.

8 Q. Never mind.

9 My point is, you described these ballots as  
10 being like flowers, but they're not, are they?

11 A. They are not flowers.

12 Q. No.

13 A. When we talk about a ballot, and you've made it  
14 very clear that they're folded and printed and put in  
15 envelopes and handled, and that's all true. The folds in  
16 that thick paper are pretty thick. So when they get run  
17 through high-speed tabulators, it doesn't weaken them, but  
18 the timing marks around them. There are possibly food  
19 stamps on them, other things on them that cause them to  
20 have to be duplicated or have issues. The more --

21 Q. These are ballots with food stains --

22 THE COURT: Mr. Blehm? Mr. Blehm, I was  
23 interested to hear where she went with that and please let  
24 her finish that answer. Go ahead, ma'am.

25 THE WITNESS: Thank you, Your Honor.

1           So the more these ballots are run through the  
2 high-speed tabulator, the more chance they have of being  
3 torn. I believe the recorder mentioned when they use the  
4 envelope opening machines, sometimes those are sliced. By  
5 the time we get them, sometimes they're cut by their  
6 machine before we have opened them. So that's what I  
7 meant by being fragile.

8           They're also very long being 19 inches. And  
9 with those folds in them, they are secured in outer  
10 wrappers with a seal. But the more people that are  
11 handling those, you don't exactly handle them straight on  
12 the bottom. They could tend to fold over. That fold on a  
13 timing mark means it won't be read by the machine. It has  
14 to be duplicated.

15           You made a comment about the storage and how  
16 they're transported. Again, I have not seen anything as a  
17 plan or had any discussion about that. But when I  
18 tabulate those, they are wrapped in those bundles with a  
19 security seal, and they're placed in a storage box, not a  
20 waterproofed plastic foot locker kind of container.  
21 They're put in a storage box similar to what you would  
22 store anything in a Bankers Box.

23           And then those boxes are sealed, stored in the  
24 ballot cage until they go into the treasurer. So if  
25 they're going to put them into plastic foot lockers,

1 that's going to be more people that are handling those  
2 ballots, that becomes a concern to me in the event we have  
3 recounts and those machines all have to be run through  
4 tabulators again because the more people that have handled  
5 them, they're not going to tabulate. We're going to have  
6 to have them duplicated, which again is two people of  
7 opposite party. That system is secure, but that's a time  
8 thing again.

9 BY MR. BLEHM:

10 Q. Okay. So the vast majority of ballots that are  
11 going to be counted in this election are early ballots;  
12 correct?

13 A. Correct.

14 Q. What percentage would you estimate?

15 A. 80 percent of our county roughly votes early by  
16 mail.

17 Q. And we know that that the ballots that you go  
18 get at the election center -- do you have print on demand?

19 A. No, we do not.

20 Q. Oh, you don't?

21 A. No.

22 Q. So you have ballots printed for every precinct?

23 A. No, we do not. We are low tech --

24 Q. If I go vote, for example, I walk in. My name  
25 is Joe. I'm in precinct 137, and I'm at a voting center

1 that's not in precinct 137. How do you [indiscernible]?

2 A. So we use electronic voting machines.

3 Q. Okay.

4 A. So Joe, I'm assuming you would have your proper  
5 identification. You would sign in with the wonderful poll  
6 workers on the poll book, and they would print the ballot  
7 that you use in the machine that has the barcode for your  
8 particular ballot style. So that's a totally different  
9 ballot paper. That's why I asked for clarification when  
10 you asked your other question.

11 Q. Understood, but they print my ballot; right?

12 A. No.

13 Q. No. I vote on the machine?

14 A. Uh-huh.

15 Q. And then the machine prints my ballot?

16 A. Correct.

17 Q. So nevertheless, the ballot is printed, and  
18 that's a thermal more fragile paper; correct?

19 A. It's a thermal paper, and it doesn't have folds  
20 in it, so it doesn't tend to have any kind of rips or  
21 tears. We rarely would have to duplicate those ballots.

22 Q. So how many -- in the 2020 election how many  
23 ballots did you have to duplicate because the machine  
24 would not read it?

25 A. Because of unreadable -- that it was

1 unreadable, not damaged or not torn or anything, I'm going  
2 to say roughly 100. I don't have the exact figure with  
3 me.

4 Q. 100 ballots. And that's after these ballots  
5 transited through the U.S. Postal Service system multiple  
6 times, went through the County Recorder's processes, and  
7 wound up with you going through machines, 100 ballots, out  
8 of how many total early ballots cast?

9 A. I do have that figure.

10 Q. What is it?

11 A. So in the 2020 general, we had 48,865 early  
12 votes cast. And those ballots were tabulated and then put  
13 into their Banker Boxes secured because the majority of  
14 them weren't sequestered for hand count, and they were  
15 never touched again.

16 Q. Okay. So excluding those that come in damaged,  
17 and trust me, I have touched a lot of ballots, so I know  
18 they can be damaged, excluding those that come in damaged  
19 from either the postal service or from the voter  
20 themselves who sometimes will do things to their ballot  
21 that we don't want to talk about, but excluding those, you  
22 have 100 that you had to duplicate because the machine  
23 would not read it?

24 A. Uh-huh.

25 Q. Only 100. What percentage is that?



1           A.     And I'm speaking strictly because that it was  
2     an unreadable image.  We're not talking voter intent.  
3     We're not talking overvote kind of things where -- because  
4     that puts it more like the 6- or 700 mark at least.

5           Q.     With voter intent?

6           A.     With voter intent.

7           Q.     Really quickly, do you have any reason to  
8     believe that the County Recorder in the process he intends  
9     to use intends to alter voter intent in any way?

10          A.     Again, we operate on a sense of honesty here,  
11     so I wouldn't think that, but I don't know what happens  
12     when those are out of my control.  I don't know.

13          Q.     But when they're out of your control and you  
14     have executed a chain of custody document given possession  
15     to the County Recorder?

16          A.     That would be the case.

17          Q.     Right?  It doesn't matter, does it, your  
18     ballots?

19          A.     It matters to me because if there's a recount,  
20     and they have got to come back to me, I'm still  
21     responsible ultimately for the ballots, done or lot.

22          Q.     My question is, do you have any reason to  
23     believe the intent to change whatever would likely to be  
24     voter intent on the ballots?  Do you believe he intends to  
25     mark ballots to alter a voter's intent?

1 A. I never said that.

2 Q. I'm asking if you had reason to believe. I'm  
3 not accusing of you of saying that.

4 A. I thought I answered that. We operate on a  
5 sense of honesty here. I wouldn't think that.

6 Q. So aside from voter intent and ballots being  
7 damaged, only 100 out of 40-some-thousand and so, you're  
8 concerned now that these ballots are going to go through  
9 an audit process, which they go through an audit process  
10 anyway; correct? A hand-count process, some of them? But  
11 you're concerned that somehow this audit process is now  
12 going to damage these ballots such that they're not  
13 readable by a machine; is that correct?

14 A. Yes. A certain amount of them, yes.

15 Q. What percentage would you estimate might be  
16 damaged?

17 A. I -- again, I haven't seen a plan or heard any  
18 final details, so I have no idea, but the more people that  
19 you have handle the ballots, the more chance you have of  
20 bending, timing mark issues, tears in the fold. So I have  
21 no idea.

22 Q. When you do an audit, how many people handle a  
23 ballot?

24 A. There would be somebody who pulls that batch  
25 out of the box because again we have only sequestered the

1 number that we're required to have for the expanded, if it  
2 went that far, audit. So the other -- in this case in the  
3 2020 general was close to 47,000 are still safe in the  
4 ballot cage. So it's just going to be those couple  
5 thousand. So it would be somebody from our staff who  
6 pulls that batch out of the box, puts it on the table for  
7 the three people that are going to count the ballots in  
8 our hand count process, and then the staff that wraps that  
9 ballot batch back up and puts it in the box.

10 Q. So you've got one staffer that pulls the batch  
11 out. You have three people then who are going to handle  
12 these ballots at the table?

13 A. Uh-huh.

14 Q. And then you have one staff member who is going  
15 to put them back in the box?

16 A. Uh-huh.

17 Q. All right. You heard the County Recorder  
18 testify as to what his proposal was, didn't you?

19 A. I did.

20 Q. All right. And he testified I believe that  
21 he's going to have, you know, three people to count these  
22 ballots? That's three people at the table?

23 A. I'm not really clear on that --

24 Q. Let's say he does, though.

25 A. -- because he indicated he was still kind of

1 working through those things, so I'm not real clear on  
2 that.

3 Q. Let's say he does because he testified he can  
4 have three people per table. So a wash three people per  
5 table, isn't it?

6 A. I suppose.

7 Q. So let's say he has one person bring those  
8 ballots and put them on the table for the three people to  
9 count. That's a wash, isn't it?

10 A. But did you count and are you including --

11 Q. That's a wash?

12 A. If it's one person, sure.

13 Q. Especially with your system; right?

14 A. Sure.

15 Q. And then he has one person take those ballots  
16 back and put them back in the box. That is a wash;  
17 correct?

18 A. Uh-huh.

19 Q. So I guess your only concern then is that you  
20 don't really know if they're going to be 100,000 other  
21 people touching those ballots other than those five?

22 A. Well, I thought that was already made clear  
23 because they're going to be putting them into plastic tubs  
24 and transporting them back and forth every day. So I'm  
25 not sure how many other people that would be.

1 Q. Now, are they going to be touching the ballots,  
2 or are they going to be putting the boxes in the tub?

3 A. I don't know.

4 Q. You don't know?

5 A. I don't know.

6 Q. We don't know. But my point is simply this,  
7 can you agree, that with respect to the actual audit  
8 procedures, there are not going to be any other people  
9 touching these ballots that's really different than your  
10 procedures; would you agree?

11 A. I'd agree if it's three at a table and one  
12 person putting them in and taking them out, yes.

13 Q. All right. Okay. I believe you said in  
14 your -- in your recount, you pull two batches of 400  
15 ballots; is that correct -- your hand audit?

16 A. We have batches in 200, so we select two, which  
17 would be 400. That's a minimum.

18 Q. Okay. So your minimum audit of an election  
19 involving -- and that's for this election?

20 A. That's based on the number of early ballots  
21 that we'd had tabulated on election morning. That's  
22 assuming we have 40,000 early ballots. But there is a  
23 minimum of 400.

24 Q. A minimum of 400. But you're assuming maybe  
25 approximately 40,000 ballots?

1           A.    That was our highest when we picked these  
2 originally, yes.

3           Q.    And I want to talk a little bit about, you  
4 know, there's a lot of controversy these days, and you're  
5 an election administrator, so I know you've got to be  
6 aware of it, a lot of controversy these days, isn't there,  
7 surrounding elections?

8           A.    I think there's a lot of confusion.

9           Q.    There's confusion?

10          A.    You could probably term it 30 different words.

11          Q.    I would agree there's a lot of confusion.  But  
12 would you agree there's a lot of controversy as well?

13          A.    Uh-huh.

14          Q.    Yeah?  A lot of controversy, a lot of  
15 confusion.  And so I sort of want to talk a little bit  
16 about the public policy behind, you know, auditing  
17 elections and the public policy behind allowing county  
18 election administrators to exceed the minimum required  
19 number in an audit.

20                You're aware that Maricopa County in 2020  
21 counted more than the minimum required by law.  Are you  
22 aware of that?

23          A.    Are you referring to the audit the Senate  
24 required?

25          Q.    No.  I'm talking about Maricopa County

1 performing its required statutory hand-count audit  
2 following the 2020 election. Are you aware that they  
3 counted more than the statutory minimum?

4 A. I haven't followed all that, to be honest, to  
5 track all the numbers. That was two years ago, and I have  
6 done I don't know how many elections since then.

7 (Background speaking off the record.)

8 Q. So you are unaware that Maricopa County counted  
9 more ballots than was required by law?

10 A. I -- I -- again, I don't keep track of that  
11 from two years ago. I couldn't tell you exactly how many  
12 they counted.

13 Q. I'm going to hand you what's been marked as  
14 Exhibit A.

15 UNIDENTIFIED SPEAKER: Your Honor, may we see  
16 that before she answers?

17 BY MR. BLEHM:

18 Q. All right. I'm handing you what I will  
19 represent is a November 4, 2020, correspondence from  
20 Attorney General Mark Brnovich to Chairman Hickman,  
21 Maricopa County Board of Supervisors. And have you ever  
22 seen that correspondence before?

23 A. I probably have. I can't recall.

24 Q. Could you read that last paragraph?

25 A. Although at this point in time we have no

1 reason to believe the tabulation equipment did not work  
2 properly, an expanded hand count may help alleviate  
3 concern and provide public confidence in the integrity of  
4 the vote tabulation process. Thank you for your prompt  
5 attention to this matter.

6 Q. And so is that the Attorney General -- well,  
7 first of all, the Attorney General, are they the chief law  
8 enforcement officer in the State of Arizona?

9 A. Yes.

10 Q. If you need a legal opinion as the Director of  
11 Elections, you know, who do you turn to for legal  
12 opinions?

13 A. I turn to the County Attorney's office.

14 Q. Who does the County Attorney turn to?

15 A. I'm not sure what their process is. I imagine  
16 they could go to the Attorney General.

17 Q. They could go to the Attorney General?

18 A. Uh-huh.

19 Q. Does this correspondence state anything with  
20 respect to, you know, why it might be a good reason to  
21 have expanded-scope audits of elections?

22 A. I can't answer that. He's suggesting that they  
23 count more. That doesn't say they did count more.

24 Q. He's suggesting they count more because -- tell  
25 me if I read this incorrectly -- because it may help



1 alleviate concern and provide public confidence?

2 A. That's what the letter says.

3 Q. Yes. Okay. And so what do you think about  
4 expanded audits? Do you disagree with them?

5 A. I think there's a policy in the procedures  
6 manual and in statute that defines how and when an  
7 expanded hand count is required.

8 Q. Okay. You said required?

9 A. Uh-huh.

10 Q. You've read the EPM; correct?

11 A. A couple times.

12 Q. You've been in court all day today; correct?

13 A. I have.

14 Q. You've heard the testimony about the proposed  
15 EPM submitted by Secretary of State Katie Hobbs; correct?

16 A. I have.

17 Q. And in that EPM and the current EPM governing  
18 Arizona election law, 2019 version, does it not state that  
19 the county can count more early ballots than the statutory  
20 minimum?

21 A. It does.

22 Q. Does it say they cannot count them all?

23 A. It does not.

24 Q. So again, I'll go back to my egg analogy. If  
25 it says you have to eat two eggs, that does not say you

1 cannot eat more. You can eat more; correct?

2 A. That's absolutely your entitlement, but you  
3 probably had lunch, and I'm not sure if you're hungry, but  
4 yes.

5 Q. You're right. I had lunch, and no, I am not  
6 hungry anymore.

7 And so expanded audits in today's day and age,  
8 do you think they might be a good thing to help alleviate  
9 the public's concern about what is happening in our  
10 elections?

11 A. I deal with the public all day every day. And  
12 I have no idea what would satisfy public anymore.

13 Q. Are there a lot of members that you encounter  
14 in the public that say what's going on in our elections?

15 A. No.

16 Q. No? You don't hear that at all?

17 A. I encounter a lot of people that are just angry  
18 and scream and yell and leave angry voice mails and hang  
19 up. That's what I experience the most.

20 Q. Well, I'm really sorry to hear that. That  
21 doesn't sound like a very good day. But there's a lot  
22 of -- is there -- do you sense a lot of since says  
23 cynicism about elections in the United States?

24 A. I don't really speak to people, you know,  
25 outside of the county very much, so I hear from county

1 voters, and I think we're about half and half.

2 Q. About 50/50?

3 A. Yeah.

4 Q. We're a nation divided about as divided as a  
5 nation gets, are we not?

6 A. I don't know again about the nation. I just  
7 judge -- I don't get calls from people mostly from other  
8 places. I get calls from Cochise County voters.

9 Q. So here we are today, and we have plaintiffs,  
10 and we have defendants, and plaintiffs are asking this  
11 court, right, to tell Cochise County, the Cochise County  
12 Board of Supervisors that you cannot count more than  
13 1 percent of your early ballots. And then we have  
14 defendants that say, gosh, the law lets us count them all.  
15 Why can't we count them all? Why can't we assuage the  
16 feelings our voters have about the election by showing  
17 them through a hand recount?

18 UNIDENTIFIED SPEAKER: Object to the form.

19 THE COURT: Overruled.

20 BY MR. BLEHM:

21 Q. Why can't we do that?

22 A. That's a decision for the court, Your Honor.  
23 I -- I can't answer legal questions.

24 Q. Do you think a hand recount might help  
25 alleviate the 50 percent of voters in your county who do

1 not trust machines? Do you think it might help alleviate  
2 some of the concerns they have?

3 A. Based on the plan we have now, no.

4 Q. No? Why not?

5 A. Because there's not going to be anything to tie  
6 those results to. There's not a batch result report, and  
7 I counted 12,000, roughly, ballots already in batches of  
8 200. There's not going to be anything to tie those to  
9 except the actual results of the final, final election.  
10 So I don't think it's going to alleviate that.

11 Q. If they -- if they match, wouldn't that  
12 alleviate concern?

13 A. It would alleviate concern if they matched is  
14 what you said. And again, they can't under -- under the  
15 hand-count policy that we have in here, law, procedure,  
16 however you determine it, it's done batch by batch,  
17 totaled out to those batch reports.

18 Q. Correct. So I guess this gets to how you store  
19 the ballots; right? I'm very familiar, for example, with  
20 Maricopa County and how they do their elections, and so  
21 I'm going to use them as an example just to see if you do  
22 things differently to make it easier for me, okay, because  
23 I'm slow. So when Maricopa County counts a ballot --

24 THE COURT: Hang on for just a second for a  
25 couple reasons. Number one, we are going to need to take

1 a break. Number two, I want to remind everybody it's  
2 3:25. We need to finish this witness, and I'm sure  
3 counsel would like to argue the case as counsel always  
4 does. And we're going to finish today at 5:00. I'm not  
5 going to keep folks here past 5:00.

6 MR. BLEHM: Understood, Your Honor.

7 THE COURT: So I don't know if we need a break  
8 now to ensure that that can happen or if we need a break  
9 after your questioning, and I'm not trying to limit, but  
10 I'm trying to advise that if we continue to question,  
11 which is fine, the cost of the argument is going to be  
12 short.

13 MR. BLEHM: Understand, Your Honor, and I am  
14 just about done.

15 Q. And so Maricopa County, they kept their ballots  
16 in batches of 200 ballots, and out with the machine it  
17 spits a batch sheet that stays with those ballots. Do you  
18 do the same thing?

19 A. A batch sheet?

20 Q. Yeah, a batch slip. They have got a little  
21 batch slip that says there are 157 ballots in this batch  
22 slip or there are 200 ballots, or do you have some sheet  
23 that comes out with those ballots that stays with those  
24 ballots?

25 A. But you're not referring to a batch sheet as a

1 batch result.

2 Q. Whatever you do, how do you do it?

3 A. Because there is a report that prints out that  
4 says, yes, 200 ballots or 199, but it doesn't have results  
5 on it.

6 Q. Okay. But that doesn't really matter, does it?

7 A. It does matter.

8 Q. Why does that matter?

9 A. Because that's how you tie in the results per  
10 race per batch.

11 Q. Only if you do it your way? Only if you do it  
12 your way, okay, which is not required by the EPM, is it?

13 A. I believe it is.

14 Q. The EPM gives you a great deal of discretion in  
15 which batches you select, doesn't it?

16 A. It does.

17 MR. BLEHM: Thank you, Your Honor. I'm done.

18 Shall we break before Mr. Kolodin?

19 THE COURT: I think that's probably a good  
20 idea. Let's take 10 minutes because we're going to take a  
21 five-minute cumber break. Let's come back at 35 of.

22 (Recess was taken.)

23 THE COURT: Thanks everyone. Please be  
24 seated. We are back on the record. The record will  
25 reflect the presence of same counsel, same parties.

1           Everybody, I want to put something on the  
2 record. Apparently there was a request from a local -- I  
3 presume local media member who wished to have a telephone  
4 in the courtroom for purposes of taking photographs and  
5 videos. Pursuant to Supreme Court Rule 122 I require this  
6 be held in advance, be made in advance much like Cochise  
7 County does as a general rule. I was not made aware of  
8 the request until after lunch today. I denied it because  
9 I didn't have the opportunity to discuss with anyone the  
10 opportunity as I think the rule requires. And so I want  
11 everybody to know that happened.

12           It is not that I don't believe it is  
13 appropriate to allow the press to have access, in fact,  
14 quite the opposite. I had press here in the courtroom and  
15 press on our call-in lines I think five or six different  
16 members of the media. And it's not that I don't believe  
17 that cameras should be in the courtroom. It's just that  
18 we didn't have the appropriate ability to have the hearing  
19 that Court thinks is required under Rule 122. So for that  
20 reason it was denied.

21           I just need to make a record of that to let  
22 you all know that happened.

23           With that having been said, Mr. Kolodin, is  
24 it your opportunity now?

25

## 1 CROSS-EXAMINATION

2 BY MR. KOLODIN:

3 Q. Now, Ms. Marra, I believe you testified that  
4 you started the process already. You already picked the  
5 random batches; is that right?

6 A. Correct.

7 Q. Okay. Now, you'd agree with me that the  
8 political leanings of voters, those tend to be correlated  
9 with when they vote; right?10 A. I can't really agree or disagree. I don't  
11 track that. I don't -- that's not something that's part  
12 of my duties.13 Q. Okay. Well, your office does have data on  
14 that; right?15 A. Not really. The elections department, we have  
16 -- we don't really even track, you know, like that would  
17 be a voter reg thing more likely.18 Q. Okay. Fair enough. If I were to represent to  
19 you that it was the case, that political leanings of  
20 voters was correlated with when they vote, would you have  
21 any reason to disbelief me?

22 A. I guess it would depend on your source, but no.

23 Q. Okay. Let's try to logic our way through this.  
24 Happy to send you lots of sources. In fact, early voters  
25 tend to skew more slightly more Republican. Believe it or



1 not that's true. But let's try to like logic our way  
2 through this. Right?

3 Let's say that I am an individual that believes  
4 the 2020 election was stolen, I watched 2000 Mules, the  
5 whole thing. I got all the paraphernalia and I have got  
6 the hat. Okay? Am I more likely to vote by mail or am I  
7 more likely to vote on election day?

8 A. I don't know.

9 Q. I watched 2000 Mules. I think mail-in voting  
10 is terribly unsafe and the drop boxes are terrible. Am I  
11 more likely to vote at the polls on election day or am I  
12 more likely to mail in my vote?

13 A. Again, I don't know. If you base it on a  
14 movie, but, you know, people lie same like they do with  
15 candidates when they say I am a registered voter, I can  
16 sign your petition. So I don't know.

17 Q. But if I am a voter that believes that, whether  
18 it's true or not, am I more likely to vote at the polls on  
19 election day?

20 MR. BLEHM: Your Honor, asked and answered.

21 THE COURT: Sustained.

22 BY MR. KOLODIN:

23 Q. Okay. You'd admit, though, that it is at least  
24 possible logically that the political preferences of  
25 voters are correlated to when they vote; right?

1 A. Probably.

2 Q. Okay. Probably. So actually hypothetically  
3 depending on when you pick the batches of ballots to do a  
4 hand count on, you might be able to pick a  
5 nonrepresentative sample let's say; right?

6 A. I don't really know. I mean, because early  
7 ballots come in from all over the county. It's not like  
8 they are coming from one particular city or.

9 Q. I am not talking about geographically  
10 representation. I am talking about you might be able to  
11 pick a sample that is more Republican or more Democrat  
12 than the (indiscernible); right? Hypothetically?

13 A. Again, I just -- I am sorry if I am frustrating  
14 you because I can't answer the question, but.

15 Q. It is really a simple, logical question. If it  
16 is the case, I am just asking you to assume with me that  
17 that is true, if it is the case that when somebody votes  
18 is correlated with their political preferences, then it is  
19 possible to pick a nonrepresentative sample to do a  
20 hand-count audit of depending on when they vote; right?

21 A. I am still just kind of -- I am not really  
22 following the line of questioning. I mean, I hear you. I  
23 understand the concept. But because they come in the mail  
24 and they come from the recorder and they come from drop  
25 boxes and there could be a week lag time.

1 Q. I am trying to make it really, really simple.  
2 Okay? Let's say that all Republicans vote early and all  
3 Democrats vote on election day. Then if I want to pick a  
4 random sample to hand count that is all Republicans, all I  
5 have to do is pick it from a batch that votes earlier;  
6 right?

7 A. If that is your logic that you just stated.

8 Q. But you would also agree with me that there is  
9 absolutely no way on earth to pick a nonrepresentative  
10 sample to hand-count audit if you do 100 percent  
11 hand-count audit; right?

12 A. Then you are going to absolutely count every  
13 ballot, so that's a given.

14 Q. Okay. Now, you would also agree with me that  
15 nothing in the EPM refers to the Director of Elections or  
16 the election strike; right?

17 A. You're right. It refers to the officer in  
18 charge of elections.

19 Q. Okay. And that is something a little bit  
20 different; isn't it? Right?

21 A. I suppose it could be.

22 Q. Okay. Let's talk about who's an officer.  
23 Right? Who is an officer of the county, that's defined by  
24 statute; right?

25 A. Um-hum. Officers, yes.

1 Q. Yeah. ARS 11-401. And the officers in the  
2 county are the sheriff. Are you a sheriff?

3 A. No.

4 Q. The recorder. Are you a recorder?

5 A. No.

6 Q. The treasurer. Are you that?

7 A. No.

8 Q. Superintendent?

9 A. No.

10 Q. You are not on that list; right?

11 A. Correct.

12 Q. Okay. Now, an officer of the county can  
13 delegate some of their authority; right?

14 A. Sometimes, yes.

15 Q. And that's how you have been given yours;  
16 right, your delegated the authority of the board?

17 A. Yes.

18 Q. Okay. Now, in fact, ARS 16-602(F) refers to  
19 the County Recorder or other officer in charge of  
20 elections; right?

21 A. Uh-huh.

22 Q. Okay. Now, nobody doubts that you are  
23 qualified. You obviously are. Counsel examined you. You  
24 are extremely qualified elections strike. But you don't  
25 want to do it; right?

1 A. I can't do it.

2 Q. Okay. If this Court declined to issue an  
3 injunction, would you do it then?

4 A. They have already delegated it you said to the  
5 recorder.

6 Q. What about the board asked you to do it, would  
7 you do it then?

8 A. I have already said that I don't believe that  
9 it's legal.

10 Q. So you wouldn't do it even if the Court  
11 declined to issue an injunction; right?

12 A. They have already delegated it.

13 Q. Okay. Would you still attend the hand count?

14 A. I think we determined that it is four days out  
15 from the election and I am going to be incredibly busy for  
16 the next two weeks. So depending on what their schedule  
17 is, perhaps. But my focus is to finish out this election  
18 and all the many audits and reports I have to do for that.  
19 So I don't know that I would be available for their hand  
20 count.

21 Q. But if you are so concerned about the chain of  
22 custody potentially being breached and the recorder not  
23 being able to be trusted to maintain the chain of custody  
24 and all that, would you want to be there to see?

25 A. Short of living there 24 hours just going to

1 visit isn't going to help me at all.

2 Q. You wouldn't want to inspect the way that he's  
3 maintaining the chain of custody, documentation, you  
4 wouldn't want to see how the handoffs work? You wouldn't  
5 want to see any of that?

6 A. I haven't even see a plan so I can't answer  
7 that.

8 Q. Now, you agree with the estimate that there  
9 will probably be about 35,000 ballots to count this  
10 election cycle in this county?

11 A. Yeah. Somewhere between 30, 35,000 most  
12 likely, yes.

13 Q. I am a lawyer. I am bad at math. If I was  
14 good at math, I would be an engineer. But here's the way  
15 you break it. Let's say you only have 50 volunteers a  
16 day. Right? And they are working eight hours a day. Are  
17 you -- you would agree -- sorry, 50 volunteers a day they  
18 are working for eight days. Right? You would agree with  
19 me that each volunteer only has to count less than 15  
20 ballots that day in order for that count to be completed;  
21 right?

22 A. I can't agree with that because I don't  
23 understand how their plan's going to work. What I can  
24 understand --

25 Q. But it's just a math question. It is not a

1 plan question. If I have 35,000 ballots, 50 volunteers  
2 and eight days, then each volunteer has to count 14.6  
3 ballots per day to get that count done in time. Is my  
4 math right or is my math wrong?

5 A. I'm not able to check your math right now so if  
6 you did it, then we can say that that's your math.

7 Q. Never trust --

8 A. I don't have my cellphone with me and I don't  
9 have a calculator but I am happy to get one if I need to.

10 Q. Fine. Fair enough. Never trust a lawyer's  
11 math. We can only divide by three. What kind of cases  
12 does the county attorney primarily handle?

13 A. The county attorney's office handles criminal,  
14 civil, they represent the department, they represent  
15 elected officials.

16 Q. What is most of their work?

17 A. I have no idea what most of their work is.

18 Q. What did the county attorney do before he  
19 became county attorney?

20 A. Our county attorney was an attorney.

21 Q. Okay. What kind of attorney?

22 A. I have no idea.

23 Q. Was he an election lawyer?

24 A. I believe he was a prosecutor but I have no  
25 idea what his history and his practice.

1 Q. So he was a criminal lawyer, he practiced  
2 criminal law?

3 A. Uh-huh.

4 Q. How about the DAG's office, do they handle a  
5 lot of election law?

6 A. They do.

7 Q. And you'd agree with me election law is pretty  
8 complicated; right?

9 A. It is complicated.

10 Q. Yeah. You deal with a lot of it in your job;  
11 right?

12 A. (No answer heard).

13 Q. Now, one more question. You know, this county  
14 is a very deep red county; right?

15 A. It has more Republican voters, yes.

16 Q. I mean, a decent number of those people,  
17 election skeptics. Is that fair to say?

18 A. I am sorry?

19 Q. A decent number of those people are election  
20 skeptics. Fair to say?

21 A. Probably.

22 Q. Certainly the ones who call your office; right?

23 A. Probably, yes.

24 Q. Okay. If plaintiffs succeed in stopping an  
25 audit that the board of supervisors has already declared



1 that they want to count 100 percent of ballots, if  
2 plaintiffs succeed in stopping that, what will those  
3 people think?

4 MR. BLEHM: Objection. Foundation.

5 THE COURT: Sustained. Calls for speculation.

6 BY MR. KOLODIN:

7 Q. Do you live in this county?

8 A. I do.

9 Q. Do you talk to a lot of people in this county?  
10 Do you have a lot of friends in this county?

11 A. I am an election official. I work seven days a  
12 week. I don't have a lot of friends in this county. I  
13 barely go home in this county.

14 MR. KOLODIN: In that case then I will  
15 acknowledge, Your Honor, my question lacks foundation and  
16 I am done with the witness. Thank you.

17 THE COURT: Thank you, sir. Ms. Estes-Werther,  
18 any redirect?

19  
20 REDIRECT EXAMINATION

21 BY MS. ESTES-WERTHER:

22 Q. Ms. Marra, just to clarify here, are you aware  
23 of any statute, law, rule or procedure that designates  
24 hand counts to anyone other than yourself?

25 A. No, I am not.

1 Q. And you have not had -- in your experience you  
2 have not essentially given up custody for another hand  
3 count to be conducted by another individual?

4 A. That's correct.

5 Q. And there's been a lot of sort of inferences  
6 here about that perhaps you have issues, trust issues or  
7 upset or feelings about this audit. But what is really  
8 the basis for your concern about a full early ballot  
9 audit?

10 A. My concern is that in the statute it's the  
11 ability to expand a hand count is already built in based  
12 on if the numbers are not correct. And the statute you  
13 referenced that it is the election officer in charge of  
14 elections, it is not written like many statutes that says  
15 the recorder and/or other officer of elections. And so  
16 that whole chain of custody in the end the ballots come  
17 back to me and I am very concerned we are going to have  
18 recounts and I can't guarantee that custody and that's the  
19 problem for me because that impacts everybody on that  
20 ballot and everybody in Arizona.

21 Q. Has the recorder had discussions with you about  
22 this chain of custody of the ballots from you to him to  
23 perform this?

24 A. No, we have had no conversations.

25 Q. And I think earlier in testimony recorder had

1 represented that he had a draft plan. Have you received  
2 that plan or reviewed it?

3 A. I have not. The only thing I saw was when the  
4 first meeting that was conducted two or three weeks ago  
5 there was a Power Point presentation he did that's part of  
6 the record. That was the only thing I have seen.

7 MS. ESTES-WERTHER: I think that is all I have,  
8 Your Honor.

9 THE COURT: You knew I was going to have to  
10 questions; right?

11 THE WITNESS: I hoped so. I hope I have  
12 answers.

13 EXAMINATION

14 BY THE COURT:

15 Q. When the ballots are not being counted, is that  
16 when they go into the vault, the cage? When the ballots  
17 are in your possession, they have been tabulated, you have  
18 them for your audit, where are they stored if they are not  
19 actually being audited?

20 A. So they are still stored in bankers boxes by  
21 their batches and they are stored in our ballot cage in  
22 our warehouse.

23 Q. Who has access to that?

24 A. I do. Two of my staff do. And that's it.

25 Q. If it is not -- how does it get from the cage

1 to where it goes to be audited. First of all, I am not  
2 familiar with what your office looks like, what the  
3 building looks like, any of that. Tell me how that  
4 happens.

5 A. So the morning of the hand count on that  
6 Saturday when they arrive, because that is the first time  
7 the batches are taken out of the cage. When we do the  
8 hand-count draws that Wednesday, that's what ships with  
9 numbers on them. So the ballots are secure. On Saturday  
10 morning when the hand count starts those are taken by two  
11 people of opposite parties, usually always at least a  
12 staffer and either an early board worker or one of the  
13 hand-count members and then those are taken to the room  
14 right around the corner in our building. It is still  
15 under camera and locked security. And that's where the  
16 hand count happens where we stay and then they are placed  
17 back in that box and taken back to the cage.

18 Q. Once the ballots are provided to you for  
19 putting into batches for tabulating, for sealing, for that  
20 whole process, is there ever a time when they are not in  
21 the possession of either you, a staff member who works for  
22 you or two members of opposite parties who can transport  
23 them from point A to point B?

24 A. No, because they go from the recorder's office  
25 with the chain of custody to our office and to early board

1 who opens the affidavit envelopes, that kind of thing,  
2 processes them for tabulation and they are always stored  
3 in that ballot cage under our control.

4 Q. Do you have promulgated written instructions  
5 for individuals as far as how you expect them to oversee  
6 the audit, how you expect them to count ballots or  
7 anything like that?

8 A. For the hand-count audit members that we deal  
9 with, the party members?

10 Q. Yes.

11 A. We don't have a written. It is pretty much  
12 procedure in the manual. But we go through the same thing  
13 like we do poll workers. We have an oath, you take a  
14 duty, nobody touches the ballots with another pen, nobody  
15 changes anything. Standard things like that.

16 Q. Where do those standard procedures come from?

17 A. Our poll worker manual. And mostly statute.  
18 Everything in the poll worker manual is statute.

19 Q. When you set aside ballots, and I apologize, I  
20 am not thinking of the absolute correct verbiage, but you  
21 set aside a specific number of ballots they might use to  
22 carry out procedure, the 1 percent or 2 percent  
23 sequestered?

24 A. That's correct, yes.

25 Q. When you sequester those ballots, my

1 understanding is in addition to sequestering them you also  
2 print out what you call batch report or batch sheet,  
3 whatever it is?

4 A. Batch result report.

5 Q. Batch result report?

6 A. Yes.

7 Q. What does a batch result report include?

8 A. So it's basically from the tabulator machine.

9 It is just the report of the results of that batch, 200  
10 ballots in count. It's broken down by the candidates and  
11 they are all early votes because they are the only thing  
12 we are counting as opposed to provisional or election day  
13 and so it gives the result of just those 200 ballots.

14 Q. Does the batch result report also tell you what  
15 machine counted those ballots?

16 A. Yes, Your Honor, it does.

17 Q. When I read the EPM and I read statutes, I have  
18 read where it is the statute seems to me anyway to  
19 indicate that you are required if you are going to do this  
20 audit to be able to tell which machine counted those  
21 ballots. Is that correct?

22 A. That is correct, Your Honor.

23 Q. Why based on your training and experience and  
24 education and experience, why is it that that happens?

25 A. In case there is a malfunction or there is an

1 issue that is really important to track it down. We have  
2 two machine tabulators that we use for early ballots. We  
3 very seldom get enough ballots at a time to have both  
4 going at a time because it takes two more people. So  
5 usually we use that one machine. And in the event of a  
6 recount everything would be tabulated again on those  
7 machines. But it's really important to have a source  
8 document to tie those two.

9 Q. Is it fair to say that if, for example, the  
10 numbers were completely skewed, you would want to know if  
11 you have a machine problem?

12 A. Absolutely.

13 Q. It sounds to me that -- let me take one of the  
14 hypotheticals that was asked by one of the other attorneys  
15 and kind of make it a little clearer. Let's say the board  
16 of supervisors instead of saying the recorder or other  
17 qualified Elections Director official officer. What if  
18 they sent ballots out to you, the Elections Director will  
19 conduct a 100 percent audit hand count of all ballots  
20 cast. Would you, assuming that I didn't intervene as the  
21 judge because somebody asked me to do that, there is no  
22 order telling me you couldn't, would you do that?

23 A. The problem is it's just not possible at all.  
24 It wouldn't have been possible three weeks ago when this  
25 conversation first came up. It is certainly not possible

1 now four days before an election. There's just no time.  
2 There is no space. There is no procedure. There is  
3 nothing in the EPM. We rely on that a lot. We even said  
4 how it outlines everything but there is nothing outlined  
5 in this to do.

6 Q. Based on your understanding of the EPM and the  
7 statutes, if a full hand recount was permissible, a full  
8 hand recount audit were permissible, do you think that the  
9 EPM would require that you still sequester batches of  
10 ballots to ensure that you know what machine tabulated  
11 those ballots?

12 A. Most likely. And again, we run into the same  
13 situation that I believe Your Honor brought up earlier.  
14 If you don't -- what do you do to expand it if the numbers  
15 aren't the same?

16 Q. I want to kind of walk through some  
17 hypotheticals that I walked through with the recorder and  
18 see if your opinions are the same or they are different.  
19 If you are looking at precinct ballots where you have to  
20 pick 2 percent of the precinct or two whichever is greater  
21 and do that, is there ever a mechanism by which you would  
22 actually count every single precinct ballot that was cast?

23 A. So because we are vote centers and everybody  
24 can vote anywhere, the ballots are never broken out by  
25 precinct.



1 Q. Okay. Let's do it by centers then.

2 A. So by -- so that is another thing because if  
3 you wanted to do it by precinct, you have to hand sort all  
4 the ballots and put them in precincts. So anybody votes  
5 anywhere. You go to vote center one and 1,000 people  
6 vote. They could all be from that general area. They  
7 could have been from anywhere in the county.

8 Q. Well, Let's say you take the percentage of the  
9 vote center like you are supposed to and do the count and  
10 it's over the expected margin. You have to count it  
11 again; right?

12 A. Yes. And it's different with vote centers or  
13 precinct based places because all of those are subject to  
14 put in for the hand-count draw, the random draw. In early  
15 batches it's the ones that you sequester and different  
16 counties do that different ways. We do the first four  
17 every day when we count until we get to the number we  
18 need. But in vote centers it is for us we put all 17 in  
19 and then it is the luck of the draw which ones you get.  
20 And if they were off, I suppose that you would -- I would  
21 get a county attorney's opinion. But I suppose you could  
22 count more. We have never had an issue with either of  
23 those being off.

24 Q. Based on your experience as an Elections  
25 Director for the past few years, same hypothetical that I

1 gave to the recorder. Let's say that you are ordered to  
2 do a full hand count, you did a full hand count or you  
3 just decided to do a full hand count. At the conclusion  
4 of your full hand-count candidate A in race A had 7,003  
5 electronic votes and had 7,005 hand votes. Which one is  
6 the one that you report to the Secretary of State?

7 A. I believe it is the tabulation.

8 Q. Why?

9 A. Because that's what it says in the EPM and I go  
10 to the statute.

11 Q. If you were required to do a full audit, full  
12 hand-count audit of all ballots including early ballots,  
13 and if the grand total of votes was different from the  
14 electronic tabulation in an amount that was greater -- in  
15 an amount that exceeded the expected result was, do you  
16 think you have to do another whole hand count to make sure  
17 your hand count was accurate in the first instance?

18 A. I would think not.

19 Q. And why not?

20 A. I would think the tabulation equipment would be  
21 -- and I guess hypothetically it would depend on if we are  
22 thousands off or are we just a few off. I think in the  
23 vote count committee that we talked about we are allowed  
24 three votes off on a race. So, but I don't think the hand  
25 count necessarily -- again, if you have those batch result

1 reports and you are counting in batches of 200 or 50 or  
2 whatever, you are going to know if you are off right there  
3 before you count all of them. That's a huge concern for  
4 me because there are no batch results in all those other  
5 ones. And so you hope at the end they tie in together.  
6 But if they don't, there is no way to track that down.

7 Q. My reading of the EPM and the statutes also  
8 says that when you have an election where the tabulated  
9 numbers versus the audit -- it appears to be very  
10 hypothetical. I don't think it's ever happened. But if  
11 the end event that the audit produces results that are out  
12 of what would be the expected range of the tabulated  
13 votes, there are certain actions that are to be taken. In  
14 fact, a special master can look at the -- and I hate to  
15 use those words to confuse it with other special masters  
16 that might be in the news, but that's what our statute  
17 permits; is that correct?

18 A. Correct. And that whole expanded hand count is  
19 identified in there. That is why we sequestered more  
20 ballots because if you have to expand it, it goes from 400  
21 or whatever the number is to 800 to 1,600. And then, yes,  
22 it talks about bringing in a special master in the courts.

23 Q. And one of the things that the special master  
24 is tasked with doing is deciding whether to reveal the  
25 source code of the instrument or the machine that was used

1 for the tabulation itself; correct?

2 A. I would imagine. I have not experienced that  
3 myself either.

4 Q. Luckily perhaps you haven't had to refer to  
5 that statute for a while. If I were -- as everyone else,  
6 if I were to tell you that the statute indicates that you  
7 are supposed to refer to whether the source code can be  
8 revealed to somebody to try to explain this inconsistency,  
9 if you cannot tie the votes that are being audited to a  
10 particular machine, are you able to do that with any sense  
11 of certainty or accuracy?

12 A. I don't believe so. And I say that because  
13 when you do -- and this might confuse you more and I'm  
14 sorry.

15 Q. It's okay.

16 A. When we have our vote centers, we are a county  
17 that tabulates at each vote center. So each vote center  
18 has its own tabulator. We have 17 vote centers. However,  
19 the number is actually 19. I believe the recorder said we  
20 have 17. The large ones have two tabulators. But when we  
21 do poll worker training, we go through and we teach how  
22 that works. So say you have 100 ballots, 100 voters.  
23 Right? They come in, they sign in, you know you have 100,  
24 you know how many ballots you gave them. They vote, they  
25 put their 100 ballots in the tabulator, they print out the

1 results, you get that, we get the paper ballots, we get  
2 the machine stick. We have all those things back  
3 potential to count 0 elects night. We read it and say it  
4 says 300. Well, we know you only had 100 ballot card  
5 stock. We know 100 people voted and we have 100 ballots.  
6 The first thing you would look at would be identify that  
7 machine, maybe there is a problem. If there is not a  
8 problem with the machine, and that can be determined by  
9 service, then did the ballots get run through three times?  
10 Is that a broke group? I mean, there are so many checks  
11 and balances with that. But it would tie to that machine.

12 Q. So if I understand correctly, you actually put  
13 into place redundancies to limit the opportunity for there  
14 to be the need to use that statute in the future?

15 A. So many, Your Honor. So, so many.

16 THE COURT: Okay. Any other questions? Any  
17 questions, Mr. Blehm?

18 MR. BLEHM: I do, Your Honor.

19 THE COURT: I thought you might.

20 MR. BLEHM: I'm sorry. I'm usually very  
21 (indiscernible).

22  
23 RE-CROSS-EXAMINATION

24 BY MR. BLEHM:

25 Q. And this gets to your point in the questions

1 you were asked. And I am sorry. I will try to yell. You  
2 know, is it possible that these procedures that Your  
3 Honor, the Court was asking you are put into place in the  
4 EPM only because a limited number of ballots that you  
5 audit each election cycle?

6 A. I'm not sure why they were put in there.

7 Q. You don't know why?

8 A. No.

9 Q. But they could be there because of the limited  
10 number of ballots by law you have to audit; correct?

11 A. Are you referring to how they expand?

12 Q. Yes.

13 A. If one is off, it expands and doubles up twice?

14 Q. Correct.

15 A. Yes.

16 Q. And so if there is a 100 percent hand vote  
17 audit, you don't need those procedures; is that correct?

18 A. I still think you are going to need a procedure  
19 when the hand-count numbers are off.

20 Q. And so we are running out of time but I have  
21 got a hypothetical for you. You draw all of your audit  
22 ballots early; correct?

23 A. Throughout the process, yes.

24 Q. Throughout the process. How many total do you  
25 draw?

1 A. It depends on, again, doing the math formula  
2 how many ballots we think we are going to get back.

3 Q. When is the last time you draw ballots for  
4 audit?

5 A. It could be election morning. If we are  
6 counting ballots and we don't have enough sequestered --

7 Q. Okay.

8 A. -- then election morning when we tabulate, that  
9 is the number that we look at where we have to have enough  
10 to do the hand count.

11 Q. And you draw ballots from each machine?

12 A. From the machines we count from. From one of  
13 the two at central count that we use.

14 Q. What happens if you -- if a ballot machine has  
15 a problem at some point in time and you are not drawing  
16 ballots from that machine when it has a problem, you can't  
17 identify that in your audit, can you?

18 A. So in major elections --

19 Q. I am doing this a yes or a no. Your audit  
20 would not identify that machine had a problem; is that  
21 correct?

22 A. I don't know. I'm not --

23 Q. If you didn't draw ballots from that machine  
24 while it was having a problem, your audit would not  
25 identify that problem; is that correct?

1           A.     But we draw the results off every day of every  
2 machine.

3           Q.     Understood.

4           A.     We would know.

5           Q.     Okay.  You would know.  You count every --  
6 every machine you draw from.  You don't include them all  
7 in the audit, do you?

8           A.     We take enough ballots -- if we are using both  
9 tab -- in this election as an instance we are only using  
10 one tabulator.

11          Q.     Okay.  We are trying to go quick here.  Is it  
12 theoretically possible that you sequester all of these  
13 ballots you draw just a limited number from and if that  
14 number matches, you are good and you are golden and you  
15 don't move forward.  Then you potentially miss a problem  
16 with a machine; isn't that correct?

17          A.     I'm not understanding that that way.

18          Q.     Okay.  If you are not hand auditing all of the  
19 ballots you are drawing from, you could possibly miss a  
20 problem with a machine; is that correct?  It is yes or no.

21                THE COURT:  Mr. Blehm, perhaps I can be of  
22 assistance.

23                MR. BLEHM:  Go ahead.

24                THE COURT:  If I am not asking it correctly --  
25



## 1 EXAMINATION

2 BY THE COURT:

3 Q. I think what Mr. Blehm is saying is there comes  
4 a time when you stop polling these packets for  
5 sequestration; is that correct?

6 A. Yes.

7 Q. Early voting is still going on at that time and  
8 tabulation is still going on at that time?

9 A. Correct.

10 Q. And the audit is only of those that have been  
11 sequestered; is that correct?

12 A. Correct.

13 Q. So if the machine has a problem counting and  
14 calculating after you have already sequestered those  
15 ballots which you have already -- are going to be part of  
16 the audit, the audit may not -- in theory could not  
17 capture the fact that a machine was having a problem  
18 because it was having a problem after you had already  
19 sequestered the ballots?

20 A. Yes.

21 THE COURT: Is that what you are asking, Mr.  
22 Blehm?

23 MR. BLEHM: Yes, Your Honor.

24 THE COURT: I didn't mean to interrupt you, but  
25 I wanted to make sure that you got your answer.

1 MR. BLEHM: That's fine.

2 THE COURT: Do you have any other questions?

3 MR. BLEHM: No, Your Honor.

4 THE COURT: Go ahead. Yes.

5 MR. KOLODIN: So we are running out of time.

6 It seems that Your Honor has been very, very interested in  
7 this question of batches. I would make a proffer that we  
8 can --

9 THE COURT: Before you make the proffer, do you  
10 have any questions?

11 MR. KOLODIN: Oh, no, Your Honor.

12 THE COURT: Okay. You are excused.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Please stay in the courtroom.

15 THE WITNESS: I will.

16 THE COURT: Hold on. I saw you conferring with  
17 Mr. Stevens. Are you asking to make a proffer as to what  
18 he would testify given the opportunity?

19 MR. KOLODIN: Yes. In the interest of time I  
20 am also happy to put him up, but I know we need time for  
21 argument.

22 THE COURT: I am happy to accept the proffer.

23 MR. KOLODIN: I would make a proffer that the  
24 way Recorder Stevens intends to do this hand count would  
25 still involve creating batches and being able to tie it

1 into the machines. So that concern should be alleviated  
2 that it would be equal either way.

3 THE COURT: Mr. Stevens is in the courtroom.  
4 Do you agree with that, sir?

5 MR. STEVENS: We are going to keep them in  
6 batches, yes.

7 THE COURT: And are the batches going to be  
8 tied to a particular machine if necessary?

9 MR. STEVENS: Currently we are only using one,  
10 so yes.

11 THE COURT: Okay. Very well. Thank you, sir.  
12 Mr. Kolodin, anything else?

13 MR. KOLODIN: No, Your Honor.

14 THE COURT: Did the plaintiffs have any  
15 rebuttal evidence or are we ready for argument?

16 MS. ESTES-WERTHER: No, Your Honor.

17 THE COURT: All right. So folks, we have 50  
18 minutes divided by four, that's 12 and a half minutes  
19 each. If we need to go a little bit beyond five, we can,  
20 but I am not trying to keep these fine folks beyond 5  
21 o'clock. They have been with me all day; they have been  
22 with us all day. So I want you all to know I have read  
23 all the briefs. I hope you can tell that I read the  
24 statutes. I read the Elections Procedures Manual. I read  
25 cases that you have cited. I have read cases that you

1 haven't cited. And I don't mean that in a negative way.  
2 It's about all the different burdens and all the different  
3 things that have to be at issue here. I think I am very  
4 aware of what the law and what the issues are. You don't  
5 need to regurge those things. I am going to ask you to  
6 keep it brief so that we can try to get out of here in a  
7 timely fashion.

8 Go ahead from the plaintiffs.

9 MS. ESTES-WERTHER: Thank you, Your Honor. I  
10 will try to be brief.

11 I think the statute at issue here has been sort  
12 of rehashed and rehashed and rehashed so I'm not going to  
13 go over what the statute states. But I would say just  
14 that (indiscernible) begins and ends with the statute and  
15 the plain text of the statute and what is statutorily  
16 required for an audit (indiscernible).

17 Arizona is clear there is a statutory cap on  
18 how many early ballots may be audited. That's progressive  
19 according to what the statute says if there are  
20 discrepancies found. And anytime a discrepancy is not  
21 found, no more hand audits of the early ballots may be  
22 conducted. Of course the Elections Procedures Manual has  
23 the single sentence in it that purports to say that at the  
24 county's discretion that the statute's text can  
25 essentially be ignored and the county may in its

1 discretion increase the number of ballots are -- early  
2 ballots that are audited.

3           Again, we briefed this so I am not going to go  
4 over it super extensively, but the Arizona Supreme Court  
5 has been (indiscernible) that where the EPM conflicts with  
6 statute that portion of the EPM does not have the force of  
7 law. The secretary, I am not sure if you read her brief  
8 yet at this point, but has also gone over that and has  
9 exclusively said that the secretary does not believe the  
10 EPM authorizes the proposed full hand recount of the early  
11 ballots. So of course the secretary who promulgated that  
12 in the first place has actually disavowed that part of the  
13 statutes. It hasn't come up too much today but the  
14 attorney general's opinion that is attached to some of the  
15 filings and so it is in the record has relied on that  
16 portion of the statute. Of course that opinion was  
17 informal. It is not a formal opinion that went through  
18 the processes that the attorney general's opinion can go  
19 through so it is sort of an ad hoc informal opinion that  
20 didn't go through the proper levels of review even when an  
21 official statement is -- official opinion is issued by the  
22 attorney general, even though those do not trump over this  
23 portion of the statute or what the statute said. And of  
24 course here all we have is informal opinion that relies on  
25 the portion of the EPM that clearly conflicts with the

1 statutory law so that opinion also should not be given any  
2 force in this case.

3 (Indiscernible) a couple minutes discussing the  
4 harms that are going to occur if the county is permitted  
5 to conduct this audit of all early ballots. Defendants of  
6 course have made argument in their papers and they say  
7 that the audit would somehow increase election integrity  
8 or increase voter confidence in the election but just the  
9 opposite is true. I mean, you heard from voters today,  
10 the alliance, Mr. Stevens who is still here about exactly  
11 what this audit would do, this unlawful audit would do to  
12 their confidence in the election and how it would affect  
13 their individual ballots. I want to focus on how serious  
14 sort of the repercussions of what is going to happen, if  
15 the audit is conducted, what is going to happen.

16 So the county is plainly unprepared to conduct  
17 this audit. That was made clear through Recorder Stevens'  
18 testimony. He said by his own admission he's never even  
19 participated in a hand-count audit of ballots. He's never  
20 conducted one. He hasn't been a part of that before. He  
21 hasn't even handled ballots once they have been voted nor  
22 has he overseen the handling of ballots once they have  
23 been voted. He's also admitted that he began this entire  
24 process about 10 days ago, the planning execution of this  
25 audit of 30 to 50,000 ballots 10 days ago. That sort of

1 planning is just a recipe for disaster in an election.  
2 This kind of audit of these ballots would have been needed  
3 to be planned months ago. Facilities would have been  
4 needed to be identified. Security would have needed to be  
5 in place. How it is conducted would have needed to be  
6 planned. As the recorder -- sorry, the Director of  
7 Elections explained probably a significantly increased  
8 number of staff would need to be necessary to actually  
9 help oversee the audit and the volunteers. And of course  
10 none of that has happened. Even at this point a facility  
11 hasn't been secured. Even at this point the volunteers  
12 haven't been trained. Even at this point no procedures  
13 have been set in place for how this is going to work. Mr.  
14 Recorder hasn't even consulted with Elections Director  
15 about how -- what transfer would properly be conducted  
16 between the two of them. The point is that no plans are  
17 in place here and that is setting up an audit that is  
18 going to -- not -- likely not be completed in time,  
19 seriously shake the public's faith in this election. And  
20 make it quite likely I think a really important risk here  
21 is the fact that the statutory deadlines aren't going to  
22 be met.

23 So there is a sort of cascading set of things  
24 that will happen if that canvas deadline isn't met. If  
25 the county doesn't meet its canvas deadline, the Secretary

1 of State can't meet her statewide deadline. If that  
2 happens, as witnesses have testified today, it is  
3 extremely likely that there are going to be mandatory  
4 recounts of these ballots once the canvas has been  
5 completed. That will be statewide. It will be local.  
6 There are a lot of races that are within the .5 margin  
7 that would require an automatic recount. If the canvas  
8 hasn't been completed, those recounts can't happen. And  
9 beyond that then the that people have actually been  
10 elected can't even be seated. So we are talking about  
11 sort of a cascading set of consequences that are going to  
12 seriously undermine the outcome of this election and the  
13 integrity of this election.

14 You also heard today about how the audit  
15 creates an intolerable risk of compromising the integrity  
16 of ballots. The statute is very clear about custody and  
17 where the ballots need to be stored, how they need to be  
18 stored, all of that you heard about today. The county's  
19 planned audit of course requires breaking that chain of  
20 custody and transferring the ballots not only to the  
21 recorder but it is also going to put them in the hands of  
22 hundreds of individuals who never done such an audit nor  
23 have they been trained at this point. Any resulting loss  
24 or damage or alteration of those ballots would compromise  
25 voters' ability to have their votes properly counted. It



1 would make it impossible to conduct the election contest  
2 that could ensue after the election. And of course again  
3 the automatic recounts could potentially be compromised.

4 Just to be clear, plaintiffs certainly are not  
5 accusing the recorder or anyone in the county of any  
6 intentionally alter these ballots or change votes or  
7 something nefarious. The issue is much more mundane than  
8 that. Simply that they could be compromised. Whether  
9 somebody tears it, whether somebody accidentally smudges  
10 ink on one of them as they are handled or a variety of  
11 other things that could happen. So that is just simply  
12 going to compromise the integrity of the election and the  
13 ability to ensure that the election process is completed  
14 and that the elected officials are seated in a timely  
15 manner. And of course hand-count audits, Director Marra  
16 testified about this, but they are complicated and they  
17 are prone to human error. And specifically the methods  
18 the County Recorder testified to today that he is going to  
19 use for the audit has already proven to be in Cochise  
20 County a method that results in errors. That sort of hand  
21 count that is not permitted by law is going to again shake  
22 the public's faith in this election and compromise the  
23 integrity of the election. Those kind of mistakes are  
24 extremely problematic and have just lasting repercussions  
25 that unnecessarily creates distrust in the election. And

1 it is because of all of these sorts of harms the United  
2 States Supreme Court has held over and over and over that  
3 changes to elections cannot be made at this late date.  
4 The cases actually talk about on the eve of the election,  
5 but here we are already in the election. Early voting has  
6 been going on for weeks. And it is especially in that  
7 circumstance where late changes to election laws can harm  
8 the confidence in the election, the integrity of the  
9 election, it can cause confuse and a whole host of other  
10 harms that come with that. It is for that reason also  
11 that the Arizona Supreme Court has been quite clear that  
12 public officials play a very important role in preserving  
13 the integrity of elections and enforcing the election laws  
14 as they are written. That is the job of the defendants in  
15 this case. The Supreme Court has also been clear that  
16 when public officials choose to change the law in the  
17 middle of an election based on what they think it should  
18 be, that undermines public confidence in our democratic  
19 system and destroys the integrity of the election process.  
20 So defendants can't be permitted to violate Arizona law  
21 like this.

22 In the end, this case looks just like Arizona  
23 Public Integrity Alliance. Defendants have mandatory a  
24 nondiscretionary duty to conduct an audit of all early --  
25 I am sorry, limited early ballots according to statute and

1 they are declining to fulfill that nondiscretionary duty.  
2 So a writ of mandamus, in the alternative preliminary  
3 injunction are appropriate to require them to perform the  
4 nondiscretionary duty in accordance with Arizona law. It  
5 ultimately appears that defendants have an issue with the  
6 statute as it is written, at least some defendants seem to  
7 have an issue with the statute the way it is written.  
8 That is a concern that the legislature, the Secretary of  
9 State might be able to address through rule making and  
10 elective powers, but it is not something the defendants  
11 who are limited to executing their duty as defined by  
12 state law can do. And it is not that they can -- not only  
13 do they have to fulfill their duties under state law, they  
14 can't go beyond those. The Arizona Supreme Court has been  
15 clear about that. There is no discretion for county  
16 election officials to invent new procedures, do anything  
17 outside of what is directly authorized to them. It's  
18 simply not permitted under the state's law.

19 So plaintiffs request that Your Honor issue the  
20 writ of mandamus or in the alternative preliminary  
21 injunction.

22 THE COURT: Thank you. Mr. Blehm?

23 MR. BLEHM: Thank you, Your Honor. On behalf  
24 of the board defendants we deny that plaintiffs actually  
25 have a viable mandamus claim. Okay? And I am not going

1 to spend a whole lot of time on this because there is a  
2 lot of talk about as to what was just said. Okay? If we  
3 want to bring a viable mandamus claim, the plaintiffs are  
4 claiming that they do not seek to compel defendants to do  
5 something they are required by law to do. Basically what  
6 defendants are saying is they have to comply with the law.  
7 Okay? My clients are complying with the law, Your Honor.

8 The law as stated by the Secretary of State in  
9 the 2019 Elections Procedures Manual, the law as proposed  
10 by Secretary Katie Hobbs in her 2021 revised draft of the  
11 Elections Procedures Manual which states my clients have  
12 the power to audit as many ballots above the minimum  
13 statutory requirement as required by law. Okay? These  
14 are statutory audits that are required by law at a minimum  
15 level, Your Honor, not at a maximum. And all secretaries  
16 of state have agreed on that until of course the eve of  
17 this gubernatorial election.

18 With respect to -- with respect to the -- I am  
19 sorry. I just got lost. With respect to whether or not  
20 my clients are trying to change the law, my clients are  
21 not changing any laws as was just argued by plaintiffs'  
22 counsel. My clients are following the laws of the State  
23 of Arizona as they are promulgated in both statute and the  
24 Elections Procedures Manual. With respect to the  
25 plaintiffs, Your Honor, plaintiffs in this matter don't

1 have standing. In order to have standing under Arizona  
2 law you have to have something that is more than a  
3 generalized grievance. And you heard the testimony from  
4 these plaintiffs. The second witness to testify actually  
5 partisan, their organization has endorsed the Secretary of  
6 State Katie Hobbs and so, you know, I would challenge  
7 anything they had to say in this matter. But she conceded  
8 that if the Elections Procedures Manual as written by  
9 Katie Hobbs is correct, then yes, my clients have the  
10 power to count or audit as many ballots of the minimum as  
11 possible.

12 The first plaintiff witness has only  
13 generalized grievances, Your Honor. She's concerned that  
14 her ballot isn't somehow going to count. But whether or  
15 not the audit is all ballots or whether or not it is some  
16 ballots, she is still going to have her ballot counted.  
17 It's probably already counted. And whether it is audited  
18 or not, might be audited, might not be audited, if it is a  
19 limited audit, it is still audited, it will be audited.  
20 There is no harm. There is no damage to that plaintiff  
21 and therefore plaintiffs are not entitled to bring this  
22 lawsuit in the first instance.

23 With respect to the four prerequisites for  
24 injunctive relief, do they have a strong likelihood of  
25 success on the merits? We don't think so, Your Honor,

1 because we think the law is clear. Again, I just talked  
2 about that. Whether or not there is an irreparable injury  
3 not remediable by damages, the allegations here are just  
4 general, Your Honor. There is no evidence to support that  
5 oh, they might not meet the statutory deadlines. Well,  
6 okay, they might not meet the statutory deadlines. Does  
7 that mean the process should be stopped because they have  
8 this general conception that the County Recorder might not  
9 be able to do his job on time? No. We can say they might  
10 not meet their deadlines to do their minimum audit.  
11 That's a possibility as well. And as the Elections  
12 Director conceded, Your Honor, by virtue of their minimum  
13 audit they might miss defects with these machines that  
14 occur after they take these ballots out to sequester or  
15 not. Okay? These audits are not designed or intended to  
16 catch all potential problems in the machines.

17 Now, I would proffer to this Court that when  
18 the statutes or the EPM calls for a progressively  
19 increasing audit, that that is because of the very small  
20 nature of the audit called for in the first instance. If  
21 there is a 100 percent audit, Your Honor, those don't  
22 apply because they don't need to apply because you are  
23 auditing 100 percent of the ballots.

24 So the last thing I want to talk about was  
25 admitted by the Elections Director. This county, and

1 everyone can see it, all you have to do is watch TV,  
2 listen to the radio or read a newspaper or watch social  
3 media. This country is divided. As the Elections  
4 Director said, the County of Cochise is 50/50. We have 50  
5 percent of our population that does not trust our  
6 elections. They do not trust our machines. We have 50  
7 percent that do. The problem we have here, Your Honor, is  
8 we have a group of people rushing in from Washington, D.C.  
9 to small Cochise County, 125,000 people approximately is  
10 my understanding, to come in here and say no, you can't  
11 have a full audit of your election. Why not? Why cannot  
12 the people of Cochise pursuant to Arizona law audit all of  
13 their ballots? Wouldn't that go a long way if they were  
14 allowed to do that, Your Honor, to dispel some  
15 conspiracies, to ease people's minds?

16 The public policy behind audits, Your Honor,  
17 should be to expand audits to give confidence to voters  
18 that their basic and most fundamental right without which  
19 they have nothing actually has meaning. Because there is  
20 a lot of frustration that we see on the eve of this  
21 election with people saying no, you can't do it. You are  
22 only allowed to count 400 out of an anticipated more  
23 40,000 ballots to audit your election. And who does that  
24 give security to, Your Honor? Nobody on one half of that  
25 fence. And so public policy should be expansive.

1           My clients, Your Honor, asked for a full  
2 hand-count audit not because they want to cause problems  
3 but because they want to help dispel myths in their  
4 county. Because they want to make their constituents feel  
5 like their votes truly do matter. Thank you.

6           THE COURT: Thank you, Mr. Blehm.

7           MR. KOLODIN: One moment here.

8           THE COURT: Take your time.

9           MR. KOLODIN: Plaintiffs acknowledged in  
10 closing that the secretary has the power to change the  
11 statute but simply did not do so. Perhaps. But I don't  
12 think the Court needs to go quite that far. But what the  
13 Court must do is harmonize two laws if it is at all  
14 possible to do so. The Arizona legislature has delegated  
15 by statute the authority to make certain laws to the  
16 secretary, the attorney general and the governor jointly  
17 in the form of the Elections Procedures Manual. It is  
18 possible to harmonized what the EPM says and what Title 16  
19 says. In fact, it has been harmonized by the best  
20 attorneys at the governor's office, the AG's office and  
21 the secretary's office and none of them felt that it was a  
22 conflict with the clear language of Title 16 to add county  
23 recorders may audit a larger number in their discretion.  
24 And the reason that none of them thought that, right, was  
25 because all of the conflicts pointed to by plaintiffs



1 today, or seeming conflicts, they actually don't scale.

2 If you count double the number of ballots, the  
3 designated margin and the cutoffs and all those  
4 escalators, they work exactly the same way. It doesn't  
5 matter. It doesn't undermine the legislative purpose. It  
6 doesn't contravene the legislative purpose. And if you  
7 count all of the ballots, then those safety mechanisms  
8 that prevent you from putting your thumb on the scale and  
9 stopping the count at an arbitrary point or continuing  
10 past an arbitrary point to help your preferred candidate,  
11 those safety mechanisms simply aren't needed because as  
12 Director Marra herself testified, it is not possible to be  
13 bias when you are counting all of the ballots. But  
14 plaintiffs say the secretary actually now says that the  
15 EPM is not the law, though she once agreed it was. And  
16 they say she put her reasons for it in the brief. But  
17 they kind of gloss over it. And to be fair so did the  
18 secretary. She buried her reasons for saying it is now  
19 not the law in a footnote. I guess she didn't think it  
20 was that important but I kind of do so I am going to read  
21 some of it.

22 The secretary acknowledges that the EPM states  
23 the counties may elect to audit a higher number of early  
24 ballots at their discretion. Since the issuance of the  
25 2019 EPM, however, both the factual and legal landscape

1 have changed material ways. Factually previously routine  
2 aspects of election administration have come under  
3 increasing attack by proponents of baseless election  
4 conspiracy theories. While that may be a very fine  
5 political point, it does not change the law. If the  
6 secretary feels that the current political environment  
7 justifies new laws or different laws, there are two  
8 processes to make those laws. One is legislative and one  
9 is through the EPM through the powers delegated by the  
10 Arizona state legislature. And she did not follow either  
11 of those processes. Indeed even in the manual that she  
12 drafted and the attorney general and the governor declined  
13 to sign, that language remained in there.

14 Now, the second reason that she says this is no  
15 longer is because the legal environment has changed and  
16 she cites McKenna versus Soto. Actually, McKenna versus  
17 Soto is a very useful case for the defense. What McKenna  
18 versus Soto said is, and I am going to quote directly from  
19 it, the EPM is promulgated pursuant to ARS 16-542, which  
20 requires that the Secretary of State prescribe rules and  
21 -- to achieve and maintain the maximum degree of  
22 correctness, uniformity and partiality and efficiency on  
23 the procedures for early voting and voting and producing,  
24 distributing, collecting, counting, tabulating and storing  
25 ballots. The EPM also contains guidance on matters

1 outside these specific topics including yada, yada, yada.  
2 These other topics, however, fall outside the mandates of  
3 16-542 and do not have any other basis statute because the  
4 statute that authorizes the EPM does not authorize rule  
5 making pertaining to candidate nomination petitions.

6 Those portions of the EPM are relied upon by  
7 McKenna to invalidate the signatures were not adopted  
8 pursuant to 16-452. Unlike in McKenna versus Soto, this  
9 is a case that directly on all fours involves the  
10 procedures for counting, tabulating and storing ballots  
11 and therefore even perhaps especially under McKenna the  
12 EPM has the force of statutory law. The law that can be  
13 reconciled.

14 As Bryan explained, no law has been changed.  
15 This law has been in force for at least three years. In  
16 fact, Maricopa County did an expanded hand count and  
17 nobody challenged that perhaps because their political  
18 views were perceived to be different. But nobody  
19 challenged it. In fact, I believe the secretary was quite  
20 supportive of it. Now, even if it were the case that the  
21 law was being changed, which it is not, right, the  
22 doctrine that plaintiffs are referring to that prevents  
23 that from happening is actually called the Purcell  
24 doctrine. And there is a couple problems with their  
25 argument about Purcell. One, it is a doctrine that only

1 applies in federal court. And two, it is a doctrine that  
2 applies to prevent a Court from joining election officials  
3 from doing their job immediately prior to election. In  
4 other words, if Purcell applied in Arizona, which it  
5 doesn't, it would apply in our clients' favor. But it  
6 doesn't apply in Arizona. The Arizona Supreme Court did  
7 not import it into Arizona law in Fontes. And I should  
8 know because I am the attorney that argued and won Fontes.

9 Now, the plaintiffs talk about irreparable  
10 harms. All they have is speculative harms. How many  
11 times today did we hear plaintiffs say oh, this could  
12 happen, I am worried about this happening, to enjoying the  
13 duly elected representatives of the people from doing the  
14 jobs that their people that their voters have asked them  
15 to do and whose interest they represent, you have to come  
16 to this Court with more. And they have failed to even  
17 explain how the harms that they are worried about are any  
18 different than the harms and risks in any hand count, in  
19 any hand count.

20 They have tried to make an issue of the ballots  
21 will be transported back and forth to the vault. It is --  
22 I submit to the Court it is entirely logical to only take  
23 as many ballots out of the vault per day as you intend to  
24 count that day and then bring them back into the vault  
25 once you have counted them. That is just common sense.

1 It is not an increased risk of harm. You also heard  
2 Director Marra testify that just like, just like the  
3 recorder testified she uses the procedures in the EPM.  
4 Right? It is the same procedures. And the main reason  
5 that the recorder is doing it is just because Director  
6 Marra doesn't want to. And if members of the public are  
7 concerned about the way the process is going to work,  
8 right, which of course concern cannot be the cause of  
9 irreparable harm, but if they are concerned, it is still  
10 important to my clients but they can come and see. They  
11 can volunteer. They can participate in the count. They  
12 just have to talk to their party chair and they will be  
13 most welcome as will Director Marra or anybody that wants  
14 to see the degree of transparency with which the count is  
15 conducted.

16           Ultimately, Your Honor, plaintiffs have come to  
17 this Court with policy concerns. They are worried that  
18 the law creates bad policy by allowing 100 percent of the  
19 ballots to be hand counted. And that may be right and  
20 that may be wrong. But that is not the province of the  
21 judiciary. That is the province of the people's  
22 representatives in the legislature as delegated to the  
23 people's representatives, the secretary, the attorney  
24 general and the governor in the drafting of the EPM and as  
25 delegated to my clients in the exercise of their

1 discretion under those laws.

2 For these reasons we would ask the Court to  
3 grant defendant's motion to dismiss, or alternatively at  
4 least to find that the legal questions in this case too  
5 close, too difficult to justify granting preliminary  
6 injunctive relief. Thank you.

7 THE COURT: Ms. Estes-Werther?

8 MS. ESTES-WERTHER: Indeed, Your Honor. As you  
9 have seen here today, Ms. Marra's interest diverge  
10 somewhat from the other defendants. And I think the Court  
11 has heard today from the testimony that 16-602 is what  
12 grants Ms. Marra the authority with the ability to conduct  
13 the hand counts. She is the officer in charge of  
14 elections. And she follows the statute and the Elections  
15 Procedures Manual as it is written to conduct that hand  
16 count. We have also heard about hand counts obviously  
17 require a great deal of preparation. She's again an  
18 experienced Elections Director, as we heard today, and has  
19 already taken a great deal of time to make preparations  
20 for the hand count. And essentially she just physically  
21 can't as she mentioned to be able to proceed with the hand  
22 count of 100 percent of ballots because of the time, the  
23 resources, all of the things that are required that she  
24 knows are necessary again due to her experience of  
25 actually performing the hand count.

1           Additionally, state law only authorizes Ms.  
2 Marra as a person who retains custody of those ballots.  
3 There is a procedure in statute and in the Elections  
4 Procedures Manual has been discussed today about how when  
5 the early ballots move from the County Recorder to Ms.  
6 Marra as Elections Director how that chain of custody  
7 works, how that process of verification works and  
8 tabulation and then the sequestering hand counts, et  
9 cetera. There is no process in statute or in EPM for a  
10 reversal for all to occur to go ahead and relinquish and  
11 provide this back to the County Recorder or for him to  
12 then return it back to her after the hand count is  
13 completed for her to conduct her regular post election  
14 duties. Ms. Marra is obviously concerned about the fact  
15 that there's specific statutes set out and the EPM and  
16 violating those statutes she wants to comply with the law.  
17 And I think the testimony here just compels one conclusion  
18 to grant relief requested by the plaintiffs to allow Ms.  
19 Marra to retain her statutorily prescribed duties to  
20 supervise and conduct the hand count as prescribed  
21 currently in state law and the EPM and also to not compel  
22 her to relinquish custody of ballots that could break the  
23 chain of custody and could jeopardize her ability for her  
24 statutorily prescribed duties to meet the canvas deadline  
25 as well as the post election processes which may include

1 the recount.

2 And that is all I have, Your Honor.

3 THE COURT: Thank you very much. 18 minutes  
4 early, not bad. Ladies and gentlemen, I wanted to say a  
5 few words before we conclude for the evening. I know all  
6 of the folks in front of the bar are very familiar with  
7 how Court works and what is likely to happen right now.  
8 But a lot of the folks in the back probably aren't and I  
9 know you are very interested in what is going on in this  
10 courtroom and I do not take that lightly. And that is  
11 exactly why I am going to do what I am about to do.

12 On TV when we watch hearings like this, what a  
13 judge does is they hear it, they think, they sit back;  
14 then they rule. And sometimes the judge can do that.  
15 This is not one of those cases. There's far too much  
16 information that's been presented today, far too much  
17 important testimony, far too much important argument and  
18 quite honestly far too important a question for this Court  
19 to rush to an answer in an effort to get it done by 5  
20 o'clock today.

21 I am quite certain that no matter what I decide  
22 in this case, whoever disagrees with it for whatever  
23 reason they disagree with it is going to visit those folks  
24 in the Court of Appeals and perhaps even higher Court if  
25 necessary to have my decision reviewed. I do not intend



1 to delay my decision in any way that would delay them from  
2 doing that. In other words, I intend to have a decision  
3 by Monday morning. But I see no benefit to having a  
4 decision right now so you know what my decision is while  
5 you drive home. It's far more important for this Court,  
6 it is far more important for this question and it is far  
7 more important for those who have a vested interest in  
8 this that folks not only understand what I decide but why  
9 I decide it because that is equally important to  
10 understand why I am doing what I am doing as opposed to  
11 just what I am doing.

12 For that reason, folks, I am going to take the  
13 matter under advisement. And Counsel, I am honestly, just  
14 like you all to be working over the weekend, so will I.  
15 And my honest intention is to get this to you first thing  
16 on Monday morning so whatever party wishes to have it  
17 reviewed can do so. Make no small bones about it. If you  
18 want to have it reviewed, you should. It is your absolute  
19 right. And I do not want to in any way inhibit that.

20 Another small note because I have your  
21 attention, I understand how difficult this whole issue is,  
22 and I cannot imagine how difficult it has been. I do not  
23 understand what it is like to have these politics going on  
24 in this county. But I live in a county in Arizona, and I  
25 understand about politics in the local county. It is

1 always refreshing as a judge when people can take issues  
2 like this that are highly contentious that are filled with  
3 emotions and beliefs and can discuss them in a  
4 professional, calm and appreciative manner in a way that  
5 allows the Court to focus on the law, the evidence and the  
6 rules in front of it as opposed to all of those other  
7 extraneous factors. I appreciate counsels hard work in  
8 allowing me to do that. I appreciate how quickly you  
9 responded to the Court's orders and how quickly you all  
10 got prepared for this hearing and the professionalism that  
11 you showed. And I also appreciate everyone who's been in  
12 attendance and how seriously you have taken these  
13 proceedings. It is always a pleasure to handle a  
14 proceeding when people act in the way that you have, and I  
15 appreciate it very much.

16 With that, we are concluded. I wish you to  
17 have a very safe, very happy weekend. I wish you all  
18 luck, and I wish you all good tidings for the upcoming  
19 election. I know it is very important to everyone in this  
20 room. And we stand at recess at this time.

21 (Hearing adjourned and end of ER recording.)  
22  
23  
24  
25

1 STATE OF ARIZONA )  
 ) ss.  
 2 COUNTY OF MARICOPA )

3 BE IT KNOWN that the foregoing electronically  
 4 recorded proceedings transcribed by Cathy A. Miccolis,  
 5 RPR/CRR, a Certified Reporter, Certificate #50068,  
 6 Benjamin Bamford, Certified Reporter #50953,  
 7 Barbara Rosado, Certified Reporter #50698 for the State of  
 8 Arizona; that the transcript consisting of 299 pages is a  
 9 full, true and accurate transcript of all electronically  
 10 recorded proceedings all done to the best of our skill and  
 11 ability.

12 WE FURTHER CERTIFY that we are in no way related to  
 13 nor employed by any of the parties hereto, nor are we in  
 14 any way interested in the outcome hereof.

15 DATED at Phoenix, Arizona, November 8, 2022.

16 *Cathy A. Miccolis*

17 Cathy A. Miccolis, RPR/CRR  
 18 Certified Reporter, No. 50068

19 \_\_\_\_\_/s/Benjamin C. Bamford\_\_\_\_\_  
 20 Benjamin C. Bamford, RPR  
 21 Certified Reporter, No. 50953

22 \_\_\_\_\_/s/Barbara Rosado\_\_\_\_\_  
 23 Barbara Rosado, RPR  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the Appellants' Opening Brief is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 3,803 words according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 10th day of November, 2022.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 10<sup>th</sup> day of November 2022, a copy of the foregoing Appellants' Opening Brief was electronically filed. The undersigned also certifies that a copy of Appellants' Opening Brief was emailed to:

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