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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

ARIZONA ALLIANCE FOR RETIRED AMERICANS, INC. and STEPHANI STEPHENSON, *Plaintiffs*, 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*.	CASE NO: CV2022-00518 **RECORDER STEVENS' MOTION TO DISMISS AND RESPONSE TO PETITION**

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

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

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

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

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

Similarly, the balance of the equities tips in Defendants' favor because, in contrast to Plaintiffs, who stand to suffer no harm at all, Defendants will suffer irreparable harm 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

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

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

For these reasons, Plaintiffs' suit should be dismissed or, alternatively, injunctive relief should be denied.

FACTUAL BACKGROUND

The Recorder is Qualified and Competent to Manage a Hand Count

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

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

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

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

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

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

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

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

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

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

Manageableness of the Count

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

be slightly fewer ballots than were cast in the last midterm.[1] With 35,000 ballots, 220 volunteers could complete the hand count by counting approximately 8 ballots per volunteer per day.

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

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

[1] *See* https://cochise.az.gov/DocumentCenter/View/683/Cumulative-Results-PDF (45,927 ballots cast).

[2] *See* https://sos.ga.gov/sites/default/files/2022-2/11.19_.20_risk_limiting_audit_report_memo_1.pdf

[3] France hand counted 32,077,401 votes to find Macron as the winner in the run-off election for president on April 24, 2022. 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 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.

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

The Ansolabehere Article relied on by Plaintiffs for the notion that "Vote counts by machines are more accurate than tallies by hand," (Pet. 5, Comp. para. 31)[5] actually concluded that vote **recounts** by hand after the "hurly burly" of election night counting find errors committed by machine counts **on election night**. There, researchers compared machine counts on election night of two statewide elections in Wisconsin with the "more careful" recounts done mostly **by hand** afterwards. The hand recount of the 2016 presidential race found that 0.59% of the ballots counted by machine on election night 2016 were miscounted when compared to the recount afterwards, i.e., **one out of every 170 ballots in 2016 was miscounted when checked by the hand recount**. (Id. at 105). Only 0.21% were miscounted on election night in a judicial race in 2011, i.e., one out of every 475 ballots. The difference in the error rates was "almost entirely" due to "miscounting of minor party and write-in ballots in 2016." (Id. p. 101). In reflecting on their findings, the authors noted, "The fact that the average scanner is more accurate than the average human in counting ballots **on election night** is not an argument against checking the work of computers. Quite the opposite." (Id. at 116). Thus, the article means that hand recounts after the machine counts under election night conditions are the standard against which the machine counts are checked.

[4] https://fairvote.org/report/a_survey_and_analysis_of_statewide_election_recounts/

[5] 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

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.

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

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

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

a. Plaintiffs lack standing.

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

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

To establish standing, a party must allege a **particularized injury** "fairly traceable to the defendant's allegedly unlawful conduct[.]" *Bennett v. Napolitano*, 206 Ariz. 520,

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

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

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

Plaintiffs' alleged harms of loss of confidence in the election process and the "need" to expend resources to address that also fail to provide standing because they are "abstract", "conjectural", or "hypothetical[.]" *Allen v. Wright*, 468 U.S. 737, 751 (1984). 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

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

Because Plaintiffs lack standing, their case must be dismissed.

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

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

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

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

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

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

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

ARS 16-602(B) provides: "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." For such hand counts ("Type 1 Hand Counts"), the only numerical requirement is that Defendants count all the ballots in "**At least** two percent of the precincts in that county, or two precincts, whichever is greater[.]" 16-602(B)(1). "Provisional ballots, conditional provisional ballots and write-in votes shall not be included" in hand counts pursuant to ARS 16-602(B). *Id*. Instead, such ballots "shall be grouped separately by the officer in charge of elections for purposes of **a separate manual audit pursuant to subsection F** of this section." *Id*. Accordingly, the rules in 16-602(F), apply to an entirely separate type of hand count. ("Type 2 Hand Counts").

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

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

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

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

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

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

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

[6] Available at: https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. The public interest favors Defendants.

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

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

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

CONCLUSION

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

Respectfully submitted this 3rd day of November, 2022

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CERTIFICATE OF SERVICE

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

By: /s/Yuka Bacchus
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