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12
13 **ARIZONA SUPERIOR COURT**
14 **YAVAPAI COUNTY**

15 MARK BRNOVICH, in his official capacity as)
16 Arizona Attorney General, et al.,)
17 Plaintiffs,)
18 v.)
19 KATIE HOBBS, in her capacity as the)
Secretary of State of Arizona,)
20 Defendant.)

No. P1300CV202200269
**DEFENDANT ARIZONA SECRETARY
OF STATE KATIE HOBBS' RESPONSE
TO PLAINTIFFS' APPLICATION FOR
ORDER TO SHOW CAUSE**
-AND-
**OPPOSITION TO PLAINTIFFS'
REQUEST FOR SPECIAL ACTION
RELIEF**
(Assigned to Hon. John Napper)
(Hearing set for April 29, 2022 at 1:30 pm)

1 **Introduction¹**

2 Arizona Attorney General Mark Brnovich (“AG”) and a political party jointly bring this
3 unprecedented action against the State’s Chief Elections Officer, Arizona Secretary of State
4 Katie Hobbs (“Secretary”), to force her to adopt their preferred policy changes in the Election
5 Procedures Manual (“EPM”) in the middle of an election year.

6 The AG does so after he approved in 2019 many procedures he now objects to, yet
7 inexplicably refused to approve a substantially similar EPM in 2021. After rejecting the 2021
8 EPM unless the Secretary accepted every demand he made, the AG did nothing for months.
9 Now, as his own U.S. Senate primary election nears and his base has criticized him for not taking
10 more aggressive action against elections administrators, he teamed up with his own political
11 party to sue the Secretary on the taxpayers’ dime and tout it for his official campaign. The AG’s
12 shameless use of his official office for his own political gain is nothing new, but shouldn’t go
13 unnoticed. And he certainly shouldn’t be allowed to use the judiciary to carry out his political
14 agenda. In the end, his obvious political motives help explain the absurdity of Plaintiffs’ claims.

15 Plaintiffs invoke Rule 3(a), R. P. S. A. (*i.e.*, a mandamus action), and ask the Court to
16 compel the Secretary to submit another draft EPM to the AG that excludes or includes specific
17 policies that Plaintiffs prefer.

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20 ¹ The Court set this matter for a hearing on Plaintiffs’ Application for Order to Show Cause
21 (“Application”), but its order required the Secretary to “file a response to Plaintiffs’ Verified
22 Complaint for Special Action.” Presumably, the Court intended to order the Secretary to respond
23 to the Application, and that is what the Secretary does below. Rule 3(d) of the Rules of Procedure
24 for Special Action provides that in a special action, “[t]here shall be a complaint, which may be
25 verified or accompanied by affidavits or other written proof, and an answer by the defendant or
26 the real party in interest, or such other responsive pleadings as may be appropriate.” The Court
did not order the Secretary to file an “answer.” And this response is not the Secretary’s answer,
which she is entitled to file in the normal course. As explained in this response, there are “triable
issues of fact” raised in this action, such that this matter must “be tried subject to special orders
concerning discovery,” Ariz. R. P. S. A. 3(f), if the Court does not dismiss this matter entirely.

1 As an initial matter, their claims run afoul of the plain language of A.R.S. § 16-452, which
2 requires the Secretary to prescribe rules and the AG and the Governor to approve those rules. If
3 Plaintiffs get their way, it will wreak havoc on the balance of powers. After all, compelling the
4 Secretary—or any constitutionally created state officer of the executive department—to blindly
5 abide by the AG’s commands would usher in a totalitarian regime in place of ordered democracy.
6 Plaintiffs’ claims fail for this reason alone.

7 But the Court should not even reach the merits of Plaintiffs’ claims because they are
8 barred by the laches and *Purcell* doctrines. Plaintiffs sat on their hands and brought their claims
9 mid-election-year. Their requested relief would disrupt election procedures, create
10 administrative burdens for election officials, and cause voter confusion. Plaintiffs’ eleventh-hour
11 claim and self-imposed “emergency” are reason enough to deny relief. Contrary to Plaintiffs’
12 repeated misrepresentations that this is an “expedited election case” requiring immediate
13 adjudication, it is exactly the kind of case that cannot be brought and decided during an election.

14 If Plaintiffs’ claims are not barred by the laches and *Purcell* doctrines, then the Court
15 should still deny the requested relief because the Complaint presents a non-justiciable political
16 question. Whether the Secretary should include certain policies in the EPM is a non-justiciable
17 political question this Court shouldn’t try to answer. Plaintiffs ask the Court to referee a political
18 dispute between two officials in the executive branch and force one official’s policy decisions
19 on the other. That is not this Court’s role, and opening the courtroom doors to these kinds of
20 disputes would put courts in the middle of every policy disagreement between elected officials.

21 And last, even if the Court reaches Plaintiffs’ claims, special action relief is unavailable
22 to Plaintiffs. First, Plaintiffs aren’t asking the Court to compel the Secretary to perform a non-
23 discretionary duty; they instead ask the Court to force her to exercise her discretion in a manner
24 they prefer. But that is exactly the type of conduct Arizona courts routinely hold cannot be
25 compelled through a mandamus action. *See, e.g., Blankenbaker v. Marks*, 231 Ariz. 575, 577 ¶
26 7 (App. 2013) (while in some cases “mandamus may be used to compel a public officer to

1 perform a discretionary act,” it can’t be used to compel the officer “to exercise that discretion in
2 any particular manner”). Second, nothing in A.R.S. § 16-452 gives the AG authority to dictate
3 the contents of the EPM and, beyond that, nothing in Arizona law requires the Secretary to adopt
4 Plaintiffs’ specifically-requested EPM provisions regarding ballot drop-boxes and signature
5 verification procedures. In fact, Arizona law does not prohibit ballot drop-boxes (as the AG
6 conceded when he approved the ballot drop-box procedures in the 2019 EPM).

7 The Court should refuse to participate in the AG’s political gamesmanship, dismiss the
8 Complaint for any and all of these reasons, and award the Secretary her fees and costs.

9 **Factual Background**

10 **I. The Secretary’s Authority to Promulgate Rules in the EPM.**

11 Under A.R.S. § 16-452(A), “[a]fter consultation with each county board of supervisors or
12 other officer in charge of elections, the secretary of state shall prescribe rules to achieve and
13 maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the
14 procedures for early voting and voting, and of producing, distributing, collecting, counting,
15 tabulating and storing ballots.” A.R.S. § 16-452(B) makes clear that, “the manual shall be
16 approved by the governor and the attorney general.” And to ensure that all three executives do
17 their part, the statute requires that the Secretary “submit the manual to the governor and the
18 attorney general not later than October 1 of the year before each general election,” and that the
19 manual be issued “not later than December 31 of each odd-numbered year immediately
20 preceding the general election.” A.R.S. § 16-452(B).

21 **II. The Secretary Adopts—and the AG and Governor Approve—the 2019 EPM.**

22 Between 2014 and 2019, election officials used the 2014 EPM because the Secretary’s
23 predecessor didn’t issue a new version. After Secretary Hobbs took office in 2019, she worked
24 hard to prepare an updated EPM before election administrators headed into an important election
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1 year. [Exhibit A (Lorick Decl. ¶¶ 6-10)]² Consistent with the statutory requirement, Secretary
2 Hobbs' office consulted County Recorders and elections directors for many months to prepare a
3 comprehensive updated draft. [*Id.*]

4 The Secretary timely submitted a draft EPM to the AG and Governor, and she began a
5 collaborative process with the AG to discuss his proposed revisions. [*Id.* ¶¶ 11-12] Much of the
6 AG's feedback reflected his lack of understanding of election administration or misreading of
7 relevant statutes and how they operate in practice. [*Id.* ¶ 13] The Secretary shared the AG's
8 comments with county officials and received feedback from the counties on those comments.
9 After multiple meetings over several weeks, including a meeting attended by county officials,
10 the Secretary's and AG's offices finalized draft. [*Id.* ¶¶ 13-15] Both the Secretary and the AG
11 compromised on certain provisions to reach a final agreement. [*Id.*]

12 **III. The Secretary Submits the 2021 EPM.**

13 The Secretary again worked with county election officials for months to draft an updated
14 EPM in 2021. Her office met with County Recorders, county elections directors, and their staff
15 extensively to update and improve the EPM chapter by chapter, and received, reviewed, and
16 incorporated public feedback into the draft. After that long and collaborative process with fellow
17 elections officials and a period for public comment, the Secretary submitted the draft EPM to
18 the AG and Governor on October 1, 2021. [Compl. Ex. 1-A] On November 15, 2021, the
19 Secretary reached out to ask when she could expect initial feedback on the draft and asked to set
20 up a time to discuss. [Lorick Decl. ¶ 20, Ex. 9]

21 Over two weeks later, she finally received an email from the AG's outside counsel stating
22 that he was hired to review the EPM. [Lorick Decl. ¶ 21] On December 9 (more than two months
23 after the Secretary submitted the EPM for review, and mere weeks before the statutory deadline
24 for issuance of the EPM), the AG's outside counsel sent the Secretary a revised draft and
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26 ² Exhibit A is filed as a separate filing concurrently with this Response.

1 declared that the AG “will not approve the manual . . . unless [his] changes are made.” [Compl.
2 Ex. 1-B; Lorick Decl. ¶¶ 22-23] The revised draft slashed nearly a third of the Secretary’s draft
3 EPM. The AG deleted large swaths, most of which the AG and Governor approved in 2019, and
4 most of which have been part of the EPM for much longer than that. [Lorick Decl. Ex. 16]

5 **IV. The AG’s Claimed Objections to Various EPM Provisions.**

6 The AG made countless arbitrary revisions to the EPM. For example:

7 The AG deleted an entire chapter on voter registration, even though the Secretary is
8 authorized to adopt EPM procedures governing “voting,” A.R.S. § 16-452, and she is the “chief
9 state election officer who is responsible for coordination of state responsibilities under the
10 national voter registration act of 1993[.]” A.R.S. § 16-142. It is hard to imagine a more basic
11 component of “voting” than voter registration. Deleting this chapter also would have removed a
12 provision mandated by a consent decree ordered by the United States District Court for the
13 District of Arizona and invited further litigation. *League of United Latin American Citizens of*
14 *Arizona (LULAC) v. Reagan*, 2:17-cv-04102-DGC, Doc. 37 (D. Ariz. June 18, 2018). [Lorick
15 Decl. ¶ 24, Ex. 13]³

16 The AG also deleted an entire chapter on the certification of voting equipment, even
17 though the Secretary is authorized to adopt those standards and procedures. Beyond the
18 authorization in § 16-452(A) for procedures to ensure “the maximum degree of correctness,
19 impartiality, uniformity and efficiency” for voting, counting, and tabulating ballots, § 16-449(B)
20 also specifically states that the EPM “shall include procedures for . . . the electronic scanning of
21 ballots and any other matters necessary to ensure the maximum degree of correctness, impartially
22 and uniformity in the administration of an electronic ballot tabulation system.”

23 The Secretary responded in good faith on December 17, accepting many edits as a
24 compromise (even though she disagreed with them as a matter of policy and did not believe the

25 ³ This is just one example of an issue that may require the development of a factual record,
26 and where other parties may actually be indispensable to the resolution of the issue.

1 edits were required as a matter of law), explaining why certain edits are improper, and asking
2 the AG to meet regarding other edits that warranted further discussion. [Compl. Ex. 1-C] For
3 example, the Secretary agreed to remove all provisions relating to candidate nominations. The
4 Secretary explained that she included these provisions as nonbinding guidance as a useful
5 resource for filing officers and candidates, but was willing to remove them as a compromise with
6 the AG. [*Id.*] The Secretary also agreed to remove provisions covering campaign finance
7 enforcement, even though the AG approved the same provisions in the 2019 EPM and didn't
8 even try to justify why he believed they should now be removed. The Secretary explained that
9 she believed the section would provide useful guidance consistent with statutes, but again agreed
10 to the revisions as a compromise. [*Id.*]

11 The Secretary expected the AG to follow past practice, including in 2019 when the
12 Secretary and AG collaborated over several meetings to agree on a final EPM. She was wrong.

13 **V. The AG Refuses to Approve the EPM.**

14 On December 22, the AG unilaterally cut off any discussion about the draft for reasons
15 completely unrelated to the substance of the draft. He informed the Secretary that, “because of
16 [her] unprecedented decision to file a bar complaint against [him]” for his unethical conduct in
17 other matters, he will not “discuss[] this matter further with [her].” [Compl. Ex. 1-D] The next
18 day, the Secretary informed all county recorders about the AG’s decision, thanked them for their
19 hard work, and explained that the 2019 EPM “remains relevant” even if not up-to-date in some
20 parts. [Lorick Decl. Ex. 18]

21 Notably, the AG let the December 31, 2021 statutory deadline for approval and issuance
22 of an updated EPM pass and then did nothing for four months. Then, after the 2022 election year
23 began, the AG filed this action to compel the Secretary to adopt all his revisions to the EPM.⁴

24
25 ⁴ The AG first made these arguments when the Arizona Republican Party (“ARP”) sued
26 the Secretary in an original special action in the supreme court last month, challenging certain
EPM provisions and Arizona’s longstanding mail-in voting system. The AG declined to defend
Arizona’s early voting laws, and urged the court to rule on the EPM claims. The supreme court

1 The AG’s position here is puzzling given his opposite approach with Republican
2 Secretary of State Michele Reagan. The AG never questioned Secretary Reagan’s failure to
3 submit an EPM for his approval at any time during her four-year tenure as Secretary of State. In
4 fact, when an attorney wrote to the AG complaining that Secretary Reagan was violating the
5 requirement under A.R.S. § 16-452(B) that she “shall” issue an EPM “not later than thirty days
6 prior to each election,” AG Brnovich responded that “the statute is subject to multiple
7 interpretations.”⁵ [Exhibit B (June 14, 2014 Ltr. to T. Ryan)] He then explained that Secretary
8 Reagan’s interpretation—that the law “does not impose a duty to issue a new [EPM] in any given
9 year”—is “plausible.” [Id.]

10 The Secretary heard nothing further from the AG on this issue until April 11, 2021, more
11 than three months after the December 31 statutory deadline. [Compl. Ex. 1-J] In the meantime,
12 several local jurisdictions have held elections under the 2019 EPM. And as detailed further
13 below, counties are in the middle of preparing for the August 2, 2022 primary election using the
14 2019 EPM. Upending the process now in the middle of an election year would wreak havoc on
15 our election systems. [See generally Exhibits C-E (Declarations of S. Richer, G. Cázares-Kelly,
16 and P. Hansen)]

17 Argument

18 Plaintiffs seek an order that the 2019 EPM (the most recent approved EPM) is no longer
19 valid, and special action relief (really a mandatory injunction) compelling the Secretary to submit
20 a new “legally compliant” 2022 EPM to the AG and Governor (even though she already did
21 that). They specifically ask the Court to order the Secretary to submit an EPM that (1) includes

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23 declined special action jurisdiction, holding that ARP “[had] not persuaded the Court that” its
24 EPM claims “can be decided without a factual record.” Order Declining Jurisdiction (Ariz. Apr.
25 5, 2022), <https://www.azcourts.gov/Portals/201/01.pdf> (last visited Apr. 27, 2022).

26 ⁵ The AG’s shifting interpretations of the statutory requirements, as well as his decision
not to demand submission of an EPM from Secretary Reagan during her first two years in
office, are examples of fact issues that require further discovery and development.

1 rules on signature verification, (2) prohibits counties from “outsourcing any part of the ballot
2 verification process,” and (3) requires counties to “properly staff” ballot drop-boxes.

3 Plaintiffs’ claims fail for at least five reasons. First, Plaintiffs’ demand for issuance of a
4 new EPM with their desired policy preferences close to five months past the statutory deadline
5 for a new EPM violates both the text and intent of A.R.S. § 16-452. Second, even if the AG has
6 the authority under the statute to demand a new EPM with specific provisions (he doesn’t),
7 Plaintiffs’ claims seeking to disrupt election procedures mid-election-year are too late. Third,
8 whether the Secretary should include the AG’s preferred policies in the EPM, when no law
9 expressly directs her to do so, is a non-justiciable political question. Fourth, special action relief
10 is unavailable to compel the Secretary to exercise her discretion in a manner Plaintiffs prefer.
11 And fifth, the Secretary has no legal duty to enact the specific changes to the EPM demanded by
12 the AG because they are contrary to law or committed to the Secretary’s discretion.

13 **I. Plaintiffs’ Demand for Issuance of the AG’s Preferred EPM in the Middle of the**
14 **Election Year Violates A.R.S. § 16-452.**

15 As an initial matter, neither the plain language nor intent of A.R.S. § 16-452 supports
16 Plaintiffs’ claims and requests for relief. The law tasks the Secretary with drafting the EPM after
17 consultation with county officials and directs that the Secretary “shall submit the manual” to the
18 AG and Governor by October 1 of each odd numbered year. A.R.S. § 16-452(A)-(B). The
19 Secretary indisputably complied with this requirement. [Lorick Decl. ¶¶ 16-30] That statute also
20 directs that “the manual shall be approved” by the AG and Governor, after which the Secretary
21 “shall . . . issue [the EPM] not later than December 31 of each odd numbered year.” The AG and
22 Governor did not fulfill their duty to approve the EPM by the statutory deadline. [*Id.* ¶¶ 30-31]

23 Nothing in § 16-452 permits the AG to unilaterally dictate the contents of the EPM or
24 force the Secretary to issue an EPM with his desired policy positions (nearly five months past
25 the statutory deadline, no less). To the contrary, the statute directs the Secretary to issue the
26 EPM, after she consults county election officials, and after she submits it to the AG and

1 Governor. If the AG were correct and he gets to decide—in his sole discretion—what goes in
2 the EPM, the statute would say so. Indeed, the AG has only those powers expressly authorized
3 by statute. *See State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997); *Ariz. State Land and*
4 *Dep’t v. McFate*, 87 Ariz. 139, 142 (1960). The Legislature did not designate the AG as the
5 State’s Chief Elections Officer, but rather (and more sensibly) the Secretary.

6 A.R.S. § 16-452 tasks the Secretary—not the AG—with drafting and issuing the EPM for
7 good reason. The Secretary, not the AG, is the State’s Chief Election Official, who oversees
8 election administration for the State. The Secretary, not the AG, works closely with county
9 officials day-to-day to administer elections and thus has relevant expertise on election
10 procedures. And the Secretary, not the AG, is the state official tasked with consulting with
11 counties regarding the EPM. If anything, the statute requires that the AG and Governor “shall”
12 approve the rules the Secretary drafts. While the Secretary does not argue that the AG and
13 Governor have a non-discretionary duty to approve whatever draft EPM she submits, Plaintiffs’
14 own arguments would give rise to such a claim. Whether Plaintiffs realize it or not, the arguments
15 they advance could be used to compel the AG’s approval of whatever EPM the Secretary
16 submits. But, unlike Plaintiffs, the Secretary respects the letter of the law. The statute gives
17 neither the AG nor the Governor the authority to dictate the rules the Secretary must include,
18 just like the Secretary cannot compel their approval. Interpreting the statute as Plaintiffs urge
19 would do violence to both the language and intent of the statute. And it would disrupt the balance
20 of powers among the State’s executive officers and, in fact, allow the AG to usurp the role and
21 powers of the Governor and the Secretary.

22 Plaintiffs repeatedly claim that *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021), and
23 *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021) somehow limited the Secretary’s authority to
24 include provisions in the EPM. But neither case supports that claim. In *McKenna*, the supreme
25 court held that EPM provisions governing candidate nomination Complaints were not binding,
26 because § 16-452 allows the Secretary to adopt binding rules governing only “early voting and

1 voting, and . . . producing, distributing, collecting, counting, tabulating and storing ballots.” §
2 16-452(A). But the court expressly recognized that the “EPM also contains guidance on matters
3 outside these specific topics, including candidate nomination Complaint procedures, and the
4 regulation of Complaint circulators[.]” 250 Ariz. at 473 ¶ 20 (citation omitted) (emphasis added).
5 *Leach* is no different. It stated the unremarkable proposition that an EPM rule “does not have
6 the force of law” if it exceeds the scope of § 16-452 or conflicts with a statute. 250 Ariz. at 576
7 ¶ 21. In short, neither *McKenna* nor *Leach* changed the Secretary’s statutory authority for
8 purposes of the EPM.

9 Consistent with longstanding practice, A.R.S. § 16-452 assumes that the Secretary, AG,
10 and Governor will work in good faith to reach agreement on an updated EPM. This is what
11 happened in 2019. [Lorick Decl. ¶¶ 11-15]⁶ Unfortunately, the AG, for apparent political
12 purposes and in sharp contrast to what he did in 2019, refused to even come to the table to discuss
13 the significant and drastic changes he demanded. [*Id.* ¶¶ 25, 28] In the face of such a stalemate,
14 nothing in § 16-452 or any other statute permits the AG to force the Secretary to issue an EPM
15 with his desired policy positions dressed up as requirements for “a legally-compliant EPM.”

16 Instead, Plaintiffs ask this Court to rewrite and add words to A.R.S. § 16-452 to give the
17 AG authority over the EPM that the legislature never granted, including, remarkably, the
18 authority to override, at his leisure, the specific statutory deadline for issuance of a new EPM.
19 That, of course, is not “is not the function of the courts.” *Lewis v. Debord*, 238 Ariz. 28, 31 ¶ 11
20 (2015); *see also In re McLauchlan*, 252 Ariz. 324 __ ¶ 15 (2022) (courts “cannot rewrite a statute
21 based on the surmise that the legislature meant to draft it a different way”). Even if the AG had
22 authority to unilaterally dictate the contents of the EPM and force the Secretary to issue an EPM

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24 ⁶ In fact, a lawyer at the AG’s office who is now suing the Secretary went out of her way
25 to praise the Secretary’s Office for how they “handled the EPM review process” in 2019, and
26 expressed that she is “looking forward” to working with them again next time. [**Exhibit F** (Dec.
24, 2019 Email from J. Wright to B. Dul)] Of course, that was before the 2020 election and
before it became politically advantageous to undermine the work of elections administrators.

1 with his preferred policies (he does not), A.R.S. § 16-452 expressly requires that any new manual
2 be issued by December 31 of the year before the general election year. That requirement
3 forecloses the relief Plaintiffs seek. The Legislature imposed this deadline precisely to avoid the
4 chaos that would ensue if Plaintiffs prevailed in this lawsuit and forced a new EPM to be issued
5 in the middle of the election year. As discussed further in Section II below, requiring election
6 officials to shift procedures and resources now, in the middle of the election year, would cause
7 significant disruption and challenges to the administration of the August and November
8 elections. [Cázares-Kelly Decl. ¶¶ 4-6; Hansen Decl. ¶¶ 4-7; Richer Decl. ¶¶ 3-5]

9 **II. Laches and the *Purcell* Doctrines Bar Plaintiffs’ Claims.**

10 Plaintiffs claim [at ¶¶ 28-29] that there is “no other plain and speedy remedy to resolve
11 this dispute” because election officials need “legal clarity as to the operative uniform rules” in
12 the 2022 election cycle. But there is no lack of clarity, and the Plaintiffs (and in particular, the
13 AG) created this supposed emergency by sitting back and waiting until the 2022 election cycle
14 is already underway.

15 Contrary to Plaintiffs’ claims that election officials need “clarity,” the counties and the
16 Secretary are operating under the 2019 EPM, except any provisions that have changed based on
17 new legislation or court rulings. [Lorick Decl. ¶¶ 34-36; Cázares-Kelly Decl. ¶ 4; Hansen Decl.
18 ¶ 4; Richer Decl. ¶ 3] Forcing the Secretary to adopt a different manual this late in the game
19 would create uncertainty and confusion mere months before the August primary elections, for
20 which election administrators are already preparing. Coconino County is “currently in the middle
21 of administering the May 17, 2022, jurisdictional elections based on the 2019 EPM and
22 subsequent legislative changes,” [Hansen Decl. ¶ 6; Cázares-Kelly Decl. ¶ 5], and other County
23 Recorders are “well under way in preparing for the statewide primary election on August 2,
24 2022,” [e.g., Richer Decl. ¶ 4]. Any changes to the existing EPM now would disrupt the orderly
25 administration of elections. [Hansen Decl. ¶ 7; Cázares-Kelly Decl. ¶ 6; Richer Decl. ¶ 5] As
26 Maricopa County noted in its amicus brief in *ARP v. Hobbs* [at 8 n.4], “[t]he 2019 Elections

1 Procedures Manual is the operative manual, because no new manual was issued in 2021.” And
2 the AG’s “jarring[]” claim that the 2019 EPM is invalid “injects unnecessary uncertainty into
3 election administration just months before the August 2022 primary election.” [*Id.*]⁷

4 Beyond that, the AG created this timing problem. The Secretary submitted the draft 2021
5 EPM to the AG by October 1, 2021, but he waited—without offering any justification—until
6 less than three weeks before the December 31 deadline to give “feedback.” He then refused to
7 compromise or even discuss his edits, categorically refusing to approve the EPM unless the
8 Secretary accepted his every demand. The Secretary, in her discretion, declined to do so. If the
9 AG believed, as he now claims, that the Secretary violated her “mandatory duty” to provide “a
10 valid draft EPM to the AG and Governor,” then why did he wait four months to say so? The
11 Court should not overlook that Plaintiffs’ claimed “emergency” is entirely of their own making.

12 First, the *Purcell* doctrine bars Plaintiffs’ claims. Under that doctrine, courts generally
13 should not alter election rules on the eve of an election. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).
14 This is for good and practical reasons; “[c]ourt orders affecting elections can themselves result
15 in voter confusion and consequent incentive to remain away from the polls,” a risk that only
16 increases “[a]s an election draws closer.” *Id.* at 4-5. A.R.S. § 16-452 contemplates that risk by
17 ensuring that EPM submission and approval happens before the election year starts. After the
18 AG refused to approve the EPM in December 2021 (and refused to even discuss the matter for
19 irrelevant reasons), he sat on his hands and did nothing. Now, some counties are administering
20 local elections as we speak, and all counties are deep in their preparations for the August 2022
21 primary. [Hansen Decl. ¶ 6; Cázares-Kelly Decl. ¶ 5; Richer Decl. ¶ 4] Early voting in that
22 election is only two months away. Changing the election procedures now would be disastrous.
23 [Hansen Decl. ¶ 7; Cázares-Kelly Decl. ¶ 6; Richer Decl. ¶ 5] It would also burden election
24 administrators and cause voter confusion, which is the precise harm *Purcell* aims to prevent.

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⁷ The Complaint [¶ 124 n.2] references *ARP v. Hobbs* and links to the docket and filings.

1 Second, laches bars Plaintiffs’ requests for relief. The laches doctrine “seeks to prevent
2 dilatory conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing
3 party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006).

4 Plaintiffs’ delay is unreasonable. When deciding whether delay is unreasonable, courts
5 consider “the justification for the delay, the extent of the plaintiff’s advance knowledge of the
6 basis for the challenge, and whether the plaintiff exercised diligence[.]” *Ariz. Libertarian Party*
7 *v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). The AG approved the
8 ballot-drop box security measures in 2019, and Plaintiffs have known about that claims for more
9 than two years. The AG also refused to approve the 2021 EPM in December 2021, yet
10 inexplicably waited until now to seek mandamus relief against the Secretary. Plaintiffs’ mid-
11 election-year request for an order invalidating the EPM and re-starting the submission and
12 review process is inexcusable.

13 Plaintiffs’ untimeliness also prejudices the Secretary, Arizona’s dedicated election
14 officials, and above all else, Arizona voters. Counties have already successfully administered—
15 or are now in the middle of administering—local elections under the 2019 EPM. [Hansen Decl.
16 ¶ 6; Cázares-Kelly Decl. ¶ 5; Richer Decl. ¶ 4] These are the rules voters and election officials
17 have come to rely on. Implementing new EPM procedures in the middle of an election year
18 would be a herculean task. [Lorick Decl. ¶ 32-37; Richer Decl. ¶¶ 3-5; Hansen Decl. ¶¶ 4-7]
19 Indeed, the Pima County Recorder’s Office likely does not “have sufficient personnel to
20 undertake such an endeavor.” [Cázares-Kelly Decl. ¶ 6] Plaintiffs’ long and unjustified delay
21 and request for emergency relief also prejudices the Court by placing it “in a position of having
22 to steamroll through” important legal issues, “leaving little time for reflection and wise decision
23 making.” *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000).

24 While courts have held that the laches doctrine does not apply against the State or its
25 agencies in some cases, “Arizona courts have moved away from” that rule and “toward balancing
26 the injustice that might result from the application of the rule against the effect that non-

1 application would have on the state’s effective exercise of its sovereignty and any resulting
2 damage to the public interest.” *State v. Garcia*, 187 Ariz. 527, 529–30 (App. 1996) (equitable
3 defenses may be available “when the government conduct complained of was in the form of
4 inaction or silence”); *see also State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ (App. 2014)
5 (same when state entities “made misrepresentations (or actions inconsistent with the entity’s
6 later position) on which the opposing party relied”). Here, the AG sat on his claim and let the
7 State’s election officials administer 2022 elections under the existing rules. Changing those rules
8 now would upend our election system and harm the public interest.

9 In sum, the Court should reject Plaintiffs’ last-minute request to change the EPM.

10 **III. Whether the Secretary Should Include Particular Policies in the EPM is a Non-**
11 **Justiciable Political Question.**

12 Next, whether the Secretary should adopt specific EPM provisions under her broad
13 authority to adopt rules “to achieve and maintain the maximum degree of correctness,
14 impartiality, uniformity and efficiency” in elections is a non-justiciable political question that
15 this Court should not attempt to answer in the absence of any express legislative directive to
16 include the specific procedures at issue. And, as described further in Section V below, when the
17 Legislature intends to require the Secretary to adopt a rule in the EPM governing a specific
18 election procedure, it says so.

19 A controversy involves a non-justiciable political question that a Court cannot resolve
20 when “there is a textually demonstrable constitutional commitment of the issue to a coordinate
21 political department; or a lack of judicially discoverable and manageable standards for resolving
22 it.” *Kromko v. Arizona Bd. of Regents*, 216 Ariz. 190, 192 ¶ 11 (2007) (cleaned up). The political
23 question doctrine stems from “the basic principle of separation of powers,” and recognizes that
24 some decisions are not appropriate for judicial resolution. *Id.* ¶ 12; *see also Mecham v. Gordon*,
25 156 Ariz. 297, 300 (1988) (“Nowhere in the United States is this system of structured liberty
26 more explicitly and firmly expressed than in Arizona.”).

1 The Secretary, like the AG, is a constitutional officer in the executive branch. Ariz. Const.
2 art. V § 1. Yet the AG asks the Court to micro-manage the Secretary’s rulemaking process and
3 force her to adopt specific procedures that reflect the AG’s political views. The inherent political
4 nature of the AG’s request is evidenced best by him (1) teaming up with a political party to bring
5 this case, and (2) touting this suit on his official campaign Twitter account. *See* Twitter,
6 @brnoforaz, Apr. 22, 2022 8:43 a.m. [https://twitter.com/brnoforaz/status/151752959](https://twitter.com/brnoforaz/status/1517529592612876289?s=21&t=67BAvbjWak_Kzly-UB4yGw)
7 [2612876289?s=21&t=67BAvbjWak_Kzly-UB4yGw](https://twitter.com/brnoforaz/status/1517529592612876289?s=21&t=67BAvbjWak_Kzly-UB4yGw) (last visited Apr. 25, 2022).

8 The AG invokes the phrase “maximum degree of correctness, impartiality, uniformity
9 and efficiency on [election] procedures” to ask the Court to compel the Secretary to include or
10 exclude specific provisions in the EPM, including rules governing “ballot signature verification”
11 and “rules for county officials to properly staff ballot drop boxes.” He asks for these provisions
12 because, in his view, they are good policy. [*E.g.*, Compl. ¶ 85 (arguing that signature verification
13 is an “important election integrity measure”)] There are simply no “judicially discoverable and
14 manageable standards” to determine whether particular procedures in the EPM achieve and
15 maintain “maximum degree of correctness, impartiality, uniformity and efficiency.” And courts
16 “are ill-equipped to inquire into and second-guess the complexities of decision-making and
17 priority-setting” involved in election administration. *See Fogliano v. Brain ex rel. Cty. of*
18 *Maricopa*, 229 Ariz. 12, 20 ¶ 25 (App. 2011); *Kromko*, 216 Ariz. at 194 ¶ 20 (“a court cannot
19 assess whether the cost of tuition is as nearly free as possible in the absence of an initial policy
20 determination of a kind clearly reserved to the Legislature and the Board.”).

21 At bottom, the Secretary is the State’s Chief Elections Officer with expertise in election
22 administration. In consultation with the counties (who, unlike the AG, likewise have expertise
23 in election administration), she developed a draft EPM. The AG may disagree with certain
24 provisions, but it’s not this Court’s role to get involved in discretionary policy decisions about
25 which specific procedures are feasible and appropriate for election administrators to follow,
26 where, as here, no statute directs the Secretary to include the procedures the AG is demanding.

1 *Sensing v. Harris*, 217 Ariz. 261, 265 ¶ 13 (App. 2007) (a government official’s discretion in
2 making certain decisions makes those decisions inappropriate for judicial review); *Daniels v.*
3 *Ariz. Dep’t of Health Servs.*, 2018 WL 5269789, at *5 ¶ 26 (Ariz. Ct. App. Oct. 23, 2018) (the
4 “judiciary is ill equipped” to review “discretionary policy decisions” of a state agency).

5 **IV. Special Action Relief is Unavailable to Plaintiffs.**

6 Plaintiffs’ Complaint also suffers a final, fatal procedural flaw. Plaintiffs are not entitled
7 to the special action relief they seek because under Rule 3, R. P. Spec. Act., the only questions
8 over which courts have special action jurisdiction are:

- 9 (a) Whether the defendant has failed to exercise discretion which he has a duty to
10 exercise; or to perform a duty required by law as to which he has no discretion; or
11 (b) Whether the defendant has proceeded or is threatening to proceed without or
12 in excess of jurisdiction or legal authority; or
13 (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

14 Plaintiffs [at ¶ 36] invoke Rule 3(a), which “sets forth the traditional functions of the writ of
15 mandamus” by allowing a Complainer to “compel a state officer to perform a duty required by
16 law.” *Ariz. for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶ 16 (2020).

17 But mandamus “is an extraordinary remedy” that “does not lie if the public officer is not
18 specifically required by law to perform the act.” *Sears v. Hull*, 192 Ariz. 65, 68 ¶ 11 (1998)
19 (quotations omitted). Thus, “if the action of a public officer is discretionary[,] that discretion
20 may not be controlled by mandamus.” *Id.* “In some circumstances, mandamus may be used to
21 compel a public officer to perform a discretionary act, but not to exercise that discretion in any
22 particular manner.” *Blankenbaker*, 231 Ariz. at 577 ¶ 7 (emphasis added). Yet that’s exactly
23 what Plaintiffs do here.

24 Plaintiffs repeatedly claim that the Secretary has a “non-discretionary duty” to “submit a
25 legally compliant EPM to the AG and Governor for approval.” But this is not a case in which
26 the Secretary has outright refused to draft an EPM. As required under A.R.S. § 16-452(A), she
“consult[ed] with each county board of supervisors or other officer in charge of elections,”

1 “prescribe[d] rules” in a new EPM, and “before its issuance” sent it to the AG and Governor for
2 approval. [Lorick Decl. ¶¶ 16-19] She then responded in good faith to the AG’s (unreasonable)
3 demands and tried to start a dialogue, but the AG ignored his duty to review and approve the
4 draft. [*Id.* ¶¶ 20-29] Because the AG withheld his approval, the Secretary couldn’t (and thus
5 didn’t) issue a final EPM. The facts establish that the Secretary performed her duties under
6 A.R.S. § 16-452. As detailed above in Section I, nothing in that statute says the AG gets the final
7 say on whether a procedure should or shouldn’t be included in the EPM.

8 The AG asks the Court to force the Secretary to include or remove specific policies in the
9 EPM. But whether to include particular provisions in the EPM is a discretionary decision the
10 Secretary makes with input from the counties. These decisions involve many policy
11 considerations (*i.e.*, whether including the provision would be administratively feasible; whether
12 it would increase costs or deplete resources; whether it would cause confusion or burden voters;
13 and so on). [Lorick Decl. ¶¶ 35-37] This is precisely the type of discretionary act that Arizona
14 courts have repeatedly held “may not be controlled by mandamus.” *Sensing*, 217 Ariz. at 263 ¶
15 6; *Blankenbaker*, 231 Ariz. at 577 ¶ 7 (mandamus not available to compel an official “to exercise
16 [her] discretion in any particular manner”). Plaintiffs’ mere disagreement with the Secretary’s
17 interpretation of election laws doesn’t warrant mandamus relief. If courts “were to adopt [that]
18 argument, virtually any citizen could challenge any action of any public officer under the
19 mandamus statute by claiming that the officer has failed to uphold or fulfill state or federal law,
20 as interpreted by the dissatisfied plaintiff.” *Sears*, 192 Ariz. at 69 ¶ 12.

21 What’s more, Plaintiffs aren’t entitled to relief because they fail to name an indispensable
22 party: the Governor. Without the Governor as a party, the AG can’t get complete relief. Even if
23 the Secretary were to submit another EPM to the AG and Governor, she can’t issue it unless both
24 the AG and Governor approve it. Plaintiffs’ failure to name a necessary defendant only highlights
25 the absurdity of this action. Issuing the EPM involves three State executive officials. If the AG
26 were correct and A.R.S. § 16-452 creates non-discretionary duties, what happens if the Secretary,

1 AG, and Governor each have a different view about whether a provision should be in the EPM?
2 Could all three officials seek mandamus relief against the other two? Whose preference prevails?
3 Allowing one of the three officials to force the others' hands would disrupt the checks and
4 balances in § 16-452. It's simply not the judiciary's role to meddle in policy disagreements
5 within the executive branch. And it's precisely why, for example, the Secretary didn't seek
6 mandamus relief against the AG when he ended all discussions related to the EPM in December.

7 At bottom, Plaintiffs cannot use a mandamus action to force the Secretary to adopt their
8 preferred EPM provisions.

9 **V. Plaintiffs' Demanded Changes to the EPM Lack Merit And, At A Minimum,**
10 **Raise Fact Issues.**

11 Even if Plaintiffs' claims didn't violate the plain language of § 16-452 (they do), they
12 were timely (they're not), their claims were justiciable (they're not), and special action relief
13 were available (it's not), Plaintiffs' demand that the Secretary submit a "legally complaint" EPM
14 fails because the specific changes the AG demands are either contrary to law or not required by
15 law, but instead committed to the Secretary's discretion.

16 First, the 2019 EPM is still in place. The Secretary complied with her duties under § 16-
17 452, and she didn't issue a final 2021 EPM because the AG refused to approve it. Second, the
18 2019 EPM's drop-box procedures (which the AG already approved) comply with Arizona law.
19 Third, no statutes require the Secretary to adopt signature verification procedures in the EPM.

20 **A. The 2019 EPM is still in effect.**

21 Plaintiffs argue that "[t]he 2019 EPM is no longer valid" and election officials are thus
22 conducting the 2022 election without a "uniform set of rules." Not true. This argument finds no
23 support in the law or longstanding practice, and it undermines the very purpose of the EPM.

24 Plaintiffs claim [¶ 29] there is "no clarity" on "the operative uniform rules counties must"
25 follow in this election. But there is no lack of clarity. The Secretary and county officials are
26 operating under the 2019 EPM—the most recent approved and issued manual. [Lorick Decl. ¶

1 31, 33-34; Cázares-Kelly Decl. ¶ 4; Hansen Decl. ¶ 4; Richer Decl. ¶ 3] Nothing in § 16-452
2 states that an existing EPM is rescinded or is otherwise invalid if a new EPM is not issued. And
3 the purpose of the EPM suggests just the opposite. The EPM is meant to “achieve and maintain
4 the maximum degree of correctness, impartiality, uniformity and efficiency” in various election
5 topics. A.R.S. § 16-452(A). If a new EPM doesn’t issue in any given year for whatever reason
6 (including, for example, the AG refusing to cooperate with the approval process), the statute’s
7 purpose is best served by continuing to follow the most recent approved manual. This approach
8 supports continuity between EPMs and promotes uniform standards and practices among all
9 counties.

10 In past years, no one ever claimed that an older EPM became invalid if a new EPM was
11 not approved. To the contrary, election officials and courts have always relied on the then-
12 existing EPM when a new EPM hasn’t been adopted. *See, e.g., Gonzalez v. Arizona*, 677 F.3d
13 383, 397 (9th Cir. 2012) (en banc) (relying on 2007 EPM, which was in effect when the parties
14 submitted the appeal in 2011 and had “the force and effect of law”); *Democratic Nat’l Comm. v.*
15 *Arizona Sec’y of State’s Off.*, 2017 WL 840693, at *3-4 (D. Ariz. Mar. 3, 2017) (allowing
16 plaintiffs to challenge and seek to enjoin then-existing 2014 EPM provisions, which had “the
17 force of law”). [See also Hansen Decl. ¶¶ 5] Plaintiffs’ self-serving view that no election
18 procedures are binding is baseless.

19 Plaintiffs also argue [¶¶ 57-49] that the Legislature amended A.R.S. § 16-452 in 2019 to
20 “require[e] the Secretary of State to promulgate the EPM by December 31 of every odd-
21 numbered year.” But that amendment didn’t change the existing requirement that the Secretary
22 promulgate an EPM and issue it after approval from the AG and Governor. Below is the entire
23 amendment:

24 ~~Such~~ The rules shall be prescribed in an official instructions and procedures
25 manual to be issued not later than ~~thirty days prior to each~~ December 31 of each
odd-numbered year immediately preceding the general election. ~~Prior to~~ Before its
26 issuance, the manual shall be approved by the governor and the attorney general.
The secretary of state shall submit the manual to the governor and the attorney

1 general not fewer later than ~~ninety days~~ October 1 of the year before each general
2 election.

3 HB 2238, 54th Leg., 1st Reg. Sess. (Ariz. 2019). The statute already required the Secretary to
4 submit the draft EPM before every election to “be approved by the governor and the attorney
5 general.” The amendment merely changes dates; it requires the Secretary to submit the draft
6 EPM in each even-numbered year before a general election, rather than 30 days before “each
7 election.” Nothing suggests that the existing EPM is invalidated if a new EPM isn’t adopted.

8 **B. The EPM’s drop-box security measures—which the AG approved—comply**
9 **with Arizona law.**

10 Plaintiffs ask the Court to submit another EPM that “require[es] ballot drop boxes to be
11 properly staffed and provid[es] guidance on how county officials can satisfy that requirement.”
12 But Arizona law does not require that ballot drop-boxes must be “staffed” at all times.

13 Plaintiffs rely on A.R.S. § 16-1005(E), which states in full: “A person or entity that
14 knowingly solicits the collection of voted or unvoted ballots by misrepresenting itself as an
15 election official or as an official ballot repository or is found to be serving as a ballot drop off
16 site, other than those established and staffed by election officials, is guilty of a class 5 felony.”
17 This statute prohibits unauthorized people from misrepresenting themselves as an official ballot
18 drop off site. It doesn’t prohibit actual election officials from setting up official ballot drop-
19 boxes. Nor does it, as Plaintiffs claim [¶ 108], require that election staff “monitor” drop-boxes
20 at all times. Even unmonitored drop-boxes are staffed by election officials, who, pursuant to the
21 2019 EPM must ensure, among other things, that ballots are regularly retrieved from the drop
22 boxes pursuant to established procedures and that the drop boxes are sealed so that voted ballots
23 cannot be dropped off after 7:00 p.m. on Election Day. EPM Ch. 2 § I(I).

24 Equally baseless is Plaintiffs’ suggestion [¶ 109] that the “purity of elections” and
25 “secrecy in voting” clauses of the Arizona Constitution somehow require constant monitoring
26 of ballot drop-boxes. The purity of elections clause allows the Legislature to “enact[] registration
and other laws to secure the purity of elections and guard against abuses of the elective

1 franchise.” Ariz. Const. art. VII § 12. But the Legislature hasn’t passed any laws prohibiting
2 ballot drop-boxes.

3 Nor do ballot drop-boxes compromise “secrecy in voting” under Article VII, Section 1.
4 Arizona’s early voting laws include detailed procedures that ensure “secrecy in voting.” Early
5 ballots are “identical” to other ballots except that the word “early” is printed on them. A.R.S. §
6 16-545(A). County recorders send these ballots to early voters along with a self-addressed return
7 envelope with a ballot affidavit.⁸ Ballot return envelopes must be “of a type that does not reveal
8 the voter’s selections or political party affiliation and that is tamper evident when properly
9 sealed.” A.R.S. § 16-545(B)(2). The voter then follows these procedures:

10 The early voter shall make and sign the affidavit and shall then mark his ballot in
11 such a manner that his vote cannot be seen. The early voter shall fold the ballot, if
12 a paper ballot, so as to conceal the vote and deposit the voted ballot in the envelope
13 provided for that purpose, which shall be securely sealed and, together with the
affidavit, delivered or mailed to the county recorder or other officer in charge of
elections. . . .

14 A.R.S. § 16-548(A) (emphasis added).

15 After verifying the signature on the ballot affidavit and confirming that the ballot will be
16 counted, officials “open the envelope containing the ballot in such a manner that the affidavit
17 thereon is not destroyed, take out the ballot without unfolding it or permitting it to be opened or
18 examined and show by the records of the election that the elector has voted.” A.R.S. § 16-552(F)
19 (emphasis added). The voted early ballot and the empty affidavit envelope are then placed in
20 separate stacks for further processing and tabulation. EPM Ch. 2 § VI(B)(3) [APP166-67].

21 Beyond that, Arizona law criminalizes fraud or other abuses related to early ballots,
22 including “knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to
23 fix an election”; “offer[ing] or provid[ing] any consideration to acquire a voted or unvoted early
24 ballot”; “receiv[ing] or agree[ing] to receive any consideration in exchange for a voted or
25

26 ⁸ Early voters also receive instructions that include the following statement: “WARNING
-- It is a felony to offer or receive any compensation for a ballot.” A.R.S. § 16-547(D).

1 unvoted ballot”; possessing someone’s “voted or unvoted ballot with intent to sell”; “knowingly
2 solicit[ing] the collection of voted or unvoted ballots by misrepresenting [one’s self] as an
3 election official [or] serv[ing] as a ballot drop off site, other than those established and staffed
4 by election officials”; and “knowingly collect[ing] voted or unvoted ballots” and not turning
5 those ballots in. A.R.S. §§ 16-1005(A)-(F). And the legislature went a step further in 2016,
6 criminalizing even non-fraudulent third-party ballot collection. A.R.S. § 16-1005(H). Given all
7 these protections, ballot drop-boxes do not compromise ballot secrecy.

8 Plaintiffs also make the false claim that the Secretary “introduced” drop-boxes in the 2019
9 EPM. Nothing in Arizona law prohibits counties from using drop-boxes, and counties had been
10 using drop-boxes for many years before the current EPM was adopted. *See, e.g.,* Yavapai Cnty.,
11 *2018 Voter Guide*, [https://storageccec.blob.core.usgovcloudapi.net/public/docs/273-2018-](https://storageccec.blob.core.usgovcloudapi.net/public/docs/273-2018-Yavapai-Voter-Guide.pdf)
12 [Yavapai-Voter-Guide.pdf](https://storageccec.blob.core.usgovcloudapi.net/public/docs/273-2018-Yavapai-Voter-Guide.pdf) (“Every time a ballot is dropped in a drop box [Yavapai] County saves
13 \$.543 in tax dollars. In 2017, the County saved a total of \$7,981.02 due to drop box usage.”);
14 Yavapai Cnty., Mar. 11, 2008 Election, *Voting Information*, [https://yavapaiaz.gov/](https://yavapaiaz.gov/electionsvr/2008-elections)
15 [electionsvr/2008-elections](https://yavapaiaz.gov/electionsvr/2008-elections) (listing Yavapai County drop-box locations for March 2008 election);
16 Yuma Cnty., *2018 Voter Guide*, [https://www.yumacountyaz.gov/home/show](https://www.yumacountyaz.gov/home/show_publisheddocument?id=37868)
17 [publisheddocument?id=37868](https://www.yumacountyaz.gov/home/show_publisheddocument?id=37868) (instructing Yuma voters in 2018 elections to “drop their Early
18 Ballots at one of the drop-box locations below”).⁹ By prescribing drop-box procedures in the
19 EPM, the Secretary merely adopted uniform security and chain-of-custody requirements for
20 counties that use drop-boxes. Both the Governor and the AG approved these procedures.

21 In the end, when statutes are silent on how to perform a particular election procedure
22 relating to voting and early voting, the Secretary gets to fill that gap, and she properly did so
23

24 _____
25 ⁹ The Court may take judicial notice of these public records on county recorder websites,
26 the accuracy of which “cannot reasonably be questioned.” Ariz. R. Evid. 201(b)(2); *Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012) (taking judicial notice of public records from the Secretary’s website).

1 here. *See, e.g., Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339
2 (2002) (“[A]s a general rule, agencies have authority to fill gaps where the statutes are silent.”).

3 **C. The Secretary has no legal duty to include signature verification guidelines**
4 **in the EPM.**

5 Plaintiffs next ask the Court to compel the Secretary to adopt signature verification rules
6 in the EPM. Under A.R.S. § 16-550(A), county recorders who receive voters’ mail-in ballots
7 “shall compare the signatures [on the ballot affidavit] with the signature of the elector on the
8 elector’s registration record.” According to Plaintiffs [¶ 103], the Secretary must adopt
9 procedures in the EPM dictating how county recorders conduct this signature comparison.
10 Plaintiffs are wrong.

11 They point to A.R.S. § 16-452(A), which authorizes the Secretary to “prescribe rules to
12 achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency
13 on the procedures for early voting and voting, and of producing, distributing, collecting,
14 counting, tabulating and storing ballots.” That statute delegates to the Secretary the authority to
15 adopt rules she deems appropriate to achieve and maintain the stated goals. It doesn’t impose a
16 duty to adopt a specific procedure all counties must follow to perform every task related to early
17 voting or processing ballots. *See Duncan v. State*, 157 Ariz. 56, 62 (App. 1988) (statutes required
18 agency to adopt rules governing minimum qualification and training standards for peace officers,
19 but nothing in the statutes compelled the agency to adopt specific “safety regulations concerning
20 firearms used at training facilities for law enforcement officers”).

21 When the Legislature intends to require the Secretary to adopt a rule in the EPM
22 governing a specific election procedure, it says so. *E.g.*, A.R.S. § 16-543(C) (“The secretary of
23 state shall provide in the instructions and procedures manual issued pursuant to § 16-452 for
24 emergency procedures regarding the early balloting process for” military and overseas voters);
25 A.R.S. § 19-118(A) (“The secretary of state shall establish in the [EPM] issued pursuant to § 16-
26 452 a procedure for registering circulators.”); A.R.S. § 16-602(B) (hand count audits must be

1 conducted “in accordance with hand count procedures established by the secretary of state in the
2 [EPM] adopted pursuant to § 16-452”). “This consistent pattern” shows that if the Legislature
3 intended to require the Secretary to adopt signature verification procedures, “it would have
4 expressly done so.” *Est. of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 327 ¶ 15 (2011).

5 Plaintiffs point to no statute requiring the Secretary to include procedures governing the
6 precise manner in which counties must verify signatures on ballot affidavits. Their claim fails
7 for this straightforward reason.

8 Finally, Plaintiffs’ own preferences and abstract claims of potential “non- or mal-
9 feasance” don’t inform the Secretary’s legal duties. Plaintiffs spill much [¶¶ 80-101] ink arguing
10 that, in their view, certain signature verification procedures are good policy. They make various
11 unsupported (and sometimes even false or misleading) allegations against Maricopa County,
12 including suggesting [¶ 99] that the County uses AI to verify signatures, even though the County
13 has debunked that misstatement multiple times and explained that a human verifies every ballot
14 affidavit signature. [*E.g.*, Howard Fischer, *Brnovich, Maricopa disagree over use of AI in ballot*
15 *verification*, Tucson.com (Apr. 16, 2022) (Maricopa County spokesperson explaining that
16 signatures are “100% verified by humans”); Maricopa Cnty., Bulletin: Just The Facts (May 27,
17 2021), <https://content.govdelivery.com/accounts/AZMARIC/bulletins/2e19cb7> (“100% of mail-
18 in ballot signatures are reviewed by trained staff.”)] These ruminations are the stuff of campaign
19 political releases (or a podcast hosted by an extremist, where the AG first made this baseless
20 claim¹⁰), not a filing in this Court seeking extraordinary and inappropriate relief against another
21 constitutional officer for transparent political gain.

22
23
24 ¹⁰ See Howard Fischer, *Arizona Attorney General: Maricopa Co. admits to using AI to verify*
25 *early ballot signatures*, KAWC News (Apr. 15, 2022), available at
26 [https://www.kawc.org/news/2022-04-15/arizona-attorney-general-maricopa-co-admits-to-](https://www.kawc.org/news/2022-04-15/arizona-attorney-general-maricopa-co-admits-to-using-ai-to-verify-early-ballot-signatures)
[using-ai-to-verify-early-ballot-signatures](https://www.kawc.org/news/2022-04-15/arizona-attorney-general-maricopa-co-admits-to-using-ai-to-verify-early-ballot-signatures) (describing AG Brnovich making this inaccurate claim
on Steve Bannon’s podcast).

1 Plaintiffs also cite a 2020 election challenge, *Ward v. Jackson, et al.*, CV-20-0343-AP/EL
2 (Ariz. Dec. 8, 2020) (decision order). In *Ward*, two forensic experts who reviewed a sampling
3 of ballot affidavits were unable to “conclusively” confirm—based on scientific standards in their
4 fields—that several signatures were a match.¹¹ This says nothing about whether Maricopa
5 County’s signature verification process complies with Arizona election law. And in all events,
6 as the supreme court found, “neither expert could identify any sign of forgery or simulation and
7 neither could provide any basis to reject the signatures.” *Ward*, at 5 (emphasis added).¹²

8 All told, Plaintiffs’ entire discussion about the quality of Maricopa County’s signature
9 verification process is beside the point. Their personal opinions about best practices for signature
10 verification are not the law.¹³

11 **Conclusion**

12 The Secretary complied with her statutory duty to submit a draft EPM to the AG and
13 Governor by October 1, 2022. She tried to work with the AG in good faith to revise the draft,
14 but he refused to participate. He can’t ask the Court to force her to adopt his preferred election
15 policies. Plaintiffs’ attacks on the State’s Chief Election Officer are unfounded, and the Court
16 should reject their claims. The Court should also award the Secretary her attorneys’ fees and
17 costs under A.R.S. §§ 12-341 and 12-348.01.

18
19 ¹¹ As the trial court noted in *Ward*, “[t]he process forensic document examiners use to testify
20 in court for purposes of criminal guilt or civil liability is much different from the review Arizona
21 election law requires. A document examiner might take hours on a single signature to be able to
22 provide a professional opinion to the required degree of certainty.” *Ward v. Jackson, et al.*, CV
23 2020-015285 (Maricopa Cnty. Super. Ct. Dec. 4, 2020).

24 ¹² Plaintiffs also incorrectly claim that one expert was a “Maricopa County Recorder’s
25 Office forensic examiner.” That is not true. The forensic experts were third parties retained by
26 the private plaintiff (Arizona Republican Party Chair) and defendants (President Biden Electors).

¹³ If Plaintiffs are asking the Court to compel the Secretary to re-submit the draft 2021 EPM
with all the revisions in the AG’s proposed redline from December 2021, as well as the new
policy demands he’s made since then, granting that request would require extensive fact-finding
and an advisory ruling on line-by-line issues raised in the AG’s redline to the draft EPM.

1 RESPECTFULLY SUBMITTED this 27th day of April, 2022.

2 **COPPERSMITH BROCKELMAN PLC**

3 By: /s/ Roopali H. Desai

4 Roopali H. Desai
5 D. Andrew Gaona
6 Kristen Yost

6 **STATES UNITED DEMOCRACY CENTER**

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Exhibit A

Exhibit A

EXHIBIT A – DECLARATION OF
KORI LORICK
IS FILED SEPARATELY

Exhibit B

Exhibit B



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

June 14, 2014

Thomas Ryan
Law Office of Thomas M. Ryan
565 W. Chandler Blvd., Ste. 210
Chandler, AZ 85225

Re: Secretary of State Complaint letter

Dear Mr. Ryan,

We received your letter dated June 9, 2016 wherein you challenge the Arizona Secretary of State's decision not to issue a 2016 version of the State of Arizona Elections Procedures Manual ("Manual").

A.R.S. § 16-452 provides for the adoption and approval of the Manual. The statute is subject to multiple interpretations. One could argue that the statute requires a new Manual for every single election of whatever kind, an interpretation that this year alone would have required four new Manuals. On the other hand, past Secretaries of State have interpreted the law to require a new Manual every election cycle. As you indicated, Secretary of State Reagan's office adopted another interpretation, i.e., that the statute precludes the distribution of new Manuals in close proximity to elections, but does not impose a duty to issue a new Manual in any given year. On that basis the Secretary of State made a policy decision to retain the 2014 Manual for this year.

We do not address here which of these possible interpretations is the better or best. We note only that the Secretary's interpretation of the statute is at least plausible. Because A.R.S. § 16-1010 requires "knowing" or "willful" nonfeasance, there could be no basis for criminal charges.

Accordingly, the Attorney General's Office declines to pursue investigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Bailey", written over a horizontal line.

Michael Bailey
Chief Deputy

Exhibit C

Exhibit C

I, Stephen Richer, declare as follows:

1. I currently serve as the Maricopa County Recorder. I was elected to the position in November 2020 and assumed office on January 4, 2021. In this role, I have significant election-related responsibilities, including overseeing voter registration, candidate services, and all vote-by-mail in Maricopa County—Arizona’s largest county.

2. In 2021, my office, as well as election officials and elected Recorders from Arizona’s other 14 counties, reviewed and provided feedback to the Arizona Secretary of State’s Office on the Elections Procedures Manual (EPM) and the updates the Secretary of State sought to implement in those drafts.

3. When the Secretary of State, Attorney General, and Governor did not agree on an updated 2021 EPM in December 2021, my office proceeded to plan for the 2022 election year in accordance with the 2019 EPM and any legislative changes enacted since the 2019 EPM was approved.

4. This year, Maricopa County has already successfully administered a jurisdictional election in March 2022, and we are in the middle of administering a May 2022 jurisdictional election based on the 2019 EPM and subsequent legislative changes. We are also well under way in preparing for the statewide primary election on August 2, 2022.

5. Any material changes to the EPM at this point in the election year would be very disruptive to the administration of the August and November elections. The election year is almost

half-way over and we are in the middle of conducting the 2022 elections. Shifting procedures and resources at this time would be very challenging.

6. Pursuant to Rule 80(c), Ariz. R. Civ. P., I declare under penalty of perjury that the foregoing is true and correct.

Executed this ^{27th} day of April, 2022.

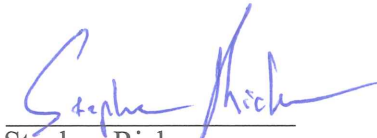
By: 
Stephen Richer

Exhibit D

Exhibit D

Public Service Center Building
240 N. Stone Ave., First floor
Tucson, AZ 85701

Document Recording: (520) 724-4350
Voter Registration: (520) 724-4330



Mailing Address:
PO Box 3145
Tucson, AZ 85702-3145
Social media: @PimaRecorder
Website: recorder.pima.gov

Gabriella Cázares-Kelly, Recorder

I, Gabriella Cázares-Kelly, declare as follows:

1. I currently serve as the Pima County Recorder. I was elected to the position in November 2020. In this role, I have significant election-related responsibilities, including overseeing voter registration and early voting in Pima County—Arizona's second largest county. We currently have approximately 625,000 registered voters in Pima County.
2. In 2021, Pima and other counties reviewed and provided feedback to the Arizona Secretary of State's Office on the Elections Procedures Manual (EPM) and the updates the Secretary of State sought to implement in that draft.
3. It is my understanding that in 2019, Pima and other counties also provided feedback to the Secretary of State's Office on her draft 2019 EPM as well as the proposed edits to that draft from the Attorney General's Office, and that feedback from the counties was factored into the final approved version of the 2019 EPM.
4. When the Attorney General and Governor failed to approve an updated 2021 EPM in December 2021, Pima County, with the guidance from the Secretary of State's Office, proceeded to plan for the 2022 election year in compliance with the 2019 EPM. Any legislative changes enacted since the 2019 EPM was approved were reviewed by our County Attorney.
5. Pima County is currently in the middle of administering the May 2022 jurisdictional elections based on the 2019 EPM and subsequent legislative changes. Our preparations typically begin in January for a major election cycle. We are well under way in preparing for the statewide primary election on August 2, 2022.
6. I believe that any material changes to the EPM at this point in the election year would be very disruptive to the administration of the August and November elections. The election year is almost half-way over. Trainings for staff and other election workers for 2022 are well under way and we have been working on those

materials for months. We are also juggling many other election year duties, including candidate challenges, multiple election lawsuits, assisting the City of Tucson with their May election, and preparing for the August election. Shifting procedures and resources at this time would be very challenging. I do not believe we have sufficient personnel to undertake such an endeavor.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 27 day of April, 2022 in Pima County.

By: Gabriella C. Kelly
Gabriella Cázares-Kelly

Exhibit E

Exhibit E

I, Patty Hansen, declare as follows:

1. I am the County Recorder for Coconino County. I have served in this role for 19 years, and I have been in election administration since 1987. In my current role, I have significant election-related responsibilities, including overseeing voter registration and early voting in Coconino County.

2. In 2021, Coconino and other counties reviewed and provided feedback to the Arizona Secretary of State's Office on the Elections Procedures Manual (EPM) and the updates the Secretary of State sought to implement in that draft.

3. In 2019, Coconino and other counties also provided feedback to the Secretary of State's Office on her draft 2019 EPM as well as the proposed edits to that draft from the Attorney General's Office. It was critical that feedback from the counties was factored into the final approved version of the 2019 EPM.

4. When the Attorney General and Governor failed to approve an updated 2021 EPM in December 2021, Coconino County, based on the advice of counsel as well as guidance from the Secretary of State's Office, proceeded to plan for the 2022 election year in compliance with the 2019 EPM and any legislative changes enacted since the 2019 EPM was approved.

5. This approach is consistent with Coconino County's approach in prior years when no updated EPM was approved in advance of the election year. For example, no updated EPM was approved before the 2016 or 2018 election years and, therefore, Coconino County conducted elections in those years in compliance with the 2014 EPM and any subsequent legislative changes enacted after the 2014 EPM was issued.

6. Coconino County is currently in the middle of administering the May 17, 2022, jurisdictional elections based on the 2019 EPM and subsequent legislative changes. We are also well under way in preparing for the statewide primary election on August 2, 2022.

7. I believe that any material changes to the EPM at this point in the election year would be very disruptive to the administration of the August and November elections. The election year is almost half-way over and we are in the middle of candidate challenges, multiple election lawsuits, administering the May election, and preparing for the August election. Shifting procedures and resources at this time would be very challenging.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 26th day of April, 2022 in Coconino
County.

By: /s/ Patty Hansen
Patty Hansen

Exhibit F

Exhibit F

From: [Roysden, Beau](#)
To: [Daniels, Evan](#); [Bo Dul](#)
Cc: afoster@az.gov; druiz@az.gov; [Wright, Jennifer](#); [Kanefield, Joe](#); [Allie Bones](#); [William Gaona](#)
Subject: RE: Attorney General Approval of 2019 Elections Procedures Manual
Date: Thursday, December 19, 2019 8:22:00 PM
Attachments: [image001.png](#)

Bo,

I just wanted to echo what Evan said. Thank you and the rest of SOS (especially Allie and Will) for your professionalism in working through this process.

Sincerely,

Beau

From: Daniels, Evan
Sent: Thursday, December 19, 2019 4:41 PM
To: Bo Dul
Cc: afoster@az.gov; druiz@az.gov; Roysden, Beau; Wright, Jennifer; Kanefield, Joe; Allie Bones; William Gaona
Subject: RE: Attorney General Approval of 2019 Elections Procedures Manual
Likewise, Bo. Thank you, and same to you and the team at SOS!
Evan Daniels
Unit Chief Counsel, Government Accountability Unit
Fintech Sandbox Counsel
Office of the Arizona Attorney General
Desk: (602) 542-7751
Fax: (602) 542-4377
evan.daniels@azag.gov

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From: Bo Dul [bdul@azsos.gov]
Sent: Thursday, December 19, 2019 4:39 PM
To: Daniels, Evan
Cc: afoster@az.gov; druiz@az.gov; Roysden, Beau; Wright, Jennifer; Kanefield, Joe; Allie Bones; William Gaona
Subject: RE: Attorney General Approval of 2019 Elections Procedures Manual

Evan,

Thank you very much for the great news. It's been a pleasure working with you throughout this process. Happy holidays to you and the rest of the team at the AG's office.

Best,

Bo



Sambo (Bo) Dul
State Elections Director
Arizona Secretary of State

Email: bdul@azsos.gov
Office: 602-542-8683

1700 W. Washington St., 7 Fl. | Phoenix, AZ | 85007

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From: Daniels, Evan <Evan.Daniels@azag.gov>

Sent: Thursday, December 19, 2019 4:30 PM

To: Bo Dul <bdul@azsos.gov>

Cc: afoster@az.gov; druiz@az.gov; Roysden, Beau <Beau.Roysden@azag.gov>; Wright, Jennifer <Jennifer.Wright@azag.gov>; Kanefield, Joe <Joe.Kanefield@azag.gov>; Allie Bones <ABones@azsos.gov>; William Gaona <WGaona@azsos.gov>

Subject: Attorney General Approval of 2019 Elections Procedures Manual

Bo,

Please see the attached letter from Attorney General Brnovich to Secretary Hobbs approving the Elections Procedures Manual as submitted on December 18, 2019.

Evan Daniels

Unit Chief Counsel, Government Accountability Unit

Fintech Sandbox Counsel

Office of the Arizona Attorney General

Desk: (602) 542-7751

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evan.daniels@azag.gov

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From: [Wright, Jennifer](#)
To: [Bo Dul](#)
Subject: RE: Merry Christmas!
Date: Thursday, December 26, 2019 9:02:56 AM

No worries, I understood what you meant. 😊

Let's plan to get lunch or a drink in early January before the 2020 election cycle goes into high gear.

Happy New Year!

Jen

From: Bo Dul [mailto:bdul@azsos.gov]
Sent: Tuesday, December 24, 2019 10:36 AM
To: Wright, Jennifer
Subject: Re: Merry Christmas!

I mean, we believe successful elections are about partnership, not partisanship! :)

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From: Bo Dul <bdul@azsos.gov>
Sent: Tuesday, December 24, 2019 10:31:15 AM
To: Wright, Jennifer <Jennifer.Wright@azag.gov>
Subject: Re: Merry Christmas!

Hi Jennifer -

Thank you for your kind words. The appreciation is mutual - thank you, Evan, and Beau for your thoughtfulness and professionalism throughout the process. I'd love to get lunch or a drink together early in the new year and toast to seeing the EPM to the finish line!

And thank you for flagging the report - we did see it and shared it with the counties in our weekly bulletin last week. If you come across other useful information that you think we should be aware of and/or consider sharing with the counties, please continue to pass it along.

And as the AGO gets going in terms of defining your priorities for the election integrity unit for 2020, we'd love to be kept in the loop and would be happy to participate in brainstorming and identifying ways our offices can work together to continue to strengthen elections in Arizona. As Secretary Hobbs recently said to the counties, we believe that successful elections are about partnership, not partnership — and that applies equally to how we approach our relationship with the counties as well as other state agencies.

If we don't otherwise connect before then, happy holidays and new year to you and your family!

Bo

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From: Wright, Jennifer <Jennifer.Wright@azag.gov>
Sent: Tuesday, December 24, 2019 9:13:27 AM
To: Bo Dul <bdul@azsos.gov>
Subject: Merry Christmas!

Good Day Bo!

First, I wanted to express my appreciation for the how you handled the EPM review process. I was very impressed with every step of the process, and I enjoyed working with you. Thank you. I look forward to working with you again.

Second, while I have no doubt you are already familiar with this recently released report from the Brennan Center for Justice, I wanted to share it with you just in case, as I found it extremely informative.

<https://www.brennancenter.org/our-work/policy-solutions/preparing-cyberattacks-and-technical-failures-guide-election-officials>

Hoping you are enjoying this week with your family.

Merry Christmas & Happy New Year!

Jennifer Wright

Assistant Attorney General



Office of the Arizona Attorney General
Appeals & Constitutional Litigation Division
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