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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF YAVAPAI**

14 **MARK BRNOVICH**, in his official capacity  
15 as Arizona Attorney General; **YAVAPAI**  
16 **COUNTY REPUBLICAN COMMITTEE**,  
17 an unincorporated  
18 association; and **DEMITRA MANJOROS**,  
19 First Vice Chair of the Yavapai County  
20 Republican Committee and registered voter in  
21 Yavapai County,

22 Plaintiffs,

23 vs.

24 **KATIE HOBBS**, in her official capacity as  
25 Arizona Secretary of State,

26 Defendant

27 **DOUGLAS A. DUCEY**, in his official capacity  
28 as Governor of Arizona,

Real Party in Interest

Case No.: P1300CV202200269

**GOVERNOR DUCEY'S RESPONSE TO  
COMPLAINT FOR SPECIAL ACTION  
RELIEF**

Real Party in Interest, Governor Douglas A. Ducey, hereby responds to Plaintiffs' Petition for Special Action Relief seeking declaratory relief regarding the Elections Procedures Manual ("EPM"). Governor Ducey addresses this Court in order to ensure Arizona's elections are conducted with a consistent set of rules across county lines and not changed in the middle of the

1 election cycle. Without this Court’s intervention and determination as to the rules that must be  
2 followed for the 2022 election, the integrity of the 2022 election will be in question.

### 3 **INTRODUCTION**

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5 This litigation both in timing and subject has created a situation where the integrity of the  
6 2022 elections and the consistency in application of rules for conducting elections in this cycle is  
7 at stake. As has been well established in this case, Arizona Revised Statute (“A.R.S.”) § 16-452,  
8 requires that the Secretary of State promulgate an “instructions and procedures manual,” known  
9 as the Elections Procedures Manual (“EPM”) every two years to ensure that elections throughout  
10 the state are standardized. Statute though *does not* state what happens if a new or updated manual  
11 is not promulgated and Plaintiffs have not provided any statutory textual support or case law to  
12 suggest otherwise. The statute is simply silent. Thus, the Governor asks this Court to issue an order  
13 stating that the 2019 EPM remains in effect with the exception of any parts that have been deemed  
14 by a court to be unlawful or those parts that have been superseded by new laws enacted by the  
15 legislature.  
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### 17 **STATEMENT OF FACTS**

18  
19 The Arizona Constitution provides that the powers and duties of statewide elected officials  
20 are what is prescribed by law. Ariz. Const. art. V, § 9. Under A.R.S. Title 16, Chapter 4, the  
21 Secretary of State is tasked with prescribing rules that “achieve and maintain the maximum degree  
22 of correctness, impartiality, uniformity and efficiency on the procedures” for numerous areas  
23 relating to voting often referred to at the Elections Procedures Manual (“EPM”). A.R.S. §16-452.  
24 This statute also provides that the Secretary shall submit the manual to the Attorney General and  
25 the Governor by October 1 of the year before each general election. *Id.* The duties of the Attorney  
26 General include serving as the “legal advisor to the departments of this state” and to “render such  
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1 legal services as the departments require” while the Governor’s duties are to see that the laws are  
2 faithfully executed. Ariz. Const. art. V, § 4 and A.R.S. § 41-192(a)(1). In line with these  
3 responsibilities, A.R.S. § 16-452, requires the Secretary submit and the Attorney General and  
4 Governor approve the elections procedure manual; each operating under his or her individual  
5 lawful authority and duty. A.R.S. § 16-452. Though statute is not explicit on the matter, in practice  
6 and respect for the constitutional and statutory duties of their offices, the Governor’s approval of  
7 the manual is contingent on the manual being deemed legally sufficient by the state’s chief legal  
8 officer. Ariz. Const. art V, § 4; A.R.S. §§ 16-452 and 41-192(a)(1)

9  
10 In 2021, the Secretary submitted a draft EPM on October 1, 2021 as directed by statute.  
11 (Compl. ¶ 70). Upon review, the Attorney General determined that there were legal flaws in the  
12 draft that needed to be corrected and notified the Secretary as such. (Compl. ¶¶ 77 and 115) The  
13 Secretary and Attorney General could not come to agreement on a finalized manual and ultimately,  
14 the manual was not finalized for the Governor to approve. (Compl. ¶¶ 117, 118 and 121). No  
15 communication provided by the Attorney General or the Secretary discussion of the implications  
16 of the consequences now suggested by the Attorney General if the EPM was not finalized by  
17 December 31<sup>st</sup> – an important point as an impasse had been reached. (Compl. ¶¶ 116, 117 and 118).

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19 As of December 31, 2021, a new EPM had not been submitted to the Governor and the  
20 Secretary had informed county recorders that the 2019 EPM should be followed. (Compl. ¶ 119)  
21 With no further action from the Attorney General, the Governor issued a letter stating that he had  
22 nothing to approve. (Compl. ¶ 121; *See also* MSJ, Exhibit A, para. 4-5). On March 15, 2022,  
23 though the Attorney General indicated for the first time that the validity of the 2019 manual was  
24 in question. (Compl. ¶ 124). Following the initiation of this action, which initially did not involve  
25 the Governor, nor was the Governor consulted prior to the action being filed, this Court joined the  
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1 Governor as a necessary party. (Order dated May 6, 2022). It is in this capacity that this response  
2 is filed.

### 3 ARGUMENT

#### 4 **1. The Court must intervene to ensure the integrity of the 2022 elections.**

5 In a special action, a court can accept jurisdiction in order to determine:

- 6 (a) Whether the defendant has failed to exercise discretion which he has a  
7 duty to exercise; or to perform a duty required by law as to which he has no  
8 discretion; or (b) Whether the defendant has proceeded or is threatening to  
9 proceed without or in excess of jurisdiction or legal authority; or  
10 (c) Whether a determination was arbitrary and capricious or an abuse of  
11 discretion.  
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14 Ariz. R. P. Spec. Act. 3. Courts have determined that acceptance of special action jurisdiction is  
15 highly discretionary and special action jurisdiction is only accepted in cases where justice cannot  
16 be served by other means. *Pompa v. Sup. Ct. in and for the Co. of Maricopa*, 187 Ariz. 531, 533  
17 (1997). Likewise, the Arizona Court of Appeals has stated that special action jurisdiction is  
18 appropriate when there is a question of whether an official abused his or her discretion by erring  
19 as a matter of law, the case is “a matter of first impression” and likely to recur. *Purdy as Trs. of*  
20 *Survivor of Jones v. Metcalf in and for Co. of Pima*, 252 Ariz. 270, 502 P.3d 36, 40  
21 (app. 2021).  
22

23 Here, the Court must accept special action jurisdiction to ensure the integrity of the 2022  
24 elections – the cornerstone of our republic and uphold the will of the legislature as stated in the  
25 text of the law. Although the Plaintiffs have requested that this Court accept special action  
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1 jurisdiction based on Rule 3(a), the Governor suggests that all three subsections of Rule 3 could  
2 be implicated.

3 Plaintiffs allege that the Secretary failed to promulgate a legally compliant draft EPM. But, the  
4 statute does not require a legally compliant draft to be submitted. A.R.S. § 16-452. Determining  
5 the legality of the draft EPM is the Attorney General's role. The constitutional and statutory duties  
6 of each of the offices involved dictate their role. In that vein, the Attorney General is tasked by  
7 law with being the legal advisor to the state and therefore has the role of providing advice on  
8 whether the EPM is legally compliant. A.R.S. § 41-192(a)(1)). Therefore, this case presents  
9 questions about the role of both the Attorney General and the Secretary in the approval of the EPM  
10 and what discretion either actually has in the issuance of the EPM before a determination can be  
11 made as to whether discretion was abused. This is a matter of first impression. Special action  
12 jurisdiction is appropriate.

13 The questions in this case without resolution will only sow more doubt into the integrity of not  
14 just our elections but our government institutions that are intended to serve the people of our great  
15 state. No party disputes that the 2019 EPM was properly submitted by the Secretary and approved  
16 by both the Attorney General and the Governor in 2019. Since that time, both the courts and the  
17 legislature have intervened to provide new direction on how elections should be conducted and  
18 what is appropriate to be included in the EPM, which carries the force of law and provides criminal  
19 penalties for failure to follow it. *See Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58 (2020);  
20 *Leach v. Hobbs*, 250 Ariz. 572 (2021). The EPM is integral to the integrity of our elections and  
21 ensuring that elections are operated uniformly throughout our state. *Id.* This action has left our  
22 county recorders and boards of supervisors without direction and has the potential to leave our  
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1 citizens questioning the integrity of the recently held and upcoming 2022 elections. The Court's  
2 intervention in this matter is imperative.

3 **2. The 2019 EPM has not expired.**

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5 As stated by all the parties in this matter, A.R.S. §16-452 outlines those areas that the EPM is  
6 to cover. However, what that statute does not say, nor is there any other statute that the parties can  
7 point to which says otherwise, is the consequence if the EPM is not promulgated as directed by §  
8 16-452. Statutes and regulations are reviewed by the courts regularly and at times are found  
9 unconstitutional. Yet, the Arizona Revised Statutes are replete with statutes that are no longer in  
10 effect because there is no requirement that such be removed. More similar though is the Arizona  
11 Administrative Code (“A.A.C.”), which provides regulations, like in this case, that are authorized  
12 in statute. The difference with those regulations though is that statute does provide clarity for when  
13 a rule expires. *See* A.R.S. § 41-1032(C) Further, rules of statutory interpretation dictate that if  
14 the legislature had intended that the prior EPM expired whether or not the Secretary promulgated  
15 an updated one as required by A.R.S. § 16-452, the language of the statute would make that clear.  
16  
17 *See State v. Johnson*, 171 Ariz. 39, 827 P.2d 1134 (App. Div. 1 1992).

18  
19 Here, neither the parties nor the Court<sup>1</sup> have provided any legal justification for the  
20 proposition that the 2019 EPM in its entirety has expired. The legislature has never directed as  
21 such. Though the legislature did provide that the Secretary “shall” promulgate a new EPM every  
22 two years, it did not provide in A.R.S. § 16-452 that the EPM expires every two years. Had that  
23 been their intent, the legislature would have said so. There is no dispute, that sections of the 2019  
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28 <sup>1</sup> The Court in its order dated May 6, 2022, joining the Governor as a necessary party to this action, “As of now  
there is no enforceable EPM in violation of A.R.S. § 16-452,” but fails to cite any legal authority for such a position.

1 EPM are no longer enforceable due to changes in statute and court rulings. The 2019 EPM was  
2 promulgated as required by statute and approved by both the Attorney General and the Governor.

3 Further, when the legislature amended A.R.S. § 16-452 in 2019, it made clear that an EPM  
4 would remain valid, even potentially with conflicting provisions, if the legislature amended  
5 statutes impacting the EPM after the December 31 deadline. Prior to 2019, statutory changes  
6 during the legislative session could be incorporated into the EPM because the EPM did not need  
7 to be issued until 30 days prior to the election. By amending A.R.S. § 16-452 to direct the EPM to  
8 be issued by December 31 in the year prior to a general election, the legislature clearly  
9 contemplated that statutory changes could be made during the period between the issuance of the  
10 EPM and the next primary and general election and therefore there could be conflicts between the  
11 approved EPM and updated laws. Put differently, neither Plaintiffs nor Defendants have provided  
12 any evidence to suggest the legislature *did not* understand that the EPM and current law could be  
13 in conflict. The legislature understood that statutes and case law could change after the statutory  
14 deadline, but it also understood that election administrators would have some certainty rather than  
15 waiting until 30 days before the election.

16 The 2019 EPM is valid and still in effect and its valid provisions remain in effect until a new  
17 EPM is issued. This Court should find that the portions of the 2019 EPM that have not been  
18 invalidated remain in effect for the 2022 election cycle.

19 **3. Statute dictates which provisions should be in the EPM.**

20 A.R.S. § 16-452(a) states, the EPM shall include “rules to achieve and maintain the maximum  
21 degree of correctness, impartiality, uniformity and efficiency on the procedures for *early voting*  
22 *and voting*, and of *producing, distributing, collecting, counting, tabulating and storing*  
23 *ballots*...[and] rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and  
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1 other election materials to and from absent uniformed and overseas citizens and...rules regarding  
2 internet receipt of requests for federal postcard applications prescribed by § 16-543.” Recently, the  
3 Arizona Supreme Court has addressed the question of whether provisions of the EPM not  
4 authorized by law can be criminally enforced determining that only those provisions of the EPM  
5 that are authorized by statute have the force of law. *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz.  
6 58 (2020); *Leach v. Hobbs*, 250 Ariz. 572 (2021).

8 Here, the Plaintiffs and Defendant have a disagreement as to which provisions of the EPM  
9 should be included or excluded. This dispute resulted in the lack of a 2021 EPM for this election  
10 cycle and questions as to what rules to follow. It is expected that county recorders and boards of  
11 supervisors will simply follow those provisions of the 2019 EPM during this election cycle.  
12 However, if the Plaintiffs’ position is accepted, the harm to the public is that a failure to follow  
13 those provisions cannot result in penalties should a bad actor operate outside those provisions.  
14 Thus, this Court’s intervention to determine that those provisions of the 2019 EPM not expressly  
15 superseded by statute or recent court decisions remain valid, is essential to the integrity of the 2022  
16 elections.  
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19 **4. Adding new provisions to the EPM at this juncture is contrary to law**

20 As noted by Plaintiffs, A.R.S. § 16-452 was changed in 2019 directing when a new EPM could  
21 be issued. Prior to this amendment, a new EPM was required to be submitted to the Attorney  
22 General and Governor 90 days before an election and issued 30 days before an election. This  
23 provided potential for last minute changes to the EPM as elections officials were preparing for the  
24 election. The clear language of the 2019 amendment communicates the intent of the legislature  
25 was to give certainty for the rules that applied at each biennial election. *See* Laws 2019, Ch. 99 §1  
26 (H.B. 2238). Likewise, Senator Leach mentioned in the committee hearing referenced by Plaintiffs  
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1 that “defense attorneys basically used the fact that we had elections going on with non-current  
2 election manuals going out there....” See  
3 <https://www.azleg.gov/videoplayer/?eventID=2019031311&startStreamAt=8091> (last accessed  
4 June 3, 2022).

5  
6 Here, the scenario that Senator Leach was concerned about is playing out. With the EPM  
7 not being approved, Plaintiffs are now alleging that the 2019 EPM is no longer valid and subjecting  
8 election officers and the upcoming election to legal challenges. Plaintiffs ask this Court to add  
9 provisions to the EPM that were not included by the Secretary but such a solution would be  
10 contrary to the plain language of the statute. Further, adding provisions to the EPM at this juncture  
11 circumvents the whole intent behind the amendments to ARS § 16-452 in 2019. Thus, the only  
12 solution to the current situation is for this Court to declare that the 2019 EPM is the valid EPM for  
13 the 2022 election cycle and that those sections identified by Plaintiffs and Defendant as no longer  
14 valid be notated as such. If any other topics exist that are not covered by the 2019 EPM which  
15 need clarification, the Secretary can issue guidance on those areas – which Plaintiffs have stated  
16 are within her authority.  
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### 19 CONCLUSION

20 Governor Ducey, in response to the Petition for Special Action, hereby asks this Court to  
21 intervene, not to direct the Secretary to promulgate a new EPM, but to resolve with finality the  
22 that the provisions of the 2019 EPM that have not been superseded by law or deemed  
23 unconstitutional by the courts, are valid and may still be enforced.  
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2 DATED this 3rd day of June, 2022.

3 OFFICE OF GOVERNOR DOUGLAS A.  
4 DUCEY

5 By /s/ Anni L. Foster

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13 A copy has been emailed and electronically served via  
14 AZTurbo Court this 3rd day of June, 2022, to:

15 Honorable John Napper  
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