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22 **ARIZONA SUPERIOR COURT**

23 **COCHISE COUNTY**

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

Plaintiffs,

v.

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

Defendants.

) No. CV 2022-00518

)

) **ARIZONA SECRETARY OF STATE**

)

) **KATIE HOBBS' MOTION FOR**

)

) **LEAVE TO FILE AMICUS**

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) **CURIAE BRIEF AND PRESENT**

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) **ARGUMENT**

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(Assigned to Hon. Casey F. McGinley)

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

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

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

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

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

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

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

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

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

18 **IV. Conclusion.**

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

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

23 **COPPERSMITH BROCKELMAN PLC**

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

26 **STATES UNITED DEMOCRACY CENTER**
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1 Maithreyi Ratakonda*

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4 Secretary of State Katie Hobbs

5 ORIGINAL efiled and served via electronic
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Exhibit A

Exhibit A

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MARRA, in her official capacity as the
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Defendants.

) No. CV2022-00518

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

) (Assigned to Hon. Casey F. McGinley)

1 **Introduction**

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

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

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

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

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

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

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

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

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

3 **Interest of Amicus Curiae**

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

14 **Background**

15 Arizona has been using electronic voting systems to tally ballots since as early as 1966.
16 H.B. 204, 27th Leg., 2d. Reg. Sess. (Ariz. 1966). All electronic voting systems undergo federal
17 and state testing and certification before being used in Arizona elections. *See, e.g.*, A.R.S. §§ 16-
18 442; 2019 Elections Procedures Manual¹ (“2019 EPM”) at 76-82. The federal Election
19 Assistance Commission and the Secretary have certified each electronic voting system to be used
20 in each county in 2022, including in Cochise County.² All counties perform logic and accuracy
21 testing on all equipment before and after every election. *E.g.*, A.R.S. §§ 16-449, 16-602; 2019
22 EPM at 86-100, 235. The Secretary also performs logic and accuracy testing on a sample of each
23

24 ¹ [https://azsos.gov/sites/default/files/2019_ELECTIONS
25 PROCEDURES_MANUAL_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)

26 ² Arizona Secretary of State’s Office, *2022 Election Cycle/Voting Equipment*,
https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment_Aug.pdf.

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

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

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

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

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

11 **Argument**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **Conclusion**

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

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

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

18 **COPPERSMITH BROCKELMAN PLC**

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

21 **STATES UNITED DEMOCRACY CENTER**

22 Sambo (Bo) Dul
23 Maithreyi Ratakonda*

24 **Application for Pro Hac Vice Forthcoming*

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

1 ORIGINAL efiled and served via electronic
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16 /s/ Diana J. Hanson _____
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Exhibit 1



COCHISE COUNTY ATTORNEY'S OFFICE

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Brian M. McIntyre
COCHISE COUNTY ATTORNEY

November 2, 2022

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Via email Michael.Catlett@azag.gov

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

Dear Deputy Solicitor General Catlett,

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

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

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

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Catlett – Hand Count Opinion

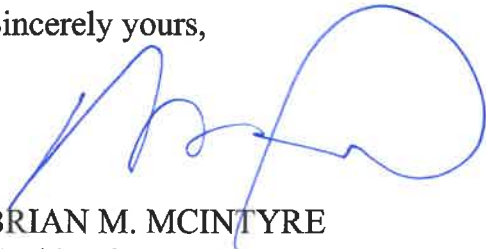
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remove the advisory opinion until such time as it has gone through the formal vetting process to ensure proper guidance to all interested parties now and in the future.

Thank you for your time.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'B. McIntyre', with a large, stylized loop at the end.

BRIAN M. MCINTYRE
Cochise County Attorney

BMM/bmm



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

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BRIAN M. McINTYRE
Cochise County Attorney

Interoffice Memorandum

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

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

The Elections Procedure Manual (“EPM”) prescribes the process by which hand counts¹ are performed. The EPM addresses hand count audits of vote centers and hand count audits of early ballots. Generally, the process is a random sampling of a small set that escalates if discrepancies are found. If insufficient discrepancies are identified, then no expansion is triggered and the counting ceases. That the hand count audit requires sufficient error to be detected before expansion can occur is conspicuously absent from the Opinion’s analysis. The Opinion eviscerates the hand count audit guidance by ignoring essential procedural rules. A cardinal principle of statutory interpretation² is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544 (2005). The Opinion’s analysis, if followed, would lead to violation of the EPM. Violation of the EPM is a criminal act³ pursuant to ARS 16-452(C.).

¹ Hand counts are authorized pursuant to ARS 16-602.

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

³ Class 2 misdemeanor.

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Voting Centers

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

Hand count audits of voting centers are treated as hand count audits of precincts⁴, and that process is described in EPM, Chapter 11, VIII.(A.). The process consists of 4 stages: 1) Precinct Hand Count, 2) Second Precinct Hand Count, 3) Expanded Precinct Hand Count, and 4) Full Precinct Hand Count. Each subsequent stage is triggered when the previous stage's count equals or exceeds a designated margin of error. If at any stage the count is less than the margin of error; "the hand count will be concluded and the results of the electronic tabulation will constitute the official count for that race."⁵ Accordingly, a 100% hand count audit of all voting centers is stage 4 of the process and can only occur if sufficient error was detected in stages 1,2, and 3.

The Opinion misleadingly states: "There is no provision of 16-602 or the EPM (or anywhere else in Arizona law) that imposes a ceiling on the percentage of precincts or vote centers that can be included in the hand count audit of votes cast in person." This myopically ignores that the hand count audit can only reach an increased ceiling if sufficient error was detected. If there is insufficient error, the counting concludes. The Opinion's error appears to be derived from selective interpretation. It is technically true that there is no ceiling, however, the steps necessary to expand the ceiling are omitted from the Opinion's analysis. As Attorney General Brnovich said: "A man hears what he wants to hear and disregards the rest."⁶

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

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

⁴ EPM page 215.

⁵ See EPM pages 225-228.

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

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

Early Ballots

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

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

The Opinion misleadingly states: "This statutory language does not set a maximum limit on the number of early ballots that can be included in the hand count audit, and at the very least, it is ambiguous." This myopically ignores that the hand count audit can only reach an increased ceiling if sufficient error was detected. If there is insufficient error, the counting concludes. Just as with the Opinion's analysis of the voting center audit, it is technically true that there is no maximum limit, however, the steps necessary to expand the limit are omitted from the Opinion's analysis.

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

⁷ See EPM pages 231-232.

the analysis because even if a county elected to audit a higher number (seemingly in contradiction to further guidance contained in the EPM), any further counting could only occur if the audit count was equal to or exceeded the margin of error. Assuming arguendo that a county elected to audit 100%, that value would be in conflict with the statutory requirement of a random sample⁸ and would be in conflict with procedural requirements to increase the audit by 1% if sufficient error is detected.

Purcell Principle

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

Summary

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

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



Kris Carlson
Deputy County Attorney

⁸ ARS 16-602(F)