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*Attorney for Plaintiffs Demitra Manjoros  
and Yavapai Republican Committee*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF YAVAPAI**

Mark Brnovich, in his official capacity as  
Arizona Attorney General; Yavapai County  
Republican Committee, an unincorporated  
association; and Demitra Manjoros, First  
Vice Chair of the Yavapai County  
Republican Committee and registered voter  
in Yavapai County,

Plaintiffs

vs.

Katie Hobbs, in her official capacity as  
Arizona Secretary of State,

Defendant.

Case No: P1300CV202200269

**PLAINTIFFS' REPLY IN SUPPORT OF  
COMPLAINT FOR SPECIAL ACTION  
RELIEF**

**[EXPEDITED ELECTION CASE]**

**(Assigned to the Hon. John Napper)**

**(Hearing Set for April 29, 2022 at 1:30  
PM)**

1 Pursuant to the Court's Order to Show Cause dated April 22, 2022, Plaintiffs Arizona  
2 Attorney General Mark Brnovich ("General Brnovich"), Yavapai County Republican  
3 Committee ("Plaintiff Committee"), and Demitra Manjoros ("Plaintiff Vice Chair") (together  
4 referred to as "Plaintiffs") hereby file this reply in support of special action relief.

5 **I. The Secretary Does Not Contest That She Failed To Comply With A.R.S. § 16-452,**  
6 **Thereby Necessitating The Judicial Relief Plaintiffs Request.**

7 Despite all of the bluster in the Secretary's response, including irrelevant ad-hominem  
8 attacks, the Secretary cannot escape the crucial fact underlying the Plaintiffs' request for special  
9 action relief: Arizona law required her to promulgate an Election Procedures Manual ("EPM")  
10 prior to December 31, 2021 and she failed to do so. That reality alone justifies the issuance of  
11 special action relief. *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 63 ¶16 (2020).

12 Once that undisputed reality is accepted, and it must be here, the primary question  
13 becomes, not whether relief is justified, but what form should that relief take?<sup>1</sup> The most  
14 appropriate form of relief for the Secretary's continued failure to promulgate an EPM prior to a  
15 mandatory statutory deadline is an order requiring the Secretary to promulgate an EPM by a  
16 new date certain. But the EPM statute requires that the AG and Governor approve the EPM  
17 prior to its issuance. Thus, the Court should order the Secretary to first provide a draft EPM to  
18 the AG and Governor for approval.

19 But the Court need not, and should not, stop there. The Court should also provide the  
20 parties with parameters for what should and should not be included in the draft EPM.  
21 Fortunately, in doing so, the Court will not write on a blank slate. Instead, the Arizona  
22 Supreme Court, in three cases decided since promulgation of the 2019 EPM, has established a  
23 legal framework for ensuring that rules promulgated through the EPM are lawful. Tellingly,  
24 the Secretary (similar to her approach to the Draft 2021 EPM) largely ignores the new  
25 framework in her Response.

26 Here is the framework those cases establish. First, an election rule promulgated through

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<sup>1</sup> The Secretary does not dispute that the Court should exercise special action jurisdiction here. She argues only that special action relief should be denied.

1 the EPM is only lawful if it falls within the distinct categories of rules that the Legislature listed  
2 in the EPM statute—namely, “early voting and voting, and . . . producing, distributing,  
3 collecting, counting, tabulating and storing ballots.” See A.R.S. § 16-452(A); see also  
4 *McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). If the proposed rule does not fall within one  
5 of those distinct categories, it is not promulgated pursuant to the EPM statute and cannot be  
6 included in the EPM or approved by the AG.

7 Second, even if an election rule promulgated through the EPM falls within one of the  
8 distinct categories of rules listed in § 16-452(A), the rule cannot be inconsistent with the text or  
9 purpose of one or more election statutes. See *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶21 (2021).  
10 If a proposed election rule would abrogate state law by providing instructions inconsistent with  
11 the text or purpose of an existing state statute, the rule cannot be included in the EPM.

12 Third, even if an election rule falls within the categories listed in § 16-452 and is  
13 consistent with the text and purpose of Arizona elections laws, the rule must achieve the  
14 purpose of the EPM statute to “maintain and achieve the maximum degree of correctness,  
15 impartiality, uniformity, and efficiency.” The Arizona Supreme Court has made clear that an  
16 EPM regulation would fail to do so where it leaves discretion over whether individual votes are  
17 counted to local election officials. See *Arizona Public Integrity Alliance*, 250 Ariz. at 64 ¶24.

18 Plaintiffs provided numerous examples where the Secretary’s draft EPM submitted to  
19 the AG and Governor in 2021 fell far short of adhering to the Supreme Court’s legal framework  
20 for the EPM. For example, the draft included numerous provisions touching on subjects far  
21 afield of the categories listed in § 16-452, including voter registration, candidate nominating  
22 petitions (in direct contravention of *McKenna*), petition circulator qualifications (in direct  
23 contravention of *Leach*), and even political party recognition. The draft also included  
24 numerous provisions that are inconsistent with election statutes, including a provision allowing  
25 voters to cast votes in the wrong precinct (in contravention of *Brnovich v. DNC*), allowing  
26 county recorders to instruct voters on how to make their intent clear if they overvote (i.e., vote  
for more candidates than authorized for a single race), rather than instructing them to obtain a  
new ballot (in contravention of *Arizona Public Integrity Alliance*), effectively extending ballot

signature cure periods in those counties that close their offices on Fridays (in contravention of *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021) (upholding the constitutionality of a five-day cure period), and allowing unstaffed ballot drop boxes (in contravention of A.R.S. § 16-1005(E)).

One might reasonably conclude that the Secretary desires to harness the EPM to undo those judicial decisions and state statutes she finds unpalatable. The Secretary's response makes little attempt to defend the inclusion of the offending provisions or her general approach to the EPM.<sup>2</sup> Instead, the Secretary argues that once she blew the December 31, 2021 deadline all bets were off (and the courts became powerless to remedy the situation) and she repeatedly accuses the AG of trying to impose his policy objectives.<sup>3</sup> Truth be told, however, the AG's proposed changes to the Secretary's prior draft consisted almost entirely of striking provisions using the new legal framework set forth by the Arizona Supreme Court.<sup>4</sup> This is perfectly consistent with the AG's role, as the State's Chief Legal Officer, in the EPM process. The AG did not attempt to add or re-write provisions. And if requiring the Secretary to comply with multiple holdings of the Arizona and U.S. Supreme Courts and to conform the EPM to state

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<sup>2</sup> The Secretary claims that voter registration rules fall within the scope of § 16-452 because registering to vote is a prerequisite to voting. The Secretary is wrong. That § 16-452 gives the Secretary the authority to promulgate rules regarding "voting" does not give her authority to promulgate rules on all prerequisites to voting. Otherwise, the Arizona Supreme Court would have concluded that candidate nominating petitions and circulator requirements fall within the topic of voting because voting cannot occur without candidates or ballot measures upon which to vote/ But the Court rejected that rules regarding either topic were validly promulgated under § 16-452. *See McKenna*, 250 Ariz. at 473 ¶20; *Leach*, 250 Ariz. at 576 ¶21. The Secretary also argues that certain voter registration rules are required under a federal consent decree. Not true. The AG was not a party to that decree, which expired in December 2020, and was complied with once the Secretary included certain provisions in a draft EPM.

<sup>3</sup> If the Secretary really believed that the AG was abusing his statutory privilege to approve the EPM, she could have sought special action relief stopping him from doing so. Tellingly, the Secretary did not seek any such judicial relief, instead opting to instruct county officials to follow the 2019 EPM in conjunction with new guidance she unilaterally issued updating the EPM to reflect new legislative enactments. *See Lori Kendrick Decl. Exh. 20*.

<sup>4</sup> The AG is not the only state official to express concern about the Secretary's approach to the EPM. Both the Arizona Senate and the Executive Director of the Arizona Clean Elections Commission did so too. *See Exhs. B and C*.



1 law can possibly be characterized as imposing a policy preference (it cannot), then the AG is  
2 guilty as charged. Ultimately, though, it is clear that the Secretary's cavalier approach to the  
3 EPM requires the Court, when remedying the Secretary's continuing failure to promulgate an  
4 EPM, to order that the Secretary follow the Arizona Supreme Court's legal framework.

5 Plaintiffs also explained why the provisions in the EPM did not achieve the purpose of  
6 the EPM with respect to ballot drop boxes and signature verification guidance. The EPM  
7 requires additional procedures to ensure that ballot drop boxes are properly staffed and that  
8 ballot affidavit signatures are verified consistent with Arizona law and in a manner that is  
9 uniform and correct. The Secretary's response fails to establish otherwise.

10 Thus, the Court should do three things to remedy the Secretary's undisputed breach of  
11 her statutory duty to promulgate a new EPM for the 2022 elections. First, the Court should  
12 order her to promulgate a new draft EPM to the AG and Governor by May 4, 2022 (or whatever  
13 other date the Court believes appropriate). Second, the Court should specify that the  
14 procedures included in the draft should be "legally-compliant," meaning that they must be  
15 consistent with the legal framework summarized above and set forth by the Supreme Court in  
16 *McKenna, Leach, and Arizona Public Integrity Alliance*. Third, the Court should order that the  
17 Secretary include additional provisions in the draft addressing ballot affidavit signature  
18 verification and ballot drop box staffing. Contrary to the Secretary's suggestion, the Court need  
19 not engage in a line-by-line analysis of the draft EPM or to order the Secretary to draft any  
20 particular provision of the EPM in a particular fashion.

## 21 **II. The Secretary's Laches and *Purcell* Doctrine Defenses Fail.**

22 Turning to the Secretary's response, she primarily claims that, despite her clear failure to  
23 promulgate a new EPM in violation of § 16-452, the Court is powerless to remedy that  
24 violation for several reasons. Broadly speaking, accepting the Secretary's arguments would  
25 allow her and future Secretaries to forego issuing a new EPM for multiple election cycles,  
26 including because the AG pushes too hard to ensure that a draft EPM actually complies with the  
law, instead directing county officials to rely on old versions of the EPM. Allowing the  
Secretary such unilateral flexibility would return the EPM to the state of affairs existing prior to

1 the Legislature's 2019 amendments<sup>5</sup> to the EPM statute and render those amendments largely  
2 meaningless. More specifically, each of the Secretary's arguments is legally flawed.

3 The Secretary argues that the Court is powerless to remedy her statutory violation  
4 because of laches and the *Purcell* doctrine. Starting with the Secretary's laches defense,  
5 "[l]aches is an equitable doctrine based on the principle of fundamental fairness." *League of*  
6 *Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 560 ¶13 (2009). "Laches will generally bar  
7 a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing  
8 party." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶6 (2000).

9 Laches is irrelevant—the doctrine does not apply to the Plaintiffs' request to require the  
10 Secretary to comply with the mandatory obligation to promulgate an EPM. *See Arizona Public*  
11 *Integrity Alliance*, 250 Ariz. at 65 ¶30 ("Plaintiffs' delay does not excuse the County from its  
12 duty to comply with the law."). As the Arizona Supreme Court has explained, "equitable  
13 defenses, such as estoppel and laches, will not lie against the state, its agencies or subdivisions  
14 in matters affecting governmental or sovereign functions." *Mohave County v. Mohave-*  
15 *Kingman Estates, Inc.*, 120 Ariz. 417, 421 (1978); see also *Arizona Independent Redistricting*  
16 *Comm'n v. Fields*, 206 Ariz. 130, 136 ¶12 (2003) (Timmer, J.) ("[C]ourts should hesitate to  
17 enforce a claim of laches against a public body that is asserting privileges designed to serve the  
18 public interest."). That exception applies here, where Plaintiffs, including the Chief Legal  
19 Officer of the State, seek to require the Secretary to comply with her duty to promulgate rules  
20 ensuring that elections are conducted in a correct, uniform, and secure manner.

21 Even if laches applies here, the Secretary has not shown unreasonable delay or that she  
22 will suffer any prejudice. As to unreasonable delay, the parties (and third parties) have been on  
23

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24 <sup>5</sup> The Secretary's argument that the statute has always required promulgation of an EPM for  
25 every election cycle is belied by the new statutory language requiring promulgation every  
26 election cycle and the old statutory language, which could plausibly be construed as setting forth  
deadlines but only when the Secretary chose to promulgate an EPM. *See* Exh. A (attaching the  
pre-2019 version of A.R.S. § 16-452(B)). Moreover, the Secretary's criticism, sourced from  
Twitter, that the AG is treating her more harshly than a prior Secretary is nonsense. Bringing a  
special action against the Secretary in her official capacity is hardly akin to the AG's refusal to  
criminally prosecute the former Secretary for "willful" failure to promulgate an EPM.

1 notice for months of the Secretary's failure to promulgate an EPM and the issue has never  
2 "come to rest" for purposes of laches. The failure was the subject of litigation in the Arizona  
3 Supreme Court, which began in late February and continued until early April. Within a few  
4 days of the Court denying jurisdiction in that case, the AG sent correspondence to the Secretary  
5 again demanding that she provide a draft EPM. Within a matter of days of receiving the  
6 Secretary's correspondence to the AG refusing to do so, Plaintiffs brought this action. This is  
7 not delay, let alone *unreasonable* delay.

8 The Secretary has also not established that she will suffer any prejudice from merely  
9 being required to comply with her mandatory statutory duty, which is fatal to her laches  
10 defense. *See Sotomayor*, 199 Ariz. at 83 ¶6 (requiring "prejudice to the opposing party").  
11 Instead, the Secretary relies on declarations from three third-party county recorders who state  
12 with no detail whatsoever that any material change to the EPM would be disruptive to the  
13 administration of elections in August and November. None of the three county recorders  
14 provides any detail on any particular changes that would be disruptive or explain how any such  
15 changes would result in actual prejudice. Such amorphous claims of disruption are insufficient  
16 to override the Legislature's mandate that the Secretary promulgate a new EPM every two  
17 years to maximize the public interest in correct and uniform elections. And those claims are  
18 also flatly inconsistent with the fact that for decades the EPM statute allowed a new EPM "to  
19 be issued not later than 30 days prior to each election." *See* Exh. A (attaching the pre-2019  
20 version of A.R.S. § 16-452(B)).

21 The Secretary's *Purcell* doctrine argument is no more viable than laches. The *Purcell*  
22 doctrine is applied by federal courts as a justification for refusing to enjoin state election laws  
23 on the eve of an election because doing so could result in voter confusion. *See Merrill v.*  
24 *Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (explain that the *Purcell*  
25 doctrine establishes that "that federal district courts ordinarily should not enjoin state election  
26 laws in the period close to an election"). Here, Plaintiffs are not requesting that the Court  
enjoin any state election laws. In fact, the relief Plaintiffs request will significantly reduce the  
risk of voter confusion and discharge the interests identified in the EPM statute. The Secretary,

1 on the other hand, would have the Court bless the current state of affairs, in which the Secretary  
2 ignores the requirement to promulgate an EPM and instead instructs county officials to utilize  
3 an old version of the EPM that is both lacking the force of law and severely outdated. On this  
4 last point, the Court need look no further than the Secretary's own correspondence to county  
5 recorders on January 12, 2022 to see the substantial pitfalls with the Secretary's approach.  
6 Attached to that letter is a draft EPM with annotations in the margins to indicate areas where  
7 the 2019 EPM is outdated because of new legislation or case law. The Secretary identifies at  
8 least *64 areas* of the 2019 EPM that are no longer current. And the Secretary asks the county  
9 recorders to follow her unilateral "guidance" regarding those updates. *See* Lori Kendrick Decl.  
10 Exh. 20. Some county recorders may heed that request and others may not, creating a  
11 significant risk of dis-uniformity in the administration of the 2022 elections. The *Purcell*  
12 doctrine is no impediment to Plaintiffs' request that the Court stop the Secretary's end run  
13 around § 16-452 through use of an old version of the EPM in conjunction with new "guidance"  
14 about updates (taking the form of the EPM) without the AG or Governor's approval.

15 **III. Determining Whether The Secretary Has Complied With § 16-452 Does Not**  
16 **Present A Non-Justiciable Political Question.**

17 As explained, the Arizona Supreme Court has set forth a clear legal framework for  
18 determining whether a particular election rule is properly promulgated under the EPM statute  
19 and applied that framework on at least three occasions in just the last two years. *See McKenna*,  
20 250 Ariz. at 473 ¶20; *Leach*, 250 Ariz. at 576 ¶21; *Arizona Public Integrity Alliance*, 250 Ariz.  
21 at 64 ¶24. Yet the Secretary insists that the Court is powerless to determine whether she is  
22 required to exclude or include certain rules because there is no manageable standard for  
23 determining whether the EPM should include certain provisions. Resp. at 15. The argument is  
24 absurd, particularly in the face of the Arizona Supreme Court's decision doing the very thing  
25 the Secretary now claims is impossible.

26 The Secretary focuses primarily on § 16-452's direction that the EPM include rules "to  
achieve and maintain the maximum degree of correctness, impartiality, uniformity and  
efficiency." A.R.S. § 16-452(A). The Secretary claims that courts cannot possibly determine



1 whether any particular rule should be included in the EPM, repeatedly emphasizing that she is  
2 the State's Chief Elections Officer and is therefore owed deference. The Secretary's argument  
3 in this respect is contrary to *Arizona Public Integrity Alliance*. In that case, the Arizona  
4 Supreme Court determined whether the Maricopa County Recorder had the authority to  
5 promulgate a ballot instruction to voters on how to correct an overvote. In rejecting that  
6 authority, the Court explained that even if a county recorder had the authority to promulgate a  
7 rule through the EPM, the Maricopa County Recorder's proposed instruction would be  
8 inconsistent with § 16-452's purpose to achieve and maximize uniformity. *Arizona Public*  
9 *Integrity Alliance*, 250 Ariz. at 64 ¶24. The Court, therefore, undertook the very analysis that  
10 the Secretary now claims is impossible for this Court to undertake. *McKenna and Leach*  
11 undertook a similar analysis. Thus, there is no non-justiciable political question here. See  
12 *Chavez v. Brewer*, 222 Ariz. 309, 317 ¶17 (2009) (rejecting an argument that the political  
13 question doctrine precluded judicial review of a claim that the Secretary abused her authority in  
14 certifying two voting machines that Appellants claimed did not comply with Arizona statutes).

15 There is no impediment, legally or practically speaking, to the Court conducting the  
16 same analysis here. Take Plaintiffs' request that the Court order the Secretary to include  
17 uniform ballot signature verification guidance in the EPM. The Secretary's Draft 2021 EPM  
18 contained no such guidance. It is hardly difficult to conclude that a *complete absence* of  
19 uniform guidance on how to verify ballot signatures does not achieve any degree of impartiality  
20 and uniformity, let alone does it "achieve and maintain the *maximum degree* of correctness,  
21 impartiality, uniformity and efficiency." A.R.S. § 16-452(A) (emphasis added).

#### 22 **IV. The Secretary Cannot Ignore The Mandatory Requirements In § 16-452.**

23 Rule 3 of the Arizona Rules of Procedure for Special Actions states that a special action  
24 proceeding is appropriate to decide "[w]hether the defendant has failed to exercise discretion  
25 which he has a duty to exercise; or to perform a duty required by law as to which he has no  
26 discretion." Ariz. R. Proc. Spec. Act. 3(a). This provision is based on the traditional writ of  
mandamus, which was "issued by a court to compel a public officer to perform an act which the  
law specifically imposes as a duty." *Bd. of Educ. of Scottsdale High Sch. Dis. No. 22 v.*

1 *Scottsdale Ed. Ass'n.*, 109 Ariz. 342, 344 (1973).

2 Here, A.R.S. § 16-452 specifically imposes a duty on the Secretary to promulgate an  
3 EPM on or prior to December 31 of each odd-numbered year. The relevant portions of the  
4 statute use the term “shall” in reference to the Secretary’s duties in six different locations. See  
5 A.R.S. §§ 16-452(A), (B). The Arizona Supreme Court has confirmed in no uncertain terms  
6 that the Secretary’s duties under the statute are mandatory: –“The Secretary must follow a  
7 specific procedure in promulgating election rules.” *Arizona Public Integrity Alliance*, 250 Ariz.  
8 at 63 ¶16. And, as explained, the Arizona Supreme Court has held that provisions that do not  
9 comply with the mandatory dictates of § 16-452 are not promulgated under that statute and  
10 enjoy no force or effect. See *McKenna*, 250 Ariz. at 473 ¶20. The Secretary failed to abide by  
11 the mandatory duty to proscribe an EPM with the AG and Governor’s approval by December  
12 31, 2021. Instead, she sent county officials what she called a 2019 Election Procedures Manual  
13 – Annotated (2022). In so doing, the Secretary violated her mandatory duties under the EPM  
14 statute, and the Court should grant relief to remedy these violations.

15 The Secretary’s argument, in any event, is based on the erroneous premise that  
16 mandamus is not available when a state official commits an abuse of discretion. To the  
17 contrary, special action relief is available where a government official has acted in an arbitrary  
18 or capricious manner. See *Rhodes v. Clark*, 92 Ariz. 31, 35 (1962) (explaining that mandamus  
19 relief will lie where “the officer has acted arbitrarily and unjustly and in the abuse of  
20 discretion”); Ariz. R. Spec. Act. 3, State Bar Comm. Note (explaining that a public officer “has  
21 no discretion to proceed arbitrarily”). Moreover, an abuse of discretion occurs when a state  
22 official has committed a “misapplication of law or legal principles.” *Tobin v. Rea*, 231 Ariz.  
23 189, 194 ¶14 (2013). Thus, even if § 16-452 gives the Secretary discretion to determine what  
24 should and should not be included in the EPM, she abused that discretion by misapplying the  
25 law or legal principles in failing to adhere to the requirements of § 16-452, as interpreted in  
26 *McKenna*, *Leach*, and *Arizona Public Integrity Alliance*. Plaintiffs are entitled to special action  
relief requiring that the Secretary comply with the law.

1 **V. The EPM Must Include Drop Box And Signature Verification Rules.**

2 To comply with the express requirements of A.R.S. § 16-452, the Secretary must  
3 provide county officials with additional guidance on how to lawfully staff ballot drop boxes and  
4 to verify ballot affidavit signatures. The Court need not instruct the Secretary to include  
5 particular provisions on those subjects, but the 2019 EPM is insufficient with respect to both.

6 The Secretary denies that she is required to say anything more about either of those  
7 topics. She begins by positing that the 2019 EPM remains in effect. It is not surprising in the  
8 least that the Secretary prefers a situation where, rather than obtain approval for a new EPM  
9 from the AG and Governor, she can pull a sleight of hand by (1) insisting to county officials  
10 that some prior version of the EPM remains in effect and (2) issue what amounts to an updated  
11 EPM in the guise of an annotated version of that prior manual but, with a wink and a nod,  
12 assure that the new document is only guidance, knowing that there is a significant likelihood  
13 county officials will simply follow the annotated version. This is exactly what the Secretary  
14 did here when she issued an annotated version of the 2019 EPM (with at least 64 updates to the  
15 2019 EPM) to county officials on January 17, 2022 (the AG learned about this for the first time  
16 in this case). *See* Lori Kendrick Decl. Exh. 20. In this manner, the Secretary can entirely avoid  
17 the EPM process the Legislature created.

18 Clearly, this is not what the Legislature meant when it amended § 16-452 in early 2019  
19 to make clear that a new manual is required every two years and setting mandatory deadlines to  
20 achieve that objective. The Legislature made those changes in reaction to a prior Secretary of  
21 State's failure to timely promulgate the EPM. The Secretary's interpretation would render the  
22 Legislature's amendments nugatory by allowing prior versions of the EPM to remain effective  
23 for all time. And the Secretary's approach would give her and future holders of the office the  
24 ability and motivation to ignore the AG and Governor's input on future draft EPMs. The EPM  
25 statute cannot be interpreted in such a manner. The only interpretation consistent with the  
26 statutory text and history is that one version of the EPM remains valid until the statutory  
deadline for promulgating a new EPM (*i.e.*, December 31 of each odd-numbered year).

1 As to ballot drop boxes, pursuant to A.R.S. § 16-1005(E) the only valid drop off sites for  
2 ballots in Arizona are “those established and staffed by election officials.” The Secretary  
3 responds to Plaintiffs’ request that the EPM include rules requiring ballot drop boxes to be  
4 staffed by quibbling about what it means for a ballot drop box to be staffed and claims that  
5 ballot drop boxes need not be monitored to be staffed. The Secretary ignores, however, that the  
6 2021 Draft EPM she provided allowed ballot drop boxes to be unstaffed, and she defined the  
7 term “unstaffed drop-box” as “not within the view and monitoring of an employee or designee  
8 of the County Recorder or officer in charge of elections.” *See* 2021 Draft EPM at 67 (AGO-  
9 082). Thus, the Secretary’s own draft EPM is inconsistent with her new position that a ballot-  
10 drop box can be staffed even if it is not monitored by a county official. The Secretary had the  
11 definition in the draft EPM correct. Arizona law does not permit unstaffed drop boxes, and  
12 thus the Court should require the Secretary to include rules requiring ballot drop boxes to, in  
13 the Secretary’s words, be “within the view and monitoring of an employee or designee of the  
14 County Recorder or officer in charge of elections.”

15 Turning to signature verification guidelines, the Secretary claims that no statute requires  
16 her to include signature verification guidelines in the EPM. Of course, this completely ignores  
17 § 16-452’s instruction that the Secretary promulgate election rules “to achieve and maintain the  
18 maximum degree of correctness, impartiality, uniformity and efficiency.” A.R.S. § 16-452(A).  
19 This is not a situation where the Secretary has included signature verification guidelines and the  
20 Plaintiffs are unhappy about the quantity or quality of such guidelines. Instead, the Secretary  
21 has included no guidelines at all. Allowing county officials to verify millions of ballot affidavit  
22 signatures in a five to six-week period with no uniform guidance whatsoever is clearly contrary  
23 to § 16-452(A)’s instructions. And that failure creates a significant risk of post-election  
24 challenge, increases the likelihood that Arizona elections will not be “free and equal,” and  
25 threatens the ongoing validity of the entire election system.

## 26 **VI. Conclusion.**

The Court should grant Plaintiffs special action relief entering the proposed judgment  
attached as Exhibit B to Plaintiffs’ Application for Order to Show Cause.



1 RESPECTFULLY SUBMITTED this 28th day of April, 2022.

2 **MARK BRNOVICH**  
3 **ATTORNEY GENERAL**

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16 *and Yavapai Republican Committee*  
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1 A copy has been electronically served via AZTurbo  
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# EXHIBIT A

2003 Ariz. Legis. Serv. Ch. 38 (S.B. 1023) (WEST)

ARIZONA 2003 LEGISLATIVE SERVICE

First Regular Session of the Forty-Sixth Legislature

Additions are indicated by Text; deletions by

Text . Changes in tables are made but not highlighted.

CHAPTER 38

S.B. 1023

ELECTIONS AND ELECTORS

AN ACT AMENDING SECTIONS 16-452, 16-542, 16-543, 16-1018 AND 41-121, ARIZONA REVISED STATUTES;  
RELATING TO ELECTIONS AND ELECTORS.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 16-452, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-452 >>

§ 16-452. Rules; instructions and procedures manual; approval of manual; field check and review of systems; violation; classification

A. After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots. The secretary of state shall also adopt rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of requests for federal postcard applications prescribed by section 16-543.

B. Such rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election. Prior to its 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 general not fewer than ninety days before each election.

C. A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor.

D. The secretary of state shall provide personnel who are expert in electronic voting systems and procedures and in electronic voting system security to field check and review electronic voting systems and recommend needed statutory and procedural changes.

Sec. 2. Section 16-542, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-542 >>

§ 16-542. Request for ballot

A. Within ninety days next preceding the Saturday before any election called pursuant to the laws of this state, an elector may make a verbal or signed request to the county recorder, or other officer in charge of elections for the applicable political subdivision of this state in whose jurisdiction the elector is registered to vote, for an official early ballot. In addition to name and address, the requesting elector shall provide the date of birth and state or country of birth or other information that if compared to the voter registration information on file would confirm the identity of the elector. If the request indicates that the elector



needs a primary election ballot and a general election ballot, the county recorder or other officer in charge of elections shall honor the request. For any partisan primary election, if the elector is not registered as a member of a political party that is entitled to continued representation on the ballot pursuant to section 16-804, the elector shall designate the ballot of only one of the political parties that is entitled to continued representation on the ballot and the elector may receive and vote the ballot of only that one political party. The county recorder may establish on-site early voting locations at the recorder's office or any other locations in the county the recorder deems necessary.

**B.** Notwithstanding subsection A of this section, a request for an official early ballot from an absent uniformed services voter or overseas voter as defined in the uniformed and overseas citizens absentee voting act of 1986 (P.L. 99-410; 42 United States Code section 1973) that is received by the county recorder or other officer in charge of elections more than ninety days next preceding the Saturday before the election is valid. If requested by the absent uniformed services or overseas voter, the county recorder or other officer in charge of elections shall provide to the requesting voter early ballot materials through the next two regularly scheduled general elections for federal office immediately following receipt of the request.

**C.** The county recorder or other officer in charge of elections shall mail postage prepaid to the address provided by the requesting elector, which address shall be the elector's residence address or the location where the elector is temporarily residing while absent from the precinct, the early ballot and the envelope for its return within five days after receipt of the official early ballots from the officer charged by law with the duty of preparing ballots pursuant to section 16-545. Only the elector may be in possession of that elector's unvoted early ballot. If the request is made by the elector within thirty days next preceding the Saturday before the election, such mailing must be made within forty-eight hours after receipt of the request. Saturdays, Sundays and other legal holidays are excluded from the computation of the forty-eight hour period prescribed by this subsection. If the request is made by an absent uniformed services voter or an overseas voter more than ninety days next preceding the Saturday before the election, the mailing shall be made within twenty-four hours after the early ballots are delivered pursuant to section 16-545, subsection B, excluding Sundays.

**D.** In order to receive an early ballot by mail, an elector's request that an early ballot be mailed to the elector's residence or temporary address must be received by the county recorder or other officer in charge of elections no later than 5:00 p.m. On the eleventh day preceding the election. An elector who appears personally no later than 5:00 p.m. On the Friday preceding the election at an on-site early voting location that is established by the county recorder or other officer in charge of elections shall be given a ballot and permitted to vote at the on-site location.

**E.** The county recorder or other officer in charge of early balloting shall provide an alphabetized list of all voters in the precinct who have requested and have been sent an early ballot to the election board of the precinct in which the voter is registered not later than the day prior to the election.

**F.** As a result of an emergency occurring between 5:00 p.m. On the second Friday preceding the election and 5:00 p.m. On the Monday preceding the election, qualified electors may request to vote early in the manner prescribed by the county recorder of their respective county. For the purposes of this subsection, "emergency" means any unforeseen circumstances which would prevent the elector from voting at the polls.

**G.** A candidate or political committee may distribute early ballot request forms to voters. If the early ballot request forms include a printed address for return to an addressee other than a political subdivision, the addressee shall be the candidate or political committee that paid for the printing and distribution of the request forms. All early ballot request forms that are received by a candidate or political committee shall be transmitted as soon as practicable to the political subdivision that will conduct the election.

Sec. 3. Section 16-543, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-543 >>

§ 16-543. Application for ballot; United States service

~~A.~~ Any absent uniformed services voter or overseas voter as defined in the uniformed and overseas citizens absentee voting act of 1986 (P.L. 99-410; 42 United States Code section 1973) may request an early ballot with a federal postcard application that contains both an early voter registration application and an early ballot application. The secretary of state shall provide for a centralized system for receiving federal postcard applications by way of the internet or facsimile and shall provide for transmitting appropriate ballot materials in response to telephone and internet requests for federal postcard applications. Upon

On receipt of such application, the county recorder or other officer in charge of elections shall determine whether or not the elector is registered. If the applicant is so registered, the recorder or other officer in charge of elections shall forward to him the applicant an official early ballot. If the applicant is not registered, and the request is for a ballot for use in a county election but the federal postcard application is complete, the recorder shall forward an official early ballot to the applicant. If the applicant is not registered to vote and the federal postcard application is not used or complete, the recorder shall forward an affidavit of registration as provided in section 16-103 and shall at the same time forward to the unregistered applicant an official early ballot and affidavit.

B. The county recorder or other officer in charge of elections shall transmit by fax early ballot request forms, unvoted ballots and ballot information to eligible absent uniformed services voters and overseas voters. The county recorder or other officer in charge of elections shall provide for receipt of completed early ballot requests and voted early ballots by fax as prescribed by the secretary of state in the instructions and procedures manual issued pursuant to section 16-452.

Sec. 4. Section 16-1018, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-1018 >>

§ 16-1018. Additional unlawful acts by persons with respect to voting; classification

A person who commits any of the following acts is guilty of a class 2 misdemeanor:

1. Knowingly electioneers on election day within a polling place or in a public manner within seventy-five feet of the main outside entrance of a polling place or on-site early voting location established by a county recorder pursuant to section 16-542, subsection A.
2. Intentionally disables or removes from the polling place, on-site early voting location or custody of an election official a voting machine or a voting record.
3. Knowingly removes an official ballot from a polling place before closing the polls.
4. Shows the voter's ballot or the machine on which the voter has voted to any person after it is prepared for voting in such a manner as to reveal the contents, except to an authorized person lawfully assisting the voter.
5. Knowingly solicits a voter to show the voter's ballot, or receives from a voter a ballot prepared for voting, unless the person is an election official or unless otherwise authorized by law.
6. Knowingly receives an official ballot from a person other than an election official having charge of the ballots.
7. Knowingly delivers an official ballot to a voter, unless the voter is an election official.
8. Except for a completed ballot transmitted by an elector by fax pursuant to section 16-543, knowingly places a mark upon the voter's ballot by which it can be identified as the one voted by the voter.
9. After having received a ballot as a voter, knowingly fails to return the ballot to the election official before leaving the polling place or on-site early voting location.

Sec. 5. Section 41-121, Arizona Revised Statutes, is amended to read:

<< AZ ST § 41-121 >>

§ 41-121. Duties

The secretary of state shall:

1. Receive bills and resolutions from the legislature, and perform such other duties as devolve upon the secretary of state by resolution of the two houses or either of them.
2. Keep a register of and attest the official acts of the governor.
3. Act as custodian of the great seal of this state.
4. Affix the great seal, with the secretary of state's attestation, to public instruments to which the official signature of the governor is attached.
5. File in the secretary of state's office receipts for all books distributed by the secretary of state and direct the county recorder of each county to do the same.
6. Certify to the governor the names of those persons who have received at any election the highest number of votes for any office, the incumbent of which is commissioned by the governor.

7. Publish slip laws of each act of the legislature promptly upon passage and approval of such act, make such acts available to interested persons for a reasonable fee to compensate for the cost of printing and provide each house of the legislature and the legislative council with a certified copy of each bill or resolution, showing the chapter or resolution number of each, as each is filed in the secretary of state's office.

8. Keep a fee book of fees and compensation of whatever kind and nature earned, collected or charged by the secretary of state, with the date, the name of the payer and the nature of the service in each case. The fee book shall be verified annually by the secretary of state's affidavit entered in the fee book.

9. Perform other duties imposed on the secretary of state by law.

10. Report to the governor on January 2 each year, and at such other times as provided by law, a detailed account of the secretary of state's official actions taken since the secretary of state's previous report together with a detailed statement of the manner in which all appropriations for the secretary of state's office have been expended.

11. Transfer all noncurrent or inactive books, records, deeds and other papers otherwise required to be filed with or retained by the secretary of state to the custody of the Arizona state library, archives and public records.

12. Make available to the public, without charge, copies of title 33, chapter 11.

13. Accept, and approve for use, electronic and digital signatures that comply with section 41-132, for documents filed with and by all state agencies, boards and commissions. In consultation with the government information technology agency, the department of administration and the state treasurer, the secretary of state shall adopt rules pursuant to chapter 6 of this title establishing policies and procedures for the use of electronic and digital signatures by all state agencies, boards and commissions for documents filed with and by all state agencies, boards and commissions.

14. Meet at least annually with personnel from the federal voting assistance office of the United States department of defense and with county recorders and other county election officials in this state to coordinate the delivery and return of registrations, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens.

<< Note: AZ ST § 16-452 >>

#### **Sec. 6. Secretary of state; delivery of registration and early ballot materials; recommendations**

**A.** On or before December 15, 2003, the secretary of state shall submit to the governor, the president of the senate and the speaker of the house of representatives recommendations on the following:

1. The delivery of voter registration and early ballot materials to all uniformed service personnel, their families and other overseas citizens who are residents of this state and who are absent from this state due to military or other overseas service.

2. Changes in state law that would allow for greater participation by absent uniformed service personnel, their families and other overseas citizens in federal, state and local elections in this state.

**B.** The secretary of state shall consult with personnel in the federal voting assistance office in the United States department of defense and with county recorders and other county election officials in this state to develop these recommendations.

Approved by the Governor, April 7, 2003.

Filed in the Office of the Secretary of State, April 7, 2003.

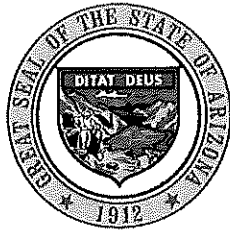
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# EXHIBIT B



KAREN FANN  
SENATE PRESIDENT  
FIFTY-FIFTH LEGISLATURE  
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DISTRICT 1



COMMITTEES:  
Rules, Chairman

## Arizona State Senate

September 8, 2021

Dear Secretary Hobbs,

As you are aware, the Secretary of State's authority regarding the Elections Procedures Manual (EPM) is illustrated in A.R.S. § 16-452, which states that the Secretary of State shall simply "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." Nothing here indicates authority for policymaking by expanding or modifying existing statutory election laws through the EPM. Attempts by your office to do just that were thwarted by the Arizona Supreme Court in *McKenna v. Soto*, which invalidated portions of the EPM that contained guidance on matters that "fall outside the mandates of § 16-452 and do not have any other basis in statute." *McKenna v. Soto*, 481 P.3d 695 (Ariz. 2021).

Title 16, Arizona Revised Statutes, enumerates the election laws of this state and the scope of authority for revisions to election procedures (A.R.S. § 16-191). As members of the legislative branch, the undersigned Senators express deep concern with apparent efforts by your office to enact substantive election law once again through draft revisions to the 2021 EPM.

As members of the Arizona State Senate, we caution the Secretary of State's office against failing to comply with the narrow scope of authority provided in A.R.S. § 16-452. Revisions to the 2021 EPM that go beyond this scope of statutory authority are firmly advised against, not lawfully justifiable and subject to challenge. As such, we encourage your office to take the opportunity to revisit revisions that have no basis in statute prior to submission of the draft 2021 EPM to the Governor and the Attorney General.

Sincerely,

A handwritten signature in cursive script that reads "Karen Fann".

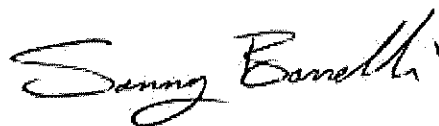
**KAREN FANN**  
*President of the Arizona State Senate*

A handwritten signature in cursive script that reads "Rick Gray".

**RICK GRAY**  
*Majority Leader of the Arizona State Senate*



**SINE KERR**  
*State Senator, Legislative District 4*



**SONNY BORRELLI**  
*State Senator, Legislative District 5*



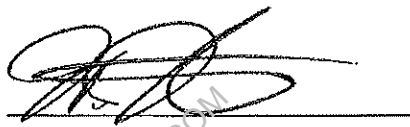
**WENDY ROGERS**  
*State Senator, Legislative District 6*



**T.J. SHOPE**  
*State Senator, Legislative District 8*



**VINCE LEACH**  
*State Senator, Legislative District 11*



**WARREN PETERSEN**  
*State Senator, Legislative District 12*



**DAVID GOWAN**  
*State Senator, Legislative District 14*



**NANCY BARTO**  
*State Senator, Legislative District 15*



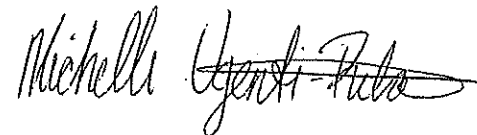
**KELLY TOWNSEND**  
*State Senator, Legislative District 16*



**J.D. MESNARD**  
*State Senator, legislative District 17*



**DAVID LIVINGSTON**  
*State Senator, Legislative District 22*



**MICHELLE UGENTI-RITA**  
*State Senator, Legislative District 23*

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# EXHIBIT C

Doug Ducey  
Governor

Thomas M. Collins  
Executive Director



State of Arizona  
Citizens Clean Elections Commission

1616 W. Adams - Suite 110 - Phoenix, Arizona 85007 - Tel (602) 364-3477 - Fax (602) 364-3487 - [www.azcleanelections.gov](http://www.azcleanelections.gov)

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September 8, 2021

The Honorable Allie Bones  
Assistant Secretary of State  
Arizona Secretary of State  
1700 W. Washington  
Phoenix, AZ 85007

**Via E-Mail**

**Re: Comments on Draft Election Procedures Manual**

Dear Assistant Secretary of State Bones:

I am writing with comments on the draft Election Procedures Manual. I appreciate this public comment period as the time for the Clean Elections Commission staff to make comment on election procedures for 2022.

I first want to reiterate that the EPM in combination with A.R.S. § 16-452 raises serious constitutional issues in terms of the delegation by the legislature, as well as, substantive and procedural due process concerns. For example, the statute purports to grant every part of the EPM the force of law, but its development requires little in the way of mandatory hearings, comment opportunities, or formal consideration of comments on the merits. Similarly, § 16-452 purports to make every violation of the EPM a Class 2 misdemeanor by *any person*, including people it does not otherwise purport to regulate. Yet the EPM does not meet the appropriate threshold for publication of a criminal law, i.e., it is not codified in the statutes or rules of this state.

Additionally, I am specifically concerned about sections of the EPM related to the Clean Elections Act. First, the draft states that “[a] statewide or legislative candidate seeking public funding under the Citizens Clean Elections Act may not run as a write-in candidate,” citing A.R.S. § 16-953. Draft at 123. Section 16-953 does not say that. It says that a primary candidate may not use Clean Funding in the primary if the candidate is a write-in candidate. The Act makes clear, and the history makes evident, a person who is on the ballot in the general election may received Clean Funding for the general election if all other qualifications have been met. Because that explanation is somewhat involved, I’d consider removing the sentence in the draft all together. But it cannot stay as is.

Likewise, the EPM draft states that “[i]n addition, candidates running with Clean Elections funding have additional rules they must follow. They should contact the Citizens Clean Elections Commission (CCEC) for further information, or visit their website[.]” Draft at 283. This is not accurate. As the statute states (and as noted by reported and superior court decisions) the Act applies to *all* candidates for state and legislative office, as well as all spenders in state political campaigns. While I appreciate the mention of the Act, the EPM minimizes its role to the point that the draft is simply incomplete and incorrect.

Further, the draft includes a footnote about the Court of Appeals’ decision last year addressing the Commission’s powers. Draft at 283 fn. 76. The footnote acknowledges that filing officers are not the “sole” office with which a campaign finance complaint may be filed. *Id.* (citing *Arizona Advocacy Network et al., v. State of Arizona*, 250 Ariz. 190 (Ariz. App. Div. 1 2020). However, the EPM goes on to state:

Before a reasonable cause determination is made, a filing officer, enforcement officer, and any other public officer or employee may not order a person to register as a committee, and do not have audit or subpoena powers to compel the production of evidence or the attendance of witnesses concerning a potential campaign finance violation.

Draft at 285. This language cannot be squared with either the conclusion or reasoning of *Arizona Advocacy*. See 250 Ariz. at 201-202, paragraphs 51-58.

This approach to 16-938 is problematic for two reasons. First, because Secretary Hobbs continued Secretary Reagan's position adverse to the Commission on the Commission's own role during the *Arizona Advocacy* case, this language supports a reasonable inference that the Secretary of State contemplates additional litigation on this point. The draft implies that the Commission's subpoena power and other authority is limited by 16-938. This decidedly is not the law. (As a practical matter adding the *Arizona Advocacy* case to the summary of cases in the guide accompanying the draft is clearly in the public's interest).

As it relates to enforcement, I would note that the enforcement section should be stricken from the EPM. The Secretary simply is not empowered to make rules for enforcement officers. A.R.S. § 16-938(B) ("The secretary of state shall establish guidelines in the instructions and procedures manual adopted pursuant to section 16-452 that outline the procedures, timelines and other processes that apply to investigations *by all filing officers* in this state.).

Please contact me with any questions.

Sincerely,

S/Thomas M. Collins  
Executive Director