ARIZONA COURT OF APPEALS
DIVISION TWO

ARIZONA ALLIANCE FOR RETIRED AMERICANS, INC. and STEPHANI STEPHENSON, Plaintiffs/Appellees, v. TOM CROSBY, ANN ENGLISH, and PEGGY JUDD, in their official capacities as the Cochise County Board of Supervisors; DAVID STEVENS, in his official capacity as the Cochise County Recorder; and the Cochise County Elections Director, Defendants/Appellants.	No. 2 CA-CV 2022-0136 Cochise County Superior Court No. CV2022-00518

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INTRODUCTION

Arizona law prescribes in detail how manual hand count audits must be performed for both ballots voted in-person on Election Day at precincts or voting centers ("precinct ballots"), and early ballots as defined by A.R.S. § 16-545 ("early ballots"). These hand count audits are *limited* in nature—they start with small, random samples, and expand if, and only if, the results of each count differ from the electronic tabulations above a statutorily designated margin for error. This progressively expanding approach can culminate in a county-wide hand count for a particular race only if the limited audits repeatedly reveal errors in the electronic tabulations.

Yet, Appellants, members of the Cochise County Board of Supervisors, in their official capacities (the "Board"), and David Stevens, in his official capacity as the Cochise County Recorder (the "County Recorder" or "Recorder"), assert that a 100% hand count audit of all ballots *in the first instance* is authorized by law and should have been permitted for the 2022 general election. Even if this issue were not now moot, such a conclusion cannot be squared with the plain text and structure of Arizona law.

This case boils down to a simple question of statutory interpretation where the law is clear: Arizona law prohibits a 100% hand count audit of all ballots in the first instance. As the trial court correctly found, "[t]he decision as to how to conduct and

tabulate elections is appropriately in the domain of the State Legislature, supplemented by the delegated rule making authority of the Secretary of State. The Legislature has spoken clearly, and elected officials are required to follow its direction." [ROA 38 at 11]. If this Court does not dismiss this appeal as moot, it should affirm the trial court's ruling.

STATEMENT OF THE CASE AND FACTS

I. Arizona law requires that all ballots be counted by electronic tabulators, which are subject to rigorous scrutiny, including a limited hand count audit.

Because Cochise County opted to use electronic equipment for the 2022 general election, Arizona law requires that all early ballots and ballots cast in polling places be counted by electronic tabulators in the first instance: "The result printed by the vote tabulating equipment, to which have been added write-in and early votes, shall, when certified by the board of supervisors or other officer in charge, constitute the official canvass of each precinct or election district." A.R.S. § 16-622(A); *see also* A.R.S. § 16-444(B) ("The provisions of all state laws relating to elections . . . apply to all elections where electronic tabulating devices are used.").[1] Indeed, ballots may only be counted by hand in the first instance if "it becomes impracticable to count all or a part of the ballots with tabulating equipment." A.R.S. § 16-621(C).

[1] Cochise County filed its election program and emergency contingency plan for the 2022 general election with the Secretary of State as required by A.R.S. § 16-445(A), confirming its use of electronic equipment for the election. [ROA 20, Amicus Br. at 9].

Otherwise, using a hand count is limited to a post-election random sample audit to confirm the accuracy of the electronic tabulation. A.R.S. § 16-602.

As part of the process to confirm that electronic tabulation is accurate, the electronic tabulators undergo thorough testing by independent, neutral experts every election cycle, *see* A.R.S. § 16-442(A), (B), as well as four independent audits: two before the election, and two after. The pre-election audits include (1) a logic and accuracy test performed by the Secretary of State on a sample of the tabulation equipment, *see* A.R.S. § 16-449(A), (B); and (2) a logic and accuracy test performed by the counties on all tabulation equipment, *see* 2019 Arizona Elections Procedures Manual ("EPM") at 86.[2] The post-election audits include (3) a limited hand count of a small percentage of ballots overseen by both county election officials and representatives of the political parties, *see* A.R.S. § 16-602(B), (F), and; (4) post-election logic and accuracy testing performed by the counties, *see* EPM at 235.

A.R.S. § 16-602, which is the sole authorization for hand count audits, provides mandatory procedures for conducting such audits. *See* A.R.S. § 16-602(B) ("The hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official

[2] The Secretary of State promulgated the operative Election Procedures Manual in 2019. The Manual has the force of law unless it contradicts statutory requirements. *See* A.R.S. § 16-452; *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020); *Leibsohn v. Hobbs*, 254 Ariz. 1, ¶ 22 (2022). The manual is available at: https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

instructions and procedures manual adopted pursuant to § 16-452."). The procedures described are highly detailed and broadly apply to any audit of votes cast in "countywide primary, special, general and presidential preference election[s]." *Id.* No other provision of Arizona law allows for separate hand count audits.

II. The Board's Resolution and the underlying proceedings.

Despite Arizona's rigorous process to ensure that its election tabulators are secure and accurate, and the lack of any evidence of election fraud, [ROA 1 at 4-5], on October 24, 2022—after early voting in the 2022 general election began, [ROA 38 at 1]—the Board adopted a resolution to conduct a 100% hand count of all ballots (the "Resolution"). [ROA 38 at 2]. The Board asserted that it was "widely known that many voters lacked confidence in the voting system" and found that "[a] 100% County wide audit of the 2022 General Election [would] enhance voter confidence." [*Id.*]. The Resolution states:

> Pursuant to ARS 16-602 B; the County Recorder or other officer in charge of elections shall take such action necessary to perform a hand count audit of all County precincts for the 2022 General Election to assure agreement with the voting machine count. Such audit shall be completed prior to the canvass of general election results by the Board of Supervisors.

[ROA 1 at 6].

On October 31, 2022, Appellees Arizona Alliance for Retired Americans, Inc. (the "Alliance"), and Stephani Stephenson filed a Special Action and a Petition for Writ of Mandamus, or in the Alternative Motion for Preliminary Injunction, in

Cochise County Superior Court, seeking to prevent enforcement of the Resolution and a declaration that the Resolution violates Arizona law. [ROA 1; ROA 7 at 20]. The Alliance is a 504(c)(4) nonprofit organization that represents retirees in every county in Arizona, including in Cochise County. [ROA 7 at 5; ROA 38 at 2]. The Alliance also "provide[s] support and education to retired individuals on topics pertaining to voting and elections." [ROA 38 at 2]. Ms. Stephenson is a Cochise County resident who cast an early ballot in the 2022 general election. [ROA 38 at 2]. Ms. Stephenson's early ballot was accepted and validated for counting prior to Appellees filing this lawsuit. [ROA 7 at 6; ROA 38 at 2].

On November 7, 2022, the trial court granted Appellees' Petition for Writ of Mandamus or in the Alternative Motion for Preliminary Injunction, ordered the Cochise County Recorder or Director of Elections to conduct any hand count audits of precinct or early ballots in accordance with A.R.S. § 16-602, as described in the trial court's ruling, and enjoined the Board from undertaking a full hand count audit of all votes cast in Cochise County in the 2022 general election. [ROA 38 at 11]. In support of its order, the trial court considered evidence presented at an all-day evidentiary hearing and briefing from Appellees, Appellants, nominal Defendant Cochise County Elections Director Lisa Marra, and Amicus the Arizona Secretary of State. [ROA 38 at 1]. Both Elections Director Marra and the Secretary of State agreed with Appellees that the Resolution violates Arizona law. [*see* ROA 20; ROA

22; ROA 24].

With respect to precinct ballots, the trial court held that A.R.S. § 16-602 "does not permit elections officials to begin the precinct hand count by counting all ballots cast," making the Resolution unlawful. [ROA 38 at 9]. In reaching this conclusion, the trial court held that (1) counting all precinct ballots cast violates the statutory "requirement that the ballots be *randomly* selected for a hand count," **and** (2) construing the statute "to permit officials to initially select 100% of the precinct ballots as its starting point" would render the statutory mechanism for expanding the hand count superfluous. [ROA 38 at 8-9].

Regarding early ballots, the trial court held that the Resolution "is not permitted by the plain language of § 16-602(F)" because that "plain language establishes that the maximum number of early ballots which can be initially audited in an election is 5,000." [ROA 38 at 9]. The trial court further held that the contradictory language in the EPM permitting counties to audit a higher number of ballots at their discretion does not have the force of law because it directly contravenes a statute and that the Board could not rely on it to conduct a full hand count audit of early ballots. [ROA 38 at 9].

The Board and County Recorder filed a notice of appeal on November 9, 2022. On November 10, Appellants moved this Court to expedite the appeal and

filed a merits brief.[3] Mot. for a Procedural Order re: Expedited Br'g Schedule and Consideration. This Court denied the motion and ordered that the matter proceed as a non-expedited appeal. Nov. 10, 2022 Order. Appellants filed their opening brief on February 13, 2023 [hereinafter "Br."], to which Appellees now respond.

STATEMENT OF THE ISSUES

1. Whether election officials may, in the first instance, conduct a hand count audit of 100% of *precinct* ballots despite the contrary mandatory procedures for hand count audits prescribed by Arizona law.

2. Whether election officials may, in the first instance, conduct a hand count audit of 100% of *early* ballots despite the contrary mandatory procedures for hand count audits prescribed by Arizona law.

STANDARD OF REVIEW

Appellate courts review issues construing statutes and rules de novo. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61-62 ¶ 8 (2020) (citation omitted).

The Court's "chief goal in interpreting a statute is 'to fulfill the intent of the legislature that wrote it.'" *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003) (citing *State v. Williams*, 175 Ariz. 98, 100 (1993)). "If a statute's language is clear and unambiguous," the Court applies it "without resorting to other methods of statutory interpretation." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994). Likewise, if a provision "has only one reasonable meaning when considered in context," courts apply that meaning without further analysis. *Leibsohn v. Hobbs*, 254 Ariz. 1, ¶ 10

[3] Appellants also moved to transfer the appeal to the Arizona Supreme Court, which the Supreme Court denied. Nov. 10, 2022 Ariz. S. Ct. Order.

(2022) (citation omitted). Courts apply secondary interpretive principles, such as "considering the statute's subject matter and purpose," only if the statute "has more than one reasonable meaning." *Id.* (citation omitted).

"A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019); *see also State v. Garza Rodriguez*, 164 Ariz. 107, 112 (1990) (courts "must, if possible, give meaning to each clause" in statute); *Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein*, 231 Ariz. 467, 471 ¶ 12 (App. 2013) ("Each word, phrase, clause and sentence must be given meaning so that no part of the statute will be void or trivial and the meaning determined must avoid absurd results.").

ARGUMENT

I. This appeal is moot because the Resolution adopted by the Cochise County Board of Supervisors pertained only to the 2022 general election, which has now passed.

As a threshold matter, this Court should dismiss the appeal as moot because the Board Resolution ordering a 100% hand count audit of all ballots pertained only to the 2022 general election and thus no longer has any practical effect.

Arizona courts typically refrain from considering moot or abstract questions as a matter of judicial restraint. *Kondaur Cap. Corp. v. Pinal Cnty.*, 235 Ariz. 189, 193 ¶ 8 (App. 2014) (citation omitted). "It is not an appellate court's function to

declare principles of law which cannot have any practical effect in settling the rights of litigants." *Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548 (App. 1985) (citation omitted). This Court should not issue advisory opinions or "decide issues unless it is required to do so in order to dispose of the appeal under consideration." *Id.* (citations omitted). The same rule governs writ proceedings: "Where the question involved has become abstract since the application for the writ," the appellate court will not decide the issue. *Mesa Mail Publ'g Co. v. Bd. of Supervisors of Maricopa Cnty.*, 26 Ariz. 521, 524 (1924) (citation omitted).

Appellants seek a ruling from this Court about the legality of a Resolution that ordered "a hand count audit of all County precincts for the" now-passed "2022 General Election." [ROA 38 at 2]. Not only is the 2022 election over, but the mandatory audits prescribed by law have been conducted, and the election results were canvassed and certified. Thus, even if this Court were to rule in Appellants' favor, the ruling would have no practical effect—as Appellants concede. *See* Br. at 5 ("[I]t is too late to enhance voter confidence for the last election.").

Nonetheless, Appellants argue that the case is not moot because Cochise County intends to violate the law in the future. *Id.* But this Court is "not empowered to decide moot questions or abstract propositions, or to declare, *for the government of future cases*, principles or rules of law which cannot affect the result as to the

thing in issue in the case before it." *J. R. Francis Const. Co. v. Pima Cnty.*, 1 Ariz. App. 429, 430 (1965) (emphasis added). It is not the court's role to "act as a fountain of legal advice," *Kondaur Cap. Corp.*, 235 Ariz. at 193 ¶ 8 (quotation omitted), and this Court should refrain from providing Appellants with an advisory opinion.

Although courts may elect to consider moot issues of "great public importance" or that are "capable of repetition yet evading review," *id.* (quotation omitted), neither of those exceptions apply here. *First*, the issues below "were resolved through straightforward application of the statutory language, confirming that this case is not appropriate for discretionary review pursuant to the 'public importance' exception because it does not involve a significant question." *Id.* at 193 ¶ 10. Indeed, before passing the Resolution, the Board was warned by its own County Attorney and the Secretary of State that Arizona law does not allow for a hand count of all ballots in the first instance—an indication that the law has always been clear on this question. [ROA 1 at 5-6].

Second, this is not the type of issue that is capable of repetition and will evade review. *Id.* at 193 ¶¶ 8, 11. Regarding the former, while Appellants state that they "intend[] to conduct full hand counts in future elections" they do not assert that the Cochise County Board of Supervisors has adopted any resolutions to that effect, which is a mandatory precursor to any such audit. Br. at 5; *see also* A.R.S. § 38-341.01(A). It is also far from clear that any hand count audit plans would "evade

review." Appellants only find themselves in this situation, appealing months after the election occurred, because they waited until the eleventh hour to pass the Resolution in the first place. [*See* ROA 38 at 1-2 (the 2022 general election began on October 12, 2022, when county recorders sent out early ballots, and the Resolution was passed on October 24, 2022)]. This Court should not entertain Appellants' request for an advisory opinion for hypothetical future lawbreaking when the law is clear and the situation is one of Appellants' own making.

II. Conducting a hand count audit of 100% of all ballots in the first instance violates Arizona law.

If the Court reaches the merits of this appeal, it should affirm the trial court's ruling that the Board's Resolution requiring a full hand count of all ballots cast is not permitted by Arizona law. [ROA 38 at 5, 10-11].

Arizona law carefully prescribes—and expressly limits—how manual hand count audits of ballots must be performed. Hand count audits *must* start with small, random samples for a limited number of races, and expand *only* on an individual race basis and *only* if hand counts repeatedly differ from electronic tabulations by more than a designated margin for error. Appellants are only legally authorized to conduct hand count audits in accordance with these statutorily prescribed procedures and cannot require a hand count audit of all ballots.

a. The Cochise County Board and Recorder have only those powers designated to them by law, and they may only conduct a hand count audit as authorized by Arizona law.

For the first time on appeal, Appellants make the baseless argument that Title 11 provides county boards with "broad authority and discretion regarding election matters, including how they choose to canvass and certify votes," and that the Board has discretion to conduct "hand count[s] *outside* of the mandatory provision of A.R.S. § 16-602." Br. at 14-16. Because Appellants did not raise this argument below, it is waived, and this Court should not consider it. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 302 n.2 (2004) (holding issue not raised in trial court was waived); *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265 ¶ 15 (App. 2004) (citing *Van Loan v. Van Loan*, 116 Ariz. 272, 274 (1977)) (arguments raised for first time on appeal waived).

But even if the Court were to reach it, this entirely unsupported argument also fails under a wealth of clear, binding precedent. Under Arizona law, the Board and Recorder have only those powers "expressly conferred by statute" and "may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (quotation omitted); *see Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14 (Defendants' powers "[are] limited to those powers expressly or impliedly delegated to [them] by the state constitution or statutes."). Appellants are plainly wrong when they claim that county boards have

unspoken "discretion" to conduct any hand count they see fit. Br. at 15. To the contrary, "[a]ctions taken by a board of supervisors by methods unrecognized by statute are without jurisdiction and wholly void [because] [a] governmental body may not do indirectly what a statute does not give it the power to do directly," *Hancock*, 188 Ariz. at 498 (internal quotations omitted). Even "[t]he absence of a statutory prohibition does not mean the county has inherent authority to engage in certain conduct." *Id.* (internal quotations omitted); *see also Maricopa Cnty. v. Black*, 19 Ariz. App. 239, 241 (1973) (rejecting contention that lack of constitutional or statutory prohibition gives counties authority because Arizona counties "are not inherently omnipotent," and their powers are "quite limited"). Appellants not only ignore this directly contrary binding case law, they cite *no* authority supporting their opposite view that the Board and the Recorder have implied powers beyond those conferred by statute.

A.R.S. § 16-602 is the sole legal authorization for hand count audits, and no other provision of Arizona law permits any other hand count. Thus, election officials must conduct hand count audits only as prescribed by A.R.S. § 16-602 and the EPM: "The hand count *shall* be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to section 16-452." A.R.S. § 16-602(B) (emphasis added).

b. Arizona law prohibits election officials from conducting a hand count audit of 100% of *precinct* ballots in the first instance.

A.R.S. § 16-602 prescribes mandatory procedures for conducting a hand count audit of precinct ballots. Pursuant to A.R.S. § 16-602(B)(1): "At least two percent of the precincts in that county, or two precincts, whichever is greater, *shall be selected at random* from a pool consisting of every precinct in that county" from which an audit of precinct ballots for a limited number of races must occur. (Emphasis added).[4] If the hand count audit of those randomly selected precincts results in "a difference in any race that is less than the designated margin when compared to the electronic tabulation of those same ballots, the results of the electronic tabulation constitute the official count for that race" and the hand count audit ceases. A.R.S. § 16-602(C). If the results are equal to or exceed the designated margin, the statute requires a ***second hand count of those same ballots*** for that single race, and ***only*** if those results are ***also*** equal to or exceed the designated margin, is the hand count expanded "to include a total of twice the original number of randomly selected precincts." *Id.* If after that further expanded hand count any race is still not within the designated margin, then the hand count is expanded again to include the entire jurisdiction for that race only. A.R.S. § 16-602(D). These procedures prescribed by law are mandatory.

[4] The EPM clarifies that vote centers are "considered to be a precinct" for counties like Cochise that use the vote center model. EPM at 215.

As the trial court correctly held, the statute does not authorize an audit of *every* precinct ballot at the outset. [ROA 38 at 8-9]. Such an expansive reading would contradict numerous statutory requirements, including the directives that precincts must be selected "at random" and may only be expanded if the results exceed the designated margin for error, permitting a jurisdiction-wide hand count only after repeated mismatches. [ROA 38 at 8-9]; A.R.S. § 16-602(B)-(E). Allowing election officials to conduct a hand count audit of all precinct ballots for all races in the first instance would render much of the statute superfluous, violating a core tenet of statutory interpretation. *Nicaise*, 245 Ariz. at 568 ¶ 11. Thus, as the trial court correctly held, the plain language of the statute does not permit election officials to begin the precinct hand count audit by counting all ballots cast, and the Board's Resolution is unlawful. [ROA 38 at 9].

Appellants decry the trial court's construction of the statute as "absurd," claiming it would allow for a hand count audit of 99% of ballots but not 100%. Br. at 10. But the statute, which requires specific procedures for selecting the audit pool, would not allow for such an outcome. As discussed above, only if after auditing the original pool of ballots twice the results still fall outside the designated margin, then the hand count must be expanded to include "***twice*** the original number of randomly selected precincts." A.R.S. § 16-602(C) (emphasis added). If this third hand count audit also falls outside of the designated margin, then the hand count must be

expanded to include "the entire jurisdiction for that race." A.R.S. § 16-602(D). A hand count audit that starts with 99% of ballots by definition cannot meet the statutory requirement that the audit pool be capable of being first doubled and then expanded to include the entire county if discrepancies arise.

Citing only Recorder Stevens' personal opinion, Appellants also posit that the Legislature's purpose behind the randomness requirement must be to eliminate bias in the audit. Appellants insist under this theory that if all ballots are counted, there can be no bias, so election officials can simply choose to ignore the statute's plain language and hand count all ballots in the first instance. Br. at 10-12, 18. Beyond the fact that Recorder Stevens admitted his bias theory was "speculation," [Trans. 189:10],[5] Appellants point to no other legislative history to support his speculative theory, and there is nothing in the Superior Court opinion to support it, Appellants' arguments flout at least two fundamental pillars of statutory construction. First, the plain language of the statute—the best indicator of legislative intent, *McKenna v. Soto*, 250 Ariz. 469, 472 ¶ 12 (2021)—is clear that hand count audits are to start with

[5] Indeed, by his own admission, Recorder Stevens was not a legislator when A.R.S. § 16-602 was amended in 2006 and 2007 to include the random sampling requirement. [Trans. 98:6-11 (stating he served as a legislator from 2009 to 2017)]; *see also* 2006 Ariz. Legis. Serv. Ch. 394 (S.B. 1557); 2007 Ariz. Legis. Serv. Ch. 295 (S.B. 1623). No matter his role then or now, his personal views are irrelevant to determining legislative intent. *See Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 ¶ 12 (2014) ("[A] legislator, lobbyist, or other interested party lacks competence to testify about legislative intent in passing a law . . . ."); *Golder v. Dep't of Revenue*, 123 Ariz. 260, 265 (1979) (noting that this rule "prevents one legislator from putting a gloss upon the meaning of a statute based only upon his own individual feelings").

a small sample and increase methodically only when errors are found. *See* A.R.S. § 16-602 (C)-(E). Second, as discussed above, Appellants' theory would render numerous portions of the statute superfluous by ignoring the Legislature's explicit and detailed procedures that the original audit pool be doubled only if two hand counts find errors, and then expanded to include the entire county for a particular race only if the audit of the doubled audit pool also finds errors. *Nicaise*, 245 Ariz. at 568 ¶ 11. Accordingly, the statute has only one reasonable meaning—it does not permit a hand count audit of all precinct ballots at the outset of the audit process. *Leibsohn*, 254 Ariz. at 1 ¶ 10.

Appellants' contention that the purpose of the random sample process is effectuated by counting all ballots because random sampling prevents election officials from auditing areas that are likely to support their preferred candidates is similarly speculative. This argument also presumes—without any basis—that hand count audits are likely to change the outcome of an election. *See* Br. at 11 (Appellants arguing that A.R.S. § 16-602's random sample requirement prevents "elections officials [from putting] their thumbs on the scale by hand counting ballots that are likely to favor their side"). The hand count audit does not determine the winner of the election; it merely confirms that electronic tabulation was accurate. And given that a hand count is designed to check the accuracy of the electronic tabulation, this

seems far more likely to be the purpose behind the random sampling requirement than the one that Appellants propose.

In essence, Appellants attempt to make their case by speculating about the purpose behind the random sampling requirement and arguing that the Resolution promotes the same entirely speculative "purpose," in order to conclude that the Resolution is lawful. But that is not how courts read statutes. And the plain language of the relevant law forbids the Board from conducting a hand count of 100% of the ballots from the get-go. The Court should reject the Board's invitation to ignore what the statute says in favor of the Board's policy preferences, especially where those preferences are based entirely on speculation about the Legislature's goals.

c. Arizona law prohibits election officials from conducting a hand count audit of 100% of *early* ballots in the first instance.

Arizona law prescribes similarly strict procedures for conducting a hand count audit of early ballots. An early ballot audit cannot begin with all early ballots. To the contrary, at the outset, election workers "*shall randomly select* one or more batches of early ballots" that were counted by each tabulation machine and sequester them, and then "shall randomly select" from those sequestered ballots a sample "equal to one percent of the total number of *early ballots cast* or five thousand early ballots, *whichever is less*." A.R.S. § 16-602(F) (emphases added). The plain language of the

statute could not be clearer: Election workers are not permitted to hand count audit, in the first instance, more than 5,000 early ballots.[6]

Under A.R.S. § 16-602(F), this initial, limited hand count of early ballots may expand *only* on an individual race basis and *only* if hand counts repeatedly differ from electronic tabulations for that race by more than a designated margin for error. "If at any point in the manual audit of early ballots the difference between any manual count of early ballots is less than the designated margin when compared to the electronic tabulation of those ballots, the electronic tabulation shall be included in the canvass *and no further manual audit of the early ballots shall be conducted*." *Id.* (emphasis added)). As the trial court correctly held, the plain language of the text is clear, ending the inquiry. *Hayes*, 178 Ariz. at 268.

Ignoring the plain text of the statute, Appellants argue that the EPM authorizes counties to "audit a higher number of [early] ballots at their discretion." Br. at 3 (citing EPM at 215). But as the trial court correctly held, this single, stray EPM line

[6] While the Attorney General's office appears to have determined, in an "informal" opinion—which admitted it skipped the "several layers of review" that a more reasoned opinion would typically undergo—that this language is ambiguous, [ROA 19 at 14], the statute is clear. Nor does the informal opinion deserve any deference. Even "formal" Attorney General opinions that receive the standard "several layers of review" are not binding. *See Ruiz v. Hull*, 191 Ariz. 441, 449 ¶ 28 (1998) ("Opinions of the Attorney General are advisory, and are not binding."); *see also* Off. of the Ariz. Att'y Gen., Attorney General Opinions ("Opinions of the Attorney General are advisory, and do not have the same effect as decisions of a court of law."), available at: https://www.azag.gov/opinions (last visited Mar. 27, 2023).

cannot override A.R.S. § 16-602(F)'s clear statutory text setting an explicit maximum of ballots to be hand count audited. [ROA 38 at 9-10].

First, the EPM language cannot lawfully permit counties to conduct a hand count of all early ballots because "an EPM regulation that contradicts statutory requirements does not have the force of law." *Leibsohn*, 254 Ariz. at 1 ¶ 22 (2022) (citing *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021)). Here, as the trial court found and the Secretary of State agreed [ROA 20 at 13], this sentence of the EPM directly conflicts with A.R.S. § 16-602(F), which mandates that counties start an early ballot audit with a certain maximum number of ballots (one percent or 5,000 ballots, "whichever is less"), and then expand the audit only if the hand count reveals a certain margin of error. If no such error is detected, the statute mandates that "no further manual audit of the early ballots shall be conducted." A.R.S. § 16-602(F). Thus, the EPM's directly contradictory language is void.

Second, this lone provision should not be read to overrule and moot all of the other provisions of the EPM that directly address this issue. Except for the stray line on which Appellants rest their entire argument, the remainder of the EPM prescribes rules for a *limited* and *restricted* hand count audit of early ballots in accordance with the statute. *See, e.g.*, EPM at 228 ("The number of early ballots to be counted is 1% of the total number of early ballots cast or 5,000 early ballots, whichever is less."); *id.* at 230 ("[T]he officer in charge of elections shall calculate a number equaling 1%

of the total early ballots. This shall serve as the number of ballots to audit."). Much like the statute, the EPM also sets out the precise conditions under which a hand count can be expanded. *See id.* at 228-32. In promulgating the EPM, the Secretary could not have intended for one line to render the rest of the detailed procedures in the EPM for conducting early ballot audits to be moot and obsolete. Nor should a court interpret it that way. *See, e.g., State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 4 (2014) (courts interpret rules "using the same principles we apply when interpreting statutes").

Finally, Appellants' argument that it is possible to construe this lone line of the EPM in harmony with A.R.S. § 16-602(F) contorts the statute beyond recognition. Br. at 16-19. Appellants' theory does not harmonize the statute with the EPM—it rewrites the statute out of whole cloth, presuming that election officials may ignore the Legislature's clear, mandatory, and limited audit process if they feel so inclined. But the plain language of the statute sets a non-discretionary upper bound on how many ballots may be subject to a hand count audit in the first instance. There is no way to reconcile the EPM's stray line with the statute's mandatory limit, and election officials may not ignore the Legislature's intent as expressed in the plain language of a statute. *See Leach*, 250 Ariz. at 576 ¶ 21 ("[A]n EPM regulation that . . . contravenes an election statute's purpose does not have the force of law."). Doing so would render much of A.R.S. § 16-602(F) and the EPM superfluous, again

violating basic principles of statutory construction. *Nicaise*, 245 Ariz. at 568 ¶ 11. As the trial court correctly found, "[t]he Legislature has spoken clearly, and elected officials are required to follow its direction." [ROA 38 at 11].

At bottom, the plain language of the statute makes clear that a full hand count audit of all early ballots is not permitted, and Appellants' arguments to the contrary fail.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot. If the Court reaches the merits, it should affirm the trial court's November 7, 2022 Order.

ARCAP 21 REQUEST FOR FEES

Appellees request fees and costs on appeal pursuant to ARCAP 21; A.R.S. §§ 12-341, -348, -1840, and -2030; and the private attorney general doctrine. *See Ansley v. Banner Health Network*, 248 Ariz. 143, 152-53 ¶¶ 38-39 (2020).

DATED this 27th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellees' Answering Brief complies with ARCAP 14(a)(1). The Brief is double-spaced, utilizes a proportionally spaced typeface of Times New Roman in 14-point font, and contains 5,674 words.

/s/ Jillian L. Andrews

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing Appellees' Answering Brief was e-filed with the Clerk of the Arizona Court of Appeals, Division Two via the Court's e-filing system on March 27, 2023, and that a copy was served via email on this same date to the following:

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