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ARIZONA COURT OF APPEALS

DIVISION TWO

ARIZONA ALLIANCE FOR
RETIRED AMERICANS, INC. and
STEPHANI STEPHENSON,

Plaintiffs/Appellees,

No. 2CA-CV2022-0136

Cochise County Superior Court Case
No. S0200CV202200518

RETRIEVED FROM DEMOCRACYDOCKET.COM

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.

**APPELLEES' MOTION TO
TAKE JUDICIAL NOTICE**

Plaintiff-Appellees Arizona Alliance for Retired Americans, Inc. and Stephani Stephenson (“Appellees”) hereby move this Court to take judicial notice of a draft of the new Elections Procedures Manual (the “Draft EPM”), which counsel obtained via public records request from the Secretary. The Draft EPM eliminates the specific language upon which Appellants rely to support their argument that it is permissible to conduct a 100% hand count audit of early ballots in the first instance. Appellees request the Court take judicial notice of the Draft EPM as further evidence that this appeal is not only moot, but also that the specific issue which arose in 2022 is not likely to be capable of repetition because the legal regime upon which Appellants rely is unlikely to be in effect for future elections.

Under Arizona Rule of Evidence 201, this Court may properly take judicial notice of the Draft EPM. Rule 201 permits a court to “take judicial notice at any stage of the proceeding,” and “[a]n appellate court can take judicial notice of any matter of which the trial court may take judicial notice, even if the trial court was never asked to do so.” *State v. McGuire*, 124 Ariz. 64, 66 (App. 1978). Courts regularly take

judicial notice of official acts of state agencies, *see Jarvis v. State Land Dep't City of Tucson*, 104 Ariz. 527, 530 (1969), including “records of the [S]ecretary of [S]tate[.]” *Hernandez v. Frohmiller*, 68 Ariz. 242, 258 (1949). In particular, courts also take notice of non-final action by agencies, including proposals and notices of proposals for rulemaking, *see Varela v. FCA US LLC*, 252 Ariz. 451, 465 n.8 (2022), and drafts of agency materials, *see San Carlos Apache Tribe v. State*, 254 Ariz. 179 ¶ 22 (App. 2022). Thus, the Draft EPM, which was obtained by a recent public records request to the Secretary by counsel, *see Ex. 1, Arellano Declaration* at ¶¶ 2-3, is a record of the Secretary that may properly be considered by this Court, even in its non-final form.

This Court may also properly use the Draft EPM in considering whether this case is moot, as other appeals courts have done before. In *San Carlos Apache Tribe*, for example, the Court of Appeals was asked to consider whether a permit was valid when it had expired by the time of the argument. 254 Ariz. at 179 ¶ 22. In determining the case presented a live controversy, the Court of Appeals took judicial notice of the fact that while a new permit had not yet been issued, a **draft** permit had been and the agency was taking steps to issue a new permit. *See id.*

Appellees do not contend that the Draft EPM is binding law; it has yet to be submitted to Governor Hobbs and Attorney General Mayes for approval, and under statute it need not be approved until December 31, 2023. *See A.R.S. § 16-452(B).*

Nonetheless, the Secretary's actions provide further evidence not only that this case is moot, but also that this specific issue will not be capable of repetition. Appellants' argument in this case—at least as it pertains to early ballots—relies almost exclusively on the 2019 EPM for the proposition that Appellants may conduct a hand count audit of 100% of early ballots. *See* Opening Br. at 3 (citing the 2019 EPM, which includes the language: “Counties may elect to audit a higher number of [early] ballots at their discretion.”). Both then-Secretary (now Governor) Hobbs and Secretary Fontes have taken the position that this language cannot be squared with statute and thus lacks the force of law. *See* Sec’y’s Amicus Br. at 21-22. Unsurprisingly, the Draft EPM thus removes this language, and states, just as the statute does, that “[t]he officer in charge of elections is required to conduct a hand count of 1% of the total number of early ballots cast, or 5,000 early ballots, whichever is less.” Draft EPM at 16 (citing A.R.S. § 16-602(F)).

Under these circumstances—where the relevant election has not only passed, but the legal regime under which the County’s actions were judged is rapidly shifting—the underlying dispute and relevant EPM language at issue is not likely to be “capable of repetition,” and this Court should decline to exercise its discretionary review of such an issue. *See, e.g., Kondaur Cap. Corp. v. Pinal Cnty.*, 235 Ariz. 189, 193 (App. 2014) (declining to apply a mootness exception where the issue was not likely to recur).

For the foregoing reasons, Appellees respectfully request that the Court take judicial notice of the Draft EPM, attached as Exhibit A to the Arellano Declaration submitted herewith, under Arizona Rule of Evidence 201.

DATED this 12th day of July, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing Motion to Take Judicial Notice was e-filed with the Clerk of the Arizona Court of Appeals, Division Two via the Court’s e-filing system on July 12, 2023, and that a copy was served via email on this same date to the following:

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Defendants/Appellants.

DECLARATION OF DANIEL A. ARELLANO IN SUPPORT OF APPELLEES' MOTION TO TAKE JUDICIAL NOTICE

1. I, Daniel A. Arellano, am a Partner at Herrera Arellano LLP and counsel in the above-captioned case for Plaintiffs-Appellees Arizona Alliance for Retired Americans, Inc. and Stephani Stephenson. I submit this Declaration in support of Appellees' Motion to Take Judicial Notice. I have personal knowledge of the facts stated herein, and if called upon, I could and would testify competently to them.

2. On June 27, 2023, I submitted a public records request to the Secretary of State's Office seeking the current draft of the new Election Procedures Manual ("EPM").

3. On July 6, 2023, I received records responsive to the public records request from a representative of the Secretary of State's office.

4. Attached as Exhibit A to this Declaration is an excerpt from the public records request I received on July 6, 2023.

5. I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

Executed this 12th day of July, 2023.

By: /s/ Daniel A. Arellano

Daniel A. Arellano

EXHIBIT A

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CHAPTER 12: HAND COUNT AUDIT

A limited precinct hand count and early ballot hand count audit must be conducted after each countywide primary, special, general, and PPE election and compared against the results from the electronic tabulation system, unless applicable exceptions apply. The purpose of the hand count audit is to compare the results of the machine count to the hand count to assure that the machines are working properly and accurately counting votes. Those conducting the hand count shall not be provided the machine count results of the batches of ballots they are hand counting prior to completion of the hand count of that batch. If the results from the hand count audit are within the “designated margin” of the electronic results for selected ballots, the hand count is deemed to have confirmed the accuracy of the electronic tabulation equipment, the hand count may cease, and the countywide electronic results are deemed the official results of the election. If the results from the hand count audit are outside of the “designated margin,” a second hand count of the same ballots is required, potentially followed by an expanded hand count and one or more jurisdiction-wide hand counts depending on the results. A.R.S. § 16-602.

I. DESIGNATION OF HAND COUNT BOARD MEMBERS

At least 14 days prior to a countywide primary, special, general, or PPE election, the officer in charge of elections must notify the county chairpersons of each political party entitled to continued representation on the state ballot of the requirement to designate Hand Count Board members, who will perform the hand count audits under the supervision of the officer in charge of elections. The officer in charge of elections should forecast the requisite number of board members (including alternate board members) based on the number of precincts/vote centers included in the hand count and/or the total number of ballots to be hand counted.

The political party county chairpersons (or designee) must designate Hand Count Board members and alternates at least seven days before the election (*i.e.*, by 5:00 p.m. on the Tuesday before the election). The designation must be submitted as prescribed by the officer in charge of elections, who may require or permit electronic submission. If the political party is not represented by a county chairperson, the chairperson of the applicable state political party (or designee) may appoint the Hand Count Board members.

The proposed board members and alternates must be registered to vote in Arizona but need not be registered members of the political party that designated them. Candidates appearing on the ballot, except for the office of precinct committeeman, may not serve as Hand Count Board members. Board members are entitled to receive compensation, but not for lodging, meals, or travel.

The officer in charge of elections must notify a political party county chairperson by 9:00 a.m. on the Wednesday before the election if there is a shortage of required board members (*i.e.*, the total number of proposed board members provided by all parties is less than four times the number of precincts to be audited). The chairperson must provide additional board member names by the next business day (5:00 p.m. on the Thursday before the election).

The hand count shall not proceed unless a sufficient number of Hand Count Board members have been designated by 5:00 p.m. on the Thursday preceding the election and appear at the designated time and location to perform the hand count. Further, for the hand count to proceed, not more than 75% of the persons performing the hand count shall be from the same political party. The hand count may also be canceled (and the electronic tabulation of ballots will constitute the official count) if the officer in charge of elections removes enough board members (due to disruption or members being unable to perform their duty) such that there is an insufficient number of board members and the shortage cannot be remedied with substitutions.

The officer in charge of elections must notify the Secretary of State if the hand count will be canceled. Among other information, the notification to the Secretary of State must outline the steps taken by the officer in charge of elections to secure sufficient participation in the hand count.

If a sufficient number of members are present for the hand count, the officer in charge of elections must create boards by selecting at least two judges and one inspector per board. Each Hand Count Board must be comprised of designees from at least two recognized political parties and no more than 75% of the members may be from the same political party. Typically, for a three-member Hand Count Board, no more than two board members may be members of the same political party entitled to continued representation on the ballot. All board members must take the oath specified in A.R.S. § 38-231(E).

Board members may not bring any electronic devices, black pens, blue pens, or cell phones into the designated location of the hand count.

A.R.S. § 16-602(B)(7).

II. OBSERVATION OF THE HAND COUNT AUDIT

The hand count is not subject to the live video requirements of A.R.S. § 16-621(D). However, political party representatives who are observing the hand count may bring their own video cameras to record the hand count. The sole act of recording the hand count does not constitute sufficient grounds for the officer in charge of elections to prohibit observers from recording or to remove them from the facility. The observation or recording shall not interfere with the hand count. In addition, to preserve the right to a secret ballot, no recording of ballot content shall be allowed. If either situation occurs, the officer in charge of elections may remove the observers or board members from the facility or further restrict video recording. A.R.S. § 16-602(B).

III. TYPES AND QUANTITIES OF BALLOTS TO HAND COUNT

A post-election hand count audit includes a precinct hand count, which involves a manual count of regular ballots from selected precincts, and an early ballot hand count, which involves a manual count of a percentage of early ballots cast in the election. A.R.S. § 16-602(B)(2), (F).

A. Ballots Included in the Precinct Hand Count

For the precinct hand count, the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the precincts, or 2 precincts, whichever is greater. Provisional and conditional provisional ballots are not included in the hand count. A.R.S. § 16-602(B)(1).

In counties that utilize vote centers, each vote center is considered to be a precinct and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is greater. *See* A.R.S. § 16-411(B)(4).

In a PPE, the officer in charge of elections must conduct a hand count of regular ballots from 2% of the polling places or vote centers established pursuant to A.R.S. § 16-248. A.R.S. § 16-602(B)(3).

B. Ballots Included in the Early Ballot Hand Count

The officer in charge of elections is required to conduct a hand count of 1% of the total number of early ballots cast, or 5,000 early ballots, whichever is less. A.R.S. § 16-602(F). At least one batch of up to 400 early ballots from each central count machine used to tabulate early ballots and at least one accessible voting machine (if those machines independently tabulate votes) used during on-site early voting shall be selected for the early ballot hand count process. The officer in charge of elections must securely sequester those selected ballots along with their unofficial electronically tabulated results for use in the early ballot hand count.

IV. SELECTING PRECINCTS OR VOTE CENTERS TO BE HAND COUNTED

The county political party chairpersons (or designees) shall take turns randomly drawing the precincts or vote centers for the hand count. If a chairperson appoints a designee, the appointment must be in writing with the signature of the chairperson. The officer in charge of elections may prescribe the method for submitting the appointment and may require or permit electronic submission. The precincts or vote centers shall be selected by lot without the use of a computer and the order of selection by the county political party chairpersons (or designees) shall also be by lot.

The selection of the precincts or vote centers shall not begin until all ballots voted in the precinct or vote center have been delivered to the central counting facility. The unofficial vote totals from all precincts shall be made public before selecting the precincts or vote centers to be hand counted. The selection of precincts or vote centers shall occur prior to the selection of the races to be counted.

At least 2% of the precincts or vote centers in the county (rounded to the nearest whole number) or two precincts or vote centers, whichever is greater, shall be selected at random from a lot consisting of every precinct in that county.

For counties utilizing vote centers, each vote center shall be considered to be a precinct during the selection process and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or two vote centers, whichever is greater.

The process for selecting the precincts for Primary and General Elections is:

1. **Determine Selection Order:** Select, by lot, the order in which the county political party chairpersons (or designees) shall draw precincts/polling locations. The selection order will apply for the entire hand count process.
2. **Create Lot:** Create a lot containing all precincts in the county.
3. **Select Precincts:** Draw the required 2% or two precincts to be counted from a lot containing every precinct in the county. Precincts without any registered voters shall be excluded from the pool of available precincts in the county. The county political party chairpersons (or designees) shall alternate selecting precincts or vote centers based on the order defined in Step 1 from the lot until the required number of precincts/polling locations is selected.
 - a. If a tabulation unit from a vote center was selected as a precinct to be hand counted, a subsequential selection shall be conducted to select a touchscreen voting machine (if they independently tabulate votes, and if there are more than one) utilized at that vote center:
 - **Create Lot:** Create a lot containing all touchscreen voting machines used at the same vote center in which a tabulation unit was previously selected.
 - **Select Touchscreen Voting Machines:** Draw a corresponding number of touchscreen voting machines to be hand counted for each tabulation unit from a vote center that was previously selected, from a lot containing every touchscreen voting machine utilized at a vote center from which a tabulation unit was selected during the selection of the precincts.
4. **Record Precincts:** The officer in charge of elections shall record the precincts to be hand counted in the Master Precinct and Race Selection Worksheet. The precincts/polling locations shall be listed in the order selected. The order of the precincts/polling locations shall be used when selecting the contested races in Section V of this Chapter.

A.R.S. § 16-602(B)(1), (B)(2), (B)(2)(e), (C).

V. RACES ELIGIBLE TO BE HAND COUNTED

A. Eligible Races Generally

The races to be counted in the hand count audit includes up to five contested races, which shall include:

- One statewide candidate race;
- One statewide ballot measure (if the election has a statewide ballot measure on the general election ballot);
- One legislative candidate race (Arizona House of Representatives or Arizona Senate);

- One federal candidate race (United States House of Representatives or United States Senate); and
- One presidential elector race (only in general elections with a race for President of the United States).

A.R.S. § 16-602(B)(2), (5).

A candidate race within one of the above-referenced categories is eligible for inclusion in the hand count only if the race is “contested,” meaning there are more candidates seeking election or nomination than the number of seats available. A.R.S. § 16-602(B)(2)(f). Write-in candidacies do not create contested races if the race is not otherwise contested. A.R.S. § 16-602(B)(4).

If there are no contested races within one of the above-referenced categories, one or more additional contested races from one of the other categories must be selected by lot until the required number of contested races are selected for the hand count. A.R.S. § 16-602(B)(2)(e). For example, because a statewide ballot measure will not appear on the ballot during a primary election, an additional contested race from one of the other categories of eligible races must be drawn to make up the required four races.

For a primary election, each political party primary is considered a separate race. For example, the requirement to select one contested legislative race is satisfied by selecting either the Democratic or Republican primary election race. A.R.S. § 16-602(B).

For federal and legislative candidate races, only the type of office (House or Senate) must be selected, not any particular district. A.R.S. § 16-602(B)(2)(c)-(d). Therefore, if, for example, the race for U.S. House of Representatives has been selected to satisfy the federal candidate race category, and the county encompasses parts of three Congressional districts, ballots cast in any of the Congressional districts are eligible for the hand count audit as long as those races are contested.

B. Eligible Races in Special Elections

For a special election to vote on a statewide ballot measure, all statewide ballot measures should be selected for the hand count audit (assuming there are four or fewer statewide ballot measures on the special election ballot).

For a special election to fill a Congressional vacancy:

- If a Congressional primary is contested, all contested political party races should be selected for the hand count audit for that special primary election (assuming there are four or fewer contested primaries);
- Regardless of whether a Congressional primary was contested, a contested special general election must be selected for the hand count.

C. Eligible Races in PPEs

A hand count must be conducted following a PPE. A.R.S. § 16-602(B)(3). Because no other races may appear on a PPE ballot, all contested political party preference races should be selected for

the hand count audit (assuming there are four or fewer contested preference races). A.R.S. § 16-241(A).

VI. SELECTING RACES TO BE HAND COUNTED

The county political party chairpersons (or designees) must randomly select the particular contested races to be hand counted, continuing with the order determined at the beginning of the hand count process and used to select precincts/polling locations.

If there are fewer than four contested races on the ballot, only the contested races on the ballot that fall within one of the four categories shall be included in the hand count audit. If there are no contested races in any of the designated categories in an election, no hand count will take place. A.R.S. § 16-602(B)(2)(f).

A. Selecting Races for Primary and General Elections

The following process shall be used to select the races to be counted for both the precinct hand count and early ballot hand count for primary and general elections:

1. **Determine the race categories available for this election.** The possible race categories shall be statewide candidate, federal candidate, state legislative candidate, and ballot measure, and, in a presidential election year, presidential elector. Some categories may not appear on the ballot for a particular election. A.R.S. § 16-602(B)(2).
2. **Create a master list of all contested races.** Create a list by race category of all possible contested races. This list will be referenced when creating the lots of possible races to count. The entries on this list shall be specific. Examples for the Primary would include Governor/Democrat or State House/Republican. Examples for the General would include State Treasurer or State Senate.
3. **Determine the required number of races that will be counted from each category.** There should be one race for each required category unless a category does not have an eligible race.
 - a. **Determine if there is a contested presidential elector race.**
 - Indicate if there is no contested presidential elector race on the ballot, for example, by placing a zero in the “Presidential Elector” line of Section B of the Master Precinct and Race Selection Worksheet.
 - Indicate if there is a contested presidential elector race, for example, by placing a tick mark in the “Presidential Elector” line.
 - b. **Determine if there is a contested statewide candidate race.**
 - Indicate if there is no contested statewide candidate race on the ballot, for example, by placing a zero in the “Statewide Candidate” line of Section B of the Master Precinct and Race Selection Worksheet and placing a tick mark in the “Additional Races Needed” line.
 - Indicate if there is a contested statewide candidate race, for example, by placing a tick mark in the “Statewide Candidate” line.

- c. **Determine if there is a statewide ballot measure race.**
 - Indicate if there is no statewide ballot measure on the ballot, for example, by placing a zero in the “Statewide Ballot Measure” line of Section B of the Master Precinct and Race Selection Worksheet and placing a tick mark in the “Additional Races Needed” line.
 - Indicate if there is a statewide ballot measure race, for example, by placing a tick mark in the “Statewide Ballot Measure” line.
 - d. **Determine if there is a contested federal candidate race on any of the ballots in the precincts/polling locations selected.**
 - Indicate if there is no contested federal candidate race in any of the selected precincts/polling locations, for example, by placing a zero in the “Federal Candidate” line of Section B of the Master Precinct and Race Selection Worksheet and placing a tick mark in the “Additional Races Needed” line.
 - Indicate if there is a contested federal candidate race, for example, by placing a tick mark in the “Federal Candidate” line.
 - e. **Determine if there is a contested state legislative race on any of the ballots in the precincts/polling locations selected.**
 - Indicate if there is no contested state legislative race in any of the selected precincts/polling locations, for example, by placing a zero in the “State Legislative” line of Section B of the Master Precinct and Race Selection Worksheet and placing a tick mark in the “Additional Races Needed” line.
 - Indicate if there is a contested state legislative race, for example, by placing a tick mark in the “State Legislative” line.
 - f. **If additional races are needed, determine if the number of races can be satisfied by an additional race(s) in another category.**
 - The priority for selecting other categories, if needed, is as follows: statewide candidate, statewide ballot measure, federal candidate and then state legislative. All additional races shall be fulfilled with the highest priority race category possible. For example, if two additional races are needed and there are two additional contested statewide races, both additional races shall be statewide races. The categories of races to be hand counted and the number per category shall be recorded on the Master Precinct and Race Selection Worksheet.
4. **Separate out the contested races by category and create selection lots for each category from which a race or races will be selected.**
 - a. For the statewide candidate lot in a primary election, each contested party race shall be placed in the lot (*e.g.*, Governor/Republican, State Mine/Democrat).
 - b. For the federal candidate lot, the officer in charge of elections shall determine the possible federal candidate race types for the lot. If one or more precincts/polling locations have a contested federal candidate race, that race type shall be placed in the lot. In a primary election, each contested party race type shall be placed in the

lot. The selections for U.S. House of Representative shall not contain the specific district since the names of the candidates may vary among the sampled precincts/polling places (e.g., U.S. House/Republican and U.S. House/Democrat).

- c. For the state legislative lot, the officer in charge of elections shall determine the possible contested state legislative race types for the lot. If one or more precincts/polling locations have a contested state legislative race, that race type shall be placed in the lot. In a primary election, each contested party race type shall be placed in the lot. The selections for state legislative race shall not contain the specific district since the names of the candidates may vary among the sampled precincts/polling locations (e.g., State House/Democrat, State House/Republican, State House/Libertarian). If any candidate race is for a vacancy, the vacancy race shall be treated as a separate race for creating lots.
5. **Select the contested races to be hand counted.** The county political party chairpersons (or designees) shall alternate selecting races continuing with the order defined when selecting precincts. The races will be selected by lot until the required number of races is selected. Document any selected race(s) in Section C of the Master Precinct and Race Selection Worksheet.
 - If a selected candidate race does not have a contested race in each of the selected precincts, only the precincts where there is a contested candidate race shall be hand counted for that race. The machine counts of the races in this category shall be added together and measured against the hand counts of the races in this category to determine if the total difference falls within the designated margin.
 6. **The races selected for the precinct hand count shall be the same used for the early ballot hand count.** Because the batches used for the early ballot hand count do not correspond to the precincts selected for the precinct hand count, the names of candidates for the selected races may differ among the various early ballot batches selected for the audit. The machine counts of the races in such categories shall be added together and measured against the hand counts of the races in those categories to determine if the total difference falls within the designated margin.
 7. **Create Hand Count Board Worksheets.** The officer in charge of elections shall create a Hand Count Board Worksheet for each Hand Count Board. The worksheet documents the members of the Hand Count Board and what races they will be hand counting.

B. Selecting Races for a PPE

The following process shall be used to select the races to be hand counted for a PPE:

1. **Determine Selection Order.** Select by lot the order in which the county political party chairpersons (or designees) shall choose from the pool of available precincts.
2. **Create Lot of Polling Locations.** Create a lot of available polling locations. A county may consolidate precincts in a PPE. Only actual polling locations will be placed in the lot of available polling locations.
3. **Select Precincts.** Draw the required 2% or two polling locations to be counted among a lot containing every actual polling location for the PPE.

4. **Record Precincts.** The officer in charge of elections shall record the polling locations to be hand counted in Section A of the Master Precinct and Race Selection Worksheet.
5. **Create Lot of Contested Races.** Create a lot of the contested races available for the PPE. Each political party that is participating in the PPE will count as a contested race.
6. **Select Race(s).** If there are four contested races or less, all possible races will be hand counted. If there are more than four contested races, the county political party chairperson (or designee) who is next (from Step 1), shall choose a contested PPE race to be hand counted. The political party chairpersons (or designees) will alternate until four contested races are selected.
7. **Record Race.** The officer in charge of elections shall record the PPE race(s) to be hand counted in Section B of the Master Precinct and Race Selection Worksheet.

A.R.S. § 16-602(B)(3).

VII. HAND COUNT TABULATING METHODS

There are two approved methods of hand counting votes:

- Stacking method: used for hand counting optical/digital scan ballots; and
- Three-person call-out method: used for hand counting votes from the VVPAT of an accessible voting machine.⁶

For either method, each judge shall be given a tally sheet that shall be marked with the precinct/polling location, the race, and the names of the candidates for that particular race.

A.R.S. § 16-602(A).

A. Stacking Method for Optical/Digital Scan Ballots

The stacking method is used for hand counting optical/digital scan ballots and may also be used to hand count paper ballots printed by accessible ballot marking devices. For the stacking method, ballots are sorted into piles by the three board members (the inspector and two judges) and the number of votes for each candidate in the particular race being hand counted are tallied using the process below. A.R.S. § 16-602(B)(7).

1. Processing Ballots with Write-In Votes

1. If write-in votes have not been tabulated yet, it is very important to keep ballots with write-in votes segregated from ballots without write-in votes. To do so, the first judge counts the total number of ballots with write-in votes. The second judge shall recount the total number of ballots with write-in votes. If the totals from both judges match, the result shall be documented in the Hand Count Tally Sheet.

⁶ Should any county revert to using accessible voting machines that independently tabulate votes or produce a VVPAT, the county must follow the three-person call-out method described in the 2019 Elections Procedures Manual when conducting the post-election hand count audit.

2. The inspector shall announce the specific race to be counted, identify that race on the ballot, and separate out ballots with over-votes or no selection for that race. The two judges shall confirm that the inspector performs this step correctly.
3. The inspector shall announce the first candidate/selection listed in the race and begin the **stacking process** for that candidate/selection:
 - The Hand Count Board members shall hold up the ballots one at a time and declare the voter's choice for the specific candidate/selection in the race. All ballots with a vote for that candidate/selection shall be placed in one stack (the "yes" stack) and all ballots with a vote for any other candidate/selection in the race shall be placed in a separate stack (the "no" or "other" stack). The judges and inspector shall view each ballot and ensure that the ballot was placed in the right stack.
 - After the sorting process is complete, one judge shall count each pile in stacks of 10 or 25 (or another agreed-upon, pre-determined number) and then the other judge shall recount each stack. The inspector shall enter the number of ballots in each stack onto the Hand Count Tally Sheet.
 - The inspector shall move the "yes" stack aside, perform the stacking process for the next candidate/selection in the race using the ballots in the "no" or "other" stack, and repeat until done recording totals for all candidates/selections on the Hand Count Tally Sheet.
 - If the race being counted is for multiple seats (e.g., vote for two), it will be necessary to go through entire set of ballots for each candidate, without the option of setting aside the "yes" stack as described in the prior step.
 - If there is any question about the intent of the voter, the determination of voter intent must be made by unanimous consent of all three Hand Count Board members using the standards established for determining voter intent. If a unanimous decision cannot be reached by the Hand Count Board, the officer in charge of elections shall make the final decision regarding the voter's intent. A notation of the final decision shall be logged on the tally sheet and the inspector shall place the ballot into the proper stack for counting.
4. After completing the stacking process, the inspector shall place the ballots with write-in votes back in the write-in envelope and keep those ballots separated from the regular ballots if write-in votes were not already tabulated and ballots with write-in votes were segregated from ballots without write-in votes.

2. Processing Regular Ballots

1. The first judge shall count the total number of regular ballots. The second judge shall recount the total number of regular ballots. If the totals from both judges match, the result shall be documented in the Hand Count Tally Sheet.
2. The inspector announces the specific race to be counted, identifies that race on the ballot, and separates out ballots with over-votes or no selection for that race. The two judges shall confirm that the inspector performs this step correctly.

3. The inspector announces the first candidate/selection listed in the race and begins the **stacking process** for that candidate/selection, using the same procedure described above for ballots with write-in votes. The stacking process is repeated for each race to be hand counted.
4. After completing the stacking process, the inspector shall place the regular ballots back in the regular ballot envelope and keep those ballots separated from the ballots with write-in votes.

VIII. PROCEDURES FOR CONDUCTING THE HAND COUNT

The officer in charge of elections must commence the hand count with a public announcement and explanation of the procedure. The hand count must begin within 24 hours after the polls close on Election Day and must be completed before the county canvass. A.R.S. § 16-602(I). The start of the hand count can be defined as the official training of the Hand Count Board members, selection of the precincts and races, coordinating the hand count with the party leaders, or any other activity that furthers the progress of the hand count for that election.

Hand count board members shall not bring cellular phones, other electronic devices, or pens with black or blue ink into the official hand counting area. Throughout the hand count, the officer in charge of elections must retain custody and control of all hand counted ballots. A.R.S. § 16-602(H).

A. Precinct Hand Count

1. Precinct Hand Count Process

The initial precinct hand count must be conducted according to the following procedure for each race selected for the hand count.

1. The officer in charge of elections: (i) ensures each board is properly assembled and has been provided all necessary forms and supplies; (ii) apportions ballots to the Hand Count Boards; and (iii) announces which specific race will be hand counted. The boards are not provided with the electronically tabulated results for any race at this time.
2. The inspector or one of the judges fills out a Hand Audit Tally Sheet (*see* sample forms) for each race to be hand counted. The inspector signs each Hand Audit Tally Sheet. All Hand Audit Tally Sheets from the precinct hand count shall be provided to the officer in charge of elections after completion.
 - a. Each judge shall fill out the top of the Hand Audit Tally Sheet, listing the precinct/polling location name, precinct/polling location number, inspector name and their name as the judge. Each judge shall also check the box for the proper election type.
 - b. For a candidate race, list each candidate's name on a separate counting line of the Hand Audit Tally Sheet. For ballot measures, list "Yes" on the first counting line and "No" on the second counting line.
3. The Hand Count Board shall hand count each group of ballots using the stacking method described above.

4. The Hand Count Board shall list the totals for each candidate on the appropriate Hand Audit Tally Sheet. Each precinct/polling location shall have one Hand Audit Tally Sheet for the optical/digital scan ballots and one for the accessible voting devices, unless the accessible voting device produces a paper ballot read by a tabulation unit and those paper ballots were hand counted using the stacking method. At this point, the hand count results for the batch is compared to the machine count results and the inspector initials the Hand Count Tally Sheet to indicate that there are no discrepancies in the batch totals.
5. The officer in charge of elections shall create a Precinct Hand Count Margin Worksheet (*see sample form*) for each race that was hand counted and calculate the hand count margin using the Precinct Hand Count Margin Worksheet and following the steps below in the presence of the county political party chairpersons (or designees):
 - a. **Fill out Top of Form.** Fill out the date of the election. Indicate the proper election (general, special, primary, or PPE). State the race category that the worksheet is for (presidential elector, statewide candidate, statewide ballot, federal candidate, or state legislative candidate). List the specific race (*e.g.*, State Senator, Corporation Commission/Democrat). List the hand count round (1st hand count, 2nd hand count, expanded hand count, or full hand count).
 - b. **Enter Hand Count Totals.** For each precinct/polling location that was hand counted, enter separately the hand count totals for the optical/digital scan ballots and the hand count totals for the accessible voting devices. These totals will come directly from the Hand Count Tally Sheets. Each candidate's counts or yes/no counts for ballot measures from the Hand Count Tally Sheet must be listed in the table. The total number of hand counted votes shall be calculated and noted in the worksheet.
 - c. **Enter Machine Count Totals.** For each precinct/polling location that was hand counted, enter separately the machine totals for the optical/digital scan ballots and the machine totals for the accessible voting devices. These totals will come directly from Election Management Systems. Each candidate's counts or yes/no counts for ballot measures from the Hand Count Tally Sheet must be listed in the table. The total number of machine counted votes shall be calculated and noted in the worksheet.
 - d. **Calculate Absolute Difference.** For each candidate's total or ballot measure's yes/no total, calculate the absolute difference between the hand count and the machine count. The absolute difference is the difference between the two numbers listed as a positive value (*e.g.*, [100 – 99] or [99 – 100] will both have an absolute value of one). The total absolute value for each precinct/machine type shall be calculated and noted in the worksheet.
 - e. **Calculate Grand Totals.** Add up all the machine count totals for a particular race category to calculate the "Grand Total Machine Count." Add up all the absolute differences for a particular race category to calculate the "Grand Total Absolute Difference."
 - f. **Calculate Hand Count Margin.** Divide the "Grand Total Absolute Difference" by the "Grand Total Machine Count" and multiply the result by 100 to calculate the margin in a percentage form.

6. Compare the hand count margin for each race to the designated margin established by the Vote Count Verification Committee (established by the Secretary of State pursuant to A.R.S. § 16-602(K)) to determine if it is in the acceptable range or if a second or expanded precinct hand count is required. The applicable designated margin is available on the Secretary of State's website at <https://www.azsos.gov/elections/voting-election/voting-equipment>.
7. If the calculated margin for the specific race from the Precinct Hand Count Margin Worksheet is less than the designated margin for the precinct hand count established by the Vote Count Verification Committee, the precinct hand count will be deemed concluded and the results of the electronic tabulation will constitute the official count for that race. The officer in charge of elections shall indicate on the Hand Count Cumulative Sheet that the count is complete, and the officer in charge of elections and the chairperson (or designee) from each political party present shall sign the sheet.

B. Second Precinct Hand Count

If any hand counted race results in a calculated margin that is equal to or greater than the designated margin for the precinct hand count, a second precinct hand count of that race and of those same ballots shall be performed. A new Precinct Hand Count Margin Worksheet shall be created for the second precinct hand count for the race in question.

If the second precinct hand count results in a calculated margin that is less than the designated margin, the precinct hand count will be concluded and the results of the electronic tabulation will constitute the official count for that race. A.R.S. § 16-602(C). The officer in charge of elections shall indicate on the Hand Count Cumulative Sheet that the count is complete, and the officer in charge of elections and the chairperson (or designee) from each political party present shall sign the sheet.

C. Expanded Precinct Hand Count

If the second precinct hand count results in a margin that is equal to or greater than the designated margin, the precinct hand count shall be expanded to include a total of twice the original number of randomly selected precincts/polling locations. Those additional precincts/polling locations (equal to the original number of randomly selected precincts/polling locations, so that the total number of ballots hand counted is twice the original number) shall be selected in accordance with the process set forth in Section IV of this Chapter. If the remaining number of precincts/polling locations for a race is less than the original number of precincts/polling locations selected for the first hand count, then the total remaining precincts/polling locations shall be included in the expanded hand count. A.R.S. § 16-602(C). A new Precinct Hand Count Margin Worksheet shall be created for the expanded Precinct Hand Count race in question.

If the calculated margin for the expanded precinct hand count (as calculated based on the results of the original hand count plus the expanded hand count) is less than the designated precinct hand count margin, the precinct hand count will be concluded and the results of the electronic tabulation will constitute the official count for that race. A.R.S. § 16-602(D). The officer in charge of elections shall indicate on the Hand Count Cumulative Sheet that the count is complete, and the

officer in charge of elections and the chairperson (or designee) from each political party present shall sign the sheet.

D. Full Precinct Hand Count

If the expanded precinct hand count results in a calculated margin that is equal to or greater than the designated precinct hand count margin, the precinct hand count shall be extended to include the entire jurisdiction for that race. If the jurisdictional boundary for that race includes any portion of more than one county, the full precinct hand count shall not be extended into the precincts/polling locations that are outside of the county that is conducting the full precinct hand count. A new Precinct Hand Count Margin Worksheet shall be created for the full precinct hand count race.

If necessary, the officer in charge of elections may work with the county political party chairpersons (or designees) to select additional Hand Count Board members using the same selection procedure for the initial Hand Count Board members.

The full hand count must be repeated for a particular race until the results of a full hand count are identical to the results of another full hand count for that race. When an identical hand count result is achieved, the hand count (not the electronic tabulation) constitutes the official result for the race in that county. The precinct hand count totals shall be added to the total count of early ballots, provisional ballots, conditional provisional ballots, and write-in votes to determine the final count and the officer in charge of elections shall report that final count to the Secretary of State. A.R.S. § 16-602(D)-(E).

E. Early Ballot Hand Count

The early ballot hand count is a hand count of a percentage of early ballots actually voted. 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. Each machine used for early ballot tabulation shall have at least one batch included in the early ballot hand count, and batch sizes may not exceed 400 ballots. A.R.S. § 16-602(F).

1. Early Ballot Hand Count Process

The selected early ballots shall be hand counted according to the following procedure for each race selected for the early ballot hand count.

1. Prior to beginning 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 5,000, whichever is less. Because the number of early ballots voted (including in-person early voting) will generally be lower than the number of early ballots sent, this calculation should yield a number of ballots that meets or exceeds the number of early ballots required to be hand counted.
2. The officer in charge of elections shall then determine the number and size of the batches. The number of batches must be enough to include at least one batch per machine used for

early ballot tabulation. That number must then be doubled to account for the possibility of an expansion from 1% to 2% of early ballots required to be hand counted. The batch size can be any amount up to 400 ballots. The size of the batch should start with the 1% number divided by the number of machines used for early ballot tabulation. The table below provides some examples.

	County A	County B	County C
Number of early ballots sent to voters	4,000	60,000	800,000
Number of machines used for early ballot tabulation	2	4	3
1% of early ballots sent to voters, or 5,000, whichever is less	40	600	5,000
2% of early ballots sent to voters, or 10,000, whichever is less (in case expansion is needed)	80	1,200	10,000
Size of Batches	20	150	400 (max)
Number of Batches Required to Meet 1%	$(40/20) = 2$	$(600/150) = 4$	$(5,000/400) = 13$
Number of Batches Required to Meet 2%	$(80/20) = 4$	$(1,200/150) = 8$	$(10,000/400) = 25$

3. The county political party chairpersons (or designees) will work with the officer in charge of elections to randomly select one or more batches of early ballots included in the initial tabulation, including at least one batch from each machine used to tabulate early ballots. The officer in charge of elections shall securely sequester those ballots, along with their unofficial tally reports, for use in the early ballot hand count.
4. From the sequestered early ballots, the officer in charge of elections will randomly select the required number of early ballots with which to conduct a hand count of the same races that are being hand counted in the precinct hand count and create batches consisting of up to 400 ballots per batch. The total number of ballots divided into batches shall satisfy the total number of early ballots required to be hand counted. At least one batch shall be created from early ballots tabulated on each machine used for tabulating early ballots. The batches may be selected from any presorted early ballot returns from Step 3 above. The batches used for the early ballot hand count need not correspond to the precincts/polling locations selected for the precinct hand count. The names of the candidates may vary among the batches if necessary. The machine counts of the races in this category shall be added together and measured against the hand counts of the races in this category to determine if the total margin of difference falls within the designated margin.
5. If a county has an EMS that can produce sub-reports of results, then the officer in charge of elections will complete the steps necessary to create a batch report for each batch and print out the sub-report.
6. The ballots included in a batch, as well as the baseline and batch tally reports, will be clearly labeled and sequestered separate from any other ballots or batches. The machine that the batches of early ballots were counted on shall be identified and listed with the

batch. Each batch may include a stack of regular ballots and a stack of ballots with write-in votes.

7. This process shall continue until a sufficient number of batches have been created.
8. On Election Day, the officer in charge of elections shall calculate the exact number of early ballots tallied up to that point in time plus the estimated number of additional early ballots expected to be received by 7:00 p.m. on Election Day. From this number, the officer in charge of elections shall calculate a number equaling 1% of the estimated total early ballots. This number (or 5,000, whichever is less) shall serve as the minimum number of ballots to audit.
9. The political party chairpersons shall randomly select one or more batches until enough ballots have been selected to equal the number of ballots to audit.
10. If needed, for each race selected for audit, the officer in charge of elections shall calculate the electronic total for the race by subtracting the batch tally total for that race from the baseline tally total for that race. This shall be done for all selected batches. All races selected for the precinct hand count shall also be hand counted in the early ballot hand count. For the early ballot hand count, the races shall be listed in Section C of the Master Precinct and Race Selection Worksheet.
11. A Hand Count Tally Sheet shall be created for each selected contested race listed on the Master Precinct and Race Selection Worksheet.
12. The Hand Count Board members shall then perform a hand count of the optical/digital scan ballots using the stacking method.
13. The officer in charge of elections shall add all hand count results together for each race, including any accessible voting device results, add all electronic results together for each race, including any accessible voting device, and calculate the margin of difference using the Early Ballot Hand Count Margin Worksheet as follows:
 - a. **Fill out Top of Form.** Fill out the date of the election. Indicate the proper election (general, special, primary, or PPE) and the race category that the worksheet is for (presidential elector, statewide candidate, statewide ballot, federal candidate, or state legislative candidate). List the specific race (*e.g.*, State Senator, Corporation Commission/Democrat). List the hand count round (1st hand count, 2nd hand count, expanded hand count or full hand count).
 - b. **Enter Hand Count Totals.** Enter separately the hand count totals for the optical/digital scan ballots and the hand count totals for the accessible voting devices. These totals will come directly from the Hand Count Tally Sheets. Each candidate's counts or yes/no counts for ballot measures from the Hand Count Tally Sheet must be listed in the table. The total number of hand counted votes shall be calculated and noted in the worksheet.
 - c. **Enter Machine Count Totals.** Enter separately the machine totals for the optical/digital scan ballots and the machine totals for the accessible voting devices. These totals will come directly from Election Management Systems. Each candidate's counts or yes/no counts for ballot measures from the Hand Count Tally

Sheet must be listed in the table. The total number of machine counted votes shall be calculated and noted in the worksheet.

- d. **Calculate Absolute Difference.** For each candidate's total or ballot measure yes/no total, calculate the absolute difference between the hand count and the machine count. The absolute difference is the difference between the two numbers listed as a positive value (*e.g.*, [100 – 99] or [99 – 100] will both have an absolute value of one).
- e. **Calculate Grand Totals.** Add up all the machine count totals for a particular race category to calculate the “Grand Total Machine Count.” Add up all the absolute differences for a particular race category to calculate the “Grand Total Absolute Difference.”
- f. **Calculate Hand Count Margin.** Divide the “Grand Total Absolute Difference” by the “Grand Total Machine Count” and multiply the result by 100 to calculate the margin in a percentage form.

If the margin of difference between the manual count of early ballots compared to the electronic tabulation of those ballots is less than the designated early ballot hand count margin, the electronic tabulation shall be the official count of the race and included in the canvass. No further hand count of the early ballots shall be conducted. A.R.S. § 16-602(F). The officer in charge of elections shall indicate on the Early Ballot Hand Count Margin Worksheet that the count is complete, and the officer in charge of elections and the chairperson (or designee) from each political party present shall sign the sheet.

F. Second Early Ballot Hand Count

If the margin of difference is equal to or greater than the designated early ballot hand count margin for any race, the Hand Count Board shall repeat the hand count of the same early ballots for that race.

If the second early ballot hand count results in a margin that is less than the designated margin, the early ballot hand count will be concluded, and the results of the electronic tabulation will constitute the official count for that race. No further hand count of the early ballots shall be conducted. A.R.S. § 16-602(F). The officer in charge of elections shall indicate on the Hand Count Cumulative Sheet that the count is complete, and the officer in charge of elections and the chairperson (or designee) from each political party present shall sign the sheet.

G. Expanded Early Ballot Hand Count

If the margin is equal to or greater than the designated early ballot hand count margin for any race, the Hand Count Board shall conduct an expanded early ballot hand count for that race, to include a number of additional early ballots equal to 1% of the total early ballots cast or an additional 5,000 ballots, whichever is less, to be randomly selected from the batch or batches of sequestered early ballots. The Hand Count Board shall hand count the additional early ballots using the steps spelled out in Section VIII(B)(1) above. A.R.S. § 16-602(F).

To calculate the hand count margin for the expanded early ballot hand count, add the first and expanded electronic count and add the first and expanded hand count together and then calculate the margin using the equation in Step 13 in Section VIII(B)(1) above.

If the expanded early ballot audit results in a difference for that race that is equal to or greater than the designated early ballot hand count margin, the manual counts shall be expanded for that race until a manual count results in a margin that is less than the designated margin, or until all early ballots for that race have been hand counted, whichever occurs first.

All results shall be documented in writing and signed by the officer in charge of elections and the chairperson (or designee) from each political party present. The officer in charge of elections shall label the ballots used for the early ballot hand count and preserve them separately. A.R.S. § 16-602(F).

H. Review of Election Program by a Special Master

If a full jurisdiction-wide hand count is necessary, the Secretary of State must make available the escrowed election program source code for that county's election equipment to the superior court for that county. The superior court for that county must then appoint a special master to review the election program.

The special master must:

1. Have expertise in software engineering;
2. Not be affiliated with an election equipment or software vendor;
3. Not be affiliated with a candidate who appeared on the ballot in that county;
4. Be bound by a signed nondisclosure agreement with respect to the contents of the election program.

The special master must prepare a public report to the superior court and to the Secretary of State with their findings on any discrepancies found in the election program.

The Secretary of State's Election Equipment Certification Committee must review this report when considering the continued certification of that election equipment and software. A.R.S. § 16-602(J).

IX. STANDARD FOR DETERMINING VOTER INTENT IN HAND COUNT

Ballots with vote choices that were marked improperly, corrected or erased, or otherwise read as blank or unclear by the electronic tabulation machine have likely been duplicated using the voter intent procedures in Chapter [], Section [] prior to being tabulated and/or committed to the EMS. Where necessary, the Hand Count Board members must also determine the voter's intent on such ballots, using the following standards:

1. If the voter selected more than the allowed number of selections for a particular race and the voter's intended choice(s) cannot be positively determined, then no vote is counted for any candidate for that race or for or against that ballot measure.
2. If the voter did not select any choice for a particular race or ballot question, then no vote is counted for any candidate for that race or for or against that ballot measure.
3. If the voter attempted to erase or undo their original vote choice, the Hand Count Board must determine which mark is clearest and count it as the proper vote choice.

The Hand Count Board members must reach a unanimous decision as to voter intent. If the Hand Count Board members are unable to reach a unanimous decision in a particular race, the officer in charge of elections shall make the final determination of voter intent. A.R.S. § 16-602(G).

X. HAND COUNT OF RECOUNTED ELECTIONS

A precinct hand count audit must also be conducted following a court-ordered recount pursuant to A.R.S. § 16-661 through A.R.S. § 16-663(B). This means any ballots that have been electronically re-tabulated for purposes of a recount are treated as if a new election took place and therefore are again subject to hand count audit requirements.

The same procedures for a precinct hand count shall be followed except that the officer in charge of elections and the political parties must conduct a hand count of at least 5% of precincts for the recounted race. A.R.S. § 16-663(B). In counties that conduct vote center-based elections, the officer in charge of elections and the political parties must conduct a hand count of at least 2% of the total number of ballots that were subject to the recount.

XI. REPORTING RESULTS OF THE HAND COUNT

Within two business days of the completion of the precinct hand count and early voting hand count, and prior to the county canvass, the officer in charge of elections must electronically submit a report to the Secretary of State that includes the following information:

- Dates of the precinct and early ballot hand counts;
- Precincts or vote centers selected for the precinct hand count;
- Races selected, as well as a Master List of All Contested Races;
- Summary of the results by precinct/voting location and race for both the electronically tabulated vote totals and the hand counted totals; and
- The margins from the hand count when compared to the electronically tabulated results.

County-appropriate versions of the following sample forms may be submitted to the Secretary of State's Office for reporting purposes:

- Master Precinct and Race Selection Worksheet
- Master List of All Contested Races
- Precinct Hand Count Report
- Early Ballot Audit Hand Count Report

- Aggregate Precinct Hand Count Report
- Aggregate Early Ballot Audit Hand Count Report
- Hand Count/Early Ballot Audit Report

The Secretary of State must post the results submitted by the counties on the Secretary of State's website. A.R.S. § 16-602(I).

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