

1 **THE VALLEY LAW GROUP, PLLC**
Bryan James Blehm, #023891
2 3101 N. Central Avenue, Ste 1470
Phoenix, Arizona 85012
3 Phone: (480) 300-6012
Fax: (480) 781-0722
4 bryan@thevalleylawgroup.com
Attorneys for Defendants

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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF COCHISE**

8 Case No. CV202200518

9 **ARIZONA ALLIANCE OF RETIRED**
10 **AMERICANS, INC. and STEPHANI**
11 **STEPHENON,**

11 Plaintiffs,

12 v.

13 **TOM CROSBY, ANN ENGLISH, and**
14 **PEGGY JUDD, in their official**
15 **capacities as the Cochise County Board**
16 **of Supervisors; DAVID STEVENS, in**
17 **his official capacity as the Cochise**
18 **County Recorder; and LISA MARRA,**
19 **in her official capacity as the Cochise**
20 **County Elections Director,**

21 Defendants.

RESPONSE TO DEFENDANTS’
PETITION FOR WRIT OF
MANDAMUS, OR IN THE
ALTERNATIVE MOTION FOR
PRELIMINARY INJUNCTION

(Assigned: Hon. Casey F. McGinley)

22 Defendants, TOM CROSBY, ANN ENGLISH, AND PEGGY JUDD (hereinafter
23 “County Defendants”), by and through undersigned counsel, hereby file their Motion to
24 Dismiss and Response to Defendants’ Petition for Writ of Mandamus, or in the Alternative
25 Motion for Preliminary Injunction. Defendants deny that it’s hand recount of early ballots
26 violates Arizona law and that Plaintiffs are entitled to a Preliminary Injunction. For its
27 response to the Petition and Motion, Defendants submit the following Memorandum of Points
28 and Authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The matter presently before this Court is not one of Cochise County violating Arizona
4 election law. Rather, this matter is political, and it is intended to benefit a flailing gubernatorial
5 candidate on the eve of Arizona’s 2022 election. As such, the Washington Democratic
6 National Political machine recruited former Hillary Clinton attorney Mark Elias and his law
7 firm to target Cochise County, a small rural Arizona County with an estimated population of
8 approximately 125,000 people. This full-frontal assault is intended to generate publicity for
9 Democratic candidates and not compel the Cochise Board of Supervisors to cease and desist
10 for violating Arizona law. After all, Cochise County is not violating the law. This Court
11 should see through the politics of Plaintiff’s Petition/Motion and deny each request made
12 therein.

13 **BACKGROUND**

14 **I. ARIZONA VOTING MACHINES AND PRACTICES ARE NOT RELEVANT**
15 **TO THE MATTER BEFORE THIS COURT**

16 In their Petition, Plaintiffs dedicate almost two full pages to a discussion of the use of
17 machines to tabulate ballots, but such arguments have absolutely no bearing on the issue before
18 this Court. Whether the machines are rigorously tested, retested, certified, or otherwise, the
19 only issue before this Court is whether Cochise County can, under Arizona law, count its
20 ballots by hand after they have been counted by the tabulators. Specifically, the issue is
21 whether the county can audit by hand all early ballots.

22 The irrelevance of the tabulators in this case is amplified by the fact that no county in
23 the State of Arizona is even obligated to use machines to count their ballots. Pursuant to
24 A.R.S. 16-443, “ballots or votes *may be* cast, recorded and counted by voting or marking
25 devises and vote tabulating devices as provided in this article.” (emphasis added). The
26 operative language here is “may be” which allows but does not require counties to use
27 machines. One might ask why a county that chose to use tabulators would be restricted in the
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1 number of ballots it could hand count in an audit when the county was not even obligated to
2 use a tabulator in the first instance. The logic expressed in Plaintiff’s Petition/Motion
3 demonstrates that politics is driving this matter and not questions of Arizona law.

4 **II. ARIZONA LAW DOES NOT PREVENT COCHISE COUNTY FROM**
5 **COUNTING ALL EARLY BALLOTS BY HAND**

6 Although Board Defendants were warned by some that their proposed hand count audit
7 was not allowed by Arizona law, there were many who disagreed. Foremost of those was the
8 Chief Law Enforcement Officer in the State of Arizona, the Officer tasked with issuing legal
9 opinions to elected officials and government bodies, the Attorney General (hereinafter
10 “A.G.”). On November 4, 2020, A.G. Mark Brnovich issued one such opinion to the
11 Honorable Clint Hickman of the Maricopa County Board of Supervisors. With respect to a
12 hand recount of precincts and early ballots, the A.G. expressed that an “expand[ed] hand count
13 may help alleviate concern and provide public confidence in the integrity of the vote tabulation
14 process.” See Correspondence from Mark Brnovich, 11/4/2020, Exhibit A. There were no
15 questions about the legal propriety of expanding the hand count raised by these Plaintiffs or
16 other similarly situated plaintiffs at that time. The only difference is the media attention
17 garnered by such a challenge on the eve of an election.

18 On October 28, 2022, in response to the Cochise County Board’s desire to hand count
19 all ballots and a formal request from Senator David Gowan, the A.G. issued an informal
20 opinion consistent with his November 4, 2020, opinion. Relying on statutes and language in
21 the Elections Procedures Manual (hereinafter “EPM”), the A.G. found that “Counties may
22 elect to audit a higher number of ballots at their discretion’.” See Correspondence of Mark
23 Brnovich, 10/28/2022, Exhibit B.

24 **LEGAL STANDARD**

25 Plaintiffs, by slight of hand, seek to evade jurisdictional requirements on standing by
26 tailoring their claim for relief as one for mandamus. Mandamus relief, however, seeks to
27 compel an official to perform some act the official is obligated to perform. Here, Plaintiffs
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1 seek to compel Board Defendants to not do something. Because Plaintiffs have no colorable
2 claim to mandamus relief, they must meet all jurisdictional standards for standing. With
3 respect to standing, these Plaintiffs have none and are not entitled to injunctive relief.

4 **I. PLAINTIFFS' HAVE NO COLORABLE CLAIM FOR MANDAMUS AND**
5 **THIS COURT LACKS JURISDICTION TO OFFER RELIEF.**

6 Plaintiffs' Complaint fails to state a mandamus claim upon which relief can be granted.
7 Under Arizona law, a true writ of mandamus may be issued "to compel . . . performance of an
8 act which the law specially imposes as a duty. . . ." ARS § 12-2021. Special Action Rule 3(A)
9 sets forth traditional mandamus relief as allowing a challenge to a failure "to perform a duty
10 required by law as to which [the public official has no discretion." *Home Builders Ass'n v.*
11 *City of Apache Junction*, 198 Ariz. 493, 503 (Ct. App. 2000). The claims raised herein,
12 however, are not mandamus claims. Rather, they fall under the auspices of Special Action
13 Rule 3(B) under which plaintiffs are allowed to proceed on the basis that a public servant is
14 doing something contrary to the law. *See also Law v. Superior Court*, 157 Ariz. 142, 146 (Ct.
15 App. 1986).

16 Plaintiffs' reliance on *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58 is
17 misplaced. In that matter, then Maricopa County Clerk and Recorder Adrian Fontes sought to
18 include voter instructions inconsistent with Arizona law. *Id.* at 306. Plaintiffs sued to compel
19 Recorder Fontes to provide ballot instructions compliant with Arizona law based on a non-
20 discretionary duty to do so. *Id.* at 307. Unlike *Ariz. Pub. Integrity All.*, the relief plaintiffs
21 seek from this Court is not mandamus relief as Plaintiffs do not seek to compel Board
22 Defendants to perform a non-discretionary duty. Rather, they seek to prevent Board
23 Defendants from acting, namely, from hand counting all early ballots. For this reason,
24 Plaintiffs' Motion for Mandamus relief must be denied for failing to state a claim.

25 Even if we assume that the Board Defendants have a non-discretionary duty to
26 audit hand count early ballots, which they do, Plaintiffs' mandamus claim still fails because
27 the legal authority does not limit plaintiffs to counting only 5,000 early ballots. A.R.S. § 16-
28 602(F), as recently interpreted by the A.G., is at worst ambiguous where the EPM is clear and

1 places no restrictions on the number of ballots counties can hand count. Further, the EPM’s
2 language is consistent with A.R.S. § 16-602(B) with both allowing counties to count more but
3 not less than the statutory requirement. Given the statutory authority and the EPM, Plaintiffs
4 cannot show that the Board Defendants must count only 5,000 ballots and any claim for
5 mandamus relief must fail.

6 In this matter, Plaintiffs allege not that the Board Defendants must conduct a
7 hand count audit of early ballots. Rather, plaintiffs seek to prohibit Board Defendants from
8 hand counting all early ballots. Accordingly, Plaintiffs’ mandamus claims must be dismissed
9 for failure to state a claim.

10 **II. SHOULD THIS COURT ALLOW PLAINTIFFS TO PROCEED ON**
11 **MANDAMUS, THE COMPLAINT MUST BE DISMISSED BECAUSE A**
12 **COMPLETE HAND COUNT OF EARLY BALLOTS IS DISCRETIONARY**
13 **UNDER ARIZONA LAW**

13 In Arizona, election requirements are set forth by statute and the EPM as two separate
14 sources of law. The relevant statute, A.R.S. § 16-602(F), may lack clarity but the A.G.
15 interpreted it to mean that there is no limit on the number of early ballots that can be hand
16 counted. See Exhibit B. When statutes lack clarity, as in this case, the EPM provides clarity.
17 See *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 418
18 (2020). The EPM also has the force of law. *McKenna v. Soto*, 250 Ariz. 469, 473 (2021); see
19 also *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (citing ARS § 16-452(C)) (“Once
20 adopted, the EPM has the force of law.”).

21 Even if the parties can debate the statute’s clarity, there can be no debate over the EPM
22 whose language is clear:

23 The officer in charge of elections is required to conduct a hand count of 1% of
24 the total number of early ballots cast, or 5,000 early ballots, whichever is less.
25 A.R.S. § 16-602(F). **Counties may elect to audit a higher number of ballots at
26 their discretion.**

27 EPM pg. 215 (Emphasis added). Additionally, A.R.S. § 16-602(B), governing hand recounts
28 of polling places and precincts clearly allows counties to count by hand as many ballots over
the minimum as counties want to count. To construe the early ballot hand count section to

1 place maximum but not minimum limits would conflict with the rest of the statute. Such an
2 interpretation of the statute is inconsistent with Arizona law. Because Arizona law does not
3 impose maximum limits on the number of ballots counties can recount by hand, Plaintiffs’
4 Complaint must be dismissed.

5 **III. PLAINTIFFS LACK STANDING, CANNOT ESTABLISH THE**
6 **PRELIMINARY INJUNCTIVE RELIEF FACTORS, AND THEIR PETITION**
7 **MUST BE DISMISSED**

8 **A. Plaintiffs Lack Standing and Their Petition For Injunctive Relief Must Be**
9 **Denied.**

10 Plaintiffs must establish standing, which they cannot do. In order to establish
11 standing, Plaintiffs must allege a particularized injury “fairly traceable to the defendant’s
12 allegedly unlawful conduct” which Plaintiffs here have not done. *Bennett v. Napolitano*, 206
13 Ariz. 520, 525 (2003) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The right “to require
14 that the government be administered according to the law is a generalized grievance.” *Wood*
15 *v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (citing *Chiles v. Thornburgh*, 865 F.2d
16 1197, 1205-06 (11th Cir. 1989) and *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). A
17 generalized grievance, “no matter how sincere,” will not support standing. *Id.* Arizona case
18 law has also been clear. To have standing, a plaintiff must allege a *distinct* and *palpable*
19 injury.” *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16, 961 P.2d 1013, 1017 (1998) (emphasis added).

20 Because generalized grievances are common to all members of society, a
21 plaintiff challenging the administration of law must show how their interest in compliance
22 differs from other members of society. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir.
23 2020). In this matter, Plaintiffs cannot show that their interests differ from other residents of
24 Cochise County because each ballot will be counted in accordance with the same laws and the
25 identity of each voter is unknown. Because the secret vote and the application of law in the
26 tabulation procedure will treat all ballots, hence voters, equally, there can be no particularized
27 grievance aside from a difference of opinion as to whether the ballots should have been
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1 counted in the first place. Accordingly, Plaintiffs lack standing and their Complaint must be
2 dismissed.

3 **B. Plaintiffs Will Suffer No Harm If This Court Denies Their Petition For**
4 **Injunctive Relief.**

5 Denying Plaintiffs' request for injunctive relief and allowing this matter to be
6 briefed in full on the merits will cause Plaintiffs' no harm let alone irreparable harm. Counties
7 routinely hand count ballots as a matter of course during elections, and Cochise County
8 election administrators know how to do it. There has been no evidence presented to this Court
9 that Cochise County will not meet all deadlines prescribed by law if it is allowed to begin its
10 audit on time. Nor is there any evidence that the outcome will somehow instill a lack of
11 confidence in our election systems. In fact, Plaintiffs concede that a large number of ballots
12 can be counted accurately when they cite to the 2020 Maricopa County Election Audit, which
13 had approximately 2,000,000 ballots cast. Plaintiffs' admission that it confirmed the machine
14 count results can only help to instill public confidence in their elected officials, elections
15 workers, and even the machine used to tabulate our ballots.

16 Furthermore, the application of Arizona law will be applied equally to each
17 ballot. Because we use secret ballots in Arizona, those tabulating the ballots have no way of
18 knowing whose ballot is whose and therefore no way to discriminate against these particular
19 Plaintiffs or any others. Because there will be no harm, this Court must deny Plaintiffs
20 injunctive relief.

21 **C. The Balance of Hardships Favors Defendants Over Plaintiffs**

22 Here, the hand count audit is set to begin in less than one week. Issuing an
23 injunction will effectively prevent Cochise County from beginning the hand count process for
24 all early ballots. To do so without a showing that the public will suffer irreparable harm would
25 deny elected officials their public charge. Entering the injunction in such a politically charged
26 case would also likely have the impact of instilling concerns and fear in the minds of voters.
27 Why, voters may ask, aren't their elected officials allowed to verify their election results?
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1 Many voters may ask what they are hiding. Audits and the public counting of all ballots can
2 only instill confidence in the system where public confidence is sorely lacking. After all each
3 citizen’s right to vote, as represented by the ballot, is his/hers most basic and fundamental right
4 as a citizen in a free society. If their own elected officials are precluded from conducting full
5 audits of their elections, how do they know they can trust the results? It would be even more
6 perplexing to voters how a large Washington D.C. law firm was able to throw all its weight at
7 their small county and elected leaders to have their planned election audit shut down. This
8 will only instill a lack of faith in the system and a lack of confidence in our elections. It will
9 also exacerbate the fear of machines counting our ballots and increase the mistrust of
10 Washington D.C.

11 **D. The Public’s Interest in Ensuring the Integrity of Elections Favors Board**
12 **Defendants**

13 Plaintiffs in this matter seek to preclude elected county officials from
14 conducting a full hand count audit of the early ballots. The question must be why? Why is
15 auditing our elections an issue? Why should elected officials not seek to go beyond the bare
16 minimum to ensure that the citizens elections are free and fair? There are no rational reasons
17 to prevent people from auditing their elections in a free society. This is especially true when
18 there are so many questions surrounding the integrity of election machines and whether they
19 can manipulate the vote counts.

20 Arizona law clearly seeks to allow county leaders to determine whether they wish to
21 exceed the minimum statutory ballot hand count whether early ballots or those cast in
22 precincts or polling centers. As A.G. Brnovich stated to Maricopa County, “expand[ed]
23 hand count may help alleviate concern and provide public confidence in the integrity of the
24 vote tabulation process.” See Exhibit B. There should be absolutely no reason to limit the
25 ability to audit our elections. Doing so has no logical rational and can only foster speculation
26 by the public. When the audit involves our citizen’s most fundamental and basic right,
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1 precluding expansive audits will cause more harm and will lead citizens to question our
2 process and the very legitimacy of our elected government.

3 **IV. CONCLUSION**

4 Board Defendants ask that this Court deny Plaintiffs Petition for Mandamus and
5 injunctive Relieve. Plaintiffs fail to make a claim for mandamus relief and even if construed
6 in their favor, Board Defendants have no non-discretionary duty to limit the number of
7 ballots audited by hand, whether early or otherwise. This Court must also deny Plaintiffs
8 their requested injunctive relief. Plaintiffs lack standing under Arizona law and even if they
9 had standing, the balance of legal equities lies in favor of Board Defendants and Plaintiffs
10 will suffer no harm.

11 **RESPECTFULLY SUBMITTED** this 3rd day of November, 2022.

12 **THE VALLEY LAW GROUP, PLLC**

13
14 /s/ Bryan James Blehm
15 Bryan James Blehm
16 *Attorney for Defendants*

17 //

18 //

19 **ORIGINAL** of the foregoing e-filed
20 with the clerk this 3rd day of November 2022.

21 **COPY** presumed delivered to:
22 Honorable Casey McGinley _____
23 Cochise County Superior Court

24 **COPY** emailed to:
25 Roy Herrera
26 roy@ha-firm.com
27 Daniel A. Arellano
28 daniel@ha-firm.com
Jillian L. Andrews
jillian@ha-firm.com
Austin T. Marshall
austin@ha-firm.com

HERRERA ARRELLANO LLP
1001 North Central Avenue, Ste 404
Phoenix, Arizona 85004

1 Aria C. Branch
abrand@elias.law
2 Lalitha D. Madduri
lmadduri@elias.law
3 Christina Ford
cford@elias.law
4 Mollie DiBrell
Mdibrell@elias.law
5 Daniel Cohen
dcohen@elias.law

ELIAS LAW GROUP LLP
6 10 G St. NE, Ste 600
7 Washington, D.C. 20002

8 *Attorneys for Plaintiffs*
9 *Arizona Alliance for Retired Americans,*
Inc. and Stephani Stephenson

10 By: /s/ TLM
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EXHIBIT “A”



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

November 4, 2020

Via Email

The Honorable Clint Hickman
Maricopa County Board of Supervisors
510 South 3rd Avenue
Phoenix, Arizona 85003

Re: Hand Count Audit

Dear Chairman Hickman:

Maricopa County will soon begin the manual hand count of certain precincts and early voting batches in accordance with A.R.S. § 16-602. Because of widespread concern raised about the ballot marking procedure in Maricopa County election day voting centers, we suggest Maricopa County consider expanding the hand count audit to five per cent of the voting center locations, which it may do in accordance with A.R.S. § 16-602(B)(1) and Chapter 11, Section III(A) of the Elections Procedures Manual.

Although at this point in time we have no reason to believe the tabulation equipment did not work properly, an expanded hand count may help alleviate concern and provide public confidence in the integrity of the vote tabulation process. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Kanefield".

Joseph Kanefield
Chief Deputy & Chief of Staff

cc: Scott Jarrett, Director of Elections Day and Emergency Voting, Maricopa County

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EXHIBIT "B"



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE

MICHAEL S. CATLETT
DEPUTY SOLICITOR GENERAL

October 28, 2022

Hon. David Gowan
Arizona State Senate
1700 W. Washington, Ste.
Phoenix, AZ 85007
dgowan@azleg.gov

Dear Senator Gowan,

You requested a formal opinion from this Office, asking whether a county board of supervisors may “audit the results of an electronically tabulated general election by hand counting all of the election ballots of their county.” As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. The Office understands that time is of the essence regarding your request, because of the impending 2022 General Election and the Cochise County Board of Supervisors’ (the “Board”) recent decision to authorize an expanded hand count audit of all Cochise County precincts for the General Election. In approving an expanded hand count audit, the Board relied exclusively on A.R.S. § 16-602(B). For these reasons, the Office offers the following informal opinion regarding the scope of Cochise County’s authority under A.R.S. § 16-602(B) (and statutory provisions and regulations referenced therein): Cochise County has discretion to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County, along with 100% of early ballots cast in Cochise County, so long as the expanded hand count audit of statewide and federal races is limited to five contested statewide and federal races appearing on the 2022 General Election ballot.

A.R.S. § 16-602(B) provides that “[f]or each countywide primary, special, general and presidential preference election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities.” In 2011, the Legislature amended § 16-602(B) to provide the Secretary with authority to create procedures for hand count audits through the Election Procedures Manual (“EPM”). More specifically, § 16-602(B) now provides that “[t]he 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 § 16-452.” The EPM, therefore, has heightened significance in the context of hand count audits because the Arizona Legislature has expressly delegated power to the Secretary of State to create hand count audit procedures. Following the 2020 General Election, for example, the Office relied on the EPM’s hand count audit procedures in advising President Fann and Speaker Bowers regarding how such audits should be conducted in counties utilizing voting centers. *See* <https://www.azag.gov/media/interest/letter-pres-fann-speaker-bowers-re-vote-center-audits> (last accessed Oct. 26, 2022). And the Maricopa County Superior Court relied on the EPM’s hand

count audit procedures in later dismissing a claim challenging the manner in which Maricopa County conducted its hand count audit following the 2020 General Election. *See Ariz. Republican Party v. Fontes*, No. CV2020014553 (Maricopa Cnty. Super. Ct. Dec. 21, 2020 Ruling) (“Under the authority of section 16-602(B), the Election Procedures Manual gives detailed instructions to the county officials who conduct hand count audits.”) Thus, in rendering this informal opinion, the Office has relied upon the express provisions of § 16-602 and the hand count audit procedures contained in the 2019 EPM (at pp. 213-232), which is the last version of the EPM approved by the Attorney General and Governor.¹

Both A.R.S. § 16-602(B) and the EPM contain different requirements for (1) hand counting ballots cast in person and (2) hand counting early ballots. Regarding the hand count audit of ballots cast in person, § 16-602(B) provides a floor for the percentage of precincts that should be included in the audit: “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.” A.R.S. § 16-602(B)(1). The EPM contains similar language but also includes broader reference to polling locations: “At least 2% of the precincts/polling locations in the county (rounded to the nearest whole number) or two precincts/polling locations, whichever is greater, shall be selected at random from a lot consisting of every precinct/polling location in that county.” 2019 EPM p. 215. There is no provision in § 16-602 or the EPM (or anywhere else in Arizona law) that imposes a ceiling on the percentage of precincts or vote centers that can be included in the hand count audit of votes cast in person. This why following the 2020 General Election, the Office wrote to the Chairman of the Maricopa County Board of Supervisors, suggesting that Maricopa County should “consider expanding the hand count audit to five per cent of the voting center locations, which it may do in accordance with A.R.S. § 16-602(B)(1) and Chapter 11, Section III(A) of the Elections Procedures Manual.” *See* <https://www.azag.gov/media/interest/letter-hon-hickman-re-hand-count-audit> (last accessed October 26, 2022). Thus, it is the Office’s conclusion that the Board has discretion under A.R.S. § 16-602(B) and the EPM to conduct an expanded hand count audit that includes ballots from 100% of the precincts or voting centers located in Cochise County.

There is similarly no limit in § 16-602(B) or the EPM on the number of ballots that the Board can include in the hand count audit of votes cast in person. To the contrary, the statutory text and purpose strongly suggest that the Board should review all ballots cast at polling places. Section 16-602(B)(1) provides that “[t]he selection of the precincts shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center.” And the statute makes clear that “[o]nly the ballots cast in the polling places and ballots from direct recording electronic machines shall be included in the hand counts conducted pursuant to this section.” A.R.S. § 16-602(B)(1). Thus, “[p]rovisional ballots, conditional provisional ballots and write-in votes shall not be included in the hand counts.” *Id.* The EPM explains that “[a] post-election hand count audit includes a precinct hand count, which involves a manual count of regular

¹ The Arizona Supreme Court recently concluded that the 2019 EPM remains in effect. *See Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶25 (2022) (explaining that “The Committee was required to follow the 2019 EPM established by the Secretary and approved by the governor and the attorney general.”).

ballots from selected precincts[.]” 2019 EPM at p. 214. Moreover, one primary purpose of a hand count audit is to ensure that the machine-count totals closely match the hand-count totals, and that exercise could have reduced value if only a subset of ballots cast in person are permitted to be included. The Board, therefore, has discretion to review 100% of the ballots cast in person at 100% of the precincts or voting centers located in Cochise County when conducting the hand count audit required under § 16-602(B).

Although there is no limit on the number of precincts or voting centers or the number of ballots that can be included in the hand count audit of votes cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit. Both A.R.S. § 16-602(B) and the EPM reflect that the required hand count audit shall include up to five contested races. *See* A.R.S. § 16-602(B)(2) (“The races to be counted on the ballots from the precincts that were selected pursuant to paragraph 1 of this subsection for each primary, special and general election *shall include up to five contested races.*” (emphasis added)); 2019 EPM p. 217 (“The races to be counted in the hand count audit generally includes up to five contested races[.]”). For a general election, the races to be included are determined by selecting by lot from the ballots cast for one statewide ballot measure, one contested statewide race for statewide office, one contested race for federal office, and one contested race for state legislative office. *See* A.R.S. § 16-602(B)(2)(a)-(d). Moreover, “[i]n elections in which there are candidates for president, the presidential race shall be added to the four categories of hand counted races.” *Id.* § 16-602(B)(5). If additional races are needed to fill out the number of races that the Board decides to count, according to the EPM, “[t]he priority for selecting other categories, if needed, is as follows: statewide candidate, statewide ballot measure, federal candidate and then state legislative.” 2019 EPM p. 220. Thus, for example, if the Board chooses to count five contested races for the 2022 General Election, because there is no presidential election in 2022, the Board should choose two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Turning to Board authority under § 16-602 regarding a hand count audit of early ballots, as stated, § 16-602 handles ballots cast in person differently than early ballots. As to early ballots, § 16-602(B)(1) directs that “the early ballots shall be grouped separately by the officer in charge of elections² for purposes of a separate manual audit pursuant to subsection F of this section.” Thus, § 16-602(B)(1) incorporates by reference the procedures set forth in § 16-602(F) for a hand count audit of early ballots.

While early ballots are not cast in precincts or voting centers, and therefore the discussion above about the percentage of precincts or voting centers that can be included in a hand count audit is inapplicable to early ballots, § 16-602(F) requires that “the chairmen or the chairmen’s designees shall randomly select one or more batches of early ballots that have been tabulated to include at least one batch from each machine used for tabulating early ballots.”

² In Cochise County, the “officer in charge of elections” for purposes of A.R.S. § 16-602 appears to be the Director of the County Elections Department.

Regarding the number of early ballots that can be included as part of a hand count audit, § 16-602(F) instructs that “[t]he chairmen or the chairmen’s designees shall randomly select from those sequestered early ballots a number equal to one percent of the total number of early ballots cast or five thousand early ballots, whichever is less.” *See also* 2019 EPM p. 215. This statutory language does not set a maximum limit on the number of early ballots that can be included in the hand count audit, and at the very least, it is ambiguous. As discussed, the Secretary has been delegated statutory authority to create hand count audit procedures through the EPM. And she did so with respect to the number of early ballots that can be included in the hand count audit. More specifically, the EPM grants the Board discretion to include additional early ballots (with no limit) in the hand count: “Counties may elect to audit a higher number of ballots at their discretion.” 2019 EPM p. 215. Thus, the Board at its discretion may include up to 100% of early ballots in an expanded hand count audit.

Like with ballots cast in person, there is a limit on the number of statewide and federal races that can be included in the hand count audit of early ballots. In fact, the races included in the hand count audit of early ballots must be the same races included in the hand count audit of ballots cast in person. *See* A.R.S. § 16-602(F) (“[T]he county officer in charge of elections shall conduct a manual audit of the same races that are being hand counted pursuant to subsection B of this section.”). Thus, the Board is limited to conducting an expanded hand count audit of early ballots cast in the same races as those audited for ballots cast in person.

In sum, the Office concludes that, pursuant to A.R.S. § 16-602, the Board is permitted to perform an expanded hand count audit of all ballots cast in person at 100% of the precincts or voting centers located in Cochise County. Moreover, the Board is permitted to perform an expanded hand count audit of 100% of early ballots cast in Cochise County. The Board must limit the number of competitive statewide and federal races audited to five. Finally, if the Board chooses to conduct a hand count audit of five statewide and federal races for the 2022 General Election, the Board should choose, by random lot, two contested races for statewide office, one statewide ballot measure, one contested race for federal office, and one contested race for state legislative office.

Please note this informal opinion does not address any of the following issues: (1) whether Cochise County has authority for a hand count outside the scope of A.R.S. § 16-602, including for races not mentioned in A.R.S. § 16-602³, (2) the procedures Cochise County should use for any hand count conducted outside the scope of A.R.S. § 16-602, and (3) what effect, if any, a full or expanded hand count might have on the official outcome of the 2022 General Election.

³ For example, in an informal opinion from Justice John R. Lopez IV (then Solicitor General), in 2015, the Office concluded that “A.R.S. § 16-602(B)(2)(f) does not affirmatively bar hand counts outside of A.R.S. § 16-602. That section only provides instructions for the county official in charge of elections on what races to count in an A.R.S. § 16-602 hand count.” *Ariz. Att’y Gen. Op. I15-009* (available at <https://www.azag.gov/opinions/i15-009-r15-021>).

Sen. David Gowan
October 28, 2022
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Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Catlett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael S. Catlett
Deputy Solicitor General

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