

**ARIZONA COURT OF APPEALS
DIVISION 2**

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

Plaintiffs-Appellees,

v.

TOM CROSBY, ANN ENGLISH, and
PEGGY JUDD, in their official
capacities as the Cochise County Board
of Supervisors; DAVID STEVENS, in
his official capacity as the Cochise
County Recorder; and the Cochise
County Elections Director,

Defendants-Appellants.

No. 2CA-CV2022-0136

Cochise County Superior Court
No. CV2022-00518

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs-Appellees Arizona Alliance for Retired Americans, Inc., and Stephani Stephenson (collectively, “Plaintiffs”) state in the introduction of their brief that Defendants-Appellants—the Cochise County Board of Supervisors (“Board”) and County Recorder David Stevens (collectively, “Defendants”)—“assert that a 100% hand count audit of all ballots *in the first instance* is authorized by law and should have been permitted for the 2022 general election.” [Appellees’ Br.](#) at 1 (emphasis in original). As a threshold matter and to prevent any confusion, Defendants wish to clarify that this case has never been about whether the Board could conduct a 100% hand count *in the first instance* such that it need not use tabulators for the initial tallying of ballots (though it may do so under Arizona law). It is true, however, that Defendants assert the Board may conduct a 100% hand count *audit* after the initial tally of ballots by machine tabulators—i.e., without going through the procedures of A.R.S. § 16-602, which merely establish *the bare minimum requirements* that counties must follow when they *choose* to use machine tabulators.

Machine tabulators are quick and convenient. Nevertheless, the Arizona legislature has seen it fit to mandate that any county choosing to use tabulators must audit the machine tally by performing a limited hand count of certain ballots (or else a county might certify the initial machine canvass without expending

further resources to otherwise verify the tally). As Plaintiffs agree, one reason for these minimum requirements is to ensure the accuracy of the machine tally.

Appellees' Br. at 17. Then again, as Plaintiffs also note, the legislature has already established several other procedures to ensure the accuracy of machine tabulators.

Id. at 3 (listing the various tests performed on the machines themselves). But the only way to truly know whether the machines have accurately tallied the vote is to conduct a hand count audit of the ballots themselves, and thus the legislature has mandated counties to perform *at least* a minimum hand count audit of the tabulated results.

One simple reason for this is that machines misread ballots and fail to read votes that human eyes would not miss, humans being capable of actual judgment.¹ In fact, Pinal County had to contend with this very issue after conducting its mandatory recount of the races for the Attorney General and the Superintendent of Public Instruction. *See* Exhibit A (Pinal County Recount Discrepancy Report, Dec. 21, 2022²) at 4. The recount revealed a discrepancy of 442 ballots that failed to be

¹ Even ChatGPT will admit that it is incapable of judgment, and of course machine tabulators do not even possess “*artificial* intelligence.”

² Also available at Dylan Smith, “Pinal County election recount discrepancy report,” TUCSONSENTINEL.COM (Dec. 29, 2022, 2:48 PM), https://www.tucsonsentinel.com/documents/doc/122922_pinal_recount_doc/. The Court may take judicial notice of this report because it is a public record and therefore *not* subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Ariz. R. of Evid. 201(b)(2). *See also In re Sabino R.*, 198 Ariz. 424, 425 ¶ 4 (App. 2000)

tallied on election day. *Id.* Ten precincts were responsible for 424 of these votes, and “[o]ne factor underlying this disparity is that the canvass was filed prior to taking an adequate opportunity to investigate any possible anomalies [Pinal County] could discern from polling place returns.” *Id.* at 5. Additionally, after election officials “physically hand counted” Pinal County’s Precinct 101 ballot box, they discovered 178 ballots that were not tabulated on election day. *Id.* at 6. Finally, officials also discovered that machine tabulators had been unable to read 63 ballots with “unclear marks” that failed to be adjudicated on Election Day. *Id.* at 8. “The result was that even in precincts where there were no differences in Election Day ballots cast and recount ballots cast, candidates did pick up votes.” *Id.* Although Pinal County attributed these issues to human error (e.g., failure to properly program the tabulators), it does not negate the fact that only a physical hand count was able to determine these errors at all.

As Defendants noted in their Opening Brief, widespread problems with tabulators in the 2022 General Election have amplified the issue at bar in this case. [Appellants’ Br.](#) at 4-5 n.3. Because of these problems, two contested races—for the Arizona Governor and the Arizona Attorney General—continue to be litigated in the trial courts. *See Kari Lake v. Hobbs, et al.*, No. CV2022-095403 (Maricopa

(appeals court may take judicial notice of anything trial court can, even if trial court never asked to take notice).

Cnty. Super. Ct. Dec. 9, 2022) (remanded to trial court by Arizona Supreme Court on Mar. 22, 2023); *Jeanne Kentch, et al., v. Kris Mayes, et al.*, No. S8015 CV2022-01468 (Mohave Cnty. Super. Ct. Dec. 9, 2022) (oral argument on Plaintiff Abraham Hamadeh's Motion for a New Trial set for May 16, 2023).

Arizona law has granted broad authority and discretion to counties to prevent these problems before they ever arise, ensuring that questionable races are fully audited before certifying the canvass and thereby preventing contentious and costly litigation. Defendants-Appellants respectfully request this Court to declare it so.

ARGUMENT

I. This appeal is not moot because the Board wishes to conduct full hand count audits in upcoming elections, but if it is moot, then the public importance exception applies.

The Court should not dismiss this appeal as moot for two reasons. First, although the Cochise County Board of Supervisors October 24, 2022, Resolution indeed pertained to the 2022 General Election, as noted by Plaintiffs-Appellees, [Appellees' Br.](#) at 9, the Board wishes to conduct full hand count audits in upcoming elections and intends to do so if and only if this Court reverses the trial court's ruling. The Board's desire to do so is even more pertinent now given the widespread issues with tabulators failing to count valid votes, as described above.

And though Plaintiffs are also correct that the Board has not yet adopted any

current resolutions to that effect and can only do so in a public meeting, [Appellees' Br.](#) at 10 (citing A.R.S. § 38-431.01(A)), this does not quash the live controversy that remains for the simple reason that the Board *cannot* adopt such a resolution unless and until this Court rules that the Board may do so legally. Indeed, Plaintiffs' entire argument rests on this simple truth—that the Board may only adopt such a resolution if expressly allowed to do so by law.³ See [Appellees' Br.](#) at 12-13. But the trial court is not the final word on the meaning of the statutes at issue in this case. Thus, the Board is currently in a Catch-22 situation of sorts, but it should not have to wait until the next election to file a declaratory action in trial court, only to then go through the appeals process once again,⁴ further expending its own resources while also wasting the trial and appellate courts' resources.

Second, even if the Court were to agree with Plaintiffs that this case is moot, the issue at bar falls under the “great public importance” exception to the prudential doctrine of mootness. Regarding that exception, Plaintiffs are simply wrong that “the issues below ‘were resolved through straightforward application of the statutory language, confirming that this case is not appropriate for discretionary review

³ In fact, Plaintiffs complain that Defendants cite no authority supporting their view that they “have implied powers beyond those conferred by statute.” [Appellees' Br.](#) at 13 Defendants do not address this red herring, however, because they have never argued that the Board may act without the statutory power to do so. Instead, Defendants argue that the statutes *do* permit the Board to conduct a full hand count audit of tabulator results.

⁴ It is certain that the losing party to such an action would appeal to this Court.

pursuant to the “public importance” exception because it does not involve a significant question.” [Appellees’ Br.](#) at 10 (citing *Kondaur Cap. Corp. v. Pinal Cnty.*, 235 Ariz. 189, 193 ¶ 8 (App. 2014)). What Plaintiffs characterize as a straightforward application of statutory language is belied by the fact that Defendants received a completely different interpretation of the law from the Office of the Arizona Attorney General than from the trial court. *See* [Appellants’ Br.](#) at 7. It is also belied by the fact that the former Secretary of State *changed her position* regarding the law for reasons of political expediency. [Appellants’ Br.](#) at 3-4 (citing 2019 Elections Procedural Manual (“EPM”) at 215) (explaining that former Secretary Hobbs changed her mind regarding the 2019 EPM’s instruction that “[c]ounties may elect to audit a higher number of ballots at their discretion”).

To the contrary, this case presents an exceedingly important question, especially, again, because it has now come to light that vote tabulators are demonstrably fallible in that they tend to undercount valid votes that a hand count would not fail to miss. The full range of these undervotes is simply unascertainable by the limited but mandatory hand count procedures for election-day and early ballots that Plaintiffs incorrectly argue are the only laws on the books regarding counties’ discretion to conduct hand counts. [Appellees’ Br.](#) at 13. Yet ensuring that all valid votes are counted is an issue that affects not only Cochise County but all Arizona counties *and* their voters and therefore has broad public impact beyond the

resolution of this specific case. *See Kondaaur*, 235 Ariz. at 193 ¶ 10 (citing *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 6 (App. 2012)). Indeed, as mentioned above, two widely publicized cases concerning the 2022 General Election are ongoing in Arizona and pertain to this issue.

II. Arizona law allows the Board of Supervisors to conduct a hand count audit of 100% of all ballots.

As Defendants argued in their Opening Brief, the EPM, Title 11, and Title 16 confer broad authority and discretion to the Board in how they choose to canvass and certify votes, including the discretion to conduct hand counts outside of the mandatory provisions of A.R.S. § 16-602. *See Appellants' Br.* at 12-16. Plaintiffs argue that the Court should not consider Defendants' argument that *Title 11* confers broad authority and discretion regarding election matters, including the canvass and certification of votes *outside* of the mandatory provisions of A.R.S. § 16-602, because Defendants waived the argument by not raising it below. *Appellees' Br.* at 12. However, this Court can and should address Defendants' argument regarding Title 11 because “this case falls within one of the well established exceptions to [the waiver] rule.” *Ruth v. Indus. Comm’n*, 107 Ariz. 572, 574 (1971).

As the Arizona Supreme Court stated in *Ruth*, “It has been repeatedly held by this Court that if the question is one of ‘a general public nature, affecting the interests of the state at large[,]’ jurisdiction will be granted.” *Id.* (citations omitted).

See also France v. Ariz. Ctys. Ins., 519 P.3d 1029, 1032 (App. 2022) (declining to apply discretionary waiver doctrine); *Noriega v. Town of Miami*, 243 Ariz. 320, 326 ¶ 27 (App. 2017) (same). Whether Arizona counties may conduct full hand count audits outside the mandatory provisions of A.R.S. § 16-602 is plainly a question of “a general public nature” and one that affects the interests of the state at large. Indeed, even the former Secretary of State chose to weigh in on the interpretation of A.R.S. § 16-602. [See [ROA 20](#).] And, as noted above, the Office of the Attorney General also thought it important enough to issue an informal opinion on the matter.

Plaintiffs essentially argue that A.R.S. § 16-602 provides the *only* authority for conducting any type of hand count audit. But that statute must be read in harmony with other statutes granting authority to counties, including those in Title 16 and Title 11. As Defendant Recorder Stevens argued in his Motion to Dismiss and Response to Petition, “Plaintiffs’ entire case hinges on the contention that A.R.S. § 16-602(F) clearly prohibits Defendants from hand counting more than 5,000 [early] ballots.” [[ROA 23](#) ep 11.] Defendants Tom Crosby, Ann English, and Peggy Judd (“Board Defendants”) framed the issue as “whether Cochise County can, under Arizona law, count its ballots by hand after they have been counted by tabulators.” [[ROA 19](#) ep 2.] The Board Defendants then correctly explained that because Arizona law does not obligate counties to use tabulators in the first place,

it makes no sense to restrict counties from conducting a full hand count *audit* of machine tabulated results if they *choose* to use tabulators at all. [[id.](#) ep 2-3 (citing A.R.S. § 16-443).] In other words, because A.R.S. § 16-443 does not mandate the use of tabulators, then counties may conduct an initial full hand count of ballots to canvass the vote. Why then would counties not be allowed to conduct a full hand count *audit* to certify the vote when they have the discretion whether to use machine tabulators at all?

As Defendants explained in their Opening Brief, the trial court found that the EPM's "declaration that '[c]ounties may elect to audit a higher number of ballots at their discretion' is not found anywhere in A.R.S. § 16-602, and has no basis or authority *in any other statute*." [Appellants' Br.](#) at 12 (citing [ROA 38](#) ep 9) (emphasis added). Because the trial court raised the issue of statutory authority outside of A.R.S. § 16-602 in its decision, Defendants should be allowed to address it. And Title 11 (entitled "Counties") is highly relevant to the Board's authority in this regard because it is where counties broadly derive their powers. Article 4 (entitled "Powers and Duties") is where the Board's power to canvass election returns is found. Indeed, A.R.S. § 11-251 is entitled "Powers of board." Specifically, § 11-251(3) provides counties with the power to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. § 11-251.

Additionally, as Defendants argue in their Opening Brief, several other statutes in Title 16 grant the Board broad authority regarding election matters. *See, e.g.*, A.R.S. §§ 16-621(A) (requiring all proceedings at the counting center to be “under the direction of the board of supervisors” and compliant with the EPM), 16-622(A) (canvass not official until “certified by the board of supervisors”), 16-443 (counties have discretion whether to use “vote tabulating devices”), 16-445(A) (lists requirements for counties that choose to use tabulating devices), 16-450 (board of supervisors’ discretion to provide for location of vote tabulating devices), and 16-451 (board of supervisors’ discretion to provide payment for vote tabulating equipment). Along with A.R.S. § 14-251, all these statutes must be harmonized with A.R.S. § 16-602.

When statutes relate to the same subject matter, courts read them together and consider not only “the literal meaning of the wording” but also “the whole system of related statutes.” *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970). They do so “even where the statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes.” *Id.* And “when two statutes appear to conflict, whenever possible, [courts] adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.” *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 28 (2001). *See also Planned Parenthood*

Ariz., Inc. v. Brnovich, 524 P.3d 262, 266 (App. 2022).

The broad authority to canvass and certify elections, which is granted to counties in the various statutes, can be easily harmonized with the more limited hand count procedures in A.R.S. § 16-602 if that statute is understood to establish *minimum* requirements when counties choose to use tabulators, but counties may always go above and beyond those procedures if they wish to conduct a thorough audit when fulfilling their duty to canvass and certify election results. In other words, A.R.S. § 16-602 exists to ensure that counties *will* audit the results of machine tabulators by *mandating* them to do so. Else counties might choose to certify the initial results of machine tabulators without ensuring—via a hand count audit—that those results are accurate.

Because it would make no sense for the various statutes to grant such broad authority to counties regarding the canvass of elections only to then limit their discretion concerning how many ballots they are allowed to recount by hand when performing a *voluntary* audit (i.e., going above and beyond the mandatory provisions of A.R.S. § 16-602), the trial court erred in finding that the “[EPM] clause at issue cannot be relied upon to conduct a full hand count audit” and that there is “no basis or authority *in any other statute*.” [[ROA 38](#) ep 9 (emphasis added).]

As Defendants have also argued, however, even A.R.S. § 16-602 permits

counties to conduct full hand count audits, as reiterated below in reply to Plaintiffs' argument to the contrary.

A. Arizona law permits election officials to conduct a hand count audit of 100% of *election-day* (“*precinct*”) ballots.

“‘When the plain text of a statute is clear and unambiguous,’ it controls unless an absurdity or constitutional violation results.” *McKenna v. Soto*, 250 Ariz. 469, 472 ¶ 12 (2021) (citation omitted). A.R.S. § 16-602(B) plainly establishes a floor and not a ceiling for the mandatory hand count of election-day (i.e., precinct) ballots. As argued above, § 16-602 establishes mandatory hand count requirements for counties that choose to use machine tabulators. However, these requirements are not overly burdensome. For precinct ballots, “the county officer in charge of elections shall conduct a hand count” of “[a]t least two percent of the precincts in that county.” A.R.S. § 16-602(B) & (B)(1). The rest of the procedures laid out in subsection B apply to the mandate only. They do not apply if a county elects to audit more than “at least two percent of the precincts.” It really is as simple and plain as that. Nothing in subsection B prohibits counties from going beyond “two percent.” Instead, the “at least” language means that counties are free to go above and beyond these minimum requirements, which after all are simply intended to make sure that counties perform *at least* a minimal audit of tabulated results. This is because counties have complete discretion to “canvass” and “certify” their elections under A.R.S. § 11-251 and A.R.S. § 16-622(A).

If a county follows these minimum requirements, then it proceeds along the A.R.S. § 16-602(B) statutory path, including the requirement to *randomly* select the precincts it audits. If it chooses to do a 100% hand audit, however, then it need not follow the § 16-602(B) path because it will satisfy the statute’s minimum requirements by default. For this reason, Plaintiffs’ criticism of Defendants’ “speculation” concerning the “at random” requirement (though Defendants’ interpretation makes sense if counties conduct only a minimal audit) and their criticism of Defendants’ “99%” example are irrelevant. See [Appellees’ Br.](#) at 15-17.

Plaintiffs also irrelevantly comment that Defendants’ “argument also presumes—without any basis—that hand count audits are likely to change the outcome of an election.” [Id.](#) at 17. Whether full hand count audits are likely to change the outcome of an election has no bearing on whether counties are permitted to conduct them. A.R.S. § 16-602(B) plainly permits counties to do so. This is why the statute uses the words “at least.”

B. Arizona law permits election officials to conduct a hand count audit of 100% of *early* ballots.

A.R.S. § 16-602(F) similarly provides a minimum set of requirements for counties that choose to use machine tabulators to tally *early* ballots. For the same reasons discussed in the preceding section, counties may elect to go above and beyond these requirements. This is precisely why the EPM states that “Counties

may elect to audit a higher number of ballots at their discretion.” 2019 EPM at 215. If counties do not conduct a full audit, they must follow the A.R.S. § 16-602(F) path, which—like its counterpart mandating the procedure for election-day ballots—is not intended to be overly burdensome.

Although the trial court and Plaintiffs have offered a different interpretation of A.R.S. § 16-602(B) & (F) and the EPM, it is only because they have failed to read these provisions *in pari materia* with all the other statutes in Title 16 and 11, which plainly grant counties discretion in how to canvass and certify their elections.

“Statutes that are in *pari materia*—those of the same subject or general purpose—should be read together and harmonized when possible.” *David C. v. Alexis S.*, 240 Ariz. 53, 55¶ 9 (2016). “Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire corpus juris. . . . Hence laws dealing with the same subject—being in *pari materia* . . . [,] should if possible be interpreted harmoniously.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). Thus, when statutes relate to the same subject matter, courts read them together and consider not only “the literal meaning of the wording” but also “the whole system of related statutes.” *Farley*, 106 Ariz. at 122. They do so “even where the

statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes.” *Id.* And “when two statutes appear to conflict, whenever possible, [courts] adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.” *UNUM Life Ins. Co. of Am.*, 200 Ariz. at 333. *See also Planned Parenthood Ariz., Inc.*, 524 P.3d at 266.

Here, the statutes at issue do not necessarily appear to conflict with one another. Rather, the trial court and Plaintiffs have simply failed to consider that A.R.S. § 16-602 and the EPM are part of a larger statutory scheme and that each provision within that scheme—all of them dealing with Arizona counties’ authority and discretion to canvass and certify elections—must be harmonized and reconciled. The only way to do that here is to interpret A.R.S. § 16-602 as establishing minimum requirements for hand count audits for counties that use tabulators rather than a prohibition on their power to canvass and certify election as they see fit. Defendants respectfully request that the Court declare it so.

CONCLUSION

For the foregoing reasons, this Court should not dismiss this appeal as moot. Instead, it should reach the merits of this case, REVERSE the trial court’s ruling, and DECLARE that it is within the County’s authority to conduct a 100% hand count

audit of elections. Alternatively, this Court should REVERSE the decision of the trial court at least as to a 100% hand count of election-day ballots.

RESPECTFULLY SUBMITTED April 17, 2023.

The Davillier Law Group, LLC

By /s/ Veronica Lucero

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By /s/ Bryan Blehm (with permission)

Bryan Blehm

Attorney for the Board of Supervisors Appellants

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Exhibit A

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Election Summary Results Report
2022 General Election
November 8, 2022

RECOUNT RESULTS

Pinal County

Statistics

	TOTAL	Election Day	Early Voting	Provisional
Election Day Precincts Reporting	109 of 109	109	0	109
Precincts Complete	109 of 109	109	0	109
Precincts Partially Reported	0 of 109	0	0	0
Absentee/ Early Precincts Reporting	109 of 109	0	109	0
Registered Voters - Total	282,572			
Ballots Cast - Total	145,987	36,069	109,324	594
Ballots Cast - Blank	2,122	384	1,723	15
Voter Turnout - Total	51.66%			

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Election Summary Results Report
2022 General Election
November 8, 2022

RECOUNT RESULTS

Pinal County

Attorney General

Vote For 1

	TOTAL	Election Day	Early Voting	Provisional
REP HAMADEH, ABRAHAM "ABE"	83,116	26,936	55,759	421
DEM MAYES, KRIS	59,068	8,430	50,487	151
Write-In Totals	188	43	145	0

Superintendent of Public Instruction

Vote For 1

	TOTAL	Election Day	Early Voting	Provisional
REP HORNE, TOM	83,533	27,008	56,101	424
DEM HOFFMAN, KATHY	58,919	8,367	50,402	150
Write-In Totals	169	43	126	0

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PINAL COUNTY

RECOUNT VARIANCE REPORT RECOUNT / GENERAL ELECTION / NOVEMBER 8, 2022

Pursuant to A.R.S. §§ 16-661 through 16-664, Pinal County has completed the reconciliation for the automatic recount of the November 8, 2022 General Election. Below is a summary of the variances found between Pinal County's canvassed returns and recount returns.

Ballot Variance

- Election Day Ballots: There was a net variance of 442 ballots that were tabulated in the recount that were not tabulated on election night.
- Early Voting Ballots: There was a net variance of 29 ballots between early ballots tabulated for the General and those tabulated in the recount.
- Provisional Ballots: There was a variance of -24 ballots that were counted in the General as provisional ballots that were inadvertently counted as early ballots in the recount.
- The recount identified 63 ballots with unclear marks that were not subject to adjudication on election night but were duplicated in the recount.

The net of these ballot variances are shown below for the two races subject to the recount.

Arizona Attorney General	<u>General</u>	<u>Recount</u>	<u>Variance</u>
Hamadeh, Abraham "Abe"	82,724	83,116	392
Mayes, Kris	58,953	59,068	115
Total Net Variance = 507			

Superintendent of Public Instruction

Horne, Tom	83,148	83,533	385
Hoffman, Kathy	58,802	58,919	117
Total Net Variance = 502			

Geraldine Roll
Pinal County Elections Director

MEMORANDUM

TO: Kori Lorick
Elections Director
Arizona Secretary of State

FROM: Geraldine Roll
Pinal County Elections Director

DATE: December 21, 2022

SUBJECT: RECOUNT DISCREPANCY REPORT

In response to the mandated recount of the Attorney General and the Superintendent of Public Instruction races, Pinal County has completed its recount and supplements the results submitted to the Secretary of State (SOS) with this discrepancy report. The purpose of this report is to assist in explaining differences in the results for the two races submitted to the SOS in the County's November 21, 2022, canvass and the results of this recount. For ease of explanation, this report breaks out the differences in (1) ballots tallied on election day, and (2) early ballots run prior to and after election (early ballots).

The canvass reported 35,627 election day ballots. Recounted election day ballots total 36,069. The difference is 442 additional ballots tallied on recount. The canvass reported early ballots to be 109,341. Recounted early ballots total 109,324. The difference in early votes tallied in the recount is -17. This is a .3% variance from the canvassed results and reflects 99.7% consistency rate.

Additionally, there was a difference of 38 ballots tallied between the canvassed amount of 632 provisional votes and the recounted 594 provisional ballots. This difference is explained as follows: There were 15 Fed only ballots that were originally part of the initial canvass but not counted in the recount because the AG or Superintendent's race were not included on the Fed only ballots. There were 21 write-ins which were tabulated with the early voting write-ins. These write-ins were inadvertently put into one of the boxes labeled as write-ins in the vault. This was not discovered until we had recounted the provisional ballots and were commencing our reconciliation. We view this as a human error because all involved were under pressure to rapidly process the provisional ballots and failed to take additional steps to ensure they were properly segregated from other

ballots. There is a 2 vote difference which we have not been able to reconcile as of yet.

Turning to the count of early ballots submitted, the difference between the canvassed amount of 109,341 early votes tallied and the recounted early votes tallied of 109,324 is -17. Our reconciliation of this discrepancy revealed there were 38 early Fed only ballots that were not counted in the recount. The difference is the 21 provisional write-ins that were erroneously tabulated in the early voting recount tabulation process.

Next, in analyzing the election day ballots that were recounted, and referring to the third tab in the attached Excel workbook entitled "Recount Results," you will find that upon conducting the recount there are 10 precincts that contained a difference of over 5 votes and several precincts that returned with differences over 50. The vote difference in these 10 precincts is 424. One factor underlying this disparity is that the canvass was filed prior to taking an adequate opportunity to investigate any possible anomalies we could discern from polling place returns.

For example, for several hours on election day some poll pads were not scanning 60/drivers licenses. A software configuration work around was created and synched to the pads to correct the issue. Although poll workers were trained to use the paper poll rosters, poll workers came up with varying ways to handle the issue. Shortly after the election, we were contacted by a voter who explained how his license wouldn't scan on the poll pad and he was given a little piece of paper which he took to the judge's table and was given a ballot. It took a few days to gather information and speak with the polling place inspector to discover that approximately 20 voters in this precinct had not been documented in any fashion such as checking them in or signing the paper roster. If their license would not scan, the marshal would call voter registration who confirmed that they were eligible voters in AVID and had not voted. They were then given a ballot. These voters were never checked in on the poll pads and their voting history was not updated in AVID. Reviewing the materials returned from the polls, it seems likely that this was the experience for possibly a hundred or more voters (an estimate).

After several weeks of investigation, KnowInk and Russ Smith informed us that when we downloaded AVID information to the poll pads we neglected to check the box to include drivers license information. Our solution going forward is to ensure that the poll pads do not leave Elections unless and until they are all checked to ensure they are scanning. We are going to ask that voter registration use a poll pad instead of AVID when checking a voter to foster coordination in getting a voter

checked in. We are going to better train and refine a uniform method for all poll workers to follow for these situations. (This was clearly a human error and processes are being updated to handle this in the future.)

Learning of the poll pad check-in problem, we began to research this concern and started with Precinct 01 which showed a difference between poll pad check-ins and number of votes counted. Unfortunately, before the analysis was completed, the canvass was downloaded and filed. While analyzing this concern, we ultimately decided to open up the locked Precinct 01 ballot box. Upon examination, it appeared to contain more than 422 ballot cards which was indicated as number of cards tabulated on election day. Therefore, we physically hand counted the number of ballot cards in that box. Our hand count revealed 600 ballot cards- not 422. We selected 3 additional precincts with similar disparities (Precinct 26, 109, 15) and physically counted the number of ballots they contained. All 3 had more ballots than were reported on election day.

We have ruled out that additional ballots were somehow added to the locked ballot boxes after they were tabulated on election day and locked in the vault by reviewing video. Since all 4 precincts had been counted on Machine B, there was a concern of a possible machine inconsistency when tabulating on election day. We notified our County Attorney and the vendor, ES&S. ES&S came out, checked the machine and ran ballots through the machine. They were unable to get Machine B to repeat the inconsistencies we experienced on election night. Instead, when batches of ballots were run again by EE&S representatives no errors were evident. (It should also be noted that all three of Pinal County's tabulation machines passed all L&A testing pre-election and post election and for the recount)

After this analysis, we conclude that human error was the cause of our election day miscounts. Machine B was manned by a bipartisan team composed of an individual who had used the machine in previous Pinal elections and was the most experienced of the tabulating team. We reviewed video of this team tabulating the questionable precincts, but could not see where they did not put ballots on the machine to be counted.

There were multiple paper jams that were observed on election day. None of the tabulating teams alerted any election employee about any issues or questions. However, we believe that when a machine jammed or a jam led to an error message, it may not have been interpreted correctly. Thus, we believe this led to ballots the operator thought were counted were not actually counted and needed to

be returned from the output trays to the input tray to be rescanned. Again, human error.

Election night ballots were being tabulated with precinct selection mode on. For that reason, we have ruled out that ballots were mistakenly placed in the wrong pile and tabulated with another precinct. Had that occurred, they would have been out stacked and someone would have noticed. However, no such incident was ever brought to our attention. Likewise we have determined during the recount, which we conducted using precinct selection mode on, as was done during election day tabulation, no ballots were co-mingled with ballots from other precincts.

Finally, 4 of the 10 precincts returning with discrepancy of 5 or more votes were co-located precincts. With precinct selection mode turned on, the machine operator had to select one of the precincts and all ballots were scanned with the precinct not selected being out stacked. These out stacked ballots had to be rescanned or manually sorted through to discern why the machine did not process the ballot. We believe the tabulating team did not properly perform this function resulting in ballots not being scanned. For example, in co-located precinct 68/95, the election day canvass in Precinct 68 was 557 votes. The recount was 640 votes. The election day canvass in Precinct 95 was 417 votes. The recount was 417 votes. It seems clear that a stack of ballots from Precinct 68 was not scanned. Again, human error.

After performing reconciliation of ballots cast, accounting for Fed only and provisional ballots, reviewing multiple hours of video footage, speaking with a number of inspectors and marshals, physically hand counting the number of ballots in a ballot box and reconciling them with the machine results, and consulting with ES&S, we believe our recount to be accurate and the discrepancies between the recount and the canvass were the results of human error. We experienced an error rate of .3% with a consistency rate of 99.7%.

SUPPLEMENT- (DECEMBER 29, 2022)

Re: DECEMBER 21, 2022 RECOUNT VARIANCE REPORT MEMO

The Memorandum sent to the Secretary of State on December 21, 2022, had to be submitted under a deadline. This supplement explains what continued research and investigation produced after that date.

The recount identified 63 ballots that had been processed on Election Day with unclear marks. These ballots were not subject to adjudication on Election Day. On recount and to be consistent with Early Ballot tabulation procedures, these ballots were sent to the top bin of the machines for possible adjudication. These ballots were marked with either a check mark, an "x" or a slash through the chosen candidates. The duplication board discerned that voter intent could be determined, and duplicated these ballots which were then tabulated. The result was that even in precincts where there were no differences in Election Day ballots cast and recount ballots cast, candidates did pick up votes.

We have concluded that when the machines were loaded for Election Day, the sort setting automatically reset to default. The default sort setting does not sort unclear marks. Election staff did not check the sort setting. Ballots with unclear marks were not sorted out for adjudication on Election Day. When the recount election was loaded onto the machines, the sort settings were checked and set to sort unclear marks. Thus, these 63 ballots were sorted out for adjudication during the recount. The failure to properly set the machines on Election Day was due to human error.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Reply Brief complies with ARCAP 14(a)(2). The brief is double-spaced and uses a proportionally spaced typeface of Times New Roman in 14-point font. It contains less than 7,000 words.

By: /s/ Veronica Lucero

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing Appellants' Reply Brief was e-filed with the Clerk of the Arizona Court of Appeals, Division Two, via the Court's e-filing system on April 17, 2023, and that a copy was served via email on this same date to the following:

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