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## **NOTICE OF CLAIM TO COCHISE COUNTY PURSUANT TO A.R.S. § 12-821.01**

**By: Claimant Paul Sivertsen**

**Dated: November 30, 2022**

Claimant Paul Sivertsen files this notice of claim pursuant to A.R.S. § 12-821.01 against Cochise County, a body politic. Pursuant to Arizona Rule of Civil Procedure 4.1(h), Claimant files this notice of claim on the Clerk of the Cochise County Board of Supervisors. Pursuant to *City of Phoenix v. Fields*, 219 Ariz. 568 (2009), Mr. Sivertsen files this notice of claim with the intention of pursuing a putative class action in the event litigation ensues. At the bottom of this notice of claim, Claimant provides an amount for which this claim may be settled if the dispute is resolved prior to litigation and class certification by a court of competent jurisdiction.

### **Background**

Paul M. Sivertsen (hereafter “Sivertsen”) is a military veteran, having served his country in the Vietnam War. He is a Sierra Vista resident, is registered to vote in Cochise County, and is a “qualified elector” as that term is used in A.R.S. § 16-121. During the November 2022 elections, Mr. Sivertsen was one of approximately 47,000 Cochise County residents who cast a ballot.

There is a distinct risk that Sivertsen's vote will not count. Yesterday was the last day for counties to canvass (also referred to as "certify") the election results. The Cochise County Board of Supervisors refused to do so. Indeed, the Board refused to do so despite the recommendations of its own staff. The Board does not have discretion to refuse to canvass the results. Canvassing election results by a date certain is the Board's mandatory legal duty under Arizona law. *See* A.R.S. § 16-642. This is what is considered a "ministerial" duty. A ceremonial duty. The Arizona Supreme Court has called it a "plain duty." *Hunt v. Campbell*, 19 Ariz. 254, 279 (1917). The Arizona Elections Procedures Manual calls it a "non-discretionary duty." The canvassing of elections is an age-old responsibility in Arizona, dating back to at least 1886 when Arizona was a territory. *See Territory v. Bd. of Sup'rs of Mohave Cnty.*, 2 Ariz. 248, 250, 12 P. 730, 731 (1887).

The Cochise County Board of Supervisors has unequivocally and deliberately refused to perform this mandatory duty. On November 18, 2022, the Board held a special meeting to discuss the certification of the election. During that meeting, the County's own Elections Director told the Board: "I believe this election was conducted within the legal requirements of all state and federal laws and the results should be certified." The Board instead voted to postpone the decision. On November 28, 2022, the Board again voted not to certify. November 28th was the state deadline.

The County's failure to canvass the election results is not academic. It has real-world consequences to the tens of thousands of Cochise County voters (of all

political persuasions) who cast a vote in the November 2022 elections. State Elections Director Kori Lorick put it plainly in a letter to the Board last week: “If the Board still has not certified by the state canvass deadline, the state canvass will proceed regardless, as is required under Arizona’s law, and your refusal to certify will only serve to disenfranchise Cochise County voters.” In Mohave County earlier this month, Deputy County Attorney Jeff Haws explained that the county’s Board of Supervisors that votes would not be included in the statewide totals if the Board chose not to perform their ceremonial duty. Under “protest,” the board members voted to canvass the results.

Even if the Board were to canvass the election results in the coming days, there is still irretrievable harm caused to Mr. Sivertsen and thousands of others. This appears to be the first time in Arizona’s 110-year history that a county board has failed to conduct the canvass by the statutory deadline. In this instance, Cochise’s breach is likely to leave the Secretary of State with no choice but to proceed with her statutory tasks in the absence of Cochise’s vote tallies. Even if Cochise County were to certify its election results in the coming days, the Secretary of State might be forced to proceed with her statewide duties without the benefit of Cochise’s vote totals. Cochise’s breach presents the Secretary of State with the Hobson’s choice of either: a) completing all of her tasks on time but without Cochise’s numbers, or b) completing her tasks with Cochise’s canvassed results but in breach of her own statutory deadline. Indeed, several legal commentators have suggested its already too late and that Cochise’s 70,000+ voters are already

disenfranchised. The mere thought of not having his vote counted has already caused severe emotional anguish to Mr. Sivertsen and many others.

**Violation of Article II, Section 21 of the Arizona Constitution (Free and Equal Clause)**

The Arizona Constitution states: “All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” This provision, commonly referred to as the “free and equal” clause, is interpreted to mean that “each vote is given the same weight as every other ballot.” *Chavez v. Brewer*, 222 Ariz. 309, 319 (Ct. App. 2009); *see also Yazzie v. Hobbs*, 2020 WL 5834757, at \*5 (D. Ariz. Sept. 25, 2020), *aff’d*, 977 F.3d 964 (9th Cir. 2020) (commenting that Arizona courts have determined the clause is “implicated when votes are not properly counted”).

This is precisely what occurred here. Although Mr. Sivertsen’s votes were included in a tally that is publicly known, his vote will not be included in statewide totals. Mr. Sivertsen’s vote, quite literally, will not count. In this sense, Mr. Sivertsen’s vote is not given the same weight as a vote cast in the same election by a qualified elector residing in any of the other 14 counties. His vote will be weighted as zero when it arrives (or, more properly, doesn’t arrive) to the statewide canvass. Mr. Sivertsen is the victim of geography: he has the bad fortune to have cast his lawful vote in a county where the Board of Supervisors acted unlawfully.

Mr. Sivertsen asserts that Arizona law provides for an implied cause of action directly under Article II of the Arizona Constitution. Article II is the constitutional section providing for individual rights. At least 10 other states have found there to exist an implied private cause of action for certain individual rights codified in the state constitution. *See, e.g., Hutchison v. City of Huntington*, 479 S.E.2d 649, 660 (W. Va. 1996); *Shields v. Gerhart*, 658 A.2d 924, 928–30 (Vt. 1995); *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 413 S.E.2d 276, 289–90 (N.C. 1992). Notably, this includes several western states, whose state constitutions provided a model for the drafters of Arizona’s 1910 document. *See, e.g., Dorwart v. Caraway*, 58 P.3d 128, 137 (Mont. 2002); *Spackman ex rel. Spackman v. Bd. of Educ.*, 16 P.3d 533, 538 (Utah 2000); *Payne v. Kerns*, 467 P.3d 659, 665–66 (2020).

Arizona appellate courts have addressed the question on only one occasion, and the procedural history of that case strongly suggests that a private right of action exists directly under the Arizona Constitution. In *Fred Nackard Land Co. v. Flagstaff*, the Arizona Court of Appeals expressly declined to reach the question, which it acknowledged to be a matter of first impression. *Fred Nackard Land Co. v. City of Flagstaff*, 225 Ariz. 338, 350 (Ct. App. 2010), *review denied and ordered depublished*, 2011 WL 2028518 (Ariz. May 24, 2011). The Arizona Supreme Court subsequently depublished that decision. An opinion depublished by the Arizona Supreme Court no longer exists as precedent. It demonstrates that there remains an open question of law. *See*

generally Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 Ariz. St. L.J. 175 (2000). Furthermore, "it is perfectly clear that the absence of enabling legislation cannot deprive [a] plaintiff of his constitutional right" to seek compensation for a wilful violation of a provision of Article II of the Arizona Constitution. This is because these provisions "were not enacted to protect in any way the sovereign state, but were specifically enacted to protect and preserve the individual rights of the subjects of the sovereign." *Mohave Cnty. v. Chamberlin*, 78 Ariz. 422, 430, 281 P.2d 128, 133 (1955). Consequently, "the framers of the [state] Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny." *Id.*

### **Monetary Demand**

Claimant is willing to resolve the above-described state-law claims and any related federal-law claims for **\$25,000 (twenty-five thousand dollars)**, inclusive of attorneys' fees and costs. Despite Arizona state law's general prohibition on punitive damages to public entities, A.R.S. § 12-821.04, Claimant is prepared to argue that this provision, being statutory in nature and enacted a full 72 years after the Constitution, is invalid when a plaintiff seeks monetary damages for a state constitutional injury of the egregiousness found here.

I look forward to hearing from you about this matter. Please contact me by email if you wish to resolve this matter.

/s Paul Gattone

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