Josh Barnett
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Plaintiff (Pro Per) (with *pro bono* assistance of counsel)

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

Josh Barnett,	**) Case No. CV2022-053785**
	)
Plaintiff,	**) EMERGENCY MOTION**
	) TO SET ASIDE THE
	) DISMISSAL FOR FRAUD
v.	**) ON THE COURT AS PER**
	) RULE 60(d)(3) OR TO
KATIE HOBBS, in her official capacity as Secretary of State of Arizona, JACK SELLERS, THOMAS GALVIN, BILL GATES, CLINT HICKMAN, AND STEVE GALLARDO in their respective official capacities as members of the Maricopa County Board of Supervisors,	**) REVERSE THE ORDER OF**
	) DISMISSAL FOR
	) MISREPRESENTATION
	) OR FRAUD OR JUDICIAL
	) MISTAKE AS PER 60(b);
	) AND A TEMPORARY
	) RESTRAINING ORDER OR
Defendants	**) PRELIMINARY**
	) INJUNCTION; AND AN
_____	**) EMERGENCY STAY**

Under Ariz. R. Civ. P. 60(b)(1), 60(b)(3), 60(d)(3), 65(a)(b), 7.1(e); and ARS 12-1801, Plaintiff, Josh Barnett, hereby moves this Court for the issuance of:

1. An Order setting aside the Court's Order of December 2, 2022, granting Defendant's Oral Motion to Dismiss Plaintiff's Complaint — which Order dismissed "this matter" in "its entirety" — due to fraud on the Court as per Rule 60(d)(3); and/or an Order granting relief from the same December 2d Order of the Court — due to fraud and/or misrepresentation as per Rule 60(b)(3) — by reversing the dismissal of the entire matter therein; and/or an Order granting relief from the same December 2d Order of the Court — due to judicial mistake as per Rule 60(b)(1) — by reversing the dismissal of the entire matter therein; and, as per all or any of the above Rules, or any other authority the Court may exercise, an Order reinstating the entire matter, inclusive of Plaintiff's Complaint For Declaratory Judgment and Preliminary Injunction, and Plaintiff's original Emergency

Motion For a Temporary Restraining Order ("TRO") Or Preliminary Injunction.

2. An Order Granting Plaintiff's Motion for a new Temporary Restraining Order ("TRO") prohibiting Defendant, Katie Hobbs, in her official capacity as Secretary of State of Arizona, from conducting the statewide canvass on, before, or after December 5, 2022 as per the Arizona Revised Statutes ("A.R.S."); and/or from declaring winners in the statewide races for Governor; Secretary of State; Attorney General; United States Senator; and any other races the Court may find — in the interests of justice — require similar injunctive relief; and/or awarding Certificates of Election thereto, on, before, or after December 5, 2022, as per A.R.S. 16-650.

3. An Emergency Stay of the official Canvass of the November 8, 2022 General Election in Maricopa County — executed by Defendants; Jack Sellers, Thomas Galvin, Bill Gates, Clint Hickman, and Bill Gallardo, in their respective official capacities as members of the Maricopa County Board of Supervisors — as to the statewide races for Governor; Secretary of State; Attorney General; and any other races the Court may, in the interests of justice, find should also not be canvassed; and/or an Emergency Stay of the Certification thereof.

4. An Emergency Stay of; the official Canvass of the November 8, 2022, General Election in the State of Arizona; and/or any Certifications thereof; and/or any Declaration of winners thereof as per A.R.S. 16-650; and/or any Certificates of Election awarded thereto, as per A.R.S. 16-650, executed by Defendant, Katie Hobbs, in her official capacity as Secretary of State of Arizona; and any other certifications, declarations, or certificates of election executed by Defendant, Katie Hobbs, in her official capacity as Secretary of State of Arizona, or executed by anyone on her behalf — as to the statewide races for Governor; Secretary of State; Attorney General; and any other races the Court may, in the interests of justice, find deserving of such relief.

5. An Order to Set Hearing on Preliminary Injunction providing Defendants, Maricopa County Board of Supervisors, and Defendant, Katie Hobbs, in her official capacity as Secretary of State of Arizona, with notice of the date and time of the hearing on Plaintiff's Application for a Preliminary Injunction as to why a preliminary injunction should not be issued in the same force and effect as the TRO and the Stay(s).

This Motion is supported by the following Memorandum of Points and Authorities and the Complaint for Declaratory and Injunctive Relief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Plaintiff relies on the General Allegations in the original Complaint for Declaratory and Injunctive Relief, and incorporates by reference the allegations, laws, precedents, and factual background therein.

Additionally, Plaintiff relies on the Court's digital record of the Hearing at 11:30 a.m. on December 2, 2022; the Court's digital record of the Hearing at 4:00 p.m. on December 2, 2022; Defendants' Briefs ordered by this Court due at 3:30 p.m. on December 2, 2022, concerning the 4:00 p.m. Hearing; Plaintiff's Pre-Hearing Memorandum (styled as such, rather than as "a brief", out of respect for the Court due to the Plaintiff not including a table of contents, and table of authorities).

Plaintiff also relies on a previous Motion to Dismiss (see Exhibit 1, attached) — entered in a previous case decided by this Court, *Arizona Republican Party v. Adrian Fontes, Et Al,* CV2020014553, (decided by the Honorable John R. Hannah, Jr., on November 19, 2020; Ruling Opinion issued on December 21, 2022) (See Exhibit 2, attached) — which was submitted to this Court by Attorney D. Andrew Gaona (See Exhibit 1, pg. 10) on November 16, 2020, who was *then*, and is acting *now*, as Counsel for Defendant Katie Hobbs, in her official capacity as Arizona Secretary of State.

Furthermore, as to the aforementioned previous case, *Arizona Republican Party v. Adrian Fontes, Et Al,* and as to the aforementioned previous Motion to Dismiss, Plaintiff informs the Court that Attorney Joseph La Rue — who is currently representing, in the present matter, Defendants; Jack Sellers, Thomas Galvin, Bill Gates, Clint Hickman, and Bill Gallardo, in their respective official capacities as members of the Maricopa County Board of Supervisors — also represented the Maricopa County Board of Supervisors in the previous case and motion, consisting then of Clint Hickman, Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, and he was served then with the aforementioned previous Motion to Dismiss of November 16, 2022, submitted to this Court by Counsel D. Andrew Gaona.

a.) The Return Hearing at 11:30 a.m., on Dec. 2, 2022

At the initial Return hearing on December 2, 2022, the Court considered whether any of the relief requested by Plaintiff, injunctive or otherwise, was available to him at that time — as to the issue of whether his requests for injunctive relief and the Complaint were premature — in light of A.R.S. 16-672, which regulates election "contests", and requires that an election contest be brought after a winner has been declared. This discussion followed an oral Motion to Dismiss by Defendant Hobbs' attorney, D. Andrew Gaona, who contended that — despite the Plaintiff's complaint being styled as a Declaratory Judgment action — it was, in fact, an election contest, and not a Declaratory Judgment action. Plaintiff denied the contention, citing to the text of A.R.S. 12-1831, Arizona's Uniform Declaratory Judgment Act ("UDJA").

During the discussion of this issue, the Court offered Plaintiff the option of preparing a paper briefing to be followed by another hearing on this issue. Plaintiff did accept the Court's offer to brief the issue late in the Hearing, but prior to that acceptance, Counsel D. Andrew Gaona addressed the Court as follows:

"And a court is not, cannot grant declaratory relief, or even injunctive relief under the traditional rubric of injunctive relief under the guise of an election contest. That is simply not authorized."

The plaintiff responded by invoking A.R.S. 16-650, responding that:

"I wholly disagree with him, and his outlook. Obviously, I know what he's going to say, ah, but according to 16 650, it allows the Court to enjoin before a declaration of a winner. And, you know, I'd like to take the briefing option…"

"And, 650 states the…Secretary of State declare the winners of statewide elections; award certificates of election, ah, thereto, quote, unless enjoined from so doing by an order of the court. So this makes it perfectly clear that the injunctive relief is foreseen by the State regardless of A.R.S. 16-672 A, which requires that a winner be declared before a contest may be brought. But since I filed a complaint for a Declaratory Judgment

rather than a contest, that 16-672 A, is not an obstacle to, ah, injunctive relief."

The Court then ordered simultaneous briefing for 3:30 p.m., later that afternoon, with a one hour oral argument to follow at 4:00 p.m.

b.) The Briefs In Support Of Oral Argument Submitted by 3:30 p.m., Dec. 2, 2022

Plaintiff submitted his brief (styled as a *Pre-Hearing Memorandum*); Counsel D. Andrew Gaona submitted a brief on behalf of Defendant Hobbs, along with Sambo (Bo) Dul, Attorneys for Defendant Arizona Secretary of State Katie Hobbs; and Karen J. Hartman-Tellez, who appeared as Counsel for the Maricopa County Board of Supervisors at the Hearings, submitted a brief, along with Joseph La Rue and Rosa Aguilar as Attorneys for the Maricopa County Defendants.

Plaintiff's Brief/Memorandum, like his argument at the Return Hearing, relied heavily on A.R.S. 16-650, in support of his contention that the UDJA and Title 16 (Arizona's Election Code) were in harmony, in that 16-650 unambiguously anticipates, and states, that the Secretary shall award Certificates of Election "unless enjoined" from doing so by a court. The word "unless" could not be more obvious as a temporal indicator that the Secretary may be *enjoined* from awarding such Certificates of Election, prior to awarding such Certificates.

Whereas the Defendant Secretary's Counsel, D. Andrew Gaona, sternly informed the Court that this interpretation was wrong. And Counsel Gaona also told the Court that it had no jurisdiction to hold otherwise, both orally, at the Return Hearing, and in his brief on behalf of Defendant Hobbs, wherein he stated:

"A.R.S. § 16-650's inclusion of the phrase 'unless enjoined' is obviously meant to be read in concert with the election contest statutes and an order arising therefrom."

We note that throughout this matter, Counsel Gaona has maintained that Plaintiff has no right to injunctive relief of any kind, and no right to any relief under the UDJA, *prior to* instituting an election contest as per A.R.S. 16-672, consistently maintaining throughout that Plaintiff has no right to challenge the election under any statute, or precedent, until

the Secretary has canvassed the statewide returns, and declared winners thereof. Counsel Gaona insisted to your Honor multiple times, orally and in writing — that *canvassing* and *declaring* winners were conditions precedent — to Plaintiff having legal capacity to request injunctive relief, and also for the Court to have *any* jurisdiction whatsoever to grant injunctive relief. Counsel Gaona further stressed that the Court that had absolutely no jurisdiction to maintain Plaintiff's UDJA claim, or to grant injunctive relief at all, until Defendant Secretary of State Katie Hobbs had canvassed the election and Declared winners thereof.

But Counsel D. Andrew Gaona failed to inform this Court, your Honor, or Plaintiff, that he took the exact opposite position in defense of Defendant, Arizona Secretary of State Katie Hobbs, in his Motion To Dismiss of November 16, 2020, in the case, ***Arizona Republican Party v. Adrian Fontes (*****CV2020014553, 2020) .**

In that case, *in this Court*, before the Honorable John R. Hannah, Jr., in the written Motion to Dismiss signed by Counsel Gaona (and Attorneys Roopali H. Desai, and Kristen Yost; see Exhibit 1, pg. 10), Counsel Gaona argued that the Plaintiff there had no right to injunctive relief to delay the Maricopa County Board of Supervisors from canvassing the County Returns, stating:

"Because the Arizona legislature provided only one circumstance where the county canvass may be postponed, no such other circumstances may be read into the statute. For the same reason, **if the legislature had intended to allow for the canvass to be delayed by court order, it would've said so—as it did elsewhere in Title 16. See, e.g., A.R.S. § 16-650 (providing that the Secretary of State '*shall, unless enjoined from doing so by an order of court*, deliver' a certificate of election to each person elected** (emphasis added));" (See Exhibit 1, pg. 8.)(Bold emphasis added.)

This passage is *exactly opposite* of what Defendant Hobbs' Counsel, D. Andrew Gaona, successfully argued before this Court to convince your Honor to dismiss Plaintiff's entire case, and to deny all requested relief.

In arguing that "the plain terms of 16-642(C)" provide "only one circumstance where a county canvass may be postponed", Counsel Gaona relied directly on A.R.S 16-650 to show *exactly* where "the legislature" provided *specifically* for the Secretary's statewide "canvass to be delayed by court order" — "as it did elsewhere in Title 16. See A.R.S. §

16-650 (providing that the Secretary of State '*shall, unless enjoined from doing so by an order of court*, deliver' a certificate of election to each person elected." (See Exhibit 1, pg. 8.)

c.) The 4:00 p.m. Oral Argument on Dec. 2, 2022

At the hearing on this exact issue, at 4:00 p.m., on December 2, 2022, Counsel Gaona continued the deception before this Court; whether intentionally, or recklessly, Plaintiff hazards no guess, makes no accusations, and has no evidence. Regardless, as legal argument below will show, it makes no difference. Defendant Secretary of State Hobbs, by her Counsel, has taken the exact opposite position — ***on the record*** — in this very recent election case, and he failed to inform the Court, or the Plaintiff thereof. As such, Plaintiff is entitled to relief from the Order of Dismissal, whether the omission was intentional, or by a reckless disregard for the truth, or, as we will discuss below, even if by simple misrepresentation.

Additionally, Counsel for Defendant, Maricopa County Board of Supervisors, Joseph E. La Rue, was also served by Counsel Gaona with the November 16, 2020, Motion to Dismiss. (See Exhibit 1, pg. 10). Neither Mr. La Rue, the other two attorneys for Defendants, Maricopa County Board of Supervisors, in the present action — Karen J. Hartman-Tellez, or Rosa Aguilar — informed Plaintiff of this crucially relevant information either, and as far as Plaintiff is aware, none of the Defendants' attorneys have informed the Court.

Additionally, Defendants, Maricopa County Board of Supervisors, were aware, or should have been aware, of the November 16, 2020, Motion To Dismiss, that it supported Plaintiff's arguments, pleadings, and requests for relief; and that it countered their own arguments in the present case, which have shadowed closely throughout, the arguments of the Defendant Secretary of State as made by Counsel Gaona. Counsel Joseph La Rue took part in the November 16, 2020, Motion To Dismiss, and he received service thereof. (See Exhibit 1, pg. 10.)

d.) The Court's Order Dismissing The Matter In Its Entirety

Pg. 6 of the Court's Order dismissing the matter states:

"Plaintiff contended the phrase "unless enjoined" supports his request for injunctive relief. The statute, however, must be read and interpreted in its larger statutory scheme. The statute is contained in Title 16 of the Arizona Revised Statutes…Plaintiff must avail himself of the remedy provided to him by the Arizona Legislature: Title 16 of the Arizona Revised Statutes, Chapter 4…Therefore, based on the foregoing…This matter is

dismissed in its entirety, without prejudice."

Since Defendant Secretary of State Katie Hobbs' Counsel, D. Andrew Gaona (and associate Counsel), argued — as to the November 16, 2020, Motion To Dismiss, in *Arizona Republican Party v. Adrian Fontes* — supporting directly Plaintiff's bedrock legal anchor regarding 16-650, the Court is now made aware of prior precedent — in this Court — on this issue, indicating that "the legislature…intended to allow for the [Secretary's statewide] canvass to be delayed by court order, [and] it…said so…in Title 16…[at] A.R.S. § 16-650 (providing that the Secretary of State 'shall, *unless enjoined from doing so by an order of court*, deliver' a certificate of election to each person elected (emphasis added))," . *Arizona Republican Party v. Adrian Fontes,* CV2020014553 (2020) (see Exhibit 2, attached).

There are no legal obstacles to reading the UDJA, in harmony with Title 16. In fact, the law requires it. As such, the Order of Dismissal must be reversed, if not set aside.

II. LEGAL ARGUMENT

a.) Fraud On The Court as per Rule 60(d)(3):

While Rule 60(b) provides relief from an order for fraud, misrepresentation, or mistake; 60(d)(3) motions requires a higher burden — to show fraud on the court — which, if proven, can result in the order being set aside. (Plaintiff will address 60(b) motions below.) The requirements for 60(d)(3) motions are thus:

"Parties moving 'for relief under Rule 60(d)(3) . . . must show fraud on the court, rather than the lower showing required for relief [from fraud] under Rule 60(b(3).' United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1167 (9th Cir. 2017), cert denied, 138 S. Ct. 2675 (2018)…

"Rule 60(d)(3)'embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not [sic] perform in the usual manner its impartial task of adjudging cases .. . .' In re Levander, 180 F. 3d 1114, 1119 (9th Cir. 1999)(quoting In re Intermagnetics Am., Inc., 926 F.2d 912, 916 (9th Cir. 1991))…

"Thus, as one court put it, the elements for a fraud on the court perpetrated by an officer of the court are: (1) an officer of the court (2) perpetrated a fraud (3) that impaired the court's ability to perform its impartial task of adjudging cases. The officer of the court must have fraudulent intent, which connotes either knowledge, including reckless disregard, of falsity or intentional omission of material information. In re Michelson, 141 B.R. 715, 726 (Bankr. E.D. Cal. 1992)." *Zagorsky-Beaudoin v. Rhino Entm't Co.*, No. CV-18-03031-PHX-JAT (D. Ariz. Nov. 12, 2019)

Counsel Gaona's failure to inform the Court, and the Plaintiff, of the argument made on behalf of Defendants in the *Fontes* case exhibits a reckless disregard for truth, law, and precedent in this matter. Plaintiff sees no reason, or evidence to suggest any other explanation. Counsel Gaona argued directly opposite a legal truth he himself used to protect the same defendants in the present matter, which helped end Plaintiff's case, despite Plaintiff's proper reliance upon A.R.S. 16-650 to establish that the legislature foresaw potential controversies, where it would be prudent to allow the courts to enjoin the Secretary from awarding Certificates of Election. The statute is unambiguous on that point.

But also, as Counsel Gaona argued to victory in the *Fontes* case, the legislature intended A.R.S. 16-650 to enjoin every act in that section as to the Secretary of State's duty to canvass the election, declare winners, and award Certificates of Election. There is no temporal gap of substance between the Secretary's canvass, declaration of winners, or awarding of Certificates, as the current Election Procedures Manual — which has force of law in Arizona — mandates that all three actions happen on December 5th. And since the Secretary would be responsible for awarding herself the Certificate of Election, immediately after declaring herself the winner, there is no possible way any litigant could avail themselves of 16-650 enjoinment authority, when there is no temporal gap available to do so. A construction such as that would render the statute absurd.

b). Rule 60(b)(3) Motion for Fraud; or Misrepresentation

Whereas Rule 60(d)(3) fraud on the court actions allow the order or judgment involved to be set aside, Rule 60(b) motions allow relief from a final judgment, order or proceeding, on motion and just terms. 60(b)(3) actions require that:

"A party seeking relief under Rule 60 (b)(3) must prove fraud, misrepresentation, or other misconduct by clear and convincing evidence. See Casey v. Albertson's Inc.,362 F.3d 1254, 1260 (9th Cir. 2004)…Thus, 'the moving party must establish that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case.' In re M/V Peacock, 809 F.2d 1403, 1405-05 (9th Cir. 1987)." (See again, *Zagorsky-Beaudoin v. Rhino Entm't Co.*, No. CV-18-03031-PHX-JAT (D. Ariz. Nov. 12, 2019)

Plaintiff submits that the conduct complained of prevented him from fully and fairly presenting his case. There is no defense to the misrepresentation by Counsel Gaona discussed above. It was prejudicial, and it led to dismissal of plaintiffs matter in its entirety. Due to all of the above facts and arguments, the Order to Dismiss should be reversed.

c.) Rule 60(b)(1) Motion for Relief From Order of Dismissal Due To Mistake

In a Rule 60(b)(1) motion, a plaintiff must show that the…court committed a specific error. *Thompson v. Housing Authority of the City of Los Angeles, 782 F.2s 829, 832* (9th Cir. 1986). Plaintiff submits that the ruling was in error with regard to A.R.S 16-650, and in failing to harmonize the UDJA with Title 16, and the Plaintiff respectfully requests relief by reversal of the Order to Dismiss.

d). Injunctive Relief

Plaintiff is entitled to injunctive relief when the following conditions are established: "1) A strong likelihood that he will succeed at trial on the merits; 2) The possibility of

irreparable injury to him not remediable by damages if the requested relief is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the injunction." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

Injunctive relief is proper based on all of the foregoing facts, arguments and law, because:

1. Plaintiff Is Likely To Succeed On the Merits

Plaintiff is likely to succeed on the merits based upon all of the foregoing facts, arguments and law. Additionally, as to the original injunctive relief requested, Maricopa County officers failed to follow the law as enacted in Title 16 of the Arizona Revised Statutes, and Rules which have authority of law promulgated in the Election Procedures Manual issued by the Secretary of State. Because of their misconduct, the General Election on November 8th was a chaotic event, the likes of which Arizona has never seen before. The results of the November 8, 2022, General Election in Arizona are incurably uncertain due to maladministration of the officials who made, and executed it. Injunctive relief is necessary to prevent the broken election from being canvassed and certified by the Defendant Arizona Secretary of State, which would cloak it with a presumption of certainty which it should not receive, and does not deserve. Injunctive relief will allow Plaintiff's Complaint and Motions to be fairly considered, prior to any positive presumption adhering to the suspect election results.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006). There can be no confidence in an election so tainted with chaos. Chaos was the overarching result of maladministration of the Board of Supervisors and other election officers, and such malfeasance was admitted to by their Chairman, Bill Gates, as is more fully discussed, and cited in the Complaint. This admission — *by the official most statutorily responsible for running the election on Election Day* — is the most compelling reason why Plaintiff is likely to succeed on the merits. It is an admission of maladministration before the assembled world media, in an official press conference designed to give information about the catastrophic election to a very concerned public. The admission was candid,

and not under duress. The admission alone is enough to grant injunctive relief.

Voting is "a fundamental political right because [voting is] preservative of all rights". *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). There can be no preservation of rights if the process by which those rights are protected is chaos.

2. Plaintiff Will Suffer Irreparable Harm Unless Defendants Are Enjoined.

Because voting is the strongest thread that can preserve our Republican form of Government, Plaintiff will suffer irreparable harm if the chaotic election is canvassed and certified, and winners are declared by Defendant Secretary of State, in the statewide races for Governor; Secretary of State; Attorney General; and United States Senator; and any other races the Court finds may require relief, if not the entire election, because official misconduct has led to substantial Equal Protection violations, under the Arizona Constitution, and the United States Constitution, both *facial* — as to the manuals, and other official actions, written or spoken — and *as applied*; and if this election is certified, winners declared, and Certificates of Election are issued, the positive presumptions that adhere to the results, whether legal, political, or in the public mind, will cloak the results of this this election with a certainty it does not deserve, and which is not true at this time, and can never be true, at least not without further discovery under Court supervision.

Plaintiff notes that his Complaint for Declaratory Relief had multiple requests for relief, not just the first point regarding the UDJA as to a potential Title 16 election contest, but the Complaint also requested relief as to other Constitutional and statutory provisions of law, as well as a request for any other justice the Court might see fit to grant. Furthermore, Plaintiff has the option of an amended complaint. The full original pleading contains Equal Protection claims, to which a UDJA decrees apply, outside of any statutory election contest. No statute can nullify our federal Constitutional rights, or the Constitutional rights provided to Arizona voters in the state Constitution.

If Plaintiff doesn't succeed in this case, the descent into administrative tyranny will surely destroy the Republic for Plaintiff, his posterity, and the community he loves.

3. The Balance of Hardships Tips Sharply In Plaintiff's Favor.

Plaintiff incorporates all of the above, and adds that the hardships involved with delaying the Defendant Secretary's canvass or certification, or delaying the subsequent declaration of winners, and issuance of Certificates of Election are nothing compared to the hardships of allowing chaos to rule. And Plaintiff also stresses the legislature's unambiguous grant of injunctive relief in 16-650, for use prior to 16-672 election contests being brought, to show that any such hardship was anticipated and planned for.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enjoin Defendant Secretary of State Katie Hobbs from canvassing or certifying the elections for Governor; Secretary of State; Attorney General; and United States Senator, and from declaring winners thereof; and from issuing Certificates of Election thereto. And Plaintiff respectfully requests that the Court stay the canvass and certification, and declaration of winners in the aforementioned races, and any Certificates of Election Defendant Secretary Hobbs may have issued if this Motion is not granted in time to stop the same, or in any other races the Court may be convinced should receive similar relief; and with regard to the official canvass of Maricopa County, Plaintiff requests that the canvass and certification by Defendants, the Maricopa County Board of Supervisors be stayed immediately.

DATED this 4th day of December, 2022.

Respectfully Submitted,

Josh Barnett, Plaintiff

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EXHIBIT 1

Clerk of the Superior Court
*** Electronically Filed ***
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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ARIZONA REPUBLICAN PARTY, Plaintiff, v. ADRIAN FONTES, as Maricopa County Recorder; and the MARICOPA COUNTY BOARD OF SUPERVISORS, by and through CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES, AND STEVE GALLARDO, Defendants.	No. CV2020-014553 **ARIZONA SECRETARY OF STATE KATIE HOBB'S MOTION TO DISMISS** (Assigned to The Hon. John Hannah) (Oral Argument set for November 18, 2020 at 3:15 p.m.)

Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., Katie Hobbs, in her official capacity as Arizona Secretary of State ("Secretary"), moves to dismiss Plaintiff's Verified Complaint.

I. Introduction

The timing of this lawsuit says it all. Despite knowing about the hand count audit procedure for nearly a decade, taking no issue with the existing procedure in two other elections in 2020, and participating in the 2020 General Election hand count audit just last week, Plaintiff Arizona Republican Party ("Plaintiff") now claims that this procedure violates long-standing

Arizona law. As a threshold issue, Plaintiff lacks standing. But even if Plaintiff is found to have standing, Plaintiff could have—and should have—brought its claim challenging the legality of the hand count procedure years ago, or at the very least, before the county completed its hand count audit in this election.

And even if Plaintiff's Complaint were timely, it fails to state a claim upon which relief can be granted. Indeed, Plaintiff's claim rests on its erroneous interpretation of Arizona law. And beyond that, Plaintiff's Complaint fails to acknowledge that the County's hand count audit was conducted in full compliance with the Elections Procedures Manual ("EPM"), which has the force and effect of law. Because Plaintiff does not challenge the EPM, Plaintiff's mandamus request, if granted, would lead to the absurd result of requiring the County to violate the law.

Plaintiff's Complaint is procedurally and substantively flawed. Moreover, it is clear that Plaintiff's true intent is to delay and undermine the final certification of the General Election results. The Court should not countenance Plaintiff's delay and blatant attempts to disrupt the election. The Secretary respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

II. Argument

A. Plaintiff's Claim Fails as a Matter of Law.

To begin, Plaintiff's sole claim fails as a matter of law. *Swenson v. Cty. of Pinal*, 243 Ariz. 122, 125 ¶ 5 (App. 2017) (dismissal under Rule 12(b)(6) is appropriate if, even accepting the factual allegations as true, "as a matter of law . . . plaintiffs would not be entitled to relief[.]"). Plaintiff's entire complaint hinges on an argument that A.R.S. § 16-602(B) **prohibits** counties from conducting a hand count audit of "voting centers" instead of "precincts." That legal interpretation is wrong, and the Court can and should decide this issue without an evidentiary hearing.

In 2011, the Legislature amended A.R.S. § 16-411 to authorize "the use of voting centers in place of or in addition to specifically designated polling places." Recognizing that this could

impact how certain counties conduct the hand count audit, it also amended A.R.S. § 16-602(B) to require that the "hand count shall be conducted as prescribed by this section **and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452**." (Emphasis added). The Legislature couldn't have been clearer: it allowed counties to use voting centers instead of precincts, and it authorized the Secretary to adopt procedures in the EPM to address A.R.S. § 16-602's silence on hand count procedures for counties that use voting centers.

The Secretary and her predecessors did just that. In 2012 and 2014, Secretary Bennett drafted hand count batch selection procedures in the EPM that allowed "counties utilizing vote centers" to consider "a vote center . . . to be a precinct/polling location during the selection process." [*See* 2012 EPM and 2014 EPM, Excerpts attached as Exhibits A and B, respectively][1] In 2019, the Secretary adopted the current version of the EPM, which likewise allows "counties that utilize vote centers" to consider "each vote center . . . to be a precinct/polling location 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." [2019 EPM, Excerpt attached as Exhibit C] The Secretary adopted the 2019 EPM, with approval from the Attorney General and Governor, and it thus has the force and effect of law. *Arizona Pub. Integrity All. v. Fontes*, __ Ariz. __, 2020 WL 6495694, at *3 (Nov. 5, 2020) ("Once adopted, the EPM has the force of law[.]") (citing A.R.S. § 16-452(C)).[2]

In sum, Plaintiff is simply wrong when it argues that A.R.S. § 16-602(B) requires all counties to conduct a hand count audit using **only** precincts. To the contrary, the statute is silent on the procedures for counties that use voting centers and, critically, it expressly authorizes the

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[1] Governor Brewer and Attorney General Horne approved both the 2012 and 2014 EPM, and Secretary Bennett adopted them.

[2] The Attorney General agrees with the Secretary's interpretation of A.R.S. § 16-602. [*See* November 12, 2020 Letter from J. Kanefield to K. Fann and R. Bowers, attached as Exhibit D]

Secretary to fill that gap. The EPM thus adheres to Arizona statutes, Maricopa County properly complied with the EPM, and Plaintiff's claim fails as a matter of law.

B. Plaintiff lacks standing.

Although Plaintiff's claim fails as a matter of law, the Court may dispose of Plaintiff's Complaint without reaching the merits. Indeed, Plaintiff fails to allege a particularized injury and thus lacks standing. "[A]s a matter of sound judicial policy," Arizona courts "require[] persons seeking redress in the courts first to establish standing." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). While Arizona courts "are not constitutionally constrained to decline jurisdiction based on lack of standing," they will not consider the merits of a complaint that fails to allege a "particularized injury," absent "exceptional circumstances." *Id.* at 527 ¶ 31. No exceptional circumstances exist here.

Plaintiff doesn't even try to allege that the hand count audit procedure somehow injured Plaintiff. Instead, Plaintiff merely raises a "generalized grievance" that is insufficient to establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992).[3]

C. Plaintiff's Claim Is Barred by Laches.

Even if Plaintiff has standing and could state a claim, it is barred by laches. The equitable doctrine of laches "seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice," *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006), and Plaintiff checks off all the boxes. Plaintiff waited **years** to challenge this longstanding procedure, its delay is unreasonable, and that delay causes significant prejudice.

1. Plaintiff unreasonably delayed in challenging the relevant laws.

In deciding whether a plaintiff's delay is unreasonable, a court should consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the

[3] Arizona courts rely on federal standing jurisprudence as "instructive." *Bennett*, 206 Ariz. at 525 ¶ 22.

challenge, and whether the plaintiff exercised diligence[.]" *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). Plaintiff has known for nearly a decade that Arizona's hand count audit procedures allow sampling from voting centers, yet Plaintiff failed to challenge these procedures every step of the way.

First, as detailed above, the Legislature authorized voting centers when it amended A.R.S. § 16-411 in **2011**. In the same bill, it remained silent on the hand count procedure for counties that use voting centers, and instead authorized the Secretary to adopt hand count procedures in the EPM. A.R.S. § 16-602(B). Plaintiff did not challenge that grant of authority in 2011 or in the subsequent nine years.

Second, when Secretary Bennett adopted the **2012 and 2014** EPM allowing counties to sample from "vote centers" for the hand count audit, Plaintiff did not challenge the procedure.

Third, when the Secretary adopted the current version of the EPM in **December 2019** that authorizes counties to select a hand count sampling from voting centers, Plaintiff again did not challenge this procedure.

Fourth, when Arizona held a Presidential Preference Election in **March 2020 and a Primary Election in August 2020**, Maricopa County conducted hand count audits using only voting centers, as authorized by the EPM. Plaintiff did not challenge the hand count procedure before, during, or after either of those elections.

Finally, as the Maricopa County Defendants explained in their motion to dismiss [at 8-9], Plaintiff did not challenge the hand count procedure for the 2020 General Election until after Maricopa County had already completed – and Plaintiff participated in – the hand count audit. If Plaintiff wanted to challenge a nearly decade-old hand count procedure in this election, the time to raise such a challenge was before the hand count was completed. *Cf. Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002) ("[C]ourts should review alleged violations of election procedure prior to the actual election."); *Tilson v. Mofford*, 153 Ariz. 468, 471, 737

P.2d 1367, 1370 (1987) ("[P]rocedural violations in the elective process itself must be reviewed by the court prior to the actual election[.]").

2. Plaintiff's unreasonable delay causes prejudice.

By waiting to challenge the hand count procedure until after all votes have been counted and the hand count audit is already complete, Plaintiff's claim causes significant prejudice. Plaintiff's requested relief is nearly impossible, if not entirely impossible, because Maricopa County only used voting centers – not precincts – for the 2020 General Election. Even if it were possible to somehow go back and identify and sort voted ballots by precinct, that would be an extremely long, tedious, and costly process.

Moreover, any delay caused by requiring a new hand count audit would interfere with Maricopa County's ability to complete the canvass by the statutory deadline, which would have cascading harmful effects. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998) ("In election matters, time is of the essence" because disputes "must be initiated and resolved" without interfering with important election deadlines).

Under A.R.S. § 16-642(A), the Maricopa County Board of Supervisors must approve its canvass on or before **Monday, November 23, 2020**. *See Hunt v. Campbell*, 19 Ariz. 254, 279 (1917) (describing a board of supervisors' duty to canvass an election). The Board's timely completion of the canvass is critical, as the Secretary must, "[o]n the fourth Monday following a general election . . . canvass all offices for which the nominees filed nominating petitions and papers with the secretary of state." A.R.S. § 16-648(A). This year, that deadline is November 30, 2020, and the Secretary has already secured an appointment with the Governor, the Attorney General, and the Chief Justice to complete the canvass on that date. The overlay of a presidential election also means the United States Constitution (Article II, § 1 and the Twelfth Amendment) and the Electoral Count Act, 3 U.S.C. § 15, impose additional deadlines and requirements on the Secretary. In short, Plaintiffs' delay in filing suit prejudices the Secretary, the County, and Arizona voters who deserve finality. *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (finding

claims barred by laches and considering fairness to the parties, the court, "election officials, and the voters of Arizona").

Beyond that, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the [applicable] deadline[s].'" *Id.* (citation omitted). Late filings, such as Plaintiff's, "deprive judges of the ability to fairly and reasonably process and consider the issues . . . and rush appellate review, leaving little time for reflection and wise decision making." *Id.* (citation omitted).

In sum, Plaintiff's nine-year delay in challenging the hand count procedure prejudices the Court, Maricopa County election officials, the Secretary, and above all else, Arizona voters. Laches thus precludes Plaintiff's claim.

D. Plaintiff's Complaint Suffers From Other Significant Procedural Defects.

Plaintiff's Complaint also fails to request necessary relief. For one, Plaintiff's request for mandamus relief against the County Defendants essentially asks the Court to ignore the EPM. The Complaint recognizes [¶ 13] that the EPM authorizes Maricopa County's hand count procedure, yet Plaintiff failed to request injunctive or declaratory relief invalidating the relevant provisions in the EPM. By not challenging the legality of this provision of the EPM, Plaintiff seeks an impossible remedy in the form of special action relief requiring the County to violate a binding provision of Arizona law. But of course, there is no non-discretionary duty to violate the law, and Plaintiff's request for mandamus must fail for this additional and foundational reason. *See* Ariz. R. P. Spec. Act. 3(a) (special action relief is appropriate when an officer "has failed to . . . to perform a duty required by law as to which he has no discretion"); *Arizona Bd. of Regents v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 155 (App. 1989) ("A complaint for special action is the proper suit to file when a party is raising the

question of whether a defendant is failing to perform a duty required by law"). Even if Plaintiff requested this relief, however, it would fail for the reasons detailed above.

Plaintiff also seeks to delay the official canvass while Maricopa County re-does the hand count audit, yet it failed to request injunctive relief postponing the canvass.[4] But even if Plaintiff had requested this injunctive relief, such a request would fail. Contrary to Plaintiff's blatant misrepresentation of the law in open court today, A.R.S. § 16-642 **does not** permit an extension of the statutory canvass deadline under these circumstances. The plain terms of A.R.S. § 16-642(C) set forth only a single, narrow exception to a timely canvass, permitting an extension where not all of the voting locations have returned results. Nowhere does A.R.S. § 16-642 mention **any** other reason to extend the canvass deadline. This "calls for application of the canon of statutory interpretation expressio unius est exclusio alterius ('[T]he expression of one thing is the exclusion of another.')." *Jennings v. Woods*, 194 Ariz. 314, 330 (1999). Because the Arizona legislature provided only one circumstance where the county canvass may be postponed, no such other circumstances may be read into the statute. For the same reason, if the legislature had intended to allow for the canvass to be delayed by court order, it would've said so—as it did elsewhere in Title 16. *See, e.g.*, A.R.S. § 16-650 (providing that the Secretary of State "shall, *unless enjoined from doing so by an order of court*, deliver" a certificate of election to each person elected (emphasis added)); A.R.S. § 16-624 (irregular ballots may only be examined after the election "upon an order of court").

The Arizona Supreme Court's seminal decision in *Hunt v. Campbell* reinforces this conclusion. As *Hunt* explained, the sole scenario in which the county canvass may be postponed is when not all of the returns have been received; in that case, the canvass is automatically

[4] Plaintiff's counsel claimed at the November 16 hearing that this was the first he learned of the Maricopa County Board of Supervisors' plan to complete the canvass this week, but the canvass deadline is not new. It is set by statute, so Plaintiff had notice that the county must complete the canvass by no later than November 23, and it could have done so as early as November 9. *See* A.R.S. § 16-642.

postponed until either all of the returns have come in or the canvass has been postponed six days. *See* 19 Ariz. 254, 278–79 (1917). But if the returns from all voting locations *have* been received and the Board of Supervisors nonetheless fails to canvass by the deadline, then "mandamus would issue to compel it to do so." *Id.* at 279. Here, there is no claim that any voting location has yet to return results. Accordingly, the plain terms of A.R.S. § 16-642 require the canvass to be completed by November 23, 2020. Plaintiff has no right of action to delay the canvass.

In short, Plaintiff's Complaint is moot because Maricopa County will complete the canvass in a matter of days. Plaintiff has not sought injunctive relief nor could it as a matter of law. Moreover, Plaintiff cannot overcome its heavy burden of establishing every other element necessary to obtain injunctive relief. *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). If Plaintiff files an amended complaint seeking an injunction, the Secretary will respond by tomorrow, November 17, as directed by the Court during today's show cause hearing.

E. Plaintiff's Requested Relief Would Violate Equal Protection.

Finally, Plaintiff's requested relief would result in differential treatment of ballots in violation of Equal Protection principles under the Arizona and United States Constitutions. U.S. Const. Ariz. Const. art. II, § 13; U.S. Const. amend. XIV, § 1. While there may be various reasons to have different election procedures among Arizona counties in some cases, there is no rational reason to grant Plaintiff's requested relief only in Maricopa County. Multiple Arizona counties used a voting center model for the 2020 General Election, including Cochise, La Paz, Maricopa, Santa Cruz, Yavapai, and Yuma Counties, and many others used a hybrid model. In all of those counties, hand count audits were conducted using the same procedure that Maricopa County used, which is required by the EPM. Requiring a precinct-based hand count for only one of the multiple counties that use a voting center model would result in an "arbitrary and disparate" treatment of ballots. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

III. Conclusion

This case is about delay—not the adjudication of good faith claims. Plaintiff's grossly deficient and untimely Complaint cannot stand. The Secretary requests that the Court dismiss Plaintiff's Complaint with prejudice. The Secretary also requests an award of her attorneys' fees and costs under A.R.S. §§ 12-341, 12-349, 12-2030, and any other applicable law.

RESPECTFULLY SUBMITTED this 16th day of November, 2020.

COPPERSMITH BROCKELMAN PLC

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EXHIBIT 2

Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2020014553 12/21/2020

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

ARIZONA REPUBLICAN PARTY

v.

ADRIAN FONTES, ET AL.

JOHN DOUGLAS WILENCHIK

JOSEPH EUGENE LA RUE
EMILY M CRAIGER
JOSEPH I VIGIL
THOMAS PURCELL LIDDY
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DOCKET-CIVIL-CCC

RULING

Arizona law requires election authorities to validate electronic vote counts by manually recounting random batches of ballots. For this process, called the "hand count audit," election officials enlist representatives of Arizona's political parties to sample and count the ballots. Following the 2020 general election, Republican, Democratic and Libertarian Party appointees hand-counted 2917 ballots cast on voting machines at polling places in Maricopa County, and 5000 additional early (mail-in) ballots. *The hand counts verified that the machines had counted the votes flawlessly.* Maricopa County, Arizona General Election - November 3, 2020 Hand Count/Audit Report ("Audit Report"), *available at* https://azsos.gov/election/2020-general-election-hand-count-results (last visited December 9, 2020).

In this lawsuit, the plaintiff Arizona Republican Party asked for a court order directing the defendant Maricopa County officials to redo the hand count audit using different batches of ballots. The plaintiff baldly asserted that this relief was necessary to maintain "confidence in the integrity of our elections," without alleging any facts to show that the machines might have miscounted the votes. The plaintiff could not explain why the suit had not been filed before the election, or what purpose another audit would serve.

This order explains why the Arizona Republican Party's case was meritless, and the dismissal order filed November 19, 2020 was required, under applicable Arizona law. What remains is intervenor Arizona Secretary of State's application for an award of attorneys' fees. That application will require the Court to decide whether the Republican Party and its attorneys brought the case in bad faith to delay certification of the election or to cast false shadows on the election's legitimacy. *See* Arizona Revised Statutes § 12-349(A) (court "shall" assess fees and costs against a party or attorney when the party's claim is brought "without substantial justification" or "solely or primarily for delay").

ELECTION LAW BACKGROUND; AND THE ISSUE IN THIS CASE

Section 16-602 of the Arizona Revised Statutes requires a hand count audit of any election in which the votes are cast or counted on "an electronic voting machine or tabulator." A.R.S. § 16-602(A). The hand count audit verifies that the machines are working properly and accurately counting votes by hand counting some ballots and comparing the result to the machine count of those same ballots. The statute calls for the ballots cast on the voting machines at the polling places to be audited separately from the early (mail-in) ballots. *Compare* A.R.S. § 16-602(B)(1) *with* A.R.S. § 16-602(F). The election results do not become "official" until the hand count audits confirm the accuracy of the machine counts. A.R.S. § 16-602(C).

Subsection (B) of section 16-1602 sets out hand count audit procedures for ballots cast on voting machines at polling places. The process starts before the election, when the county officer in charge of elections tells the county political party chairs[1] how many of the parties' designees will be needed to perform the hand count. A.R.S. § 16-602(B)(7). At least a week before the election, the party chairs name the individuals who will physically count the ballots. *Id.* After the election, when the polls have closed and the unofficial vote totals have been made public, the party chairs take turns randomly choosing a limited number of specific polling places for audit. A.R.S. § 16-602(B)(1). The party chairs also choose the specific races that will be audited, A.R.S. § 16-602(B)(6), except that the presidential race is always audited. A.R.S. § 16-602(B)(5).

[1] The county political parties are effectively subgroups of the recognized state political parties under Arizona law. *See* A.R.S. section 16-825 (state committee of each party consists of county party chairs and one member of each county committee for every three elected at the county level).

The hand count must begin within twenty-four hours after the polls have closed. A.R.S. § 16-602(I). If the limited hand count produces evidence that the machine count might be inaccurate in some way, the hand recount expands in stages. A.R.S. § 16-602(C).[2] But when the limited hand count matches the machine count for a given race, "the results of the electronic tabulation constitute the official count for that race." *Id.* In all events, the hand count audit must be completed before the canvassing of the county election results. A.R.S. § 16-602(I). The responsible county officials must report the results of the audit to the secretary of state, who in turn must make the results publicly available on the secretary of state's website. *Id.*

The provision of section 16-602 at issue in this case, concerning the selection of polling places for audit, reflects the longstanding Arizona practice of organizing elections around political precincts. When the election is organized by precinct, the county board of supervisors establishes "a convenient number" of precincts before each election, and then designates one polling place in each precinct for the voters who resided in that precinct. *See* A.R.S. § 16-411(B). Consistent with that model, the statute refers to sampling of "precincts."[3]

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[2] The hand recount can extend to an entire county or jurisdiction, if necessary. A.R.S. § 16-602(D). Under some circumstances it can be treated as the official count. A.R.S. § 16-602(E). When the hand recount expands to cover an entire jurisdiction, the secretary of state must make available to the superior court "the escrowed source code for that county," and the judge then must appoint an independent expert with software engineering expertise to review the software and "issue a public report to the court and to the secretary of state regarding the special master's findings on the reasons for the discrepancies." A.R.S. § 16-602(J).

[3] The text of the statute says, in pertinent part:

> B. For 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. The hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452. . . . The hand count shall be conducted in the following order:
>
> > 1. At least two per cent 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. The county political party chairman for each political party that is entitled to continued representation on the state ballot or the chairman's designee shall conduct the selection of the precincts to be hand counted. The precincts shall be selected by lot without the use of a computer, and the order of selection by the county political party chairmen shall also be by lot.

In 2011, the Legislature authorized Arizona counties to establish "voting centers" as polling places in place of the traditional precinct locations. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) section 3, *codified at* A.R.S. § 16-411(B)(4). At a voting center, any voter in the county can receive an appropriate ballot and lawfully cast the ballot on Election Day. *Id.* But the Legislature chose not to amend section 16-602 to specify hand count audit procedures for voting center elections. In fact, section 16-602 does not refer to voting centers at all.

Instead the Legislature delegated to the secretary of state the authority to make rules for hand count audits, including audits of elections conducted at voting centers. It did so by amending a sentence in section 16-602(B) that had read, "[t]he hand count shall be conducted as prescribed by this section." The sentence as amended in 2011 says, "[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."* 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) section 8, *codified at* A.R.S. § 16-602(B) (emphasis added).

The "official instructions and procedures manual adopted pursuant to § 16-452" is known as the Elections Procedures Manual. Arizona Secretary of State, State of Arizona Elections Procedures Manual (December 2019) ("Election Procedures Manual"), *available at* https://azsos.gov/about-office/media-center/documents (last visited November 25, 2020). The Elections Procedures Manual comprehensively lays out process and procedure details for Arizona elections. A new edition issues not later than December 31 of each odd-numbered year immediately preceding the general election. A.R.S. § 16-452(B). Each new edition must be formally approved by both the Governor and the Attorney General. *Id.* The current edition, issued at the end of 2019, received the endorsement of both Governor Ducey and Attorney General Brnovich.

Under the authority of section 16-602(B), the Election Procedures Manual gives detailed instructions to the county officials who conduct hand count audits. Election Procedures Manual at 213-234. The rule on sampling polling places for voting center election audits is straightforward and simple. "Each vote center shall be considered to be a precinct/polling location 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." Election Procedures Manual at 216. Consistent with that directive, Maricopa County's 2020 general election hand count audit focused on a random sample of the voting centers that served as polling places.

The plaintiff here claimed that the Maricopa County hand count did not comply with section 16-602, because the statute refers to selection of "precincts" for audit and says nothing about voting centers. The plaintiff asked the Court to order Maricopa County election officials to identify all of the ballots cast at the voting centers by residents of randomly sampled precincts, and to hand count those ballots to see whether the count matched the electronic vote count.

RELEVANT FACTS AND PROCEDURAL HISTORY

The decision to conduct the 2020 election at voting centers instead of precinct polling places was made by the Maricopa County Board of Supervisors on September 16, 2020. *See* Maricopa County Elections Department, *Election Day & Emergency Voting Plan – November General Election* (September 16, 2020), ("Election Plan"), *available at* https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Election%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf (last visited Nov. 25, 2020). The Board's decision effectively determined that the hand count audit likewise would focus on voting centers, since that is what the Elections Procedures Manual requires. There is no record, however, that the Republican Party expressed any objection, before the Board of Supervisors or to the officials who carried out the election plan. No one sought judicial intervention to clarify the alleged mismatch between the manual and the statute.

"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." Election Procedures Manual at 225. By that definition, the 2020 general election hand count arguably started in Maricopa County two weeks before the election, when the county officer in charge of elections told the county political party chairs how many of their respective members would be needed to serve on the "Hand Count Boards," and moved forward a week later, when the county chairs designate Hand Count Board members and alternates. *See* Elections Procedures Manual at 213. Again there is no record of any objection from the Republican Party when these steps were taken. No one asked for a judicial declaration that the county election officials were planning to recount the wrong ballots.

The official audit report says that the Maricopa County hand count began on the day after the general election, November 4. Maricopa County, Arizona General Election – November 3, 2020 Hand Count/Audit Report ("Audit Report"), *available at* https://azsos.gov/election/2020-general-election-hand-count-results (last visited December 9, 2020). That evening, the Maricopa County chairs of the Arizona Republican, Democrat and Libertarian parties took turns choosing "the polling places (vote centers) to be audited." *Id.* On November 7, the volunteers appointed by the parties began counting the ballots cast at the selected voting centers. *Id.* They completed the task mid-day on November 9. *Id.* In all they hand-counted 2917 ballots from four voting centers,

and another 5000 randomly sampled Maricopa County early (mail-in) ballots. *Id.* Nothing in the official report suggests that the Republican Party expressed disagreement, at any point in the process. *Id.*

As far as the court record shows, the complaint in this case stated the Arizona Republican Party's objection to the 2020 general election hand count audit for the first time. Filed on November 12, the complaint was framed as though the hand count had not yet begun when the complaint was filed. "Verified Complaint" at 1 ("Because the `sampling' is expected to begin soon, Plaintiff seeks expedited relief.") The complaint requested a declaratory judgment that the law requires sampling of precincts rather than voting centers for the hand count audit, and a writ of mandamus directing Maricopa County officials to conduct the hand count audit accordingly.

Responding to the complaint in a motion to dismiss on November 16, the defendants advised the Court that by September 12 the hand count audit had already been completed, reported and posted on the secretary of state's website.[4] *The report showed that the hand count matched the machine count exactly. See* Audit Report ("No discrepancies were found by the Hand Count Audit Boards.") The plaintiff reacted by applying for an injunction to bar the Board of Supervisors from certifying the election results. The plaintiff continued to assert, even in the face of the audit showing a flawless vote tabulation, that a second hand count of a different sample of ballots was necessary to avoid "lingering questions" and a "cloud" over the "legitimacy" of the election." Application for Preliminary Injunction at 3.

THE REASONS THE PLAINTIFF'S CASE WAS DISMISSED

The plaintiff's claim for mandamus relief failed because the duty of County election officials was to comply with the Election Procedures Manual, and they did so. The declaratory judgment claim failed because its extreme tardiness prejudiced both the defendant county officials and the public interest. Both those claims, and the mid-case request for an injunction, were prohibited post-election challenges to election procedures. These issues are addressed in turn. The question whether the Elections Procedures Manual correctly applies section 16-602(B) is not addressed, because the plaintiff did not make the showing necessary to justify that inquiry.

[4] What exactly the Arizona Republican Party and its attorney knew or had reason to know about the status of hand count audit, at the time of filing the complaint, will be an issue on the application for attorneys' fees. The Republican Party appears to have had constructive knowledge, at least, of facts that contradicted the allegations in the complaint. The attorney (who also verified the complaint) said he "did not receive a copy" of the audit report until after the suit had been filed, Plaintiff's Response to Defendant/Intervenors' Motion to Dismiss at 3, n.1, but what he knew about the audit when he filed the complaint is unclear.

Mandamus Did Not Apply Because the Election Officials Followed the Law

The plaintiff presented its case primarily as a claim for mandamus relief. A writ of mandamus is an extraordinary remedy issued by a court against a public officer to compel the officer to perform an act required by law. *Sears v. Hull*, 192 Ariz. 65, 961 P.2d 1013, para. 11 (1998); *Adams v. Bolin*, 77 Ariz. 316, 322-323, 271 P.2d 472 (1954). If the officer is not specifically required to perform the duty or has any discretion as to what shall be done, the court may not issue the writ. *Adams v. Bolin*, 77 Ariz. 316 at 323.

Maricopa County officials had no discretion, under Arizona law, to hand count precincts instead of voting centers for the hand count audit. A county official's authority is limited to those powers expressly or impliedly delegated to him or her by state law. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶14 (2020). The Elections Procedures Manual directs county election officials to treat the voting centers as "precincts" for purposes of the hand count audit. Election Procedures Manual at 216. The manual has the force of law, meaning that county election officials must do as it says. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶16 (2020). Maricopa County officials therefore could not lawfully have performed the hand count audit the way the plaintiffs wanted it done. If they had done so, they would have exposed themselves to criminal punishment. *See* A.R.S. § 16-452(C) (a person who violates a rule in the Election Procedures Manual is guilty of a class 2 misdemeanor).

Since Maricopa County election officials had no power to vary from the Election Procedures Manual rules for the hand count audit, this Court likewise has no authority to issue a writ of mandamus to compel them to do so. "It is the duty of the court so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the right of electors." *Hunt v. Campbell*, 19 Ariz. 254, 269, 169 P. 596, 602 (1917). A judge cannot change election rules whenever someone has "questions" or "concerns" about the results. A writ of mandamus lies only if election officials fail to follow the rules established by the law – here, the Election Procedures Manual. When Maricopa County officials conducted the hand count audit, they followed the Elections Procedures Manual to the letter. As a result, there was and is no basis for mandamus relief.

The Request for Declaratory Relief Was Way Too Late

There are legally appropriate ways to test the validity of the Elections Procedures Manual in court. The political party has the right to sue for a judicial determination of whether the Elections Procedures Manual follows the law. The Arizona Republican Party nominally did that here, by asking the court to "declare that the hand count sampling be of "precincts . . . and not of "vote centers." Verified Complaint at 5. But the law sets out basic rules, for that kind of lawsuit,

that were not followed here. The suit was brought against the wrong party, and far too late, for the requested relief.

Arizona's Uniform Declaratory Judgments Act, A.R.S. §§ 12–1831 through 12–1846, is an "instrument of preventive justice" that allows a court to determine a person's rights, status or other legal relations. *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 258 P.3d 154 ¶ 18 (App. 2011). When a justiciable controversy exists, the Act allows adjudication of rights before the occurrence of a breach or injury necessary to sustain a coercive action for damages or injunctive relief. *Id.* A justiciable controversy arises when the party seeking the declaration has a real, present interest in the issue and the party being sued has a real, present interest in opposing the declaration being sought. *Moore v. Bolin*, 70 Ariz. 354, 358, 220 P.2d 850, 852-853 (1950).

A party seeking a declaratory judgment must file suit against the appropriate party. On a claim like this one, where the plaintiff says that government officials have misinterpreted the law, the proper defendant is the government agency or official responsible for the interpretation. The official responsible for the Elections Procedures Manual, including the hand count audit rules, is the secretary of state. A.R.S. § 16-452. The secretary of state therefore should have been named as the defendant in this case for purposes of the declaratory judgment claim.

The plaintiff chose to sue Maricopa County election officials instead of the secretary of state. County officials have no power to rewrite the Elections Procedures Manual. As a result, the plaintiff's request for a declaratory judgment against them was futile. Fortunately for the plaintiff, the secretary of state chose to intervene. But for that decision, the declaratory judgment claim would have been dismissed out of hand.

A party seeking a declaratory judgment also must file suit at the appropriate time. Declaratory relief cannot be sought until a justiciable controversy has arisen. *Arizona State Board of Directors for Junior Colleges v. Phoenix Union High School District*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967). On the other hand, the party seeking relief must not unduly delay. A legal doctrine called *laches* discourages dilatory conduct by litigants. *Lubin v. Thomas*, 213 Ariz. 496, 144 P.3d 510 ¶ 10 (2006). Laches requires dismissal of a case when unreasonable delay in bringing the claim prejudices the opposing party or the administration of justice. *Id.*

This case is a textbook example of unreasonable delay that calls for the application of laches. The plaintiff could have gone forward with the case months ago. Instead it waited until after the election, after the statutory deadline for commencing the hand count audit, and (as it turned out) *after the completion of the audit*. The delay prejudiced both the defendants and the public. That defect, unlike the failure to sue the proper party, could not have been fixed.

The plaintiff itself admitted that its claim could have been filed long ago. In one of its filings, the plaintiff said, "until this election cycle, there was simply no real case or controversy to decide in Maricopa County . . . because the county used the 'precinct' model" instead of the voting center model. Plaintiff's Response to Defendant/Intervenors' Motion to Dismiss at 3. The necessary implication is that a justiciable controversy arose when the Board of Supervisors first approved the use of voting centers for 2020 election cycle. Since the first elections in 2020 were the presidential preference primaries on March 17, the decision to use voting centers for those elections happened in January, or February at the latest. The plaintiff could have filed the case then, or at any time in the eight or nine months since.

Even if the focus is narrowed to the general election, the plaintiff delayed unreasonably. The Board of Supervisors passed the resolution authorizing the use of voting centers for the general election on September 16. The plaintiff unquestionably could have brought the action then. Instead the plaintiff waited another eight weeks to file the complaint, until the election was over and the statutory post-election deadline for commencing the hand count audit had passed.

The plaintiff asserted that its eleventh-hour filing decision primarily stemmed from worries about election integrity. "[P]erhaps most importantly (and obviously) of all concern about potential widespread voter fraud has taken on a special significance in this general election, warranting a thorough focus on these [election] laws and compelling Plaintiff to take action." Plaintiff's Response to Defendant/Intervenors' Motion to Dismiss at 2. Setting aside for the moment the illogic of an attempt to disprove a theory for which no evidence exists, the plaintiff's defense of the case's timing failed on its own terms. The filing delay created a situation in which an order requiring another audit with different rules would only have amplified public distrust.

The Arizona Supreme Court very recently highlighted the prejudice caused by belated lawsuits directed at election rules. The issue arose when the Maricopa County Recorder proposed sending out mail-in ballots with instructions different than those specified in the Elections Procedures Manual. *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 (2020). Disallowing the Recorder's proposal, our Supreme Court warned: "When public officials, in the middle of an election, change the law based on their own perceptions of what they *think* it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process." 475 P.3d 303 ¶ 4 (emphasis in original).

The Supreme Court's admonition to public officials who would change the rules "in the middle of the election," applies squarely to this case. It applies to the Maricopa County officials administering the election. It applies to the Arizona Republican Party as an official participant in the election. Most importantly, it applies to this Court, when a participant in the election asks the court to change an election process that is already underway or, worse, to order election officials to do it over using different rules. Either way, the only possible answer is "no."

The plaintiff also failed to acknowledge the prejudice that its delay caused Maricopa County. The plaintiff argued that there was still time to conduct another audit before the deadline for the canvass. Assuming (generously) that the plaintiff was right about that, the argument ignored the cost to the county of repeating the hand count audit. A second audit would have cost tax dollars and disrupted the orderly administration of the election. The fact that the second audit would have been conducted under tight deadlines, with election resources at a premium, would have multiplied those costs. For that reason also, the plaintiff's declaratory relief claim was not well taken.

A Post-Election Judicial Inquiry into Election Procedures Was Not Justified

It is telling that the plaintiff lost interest in the declaratory judgment claim, and pivoted instead to the request for an injunction to stop the certification of the election and the canvass of the results, as soon as the defendants made clear that the hand count audit has been completed. The plaintiff could have pursued the declaratory judgment claim to determine how to audit future voting center elections. That it did not do so demonstrates that its real interest was not the audit procedure as such. The real issue, evidently, was the outcome of the 2020 election.

Arizona law categorically prohibits this kind of post-election lawsuit. Actions concerning alleged procedural violations of the electoral process must be brought prior to the actual election. *Sherman v. City of Tempe*, 202 Ariz. 339, 342, 45 P.3d 336 (2002). "[T]he procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures *must* be challenged before the election is held." *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367 (1987) (emphasis in original). "If parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure." *Kerby v. Griffin*, 48 Ariz. 434, 444, 62 P.2d 1131 (1936). Our state Supreme Court long ago explained why this rule exists, in terms that remain relevant today.

> The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as when it is known precisely how many votes it will take to change the result; and men who are willing to sell their votes before election will quite as readily sell their testimony afterwards, especially as the means of detecting perjury and falsehood are not always at hand until after the wrong sought to be accomplished by it has become successful and the honest will of the people has been thwarted.

Hunt v. Campbell, 19 Ariz. 254, 277, 169 P. 596, 605 (1917), *quoting Oakes v. Finlay*, 5 Ariz. 390, 53 P. 173 (1898).

Because the public interest in protecting "the honest will of the people" is paramount, an allegation that election officials did not "follow the law" is not sufficient to sustain a post-election claim. Noncompliance with a procedural rule that could have been enforced by mandamus prior to the election justifies rejecting the vote afterward only if there has been "actual fraud" or a demonstrable effect on the election's outcome. *Id.* at 267-268, 169 P. at 601-602. The "cardinal rule," after the election, is this:

> [G]eneral statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.

Findley v. Sorenson, 35 Ariz. 265, 269, 276 P. 843, 844 (1929).

From these substantive principles, procedural rules follow. One is that election results are presumed to be valid and free of fraud. *Hunt v. Campbell*, 19 Ariz. at 268, 169 P. at 602. The presumption against fraud is especially strong when the election contest "arises from the acts of public officers, acting under the sanction of their official oaths." *Id.* at 271, 169 P. at 603 (citation and internal punctuation omitted). "The presumption is in favor of the good faith and honesty of the members of the election board. Regarding their official conduct, like all public officials, courts never presume fraud against them to impeach their official acts." *Id.* at 268, 169 P. at 602. The election challenger bears the burden of proving the existence of fraud or impropriety. *See id.* at 264, 169 P. at 600.

Moreover, proof "of the most clear and conclusive character" is necessary to justify judicial intervention that might jeopardize "the certainty and accuracy of an election." *Id.* at 270-271, 169 P. at 603. (citation and internal punctuation omitted). Fraud or impropriety "ought never to be inferred from slight irregularities, unconnected with incriminating circumstances; nor should it be held as established by mere suspicions, often having no higher origin than partisan bias and political prejudices." *Id.* at 264, 169 P. at 600. "[N]othing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns. It is not sufficient to cast suspicion upon them; they must be proved fraudulent before they are rejected." *Id.* at 271, 169 P. at 603. "To destroy the credit of the official returns there must be positive and unequivocal evidence of the fraud, and if the circumstances of a case can be explained upon the hypothesis of good faith, that explanation will prevail. *Id*. at 276, 169 P. at 605.

These longstanding rules have stood the test of time. They remain vital today, guarding the electoral process against the gamesmanship of those who might otherwise hedge against a loss at

the polls by holding legal issues in reserve or use the law as a tool to thwart the will of the voters. An example of their recent application, in a case analogous to this one, is *Williams v. Fink*, 2019 WL 3297254 (Ariz. App. July 22, 2019). Williams, a candidate for Santa Cruz County Superior Court judge, challenged the result of the election because opposing candidate Fink's name had been listed first on most of the ballots.

The Court of Appeals affirmed the trial court's order dismissing Williams's claim without a hearing. The court held that "Williams's challenge to how the ballots were printed should have – and could have – been brought before the election. Because he failed to address the county's method of alternating the candidates' names on the ballots prior to the election, he cannot, after the election, question the county's procedure." *Id.*, ¶ 14. Alternatively the court held, citing *Findley v. Sorenson*, that Williams had failed to state a claim because he had not plausibly alleged that the purported misconduct of election officials might have affected the outcome of the election. *Id.*, ¶¶ 15-20.

The same rules applied here, in the same way as in *Williams*. The alleged procedural violation of the election laws (here, the sampling of ballots for the hand court audit by voting center rather than by precinct) resulted directly from pre-election decisions that were known, or should have been known, to the party claiming to be aggrieved. The implementation of the questioned procedure began before the election (in *Williams*, when the ballots were printed; here, when the political party officials chose the Hand Count Board members) though the alleged harm occurred later (in *Williams*, during the election itself; here, immediately after the election when the polling places were sampled for audit). The time for testing whether the procedure comported with the law, here as in *Williams*, was likewise before the election.

Similarly, here as in *Williams*, the plaintiff failed to state a viable post-election claim. The plaintiff here demanded a hand count audit "in strict accordance" with the statute, Verified Complaint at 1, at a time when an alleged failure strictly to comply did not give rise to a cause of action. The plaintiff offered only suspicion of wrongdoing, in a situation that required it to plead specific, facially credible facts backed by "the most credible, positive, and unequivocal evidence" of fraud or malfeasance. The plaintiff here did not even allege facts that cast doubt on the reliability of the hand count audit, let alone the outcome of the election or the honesty of the officials who administered it. The law therefore required immediate dismissal of the case.

The Proposed Amendment Adding a Claim for Injunctive Relief Was Futile

When this case was dismissed, Plaintiff's Motion for Leave to File an Amended Complaint was pending. The plaintiff asked in the motion for permission to add an application for preliminary injunction to the application for a writ of mandamus and the declaratory judgment claim. The plaintiff sought to enjoin the defendants from certifying the countywide voting results and issuing

the official canvass "until there has been a judgment or other dispositive ruling in this matter, and the terms of such ruling or judgment, if any, have been complied with." Application for Preliminary Injunction at 1.

A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. *Arizona Association of Providers for Persons with Disabilities v. State of Arizona*, 223 Ariz. 6, 219 P.3d 216 ¶ 12 (App. 2009). As with any request to amend the complaint, however, a request to add a claim for an injunction may be denied if the amendment would be futile. *First Citizens Bank & Trust Company v. Morari*, 242 Ariz. 562, 399 P.3d 109 ¶ 12 (App. 2017).

The plaintiff's application for a preliminary injunction was futile here. The underlying election challenge had no chance of success, for all of the reasons stated above. The plaintiff could not show irreparable injury from the certification of the election results, or a favorable balance of hardships, because the plaintiff could not explain how, exactly, it would benefit from a do-over of the hand count audit. At the November 18 oral argument, counsel said, "It's about making sure there's no error, making sure there's no fraud." But that explanation ran headfirst into the public policy that prohibits judicial intervention into an election based on mere suspicion that something went wrong. As a matter of policy, the public's interest in "the certainty and accuracy of an election" far outweighed what the Arizona Republican Party described as "the importance . . . of doing everything with respect to this election 'by the book." Application for Preliminary Injunction at 3. In short, all four criteria weighed *against* the request for injunctive relief.

For all these reasons,

IT IS ORDERED affirming the order of dismissal filed November 19, 2020.