

ARIZONA COURT OF APPEALS
DIVISION ONE

MARK BRNOVICH, in his official
capacity as Arizona Attorney General,

Plaintiff/Appellant,

v.

KATIE HOBBS, in her official capacity
as Arizona Secretary of State.

Defendant/Appellee.

v.

DOUGLAS A. DUCEY, in his official
capacity as Governor of Arizona,

Real Party in Interest.

) No. 1-CA-22-0389

) Yavapai County Superior
) Court No. P1300CV202200269

**ARIZONA SECRETARY OF STATE KATIE HOBBS' MOTION
TO DISMISS APPEAL**

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** Application for Pro Hac Vice
Forthcoming*

Attorneys for Appellee Arizona Secretary of State Katie Hobbs

Appellee Katie Hobbs, in her official capacity as Arizona Secretary of State (“Secretary”), moves to dismiss this appeal because it is moot.

Appellant Mark Brnovich, in his official capacity as Arizona Attorney General (“AG”), sought limited special action relief to compel the Secretary to produce a new draft of the election procedures manual (“EPM”) for use during the 2022 election cycle. In the trial court, he requested expedited consideration to obtain a ruling before the primary election. But the primary election has now come and gone, and this appeal won’t be at issue until after the general election. The AG thus cannot receive the relief he seeks, and this Court should dismiss the appeal because its “action as a reviewing court will have no effect on the parties.” *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4 (App. 1988) (citation omitted).

Background

This appeal arises out of the AG’s “Complaint for Special Action Relief,” which pled only a request for special action relief. [Ex. 1 at 31-35] Specifically, the AG asked the trial court to “order[] the Secretary to promptly provide the AG and Governor with a legally compliant draft EPM by May 4, 2022.” [*Id.* at 35] The AG’s Application for Order to Show

Cause similarly sought relief specific only to the “2022 election cycle.” [Ex. 2 at 4] And this limited request for special action relief was consistent throughout the proceedings below. [See, e.g., Ex. 3 at 11 (describing the “Plaintiffs’ request that the Court issue special action relief requiring the Secretary to issue a valid EPM for the 2022 election” (emphasis added)]

On June 22, 2022, the trial court entered final judgment against the AG, holding that he had no right to special action relief. The AG appealed and immediately asked the Arizona Supreme Court to transfer the appeal, a request the court denied. *See Brnovich v. Hobbs*, No. T-22-0002-CV. The AG responded nine days later by seeking special action review in this Court, which declined jurisdiction before the Secretary responded. *Brnovich v. Napper*, No. 1 CA-SA 22-0132. And in both the transfer petition and the petition for special action (just as he had done in the trial court proceeding), the AG stressed the need for expedited review to obtain relief for the 2022 general election. [Ex. 4 at 3 (“The purpose of this Petition is to ensure that Arizona election officials and others have a valid and up-to-date EPM to govern the 2022 elections”);

Ex. 5 at 5 (“Even if now is too late for an updated EPM for the primary election, it is not too late for the general.”).]

Under the Rules of Civil Appellate Procedure, the AG’s opening brief is due September 12, the Secretary’s answering brief will be due on October 22, and the AG’s reply due on November 11—three days after the general election concludes. As a result, the AG cannot, under any circumstance, receive the limited special action relief he requests before the 2022 general election is underway.¹ Indeed, counties will begin to mail UOCAVA ballots for the general election on September 22, ten days after the due date for the AG’s opening brief. Early voting will then begin on October 12, 2022, more than a week before the Secretary’s answering brief will be due. And the general election is on November 8, three days before the reply deadline. In addition, once the general election is over and canvassed (and almost certainly well before this Court decides the appeal), the terms of the current AG and Secretary will end, both will leave their offices, and the statutory process for adopting a new EPM in

¹ Nor does the AG seem at all serious about obtaining that relief. Despite all the AG’s procedural machinations and calls for expedited review, he still has not filed an opening brief. And even if the AG filed his opening brief today, briefing would not be complete before early voting has begun for the general election.

2023 must begin anew with new administrations. See A.R.S. § 16-452(B) (requiring the secretary of state to submit the manual to the governor and attorney general “not later than October 1 of the year before each general election,” and requiring issuance of a manual “not later than December 31 of each odd-numbered year”).

Perhaps recognizing that the relief requested below is unavailable, the AG now presents a new legal issue on appeal:

Is the AG entitled to special action relief if the Secretary provides a draft EPM to the AG and Governor that contains provisions that are beyond the scope of the subjects listed in § 16-452 and inconsistent with Arizona election statutes, thereby requiring them to violate Arizona law by approving the draft EPM?

[See 8/1/2022 Case Management Statement at 5] This is not the relief the AG sought below and is also not relief that this AG can obtain against this Secretary. Instead, the AG now attempts to re-frame the narrow issue presented below (*i.e.*, the AG’s entitlement to special action relief) into a broader issue that sounds in declaratory relief the AG never sought. The AG’s attempt to replead his claims for the first time on appeal are improper and should be rejected.

Argument

This appeal is moot and should be promptly dismissed to avoid any further waste of resources by either the parties or judiciary.

This Court “will dismiss an appeal as moot when [its] action as a reviewing court will have no effect on the parties,” and it does so as “a matter of prudential or judicial restraint.” *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 5 (App. 2012) (citation omitted). Here, there can be no reasonable dispute that this appeal “will have no effect on the parties” because it is impossible for the AG to obtain the relief he requested. At this point, there will not be a new draft EPM produced or adopted that will be effective for the 2022 election cycle. What the AG now requests is an advisory opinion in the form of a declaratory judgment he never sought below.

Nor do any exceptions to the mootness rule apply. This Court has “discretion [to] consider[] appeals that have become moot when they present an issue of great public importance or one capable of repetition yet evading review.” *Cardoso*, 230 Ariz. at 617 ¶ 5. As for “public importance,” cases qualifying for that exception “usually involve[] an issue that will have broad public impact beyond resolution of the specific

case.” *Id.* ¶ 6. And as for “capable of repetition yet evading review,” that “exception is applicable when, because of time constraints, an issue that is capable of recurring cannot be decided by the appellate court.” *Id.* ¶ 7.

This appeal does not qualify under either exception. As the record below demonstrated, there has never before been litigation between the AG and Secretary arising out of the drafting and adoption of the EPM, and hopefully there never will be again. And as the Secretary has argued throughout this proceeding, the AG sued far too late and for transparently political reasons. Indeed, after rejecting the Secretary’s draft EPM in December 2021 unless the Secretary accepted every demand he made, the AG did nothing until April 2021, almost five months later. And there was nothing surprising about the timing; the AG’s (now unsuccessful²) U.S. Senate primary election neared, his base criticized him for not taking more aggressive action against elections

² Arizona Secretary of State, 2022 Primary Election Results <https://results.arizona.vote/#/featured/32/0> (last visited Aug. 12, 2022) (showing the AG in third place with 17.73% of the vote, well behind Blake Masters’ 40.23%, with the gap between those two candidates at 182,613 votes).

administrators, and he sued the Secretary on the taxpayers' dime and touted it for his campaign.³

The AG's inexcusable delay is proof that this issue is not one of "great public importance" (were it so, the AG would have immediately sued). But more than that, it is compelling evidence that the issue is not one that "because of time constraints . . . is capable of recurring" and "cannot be decided by the appellate court." Though the Secretary does not concede that the AG's request for special action relief was proper in any way, the issue will not necessarily "evade review" in the future; presumably, another case raising similar claims will be timely filed and diligently prosecuted.

At bottom, the AG has only himself to blame for the fact that his appeal is now moot, and this Court should not reward the AG's dilatory conduct with an advisory opinion.

Conclusion

For all these reasons, this appeal is moot and should proceed no further. The Secretary requests that it be dismissed, and that she be

³ Twitter, @brnoforaz, Apr. 22, 2022 8:43 a.m.
https://twitter.com/brnoforaz/status/1517529592612876289?s=21&t=67BAVbjWak_Kzly-UB4yGw (last visited Aug. 12, 2022).

awarded her reasonable attorneys' fees associated with this appeal under
A.R.S. § 12-348.01.

RESPECTFULLY SUBMITTED this 12th day of August, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
D. Andrew Gaona
Kristen Yost

**STATES UNITED DEMOCRACY
CENTER**

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Christine Bass*

*Application for Pro Hac Vice Forthcoming

Mark Brnovich v. Katie Hobbs

No. 1-CA-22-0389

Index of Exhibits to Arizona Secretary of State Katie Hobbs' Motion to
Dismiss Appeal

- | | |
|-----------|--|
| Exhibit 1 | Plaintiffs' Verified Complaint for Special Action Relief |
| Exhibit 2 | Plaintiffs' Application for Order to Show Cause |
| Exhibit 3 | Plaintiffs' Response in Opposition to Secretary of State
Katie Hobbs' Motion for Summary Judgment (exhibits
omitted) |
| Exhibit 4 | Arizona Attorney General Mark Brnovich's Petition for
Special Action |
| Exhibit 5 | Arizona Attorney General Mark Brnovich's Petition for
Transfer (exhibits omitted) |

EXHIBIT 1

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15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
16 **IN AND FOR THE COUNTY OF YAVAPAI**

17 Mark Brnovich, in his official capacity as
18 Arizona Attorney General; Yavapai County
19 Republican Committee, an unincorporated
20 association; and Demitra Manjoros, First
21 Vice Chair of the Yavapai County
22 Republican Committee and registered voter
23 in Yavapai County,

22 Plaintiffs

23 vs.

24 Katie Hobbs, in her official capacity as
25 Arizona Secretary of State,

26 Defendant.

Case No: P1300CV 202200209 -

**PLAINTIFFS' VERIFIED COMPLAINT
FOR SPECIAL ACTION RELIEF
[EXPEDITED ELECTION CASE]**

1 For their complaint against Arizona Secretary of State Katie Hobbs (the “Secretary”),
2 Arizona Attorney General Mark Brnovich (“AG”), Yavapai County Republican Committee
3 (“Plaintiff Committee”), and Demitra Manjoros (“Plaintiff First Vice Chair”) (together referred
4 to as “Plaintiffs”) hereby allege as follows:

5 INTRODUCTION

6 1. This case is about the Secretary’s ongoing violation of her mandatory statutory duty
7 to promulgate an Elections Procedures Manual (“EPM”) for the 2022 election cycle. *See* A.R.S.
8 § 16-452. To cure that ongoing violation, Plaintiffs are entitled to special action relief ordering
9 the Secretary to comply with the mandatory requirement of providing a legally-compliant EPM
10 to the AG and Governor for approval.

11 2. “No right is more precious in a free country than that of having a voice in the
12 election of those who make the laws under which, as good citizens, we must live.” *Wesberry v.*
13 *Sanders*, 376 U.S. 1, 17 (1964). But that right means little without the necessary structure to
14 maintain the integrity of the democratic process. *See Burdick v. Takushi*, 504 U.S. 428, 441
15 (1992).

16 3. The laws and regulations creating and implementing the democratic process must
17 simultaneously serve a number of ends. While the security and integrity of the process is perhaps
18 first and foremost among those ends, election laws and regulations must also achieve uniformity
19 and correctness.

20 4. In Arizona, the democratic process derives from several sources, each of which is
21 critical to the overall functioning of the system.

22 5. First, the Arizona Constitution imposes certain requirements with respect to the
23 democratic process. *See generally* Ariz. Const. art. 7. For example, the Constitution requires
24 that “[a]ll elections shall be free and equal.” Ariz. Const. art. 2 § 21. The Constitution also
25 requires that only qualified voters shall be entitled to vote. Ariz. Connt. art. 7 § 2. To ensure
26 security, the Constitution directs the Legislature to “enact[] registration and other laws to secure

1 the purity of elections and guard against abuses of the elective franchise.” Ariz. Const. art. 7 §
2 12. The Constitution requires secrecy in voting too: “All elections by the people shall be by
3 ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting
4 shall be preserved.” Ariz. Const. art. 7 § 1.

5 6. Second, the Arizona Legislature has taken a number of steps to achieve a secure,
6 uniform, and correct democratic process through statute. The Legislature has enacted a number
7 of election laws—contained primarily in Title 16 of the Arizona Revised Statutes—to guide
8 officials and Arizona citizens in voting and to ensure the purity of Arizona’s elections. These
9 include laws on the methods for casting, collecting, and counting ballots. For example, the
10 Arizona Legislature requires that Arizona voters cast their ballots in an assigned precinct (unless
11 a voting center model is followed) and, with certain exceptions, prohibits individuals from
12 collecting and returning others’ ballots. *See* A.R.S. § 16-122; A.R.S. § 16-1005(H)-(I); *Brnovich*
13 *v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343-44 (2021) (rejecting challenge to precinct
14 voting requirement and ballot harvesting ban under the Voting Rights Act).

15 7. Third, the Legislature has delegated authority over the various stages of the
16 democratic process to certain government officials, who through their actions must implement
17 and protect the democratic process. For example, county recorders are primarily responsible for
18 voter registration and early voting and county supervisors are responsible for election-day
19 operations and tabulation of votes. *See e.g.* A.R.S. §§ 16-101 *et seq.* (duties prescribed to county
20 recorders to register voters and maintain voter registration records), -542 to -550 (duties
21 prescribed to county recorder to provide for and administer early voting up to and including
22 comparing voter’s signatures on ballot affidavits to voter registration records), -551 (duties
23 prescribed to boards of supervisors to establish early election boards for tabulating early ballots),
24 -531 (duties prescribed to boards of supervisors to appoint election boards for each voting
25 location). The AG is responsible for enforcing Arizona’s elections laws and defending those
26 laws in state and federal court. *See* A.R.S. § 16-1021; *Brnovich*, 141 S. Ct. at 2336 (rejecting the

1 Secretary’s argument that Attorney General Brnovich did not have standing to defend the election
2 laws at issue). And the Secretary is responsible for promulgating election procedures to guide
3 county officials in implementing certain portions of the democratic process. *See* A.R.S. § 16-
4 452; *see Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62 (2020) (“The legislature
5 has expressly delegated to the Secretary the authority to promulgate rules and instructions for
6 early voting.”). As the Arizona Supreme Court recently explained, but which should go without
7 saying, “public officials should, by their words and actions, seek to preserve and protect [election]
8 laws.” *Arizona Public Integrity Alliance*, 250 Ariz. at 61.

9 8. Fourth, among the procedures the Secretary is tasked with promulgating is “an
10 official instructions and procedures manual,” otherwise commonly known as the “Elections
11 Procedure Manual” or “EPM.” A.R.S. § 16-452(B). The Secretary has a non-discretionary
12 statutory duty to promulgate the EPM “not later than December 31 of each odd-numbered year
13 immediately preceding the general election.” *See id.*

14 9. The Arizona Legislature delegated the mandatory duty of promulgating the EPM
15 to the Secretary “to achieve and maintain the *maximum degree* of correctness, impartiality,
16 uniformity and efficiency on the procedures for early voting and voting, and of producing,
17 distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A) (emphasis
18 added).

19 10. To facilitate promulgation of the EPM by December 31 of each odd-numbered year
20 immediately preceding a general election, the Legislature requires the Secretary to provide a draft
21 EPM to the AG and Governor prior to October 1 of each odd-numbered year.

22 11. The Arizona Supreme Court has previously held that “[t]he Secretary must follow
23 a specific procedure in promulgating election rules,” including providing a draft EPM to the AG
24 and Governor by October 1 of each odd-numbered year. *Ariz. Public Integrity Alliance*, 250
25 Ariz. at 63 (emphasis added).

1 12. In the time since the Secretary promulgated the 2019 EPM, the Arizona Supreme
2 Court has twice provided new guidance on the proper scope of the EPM.

3 13. First, the Arizona Supreme Court held that because A.R.S. § 16-452 does not
4 mention candidate nominating petitions, the 2019 EPM’s procedures relating to that topic were
5 inconsistent with § 16-452 and did not have the force of law. *McKenna v. Soto*, 250 Ariz. 469,
6 473 ¶20 (2021).

7 14. Second, the Supreme Court subsequently made clear that “an EPM regulation that
8 exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does
9 not have the force of law.” *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶21 (2021).

10 15. Applying the deadlines contained in § 16-452 to the 2022 election cycle, the
11 Secretary was statutorily required to provide the AG and Governor with a legally-compliant EPM
12 for approval prior to October 1, 2021 and to promulgate the EPM prior to December 31, 2021.
13 *See* A.R.S. § 16-452.

14 16. Despite her mandatory statutory duty to do so, the Secretary failed to provide the
15 AG and Governor with a legally-compliant EPM prior to October 1, 2021 and failed to
16 promulgate the EPM prior to December 31, 2021, thereby violating A.R.S. § 16-452. And the
17 Secretary’s violation of those mandatory statutory duties remains ongoing—she has still not
18 provided the AG and Governor with a legally-compliant draft or promulgated an EPM for the
19 2022 election cycle.

20 17. On October 1, 2021, the Secretary provided the AG and Governor with what she
21 claimed was a draft EPM (“Draft 2021 EPM”) consistent with A.R.S. § 16-452.

22 18. Contrary to the Secretary’s statement that the draft was provided “pursuant to
23 A.R.S. § 16-452,” the draft EPM contained numerous provisions that were inconsistent with the
24 text or purpose of Arizona election law.

25 19. For example, despite the Arizona Supreme Court’s conclusion in *McKenna* that §
26 16-452 does not authorize the Secretary to promulgate procedures relating to candidate

1 nominating petitions, the Secretary included numerous pages or procedures relating to candidate
2 nominating procedures in the draft.

3 20. Similarly, despite the U.S. Supreme Court upholding Arizona’s precinct-voting
4 system in *Brnovich*, the Secretary included procedures in her draft EPM that would allow voters
5 to cast a ballot outside of their assigned precinct, which she acknowledged in her cover letter to
6 the AG and Governor.

7 21. In response, the AG notified the Secretary that the Draft 2021 EPM violated A.R.S.
8 § 16-452 by including numerous provisions beyond the authority conferred therein or
9 inconsistent with Arizona election laws. The AG provided the Secretary with a redline showing
10 those provisions that would need to be removed before the AG would approve the draft.

11 22. Following an exchange of additional correspondence, the Secretary refused to
12 make the changes necessary for the EPM to be legally compliant and failed to issue an EPM for
13 the 2022 election cycle.

14 23. Arizona county election officials, therefore, now lack a valid, legally sufficient set
15 of uniform rules with which to administer the 2022 statewide primary and general elections.

16 24. Consequently, Plaintiffs seek special action relief compelling the Secretary to
17 promulgate a draft EPM to the AG and Governor that is fully compliant with A.R.S. § 16-452 by
18 May 4, 2022.

19 25. To comply with A.R.S. § 16-452, the draft EPM provided by the Secretary to the
20 AG and Governor must not contain any provision that “exceeds the scope of its statutory
21 authorization or contravenes an election statute’s purpose[.]” *Leach*, 250 Ariz. at 576 ¶21.

22 26. To ensure the “maximum degree of correctness, impartiality, uniformity and
23 efficiency,” *see* A.R.S. § 16-452(A), the draft EPM provided to the AG must also contain uniform
24 procedures regarding (1) verification of ballot affidavit signatures and (2) staffing ballot drop
25 boxes.

1 the Secretary to perform the duties of her office. *See State ex rel. Sawyer v. LaSota*, 119 Ariz.
2 253, 255 (1978) (“[T]he holder [of a state office] may be compelled by mandamus to perform
3 the duties of his office.”). Moreover, under A.R.S. § 16-1021, the AG has the authority to enforce
4 the provisions of Title 16, including A.R.S. § 16-452, “through civil and criminal actions.”

5 31. Plaintiff Yavapai County Republican Committee (“Plaintiff Committee”) is an
6 unincorporated association and is responsible, under various sections of title 16, for providing
7 political party representatives to participate and oversee critical election functions. Several
8 sections of the EPM provide uniform instructions on how Plaintiff Committee’s statutory
9 responsibilities are conducted. *See e.g.* A.R.S. § 16-531(A). Plaintiff Committee is, therefore,
10 beneficially interested in the Secretary’s non-discretionary duty to promulgate a legally-
11 compliant EPM, and the Plaintiff Committee, therefore has standing to bring this action. *See*
12 *Arizona Public Integrity Alliance*, 250 Ariz. at 62.

13 32. Plaintiff Demitra Manjoros is the First Vice Chair of the Yavapai County
14 Republican Committee (“Plaintiff Vice Chair”) and assists the Chair in fulfilling several statutory
15 obligations under Title 16. *See e.g.* A.R.S. § 16-531(A). The EPM provides uniform instructions
16 to county chairs to help county parties fulfill statutory responsibilities. Plaintiff Vice Chair is
17 also a registered voter in Yavapai County that would be harmed if procedures for signature
18 verification or ballot drop boxes failed to be correct, impartial, uniform, or efficient such that her
19 legal vote is not properly counted or is diluted by one or more illegal votes. Plaintiff Vice Chair
20 is, therefore, beneficially interested in the Secretary’s non-discretionary duty to promulgate a
21 legally-compliant EPM. *See Arizona Public Integrity Alliance*, 250 Ariz. at 62 (plaintiffs “as
22 Arizona citizens and voters” had standing to compel the Maricopa County Recorder to perform
23 non-discretionary election duties); *Arizona Dep’t of Water Resources v. McClennen*, 238 Ariz.
24 371, 377 ¶32 (2015) (explaining that the “mandamus statute [§ 12-2021] reflects the Legislature’s
25 desire to broadly afford standing to members of the public to bring lawsuits to compel officials
26 to perform their public duties”).

1 Action. *See Second Chances*, 249 Ariz. at 404 ¶18 (concluding that petitioners “have properly
2 alleged a mandamus action” where they alleged “that the Secretary has refused to perform her
3 constitutional duty to accept and file E-Qual petitions, and that this Court should order her to
4 perform that constitutional duty”).

5 37. Moreover, “one purpose of a mandamus action is to determine the extent of a state
6 official’s legal duties.” *Id.* at 404 ¶19. Here, Plaintiffs ask the Court to determine the extent of
7 the Secretary’s legal duties under A.R.S. § 16-452. Thus, Plaintiffs’ claims state a claim for
8 special action relief.

9 38. Other factors support that the Court should accept special action jurisdiction. The
10 issues presented—the scope of the Secretary’s duties under A.R.S. § 16-452 and whether the
11 Secretary has complied with those duties—are primarily legal questions, and the ultimate
12 resolution of those issues is not likely to turn on disputed facts. *See Second Chances*, 249 Ariz.
13 at 404-05 ¶20; *Brewer v. Burns*, 222 Ariz. 234, 237 ¶¶ 8-9 (2009) (granting special action
14 jurisdiction even though one party claimed “intense fact questions”). Although Plaintiffs do not
15 believe the issues presented will require factual development, to the extent there are disputed fact
16 questions, the Court can resolve those issues through an evidentiary hearing.

17 39. The issues presented are also of statewide importance. The stated purpose of the
18 EPM is to help “achieve and maintain the maximum degree of correctness, impartiality,
19 uniformity and efficiency on the procedures for early voting and voting, and of producing,
20 distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). The EPM
21 is used by election officials throughout the state in administering elections. The EPM carries the
22 force of law and a person who violates any rule contained in the EPM is guilty of a class 2
23 misdemeanor. *See* A.R.S. § 16-452(C). Without a valid EPM for the 2022 election cycle, the
24 rules that would otherwise be contained therein cannot be enforced. The absence of statewide
25 rules to guide county officials in the administration of the election could result in arbitrary
26 treatment of ballots, which could engender violations of Arizona election laws and post-election

1 challenges. *See Bush v. Gore*, 531 U.S. 98, 106 (2000) (“The formulation of uniform rules to
2 determine intent based on these recurring circumstances is practicable and, we conclude,
3 necessary.”). When validly promulgated under § 16-452, courts look to rules contained within
4 the EPM for guidance in deciding pre- and post-election legal issues. *See, e.g., Ward v. Jackson*,
5 CV-20-0343-AP/EL, 2020 WL 8617817, *2 (Ariz. Dec. 8, 2020) (“The Court recently considered
6 a challenge to an election process and granted relief where the county recorder adopted a practice
7 contrary to the EPM.”); *see id.* (rejecting a post-election challenge where “there are no allegations
8 of any violation of the EPM or any Arizona law”); *Arizona Public Integrity Alliance*, 250 Ariz.
9 at 64 ¶25 (“[O]nly the Overvote Instruction authorized by the 2019 EPM may be included with
10 mail-in ballots”).

11 40. Finally, there is a need for final, immediate relief. The 2022 statewide primary
12 election is rapidly approaching. Candidates were required to submit elector signatures to the
13 Secretary by April 4, 2022 and candidate challenges are currently underway. Election officials,
14 including the Yavapai County Recorder, will be mailing early ballots for the primary election to
15 uniformed and overseas voters no later than June 18, 2022 and all early ballots to Arizona voters
16 no later than July 6, 2022. Thus, the parties require expedited and final relief to ensure that an
17 EPM is in place for the start of the 2022 primary elections. *See Smoker v. Bolin*, 85 Ariz. 171,
18 172 (1958) (considering whether to grant mandamus against the Secretary where “time was of
19 the essence and the matters involved were of great public interest”).

20 VENUE

21 41. Pursuant to Rule 4(b) of the Rules of Procedure for Special Actions, a special action
22 brought in the superior court “shall be brought in the county in which the body or officer has or
23 should have determined the matter to be reviewed, or, in the case of a state officer or body, either
24 in Maricopa County or in the county of residence of the plaintiff.” The Plaintiff Committee and
25 Plaintiff Vice-Chair are residents of Yavapai County. Venue, therefore, is appropriate in this
26

1 Court. *See, e.g., Bishop v. Marks*, 117 Ariz. 50, 51 (App. 1977); *Belcher v. Raines*, 130 Ariz.
2 464, 465 (App. 1981).

3 FACTUAL BACKGROUND

4 **I. The Elections Procedures Manual**

5 **A. Historical Practice**

6 42. Beginning in 1979, the Legislature delegated to the Secretary of State the authority
7 to promulgate certain election-related rules, the scope of which has changed slightly over the
8 years. A.R.S. § 16-452(A) currently provides:

9 After consultation with each county board of supervisors or other officer in charge of
10 elections, the secretary of state shall prescribe rules to achieve and maintain the maximum
11 degree of correctness, impartiality, uniformity and efficiency on the procedures for early
12 voting and voting, and of producing, distributing, collecting, counting, tabulating and
13 storing ballots. The secretary of state shall also adopt rules regarding fax transmittal of
14 unvoted ballots, ballot requests, voted ballots and other election materials to and from
15 absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of
16 requests for federal postcard applications prescribed by § 16-543.

17 43. Originally, the scope was limited to “absentee voting, voting, and of collecting
18 counting, tabulating and recording votes.” *See* Laws 1979, Ch. 209, § 3, eff. Jan. 1, 1980.

19 44. For four decades, A.R.S. § 16-452(B) included the following language:

20 Such rules shall be prescribed in an official instructions and procedures manual to be
21 issued not later than thirty days prior to each election. Prior to its issuance, the manual
22 shall be approved by the governor and the attorney general.

23 45. Over the ensuing four decades, Arizona Secretaries of State complied with the
24 obligation, generally promulgating what is now referred to as the “Elections Procedures Manual”
25 in advance of the statewide biennial elections with approval of the AG and Governor.

26 46. Promulgation of the EPM first became an issue starting in 2016, when the Secretary
of State at the time failed to promulgate an approved manual in 2016 and 2018.

1 47. As the counties continued to operate under the increasingly out-of-date 2014
2 Elections Procedures Manual (“2014 EPM”), the Arizona Legislature stepped in to amend A.R.S.
3 § 16-452(B) in 2019 to state:

4 B. The rules shall be prescribed in an official instructions and procedures manual to be
5 issued not later than December 31 of each odd-numbered year immediately preceding the
6 general election. Before its issuance, the manual shall be approved by the governor and
7 the attorney general. The secretary of state shall submit the manual to the governor and
8 the attorney general not later than October 1 of the year before each general election.
(emphasis added)

8 *See* Laws 2019, Ch. 99, § 1 (H.B. 2238) (emphasis added).

9 48. H.B. 2238, requiring the Secretary of State to promulgate the EPM by December
10 31 of every odd-numbered year, received not only bipartisan, but unanimous support in the
11 Legislature, and was supported by the Secretary (“Secretary Hobbs”). *See*
12 <https://apps.azleg.gov/BillStatus/BillOverview/71323> (last accessed Feb. 24, 2022); *see also*
13 Testimony of Betty McEntire on behalf of Secretary Hobbs, available at
14 <https://www.azleg.gov/videoplayer/?eventID=2019021416&startStreamAt=15523> (stating “we
15 are all on board” with issuing an EPM under the timelines contemplated in the revised statute)
16 (last accessed Feb. 24, 2022).

17 49. The clear intent of H.B. 2238 was to prevent a situation where the Secretary fails
18 to promulgate a valid EPM and county officials are left instead to rely on an outdated EPM that
19 no longer carries the force of law. *See e.g. id.* (House Elections Committee Chair Kelly
20 Townsend introduced the bill by saying, “we want to make sure that we are producing our
21 manuals in a timely manner, and we haven’t had one and I think it’s really important that that
22 does happen.”). Unfortunately, that is the very situation we are now facing.

1 **B. The 2019 EPM**

2 **1. Negotiation and Content**

3 50. Following H.B. 2238’s enactment in 2019, Secretary Hobbs produced a Draft 2019
4 Elections Procedures Manual (“Draft 2019 EPM”) on October 1, 2019. Arizona Secretary of
5 State, *Draft Elections Procedures Manual* (Oct. 1, 2019), available at
6 https://azsos.gov/sites/default/files/EPM_2019_FINAL.pdf (last accessed Apr. 6, 2022).

7 51. After a thorough review of the Draft 2019 EPM, the AG’s Office identified more
8 than 100 provisions that contravened, expanded, or reinterpreted Arizona law.

9 52. Through the course of lengthy negotiations, the offending provisions were removed
10 or made to conform to Arizona law. Without later guidance from the Arizona Supreme Court on
11 the proper scope of the EPM (discussed below), where Arizona law was silent and the rule was
12 arguably within the Secretary’s authority, the 2019 Elections Procedures Manual (“2019 EPM”)
13 was permitted to “gap-fill,” creating extra-statutory provisions not expressly precluded under
14 Arizona law. Arizona Secretary of State, *2019 Elections Procedures Manual* (Dec. 19, 2019)
15 available at
16 [https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROV](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)
17 [ED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf) (last accessed Apr. 19, 2022).

18 53. One example of such provisions is those allowing for early ballot drop-boxes. In
19 2019, Arizona law neither permitted nor excluded the use of early ballot drop boxes. In an initial
20 draft of the EPM, the Secretary proposed allowing county recorders to include “additional ballot
21 drop-off locations,” with almost no additional guidance. Through negotiations, however, the AG
22 insisted that the EPM instead provide uniform specifications for official early ballot drop-off
23 locations and drop boxes, which were included in the final EPM. *Compare e.g.* Draft 2019 EPM
24 at 56 (allowing County Recorders to include “additional ballot drop-off locations”) to the final
25 2019 EPM at 60-62 (providing uniform specifications for official early ballot drop-off locations
26 and drop-boxes).

1 54. After a series of meetings, the AG and Governor gave final approval to a version
2 of the 2019 EPM that reflected the final agreements on negotiated issues. *See* 2019 EPM
3 (approval letters from Governor Ducey and General Brnovich in the introduction).

4 55. Portions removed from the 2019 EPM at the behest of the AG pertaining to
5 electronically adjudicating votes on early ballots were later reinserted to the 2019 EPM as an
6 addendum, but only after Maricopa County obtained statutory authority from the Arizona
7 Legislature to electronically adjudicate votes. *See* Arizona Secretary of State, *Electronic*
8 *Adjudication Addendum to the 2019 Elections Procedures Manual* (Feb. 28, 2020) available at
9 [https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Election](https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf)
10 [s_Procedures_Manual.pdf](https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf) (last accessed Feb. 24, 2022); *see also* Laws 2020, Ch. 1, § 2, eff. Feb.
11 3, 2020 (S.B. 1135).

12 2. **The 2019 EPM Is No Longer Valid**

13 56. Because the statutory deadline for promulgating the 2021 EPM has now passed,
14 the 2019 EPM no longer has the force of law. There is nothing in A.R.S. § 16-452 or any other
15 statute supporting that an old EPM remains legally binding or valid once the deadline for
16 promulgation of a new EPM passes.

17 57. Construing the law to imply such a result would render the Legislature's 2019
18 revisions superfluous and fail to take into consideration this Court's intervening precedent in
19 *Leach* and *McKenna* (discussed below), which now provide clear direction on what can and
20 cannot be included in the EPM.

21 58. Construing the law to allow prior versions to retain the force of law would be
22 inconsistent with the purpose of the Legislature's revision to § 16-452, which was intended to
23 avoid a situation like in 2016 and 2018 where no new manual was published.

24 59. Any motivation to promulgate a lawful manual decreases significantly if a
25 Secretary can simply instruct county election officials to follow an old version she prefers more.
26 That reality was borne out here when the Secretary failed to provide the AG and Governor with

1 a valid draft and instead signaled to county recorders that they should continue to follow the 2019
2 EPM.

3 **C. The Arizona Supreme Court’s Intervening Guidance On The EPM**

4 60. On at least three occasions after issuance of the 2019 EPM, the Arizona Supreme
5 Court provided guidance on the proper scope and implementation of the EPM.

6 61. In *Arizona Public Integrity Alliance*, the Court held that “[t]he Secretary must
7 follow a specific procedure in promulgating election rules.” 250 Ariz. at 63 ¶16. Relying on the
8 statutory language, the Court further explained that the EPM “must be issued no ‘later than
9 December 31 of each odd-numbered year immediately preceding the general election.’” *Id.*

10 62. In *Arizona Public Integrity Alliance*, the Court held that the proposed election rule
11 at issue “contradicts the purpose of the EPM, which is to ‘prescribe rules to achieve and maintain
12 the maximum degree of correctness, impartiality, uniformity and efficiency’” because it would
13 create a situation where “depending on the judgment of election officials, [a ballot] may or may
14 not be counted.” *Id.* at 64 ¶24.

15 63. The Court also made clear that the Secretary does not enjoy unlimited discretion in
16 determining what provisions to include in the EPM. In *McKenna v. Soto*, a candidate signature
17 challenge, the Arizona Supreme Court clarified that, because § 16-452 does not mention
18 candidate nominating petitions, the 2019 EPM’s procedures relating to that topic could not have
19 been promulgated under § 16-452 and do not have the force of law. 250 Ariz. 469, 473 ¶20
20 (2021). The court held that the Secretary’s statutory authority to promulgate rules in the EPM
21 are constrained to “procedures for early voting and voting, and of producing, distributing,
22 collecting, counting, tabulating and storing ballots” and that candidate nominating petition
23 procedures “fall outside of the mandates of § 16-452[.]” *Id.* at ¶20. Furthermore, the Court noted
24 that the rule permitting candidates to have otherwise valid signatures invalidated based on rules
25 promulgated in the EPM pertaining to the form of the date signed had no other basis in statute,
26

1 therefore “the 2019 EPM’s directive to reject a signature without a complete date does not have
2 the force of law, and simply acts as guidance.” *Id.* at ¶21.

3 64. Finally, in *Leach v. Hobbs*, the political action committee (“Committee”) that was
4 defending petition sheets gathered in support of a ballot initiative, asserted that the court should
5 not reject petitions sheets gathered by circulators who failed to appear at trial as “circulators were
6 not required to appear for trial pursuant to § 19-118(E) because the circulators had been ‘de-
7 registered’” as provided for in the 2019 EPM. 250 Ariz. at 574 ¶7. The court concluded that the
8 Committee’s interpretation was “untenable” and inconsistent with the purpose of the registration
9 requirement in A.R.S. § 19-102.01(A). *Id.* at 576 ¶20. Thus, the Court rejected the Committee’s
10 reliance on the EPM, explaining that “an EPM regulation that exceeds the scope of its statutory
11 authorization or contravenes an election statute’s purpose does not have the force of law.” *Id.* at
12 576 ¶21.

13 **D. The AG’s Authority With Respect To The EPM**

14 65. The Secretary is also subject to oversight by other state officials—both the AG and
15 the Governor must approve the draft EPM before it enjoys the force of law. A.R.S. § 16-452(B).

16 66. To ensure that the EPM is timely promulgated, Arizona law requires the Secretary
17 to provide a draft EPM to the AG and Governor by October 1 of each odd-numbered year. *Id.*

18 67. The AG is not statutorily authorized to rubber stamp the draft EPM without regard
19 to what provisions the Secretary includes. Instead, “the authority of the [AG] must be found in
20 statute.” *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 ¶8 (2020).

21 68. No Arizona statute, including A.R.S. § 16-452, allows the AG to approve an EPM
22 provision exceeding the scope of its statutory authorization or contravening an elections statute’s
23 purpose. *See Leach*, 250 Ariz. at 576 ¶20. Put differently, the AG has no statutory authority to
24 approve election procedures not adopted “pursuant to § 16-452” and which are mere guidance.
25
26

1 69. The limitations—scope and approval—on the Secretary’s authority to promulgate
2 rules through the EPM are particularly vital in light of the fact that “[a] person who violates any
3 rule adopted pursuant to [§ 16-452] is guilty of a class 2 misdemeanor.” A.R.S. § 16-452(C).

4 **E. The Draft 2021 EPM**

5 70. On October 1, 2021, after the Court’s guidance in *Leach* and *McKenna*, the
6 Secretary submitted a Draft 2021 EPM to the AG and the Governor for review and approval. *See*
7 Declaration and Verification of Jennifer J. Wright (“Wright Decl.”) attached hereto as Exhibit 1
8 at ¶2, AGO-002 to -003.¹

9 71. The Supreme Court’s new guidance in *McKenna* and *Leach* necessitated a fresh
10 look at the entire EPM. The Secretary readily admitted in her October 1 submission letter that
11 intervening cases necessitated the removal of some provisions, but failed to fully comport the
12 Draft 2021 EPM to the holdings in those cases.

13 **1. The Draft 2021 EPM Violated *Leach* and *McKenna***

14 72. Many of the draft provisions contained in the Draft 2021 EPM either exceeded the
15 scope of the Secretary’s authority or were inconsistent with the purpose of one or more election
16 statutes. In all, the Draft 2021 EPM contained over 75 pages of rules (not including appendices)
17 that the AG determined either exceeded the Secretary’s statutory authority or contravened an
18 election statute’s purpose. The following are just some of the more egregious examples and are
19 not meant to be exhaustive.

20 73. The Secretary included seventeen pages of rules and procedures relating to
21 candidate nominating procedures. *See* Wright Decl. ¶3, AGO-135 to -152. The Secretary
22 included those provisions despite the Court’s clear conclusion in *McKenna* that “the statute that
23 authorizes the EPM does not authorize rulemaking pertaining to candidate nomination petitions”
24 and that such provisions are “not adopted ‘pursuant to’ § 16-452.” 250 Ariz. at 473 ¶20. Because

25
26 ¹ Pinpoint citations to the bates-stamp on the upper righthand corner of each exhibit page are included to aid the Court.

1 candidate nominating provisions cannot be adopted pursuant to § 16-452, they should not again
2 have been included in the EPM and the AG could not approve them pursuant to § 16-452.

3 74. The Secretary also included over forty-five pages of rules and procedures relating
4 to voter registration. *See* Wright Decl. ¶3, AGO-016 to -060. Voter registration is not one of the
5 topics upon which the Secretary is empowered to promulgate rules under § 16-452, which
6 mentions instead “early voting and voting, and of producing, distributing, collecting, counting,
7 tabulating and storing ballots.” A.R.S. § 16-452(A). The Legislature granted statutory authority
8 for voter registration solely to county recorders. *See, e.g.*, A.R.S. §§ 16-131, 16-163(A). Because
9 voter registration provisions cannot be adopted pursuant to § 16-452, the Secretary should not
10 have again included them and the AG could not approve them pursuant to § 16-452.

11 75. For years, Arizona has, at least in part, followed a precinct system for in-person
12 voting. Those who vote in person in a county using the precinct system must vote in their
13 assigned precinct. A.R.S. § 16-122. The Democratic National Committee (“DNC”) challenged
14 Arizona’s out-of-precinct rule on the grounds that it violated § 2 of the Voting Rights Act. The
15 AG defended the law and the Court rejected DNC’s challenge, explaining that “[h]aving to
16 identify one’s own polling place and then travel there to vote does not exceed the ‘usual burdens
17 of voting.’” *Brnovich*, 141 S. Ct. at 2344. The Secretary’s Draft 2021 EPM, however, inserted
18 provisions allowing voters who appear at the wrong precinct to nonetheless cast a provisional
19 ballot for certain races, which is in direct conflict with A.R.S. §§ 16-122 and -584 (not to mention
20 *Brnovich*). *See* Wright Decl. ¶3, AGO-235 (indicating that “ballots cast in the wrong precinct
21 must also be manually duplicated in order to be tabulated”); *see also id.* at AGO-236 (“for out-
22 of-precinct ballots, only the voter’s selections for races and ballot measures for which the voter
23 is eligible to vote shall be duplicated onto the correct ballot style”).

24 76. The Draft 2021 EPM also included several provisions that purported to provide
25 what can only be construed as rendering a legal opinion, such as attempting to define through the
26 EPM when a statute becomes effective (*Id.* at AGO-072, n.25), defining what constitutes a

1 “business day” (*Id.* at AGO-090), authorizing counties to delegate statutory responsibilities to a
2 different constitutional officer than the one defined in statute (*Id.* at AGO-074), and unilaterally
3 dictating what a court would construe as substantially similar language where ballot envelope
4 language deviated from the prescribed statutory text (*Id.*).

5 77. Again, these examples are just a few of many problematic provisions. On
6 December 9, 2022, the AG sent the Secretary a redline EPM showing the provisions that were
7 inconsistent with *Leach* and *McKenna*. See Wright Decl. ¶3, AGO-004 to -313.

8 **2. The Draft 2021 EPM Omitted Provisions Required Under A.R.S. § 16-**
9 **452**

10 78. As explained, A.R.S. § 16-452 requires the Secretary to promulgate rules in the
11 EPM “to achieve and maintain *the maximum degree* of correctness, impartiality, uniformity and
12 efficiency.” A.R.S. § 16-452(A) (emphasis added). And, as the Arizona Supreme Court recently
13 held, election rules contradict the purpose of the EPM when they create a situation where a ballot
14 may or may not be counted “depending on the judgment of election officials.” *Arizona Public*
15 *Integrity Alliance*, 250 Ariz. at 64 ¶24.

16 79. The Draft 2021 EPM did not contain certain rules required to achieve and maintain
17 the maximum degree of correctness, impartiality, uniformity and efficiency of elections in
18 Arizona, and to ensure that ballots are not rejected based on the judgment of election officials.

19 **a. The EPM Must Contain Ballot Signature Verification Rules**

20 **i. Arizona’s Early Voting System Requires Robust Signature**
21 **Verification**

22 80. Arizona has permitted some form of absentee balloting since 1918 beginning with
23 World War I soldiers, and since the 1992 election cycle, Arizona has allowed no-excuse access
24 to voting-by-mail (colloquially referred to as “early voting”). See 1991 Ariz. Sess. Laws, ch. 51,
25 § 1.
26

1 81. Voters may elect to receive an early ballot by mail (with postage paid return
2 envelope) or at an early voting center. A.R.S. § 16-541 et seq.

3 82. Ballots cast through early voting, whether by mail or at a voting center, must be
4 accompanied by a ballot affidavit that not only serves as the primary form of identification for
5 the voter, but also requires the voter to declare, under penalty of perjury, that he or she “voted
6 the enclosed ballot.” A.R.S. § 16-547(A).

7 83. Both the ballot and the signed affidavit must be delivered to the county recorder no
8 later than 7:00 p.m. on election day, and a ballot is not considered complete, nor can it be counted,
9 unless and until it includes a signature on the ballot affidavit. A.R.S. §§ 16-548(A), -550(A).

10 84. Once received, county election officials compare the signature on the ballot
11 affidavit with the signature in the voter’s registration record to determine if the signature matches
12 that on file; if not, then the ballot cannot be counted unless the voter confirms the mismatched
13 signature is the voter’s signature. A.R.S. § 16-550(A).

14 85. Requiring a match between the signature on the ballot affidavit and the signature
15 on file with the county is the primary, if not only, and certainly most important election integrity
16 measure when it comes to absentee ballots. The Ninth Circuit acknowledged, in response to a
17 constitutional challenge to the deadline for submitting signed ballot affidavits, that “Arizona
18 requires early voters to return their ballots along with a signed ballot affidavit in order to guard
19 against voter fraud.” *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020).

20 86. County election officials, therefore, must be extremely diligent in ensuring that
21 early ballot affidavit signatures match those on file, regardless of the sheer quantity of early
22 ballots received, the administrative burdens imposed by verifying each one, or for other reasons
23 that could be construed as nefarious or partisan. County election officials and their staffs cannot
24 violate their statutory duty to match *every* signature.

1 **ii. Signature Verification Is Vulnerable To Non- or Mal-Feasance**

2 87. Early voting is widespread in Arizona: 79% of Arizona voters cast early ballots in
3 2018 and that number reportedly increased to 89% for the 2020 General Election. With over 3.4
4 million ballots cast in the General Election in 2020, Arizona elections officials were required to
5 match signatures on over 3 million early ballots during a five to six-week period.

6 88. This large number of early ballots combined with the administrative burden of
7 confirming every one of the signatures submitted in a very short period of time, when not
8 administered diligently, could result in election officials approving early ballot affidavits that
9 should not otherwise be approved without further verification.

10 89. Statistics for Maricopa County, for example, over the last three election cycles
11 reflect that the number of early ballots rejected because of missing and mismatched signatures is
12 trending down. Wright Decl. ¶8, AGO-329. During the 2016 General Election, when Helen
13 Purcell was county recorder, Maricopa County received 1,249,932 early ballots. *Id.* Of that
14 amount, Maricopa County rejected 2,209 early ballots because of missing signatures and 1,451
15 ballots because of mismatched signatures. *Id.*

16 90. Just two years later, during the 2018 General Election, after Adrian Fontes became
17 county recorder, Maricopa County received 1,184,791 early ballots, just 65,141 less than in 2016.
18 *Id.* Yet the number of ballots rejected in 2018 because of missing signatures (only 1,856) and
19 mismatched signatures (only 307) declined significantly—the number of early ballot rejected due
20 to missing signatures decreased by 353 and the mismatched signatures decreased by 1,144 (a
21 79% decrease). *Id.* By comparison, Pima County received 302,770 early ballots (882,081 less
22 than Maricopa) and rejected 488 (135 more than Maricopa) because of mismatched signatures.
23 *Id.*

24 91. During the 2020 General Election, Maricopa County saw a significant increase in
25 the number of mail-in ballots, receiving 1,908,067 mail-in ballots (an increase of 723,276 mail-
26 in ballots). *Id.* Yet the number of ballots rejected because of missing signatures continued its

1 dramatic decrease (to only 1,455 ballots) and the number of ballots rejected because of
2 mismatched signatures increased only slightly (to 587 ballots). *Id.*

3 92. In conjunction with a November 2020 election challenge brought under A.R.S. §
4 16-672, a judge authorized forensic examination of 100 ballot affidavit signatures that Maricopa
5 County accepted as matching. *Ward v. Jackson*, No. CV2020-015285, 2020 WL 13032880, *3
6 (Maricopa Cnty. Super. Ct. Dec. 4, 2020). The plaintiffs' expert testified that 6 of the 100 ballots
7 affidavit signatures were "inconclusive," meaning she could not testify that the signature on the
8 envelope/affidavit matched the signature on file." *Id.* at *4. Defendant Maricopa County
9 Recorder's Office forensic examiner "testified that 11 of the 100 envelopes were inconclusive,
10 mostly because there were insufficient specimens to which to compare them." *Id.*

11 **iii. Maricopa County Is Now Outsourcing Portions Of The**
12 **Signature Verification Process To A Non-Governmental Third-**
13 **Party And Using Automated Signature Verification Software**

14 93. On or around June 1, 2020, Maricopa County contracted with Runbeck Election
15 Service ("RES") to use the Verus Pro "Automated Signature Verification" application for up to
16 four (4) million signatures per year. Wright Decl. ¶10(a), AGO-353 to -360.

17 94. Using this process for the general election in 2020, Maricopa County outsourced
18 initial ballot review to a non-governmental third party, using what Maricopa County's Director
19 of Elections referred to as an "AI Signature process."

20 95. In March 2020, when preparing the format for the affidavit envelopes to be used
21 during the 2020 primary and general elections, Maricopa County's Director of Elections directed
22 that the "signature" section on the ballot affidavit be separated from the "phone & date" box so
23 that there would be a clean target area for the "AI signature process": "We wanted to break apart
24 the signature box from the 'Phone & Date' box so that if and when we go to the AI Signature
25 process, we would have a very clean target area to focus in on that is free of the black signature
26 line and free of the text." Wright Decl. ¶10(b), AGO-362 (emphasis added). The Director of

1 Elections later asked, “Is it possible to work on that signature box section to conform to what
2 would be best for that AI process?” *Id.* (emphasis added).

3 96. According to the RES, “Verus Pro exchanges files with the inbound mail sorter by
4 evaluating signature images captured [at RES facilities] from the mail packets and compares
5 them to the reference images [provided by Maricopa County] from the voter registration
6 database. This solution consists of a server running the Verus Pro application while exchanging
7 files with [MCRO’s] voter registration system.” Wright Decl. ¶10(a), AGO-353 to -360.

8 97. Based on email exchanges between RES and Maricopa County recently obtained
9 by the AG through a public records request, Verus Pro uses computer software to compare
10 signatures on file with ballot affidavit signatures to determine a confidence score. Wright Decl.
11 ¶10(c), AGO-365. Depending on the confidence score, the signatures are batched into “high
12 confidence”, “low confidence” and “manager” queues for review by examiners inside the
13 MCRO. Wright Decl. ¶10(d), AGO-367.

14 98. It is unclear at this point what factors determine whether a ballot signature is routed
15 to the “high confidence,” “low confidence” and “manager” queues for review. It is clear,
16 however, that Maricopa County has no written policies explaining the difference, instead relying
17 entirely on RES to do so. In a letter dated March 31, 2022, outside counsel for Maricopa County
18 admitted that “[t]here are no written procedures provided to or created for staff as it relates to
19 batching into high or low confidence because Runbeck does the batching with Verus Pro.” Wright
20 Decl. ¶9, AGO-331. This lack of guidance manifested in communications between RES and
21 Maricopa County. In July 2020, Maricopa County’s Director of Elections asked RES, “We
22 trained staff to look at High Confidence one way and Low Confidence another, so I need to have
23 them made aware that the ‘High Confidence’ is not really true and there can and will be a mix of
24 all types (match, no match, no signature, etc.) in the High Confidence queue, correct?” Wright
25 Decl. ¶10(e), AGO-369.

1 99. It is clear that Maricopa County and RES employees viewed this new process as at
2 least a partial substitute for manual signature verification. It appears Maricopa County began
3 testing the new system during the 2020 primary election. During that time, one Maricopa County
4 employee explained in an email that, “We provided 10001.tif, Runbeck created
5 10001_Document_Alpha.tif and that is what they use to do the actual signature verification.”
6 Wright Decl. ¶10(f), AGO-371 (emphasis added). The Director of Elections commented that
7 “[a]s for the Primary, we still have to look at 100% of the signatures so not a major issue,”
8 implying that Maricopa County would not have to look at 100% of signatures once the process
9 was implemented for the general election. Wright Decl. ¶10(g), AGO-373. At one point when
10 the system failed, a RES employee responded that “I’ve stopped Verus Pro from automatically
11 verifying new signatures, and am researching the cause of the failure now[.]” Wright Decl.
12 ¶10(h), AGO-375 (emphasis added). And the same RES employee later informed Maricopa
13 County that, “The incoming signatures from this morning are finished verifying[.]” Wright Decl.
14 ¶10(i), AGO-377 (emphasis added).

15 100. Entering the 2020 general election, Maricopa County immediately experienced
16 issues with RES and the Verus Pro system. On October 9, 2020, RES informed Maricopa County
17 that there would be a delay “to set up the General Election of the server” and that the system
18 might not be available until Monday morning, October 12, 2020. Wright Decl. ¶10(j), AGO-
19 379. Maricopa County’s Director of Elections responded, threatening to cancel the contract with
20 RES and commenting that “[s]o much for using Verus Pro for the General and me stating early
21 on to proceed, noting we should not see any major issues.” The Director of Elections went on to
22 say that, “Excuse my French but this shit show needs to be improved on post haste from RES
23 side.” (Emphasis in original). He also informed RES that he regretted the decision to use Verus
24 Pro: “Again, I am regretting my decision to proceed with using Verus Pro for the General and
25 to be proven wrong that we won’t have any issues, and to put my name to that decision and have
26 it be a first file issue is beyond frustrating.” (Cleaned up). The Director of Elections also notified

1 another Maricopa County employee that “I need to know if we can shut Verus Pro down and go
2 back to our former process after this first file?” Wright Decl. ¶10(k), AGO-381 to -382.

3 101. No statute allows counties to outsource any portion of the signature verification
4 process to a non-governmental third party or to use computer software as a substitute, in whole
5 or in part, for the human signature verification process.

6 **iv. The EPM Must Include Signature Verification Guidance**

7 102. Although the Secretary has published a “Signature Verification Guide” (the
8 “Guide”) on the Secretary’s website, the Guide is not only legally insufficient as it permits
9 missing, inconsistent, digital, and electronic signatures not statutorily authorized, but also
10 because it hasn’t been reviewed and approved by the AG and Governor as required by A.R.S. §
11 16-452(B). Arizona Secretary of State, *Signature Verification Guide* (July 2020), available at
12 https://azsos.gov/sites/default/files/AZSOS_Signature_Verification_Guide.pdf (last accessed
13 Apr. 19, 2022).

14 103. To ensure the *maximum degree* of correctness, impartiality, uniformity and
15 efficiency with respect to signature verification, the Secretary must include signature verification
16 rules in the draft EPM. Any and all such rules must be consistent with the text and purpose of
17 Arizona election law. And any and all such rules must make clear that county officials are not
18 permitted to outsource any portion of the signature verification process to non-governmental
19 entities and must include guidelines to ensure that computer software does not replace any portion
20 of the manual signature process and is used in a uniform and correct manner.

21 104. Nowhere in the 297 page Draft 2021 EPM, nor in its 331 page appendix, are
22 uniform instructions for the counties to use to verify early ballot affidavit signatures in order to
23 ensure the maximum degree of correctness, impartiality, uniformity and efficiency in early
24 voting. *See* Draft 2021 EPM.

1 **b. The EPM Must Contain Ballot Drop Box Rules**

2 105. Although the Secretary included uniform requirements for drop boxes in the Draft
3 2021 EPM, the provision allowing for *unstaffed* drop boxes contravenes the purpose of A.R.S. §
4 16-1005(E).

5 106. Arizona law requires that drop boxes to be properly staffed. A.R.S. § 16-1005(E)
6 provides that “[a] person or entity that . . . is found to be serving as a ballot drop off site, *other*
7 *than those established and staffed by election officials, is guilty of a class 5 felony.*” (emphasis
8 added).

9 107. In order for ballot drop-off sites to meet the statutory purpose of A.R.S. § 16-
10 1005(E), the drop-off site, including ballot drop boxes, must be *established* and *staffed* by
11 election officials.

12 108. To give the phrase “staffed” meaning separate from “established,” election officials
13 must do more than simply set up a ballot drop box and leave it for the duration of the early-voting
14 period. Instead, ballot drop boxes must be monitored by an election official’s staff.

15 109. Staffing must be sufficient “to secure the purity of elections” and in such a manner
16 that “secrecy in voting shall be preserved.” *See* Ariz. Const. art. VII §§ 12, 1, respectively. The
17 Arizona Constitution and § 16-1005(E) require that ballot drop boxes, if permitted, be monitored
18 at all times.

19 110. In the Draft 2021 EPM, the Secretary included provisions that explicitly permit
20 “unstaffed” drop-boxes, defined as “not within the view and monitoring of an employee or
21 designee of the County Recorder or officer in charge of elections[.]” Wright Decl. ¶3, AGO-
22 082.

23 111. Arizona law is silent on the use of ballot drop boxes. Instead, drop boxes were
24 introduced in the Draft 2019 EPM when the Secretary made a passing reference that County
25 Recorders “may add additional ballot drop-off locations” in their instructions to voters. *See* Draft
26 2019 EPM at 56.

1 112. Despite the AG’s objections to the ballot drop box provisions, the Secretary insisted
2 that she could and should provide *guidance* on the use of “additional ballot drop-off locations”
3 should county officials choose to use them, and thus she added chapter 2, section I, subsection I,
4 “Ballot Drop-Off Locations and Drop-Boxes” to the 2019 EPM. *See* 2019 EPM at 60-62.

5 113. In light of *Leach* and *McKenna*, it is clear that the EPM can no longer allow for
6 *unstaffed* drop boxes because allowing ballots to be returned at unstaffed drop boxes conflicts
7 with the statutory purpose of A.R.S. § 16-1005(E).

8 114. Instead, to achieve the *maximum degree* of correctness, impartiality, uniformity
9 and efficiency with respect to signature verification, the Secretary must include rules in the draft
10 EPM requiring ballot drop boxes to be properly staffed and providing guidance on how county
11 officials can satisfy that requirement.

12 **F. The AG Objected To The Draft 2021 EPM And The Secretary Failed To Issue**
13 **An EPM**

14 115. After receiving the Draft 2021 EPM from the Secretary on October 1, 2021, the
15 AG concluded that numerous provisions in the draft violated A.R.S. § 16-452, particularly in
16 light of the Arizona Supreme Court’s guidance in *Arizona Public Integrity Alliance*, *Leach*, and
17 *McKenna*.

18 116. On December 9, 2021, the AG, therefore, returned the draft EPM to the Secretary
19 noting the specific provisions that had to be removed as the “proposed regulations exceed the
20 scope of the Secretary’s statutory authorization or contravene an election statute’s purpose, and
21 therefore cannot be approved[.]” Wright Decl. ¶3, AGO-016.

22 117. The Secretary refused to make each of the changes identified by AG prior to the
23 December 31 statutory deadline for promulgating the EPM. Instead, the Secretary responded on
24 December 17, 2021, offering to remove some offending provisions but refusing to remove others
25 and criticizing the AG for retaining outside counsel. Wright Decl. ¶4, AGO-314 to -321.
26

1 118. After the Secretary responded by refusing to conform the Draft 2021 EPM to
2 Arizona law, the AG again responded on December 22, 2021, stating that his prior letter and
3 redlined Draft 2021 EPM “made clear what changes need to be made to assure the EPM complies
4 with the law and does not unnecessarily expose election officials and workers to criminal
5 penalties.” Wright Decl. ¶5, AGO-323.

6 119. On December 23, 2021, the Secretary signaled to County Recorders and County
7 Election Directors that they should continue to follow the 2019 EPM, while also acknowledging
8 that the 2019 EPM is no longer “fully up-to-date[.]” Wright Decl. ¶6, AGO-325.

9 120. Contrary to the Secretary’s suggestion to county officials that they should rely on
10 the 2019 EPM, the AG has not approved the 2019 EPM for use during the 2022 election cycle.

11 121. On December 31, 2021, Governor Doug Ducey sent a letter to the Secretary noting
12 that because the Secretary and the AG had not come to an agreement there was no action for him
13 to take as he could not independently approve the Draft 2021 EPM. However, the Governor
14 explained that “[a]n accurate and updated EPM ensures both consistency throughout our 15
15 counties and predictability for our electorate” and that as “the EPM carries with it the force of
16 law, the first objective must always be compliance with the law by ensuring that the executive
17 branch is not straying into the responsibilities of the legislature.” Wright Decl. ¶7, AGO-327.

18 **G. The Arizona Republican Party Arizona Supreme Court Litigation**

19 122. On February 25, 2022, the Arizona Republican Party (“ARP”) filed an Application
20 for Issuance of Writ Under Exercise of Original Jurisdiction (“Application”) in the Arizona
21 Supreme Court against the Secretary and the State of Arizona (“the State”).

22 123. In the Application, ARP requested that the Court grant it special action relief by,
23 as relevant here, including signature verification rules in the 2019 EPM and prohibiting the
24 Secretary from authorizing ballot drop boxes “in the 2022 general election and beyond.”
25 Application at 44.

1 124. The State and the AG responded that the Court should “order the Secretary to
2 comply with § 16-452 by promptly providing a valid draft EPM to the AG and Governor by a
3 date certain.” State’s Resp. to Application at 12.²

4 125. The State and AG further explained that they did not object to additional signature
5 verification rules being included in the EPM, “provided that such guidance complies with the
6 Court’s statements in *Leach* about the scope of the EPM.” State’s Resp. to Application at 20.
7 The State and AG explained, however, that “[t]he only effective way Petitioners requested relief
8 can be granted . . . is by ordering the Secretary to provide the AG and Governor with a valid draft
9 EPM[.]” *Id.*

10 126. Finally, the State and AG explained that “the Court should accept jurisdiction” and
11 provide the relief requested in part “to provide election officials with clarity about allowable
12 procedures, including with respect to ballot drop boxes, for the 2022 election cycle.” State’s
13 Resp. to Application at 21.

14 127. On April 5, 2022, the Arizona Supreme Court entered an Order Declining
15 Jurisdiction, in which the Court declined to exercise special action jurisdiction. The Court
16 explained that ARP had not convinced the Court that the issues regarding the EPM could be
17 resolved without a factual record. The Court made clear, however, that “[t]his order is without
18 prejudice to the parties’ refiling this case in superior court.” *Arizona Rep. Party v. Hobbs*, CV-
19 22-0048-SA, Order Declining Jurisdiction (Apr. 5, 2022).

20 **H. The AG Again Demands That The Secretary Comply With Arizona Law**

21 128. On April 11, 2022, within six days of the Arizona Supreme Court’s denial of special
22 action jurisdiction, the AG wrote to the Secretary, giving her one week, until April 18, 2022, to
23 provide the AG and Governor with “a legally compliant and updated EPM.” Wright Decl. ¶11,
24

25 ² The docket and copies of filings, including the Application and the State’s Response to
26 Application, in *Ariz. Rep. Party v. Hobbs*, CV-22-0048-SA is available at
<https://www.azcourts.gov/newsandinfo/CV-22-0048> (last accessed Apr. 20, 2022).

1 AGO-385 to -386. Moreover, the AG notified the Secretary that “the submitted EPM must also
2 include legally enforceable signature verification standards to ensure that all counties provide the
3 necessary level of scrutiny to early ballot affidavits to confirm the voter’s identity.” *Id.* Finally,
4 the AG indicated that the Secretary should update the EPM “to prohibit the use of unstaffed drop
5 boxes to prevent counties from violating A.R.S. § 16-1005(E) and its statutory purpose of
6 preventing ballot harvesting.” *Id.*

7 129. On April 18, 2022, the Secretary responded, flatly refusing to provide the AG and
8 Governor with a legally-compliant draft EPM for approval. Wright Decl. ¶12, AGO-388.

9 **CLAIM FOR RELIEF**

10 **Special Action Relief**

11 130. The Plaintiffs incorporate by reference the foregoing allegations as if set forth
12 herein.

13 131. As explained above (*see* ¶¶ 37-40), this case satisfies each and all of the factors for
14 granting special action relief.

15 132. Rule 3 of the Rules of Procedure for Special Action provides that, in a special
16 action, the Court may decide “[w]hether the defendant has failed to exercise discretion which he
17 has a duty to exercise; or to perform a duty required by law as to which he has no discretion.”
18 Ariz. R. P. Spec. Act. 3(a); *see also Blake v. Schwartz*, 202 Ariz. 120, 127 n.6 (App. 2002)
19 (mandamus action used to compel public official to perform duty; mandamus now “replaced with
20 special actions”).

21 133. Special action relief is also available where a government official has acted in an
22 arbitrary or capricious manner. *See Town of Paradise Valley v. Golf Leisure Corp.*, 27 Ariz.
23 App. 600, 611 (1976) (“[I]f the actions of a municipality are arbitrary, capricious and in error
24 with prevailing law, mandamus and/or special action injunctive relief will lie.”); *Rhodes v. Clark*,
25 92 Ariz. 31, 35 (1962) (explaining that mandamus relief will lie where “the officer has acted
26

1 arbitrarily and unjustly and in the abuse of discretion”); *Book Cellar, Inc. v. City of Phoenix*, 139
2 Ariz. 332, 335-36 (App. 1983) (“[T]he trial court could have considered this matter as a special
3 action in the nature of mandamus which also lies to correct an arbitrary or unjust act or abuse of
4 discretion.”).

5 134. Moreover, where a government official has acted unlawfully or exceeded her
6 statutory authority, a plaintiff need not satisfy the standard for injunctive relief. *See Arizona*
7 *Public Integrity Alliance*, 250 Ariz. at 64 ¶26 (“Because Plaintiffs have shown that the Recorder
8 has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy
9 the standard for injunctive relief.”).

10 135. The Arizona Supreme Court has held that “[t]he Secretary must follow a specific
11 procedure in promulgating election rules.” *Id.* at 63 ¶16.

12 136. The Secretary has a statutory duty to provide the AG and Governor with a draft
13 EPM that “prescribe[s] rules to achieve and maintain the maximum degree of correctness,
14 impartiality, uniformity and efficiency on the procedures for early voting and voting, and of
15 producing, distributing, collecting, counting, tabulating and storing ballots” by October 1 of
16 every “odd-numbered year immediately preceding the general election.” A.R.S. § 16-
17 452(A),(B).

18 137. Similarly, the Arizona Supreme Court has held that election rules contradict the
19 purpose of the EPM when they create a situation where a ballot may or may not be counted
20 “depending on the judgment of election officials.” *Arizona Public Integrity Alliance*, 250 Ariz.
21 at 64 ¶24.

22 138. By providing a 2021 Draft EPM to the AG and Governor that included numerous
23 provisions outside the scope of § 16-452 or that are inconsistent with the text or purpose of
24 Arizona election law, the Secretary violated her statutory duty to provide the AG and Governor,
25 by October 1, 2021, with a draft EPM consistent with § 16-452 and the holdings in *Leach* and
26 *McKenna*. In so doing, the Secretary acted unlawfully.

1 139. By failing to promulgate a lawfully-compliant EPM by December 31, 2021, the
2 Secretary violated her statutory duty under A.R.S. § 16-452(A) to promulgate an updated and
3 legally-compliant EPM for each primary and general election cycle.

4 140. By failing to include provisions in the 2021 Draft EPM that did not include rules
5 regarding ballot signature verification, the Secretary also violated her mandatory statutory duty
6 to promulgate election rules that “achieve and maintain the maximum degree of correctness,
7 impartiality, uniformity and efficiency.” A.R.S. § 16-452(A).

8 141. By failing to include provisions in the 2021 Draft EPM regarding ballot signature
9 verification, the 2021 Draft EPM contradicts the purpose of the EPM statute by allowing ballots
10 to be counted depending on the judgment of election officials.

11 142. By failing to include provisions in the 2021 Draft EPM regarding ballot signature
12 verification, the Secretary acted arbitrarily or capriciously and abused her discretion, thereby
13 justifying special action relief. *See Rhodes*, 92 Ariz. at 35.

14 143. By failing to include provisions in the 2021 Draft EPM prohibiting county election
15 officials from outsourcing any part of the ballot signature verification process to a non-
16 governmental third party and by failing to provide guidance regarding the procurement and use
17 of computer software to verify, at least in part, ballot signatures (an “AI Signature process” as
18 Maricopa County’s Director of Elections described it), the 2021 Draft EPM contradicted the
19 purpose of the EPM statute.

20 144. By failing to include provisions in the 2021 Draft EPM prohibiting county election
21 officials from outsourcing any part of the ballot signature verification process to a non-
22 governmental third party and by failing to provide guidance regarding the procurement and use
23 of computer software to verify, at least in part, ballot signatures (an “AI Signature process” as
24 Maricopa County’s Director of Elections described it), the Secretary acted arbitrarily or
25 capriciously and abused her discretion, thereby justifying special action relief. *See Rhodes*, 92
26 Ariz. at 35.

1 145. By failing to include provisions in the 2021 Draft EPM that provide county officials
2 guidance on how to properly staff ballot drop boxes, the Secretary violated her mandatory
3 statutory duty to promulgate election rules that “achieve and maintain the maximum degree of
4 correctness, impartiality, uniformity and efficiency.” A.R.S. § 16-452(A).

5 146. By failing to include provisions in the 2021 Draft EPM that provide county officials
6 guidance on how to properly staff ballot drop boxes, the Secretary acted arbitrarily or capriciously
7 and abused her discretion, thereby justifying special action relief. *See Rhodes*, 92 Ariz. at 35.

8 147. Based on the foregoing, the Court should grant Plaintiffs special action relief by
9 ordering the Secretary to comply with A.R.S. § 16-452 by promptly providing the AG and
10 Governor with a valid draft EPM by a date certain.

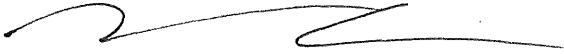
11 148. Based on the foregoing, the Court should grant Plaintiffs special action relief by
12 ordering the Secretary to comply with A.R.S. § 16-452 by promptly providing the AG and
13 Governor with a draft EPM that includes rules for county officials regarding ballot signature
14 verification.

15 149. Based on the foregoing, the Court should grant Plaintiffs special action relief by
16 ordering the Secretary to comply with A.R.S. § 16-452 by promptly providing the AG and
17 Governor with a draft EPM that includes rules prohibiting county election officials from
18 outsourcing any part of the ballot signature verification process to a non-governmental third party
19 and by failing to provide guidance regarding the procurement and use of computer software to
20 verify, at least in part, ballot signatures (an “AI Signature process” as Maricopa County’s
21 Director of Elections described it).

22 150. Based on the foregoing, the Court should grant Plaintiffs special action relief by
23 ordering the Secretary to comply with A.R.S. § 16-452 by promptly providing the AG and
24 Governor with a draft EPM that includes rules for county officials to properly staff ballot drop
25 boxes.
26

1 RESPECTFULLY SUBMITTED this 21st day of April, 2022.

2 **MARK BRNOVICH**
3 **ATTORNEY GENERAL**

4 By 

5 Joseph A. Kanefield
6 Brunn ("Beau") W. Roysden III
7 Michael S. Catlett
8 Jennifer J. Wright
9 *Assistant Attorneys General*

10 *Attorneys for Plaintiff Attorney General Mark*
11 *Brnovich,*

12 **BERGIN, FRANKS, SMALLEY & OBERHOLTZER**

13 By  for

14 Brian M. Bergin

15 *Attorney for Plaintiffs Demitra Manjoros*
16 *and Yavapai Republican Committee*

17
18
19
20
21
22
23
24
25
26

EXHIBIT 2

ORIGINAL FILED THIS _____
DAY OF APR 21 2022
DONNA McQUALITY
Clerk of Superior Court

By: L FISHER
Deputy

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22 *and Yavapai Republican Committee*

15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
16 **IN AND FOR THE COUNTY OF YAVAPAI**

17 Mark Brnovich, in his official capacity as
18 Arizona Attorney General; Yavapai County
19 Republican Committee, an unincorporated
20 association; and Demitra Manjoros, First
21 Vice Chair of the Yavapai County
22 Republican Committee and registered voter
23 in Yavapai County,

22 Plaintiffs

23 vs.

24 Katie Hobbs, in her official capacity as
25 Arizona Secretary of State,

26 Defendant.

Case No: P13000W 202200209 -

**PLAINTIFFS' APPLICATION FOR
ORDER TO SHOW CAUSE**
[EXPEDITED ELECTION CASE]

1 Pursuant to Arizona Rule of Civil Procedure 7.3, Plaintiffs hereby apply for the entry of
2 an order to show cause as to why the relief Plaintiffs request in Plaintiffs' Verified Complaint for
3 Special Action Relief ("Verified Complaint") should not be granted. As the Verified Complaint
4 explains in more detail, Plaintiffs are entitled to special action relief requiring the Secretary of
5 State to comply with her statutory duty under A.R.S. § 16-452 to provide the Attorney General
6 and Governor with a draft Election Procedures Manual and, following approval by the Attorney
7 General and Governor, to promulgate the Election Procedures Manual for use during the 2022
8 election cycle. Moreover, the Secretary of State is required under A.R.S. § 16-452 to include in
9 the Election Procedures Manual rules regarding ballot signature verification and the use of ballot
10 drop boxes.


11 Special action jurisdiction and relief is appropriate here for a number of reasons. "[O]ne
12 purpose of a mandamus action is to determine the extent of a state official's legal duties."
13 *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶19 (2020).
14 Plaintiffs ask the Court to determine the extent of the Secretary's legal duties under A.R.S. § 16-
15 452, and, therefore, Plaintiffs' claims state a claim for special action relief. The issues
16 presented—the scope of the Secretary's duties under A.R.S. § 16-452 and whether the Secretary
17 has complied with those duties—are primarily legal questions, and the ultimate resolution of
18 those issues is not likely to turn on disputed facts. *See Second Chances*, 249 Ariz. at 404-05 ¶20;
19 *Brewer v. Burns*, 222 Ariz. 234, 237 ¶¶ 8-9 (2009) (granting special action jurisdiction even
20 though one party claimed "intense fact questions"). The issues presented are also of statewide
21 importance. The Elections Procedural Manual is used by election officials throughout the state
22 in administering elections. Without a valid EPM for the 2022 election cycle, the rules that would
23 otherwise be contained therein cannot be enforced. The absence of statewide rules to guide
24 county officials in the administration of the election could result in arbitrary treatment of ballots,
25 which could engender violations of Arizona election laws and post-election challenges. Finally,
26 there is a need for final, immediate relief. The 2022 statewide primary election is rapidly

1 approaching. Election officials, including the Yavapai County Recorder, will be mailing early
2 ballots for the primary election to uniformed and overseas voters no later than June 18, 2022 and
3 all early ballots to Arizona voters no later than July 6, 2022. Plaintiffs ask the Court to order the
4 Secretary to comply with her statutory duties no later than May 4, 2022. Plaintiffs, therefore, ask
5 that a Show Cause hearing be set expeditiously.

6 Attached hereto as Exhibit A is a proposed Order to Show Cause and attached hereto as
7 Exhibit B is a proposed Final Judgment Granting Special Action Relief.

8
9
10 RESPECTFULLY SUBMITTED this 21st day of April, 2022.


11 **MARK BRNOVICH**
12 **ATTORNEY GENERAL**

13 By /s/ 

14 Joseph A. Kanefield
15 Brunn ("Beau") W. Roysden III
16 Michael S. Catlett
17 Jennifer J. Wright
18 *Assistant Attorneys General*

19 *Attorneys for Plaintiff Attorney General Mark*
20 *Brnovich,*

21 **BERGIN, FRANKS, SMALLEY & OBERHOLTZER**

22 By /s/  for

23 Brian M. Bergin

24 *Attorney for Plaintiffs Demitra Manjoros*
25 *and Yavapai Republican Committee*
26

Exhibit A

1 **MARK BRNOVICH**
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5 Brunn W. Roysden III (State Bar No. 28698)

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21 *Attorney for Plaintiffs Demitra Manjoros*

22 *and Yavapai Republican Committee*

23 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

24 **IN AND FOR THE COUNTY OF YAVAPAI**

25 Mark Brnovich, in his official capacity as
26 Arizona Attorney General; Yavapai County
Republican Committee, an unincorporated
association; and Demitra Manjoros, First
Vice Chair of the Yavapai County
Republican Committee and registered voter
in Yavapai County,

Plaintiffs

vs.

Katie Hobbs, in her official capacity as
Arizona Secretary of State,

Defendant.

Case No:

ORDER TO SHOW CAUSE

[EXPEDITED ELECTION CASE]

1 Upon application of the Plaintiffs and good cause appearing,

2 IT IS HEREBY ORDERED that Defendant Katie Hobbs, in her official capacity as
3 Arizona Secretary of State, shall appear in person or through counsel before this Court on the
4 ____ day of _____, 2022, at the hour of ____ .m. (____ hours allotted) at the
5 Yavapai County Superior Court located at 120 S. Cortez, Prescott, AZ 86303, Courtroom ____,
6 then and there to show cause why the requested relief should not be awarded.
7

8 Additional instructions are as follows:

9 IT IS FURTHER ORDERED that Plaintiffs shall serve the Defendants within one (1)
10 business day of receipt of this order. Service may be effected by leaving a copy of the filings in
11 this case at Defendant's office, and emailing a copy to Defendant's Assistant Secretary of State
12 and General Counsel at their government email addresses.
13

14 IT IS FURTHER ORDERED that Defendant shall, by _____, ____ 2022, file a response
15 to Plaintiffs' Verified Petition for Special Action Relief and email a courtesy copy of the response
16 to Plaintiffs' counsel and to the Court at _____.

17 IT IS FURTHER ORDERED that Plaintiffs shall, by _____, ____ 2022, file a reply in
18 support of Plaintiffs' Verified Petition for Special Action Relief and email a courtesy copy of the
19 reply to Defendant's counsel and to the Court at _____.
20

21
22
23 Dated: _____

24 Judge _____, Yavapai County Superior Court
25
26

Exhibit B

1 **MARK BRNOVICH**
2 **ARIZONA ATTORNEY GENERAL**

3 Firm State Bar No. 14000

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20 bbergin@bfsolaw.com

21 *Attorney for Plaintiffs Demitra Manjoros*

22 *and Yavapai Republican Committee*

23 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

24 **IN AND FOR THE COUNTY OF YAVAPAI**

25 Mark Brnovich, in his official capacity as
26 Arizona Attorney General; Yavapai County
Republican Committee, an unincorporated
association; and Demitra Manjoros, First
Vice Chair of the Yavapai County
Republican Committee and registered voter
in Yavapai County,

Plaintiffs

vs.

Katie Hobbs, in her official capacity as
Arizona Secretary of State,

Defendant.

Case No:

**FINAL JUDGMENT GRANTING
SPECIAL ACTION RELIEF**

[EXPEDITED ELECTION CASE]

EXHIBIT 3

1 **MARK BRNOVICH**
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15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

16 **IN AND FOR THE COUNTY OF YAVAPAI**

17 Mark Brnovich, in his official capacity as
18 Arizona Attorney General; Yavapai County
19 Republican Committee, an unincorporated
20 association; and Demitra Manjoros, First
21 Vice Chair of the Yavapai County
22 Republican Committee and registered voter
23 in Yavapai County,

Plaintiffs

vs.

24 Katie Hobbs, in her official capacity as
25 Arizona Secretary of State,

26 Defendant.

Case No: P1300CV202200269

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO ARIZONA
SECRETARY OF STATE KATIE
HOBBS' MOTION FOR SUMMARY
JUDGMENT**

[EXPEDITED ELECTION CASE]

(Assigned to the Hon. John Napper)

**(Hearing Set for June 10, 2022 at 1:30
PM)**

1 **I. INTRODUCTION.**

2 After full briefing and oral argument on Plaintiffs’ request for special action relief
3 compelling the Secretary of State (“Secretary of State”) to promulgate an Election Procedures
4 Manual (“EPM”) for the 2022 election cycle, the Court issued an order resolving the
5 Secretary’s defenses. The Court could not have been clearer in that order when it stated that
6 it was “[d]enying the Defendant’s Defenses.” *See* Order dated April 29, 2022. The Court
7 similarly explained at the return hearing that “I’m denying [the affirmative defenses] so you
8 can take them up, so a higher court can tell me to knock it off if they think I should.”
9 Transcript of 4/29/2022 Return Hearing (“Transcript”) at 87:21-23. The Secretary did not
10 appeal the Court’s order.

11 The Court also gave the Secretary two weeks to respond to the Attorney General’s
12 (“AG”) supplemental brief setting forth the basis for his objections to various provisions
13 included in the Draft 2021 EPM. Subsequently, the Court granted the Secretary a two-week
14 extension to file that response. When all is said and done, therefore, the Secretary will have
15 had nearly a month to respond to the AG’s explanation of his objections.

16 The Secretary, however, hopes to short circuit the Court’s review of the merits of the
17 numerous unlawful provisions she inserted into the Draft 2021 EPM by asking the Court to
18 reconsider its prior order and instead adopt one or more of her already-rejected defenses. But
19 nothing has changed in the four weeks since the Court issued its order. The Arizona Supreme
20 Court has not issued new guidance regarding the proper scope of EPM provisions, and the
21 Secretary’s motion does not rely on any new case law issued in the last four weeks. Similarly,
22 the Secretary does not provide any new evidence in conflict with the Court’s statement during
23 oral argument that, “I’m of the opinion that you need to have a functioning manual constructed
24 pursuant to the statute.” Transcript at 89:20-22.

25 The Secretary’s motion instead further demonstrates her disregard for the rule of law.
26 The Court will recall that after the Secretary failed to promulgate an EPM in December 2021,
she instructed local election officials to instead follow a document she referred to as the 2019
Elections Procedures Manual – Annotated (2022) (the “Unilateral 2022 EPM”). *See* Exh. 20

1 to 4/27/22 Decl. of Kori Lorick. In the Unilateral 2022 EPM, the Secretary simply re-inserted
2 all of the provisions to which the AG had previously objected as being beyond the scope of
3 A.R.S. § 16-452. The Secretary also re-inserted almost all of the provisions to which the AG
4 had objected as being inconsistent with Arizona election law. For example, the Unilateral
5 2022 EPM re-inserted a footnote attempting to unilaterally alter the effective date of
6 legislation regarding the Active Early Voting List (AEVL) passed in 2021. *See* Unilateral
7 EPM (Lorick Decl. Exh. 20) at 56 n.26. The Unilateral 2022 EPM defines and then allows
8 the use of “unstaffed ballot drop box[es].” *See id.* at 65. The Unilateral 2022 EPM revises
9 mandatory language that the Legislature, through A.R.S. § 16-547(C), requires to be printed
10 on the outside of early voting envelopes. *See id.* at 58. And the Unilateral 2022 EPM
11 unlawfully forbids, whenever possible, the placement of voting locations inside courthouses
12 or police stations. *See id.* at 143.

13 The Secretary again argues that the Court is powerless to do anything about this
14 situation. Aside from legal arguments about whether the Secretary has violated A.R.S. § 16-
15 452 (she clearly has) or whether there is a legal standard to determine that question (there
16 clearly is), the Secretary asks the Court to stay its hand because local election officials have
17 violated, or are on the verge of violating, state election law by relying on the Secretary’s
18 Unilateral 2022 EPM. The Secretary has even convinced several such officials to submit
19 declarations supporting that they have relied on the Unilateral 2022 EPM to their own
20 detriment. Fortunately, the law does not countenance the Secretary’s tactics. Not only do
21 *Purcell* and laches not apply here as a matter of law, but neither doctrine permits the Secretary
22 to violate the law and then escape any remedy for that violation by convincing local election
23 officials to instead follow her unlawful guidance. The Court was correct in observing that
24 “I’m unfamiliar with the law that doesn’t have a remedy.” Transcript at 89:22-23.

25 If adopted, the Secretary’s position will create dangerous precedent. Why would any
26 Secretary of State go through the hassle of obtaining attorney general and governor approval
for an EPM when she can simply annotate a prior EPM in any manner she sees fit? The
declarations submitted herein demonstrate that local election officials will readily follow a

1 Secretary's guidance. But the Legislature knew that the process of creating uniform rules for
2 elections would be best served, for a number of reasons, by involving the State's chief
3 executive and chief legal officers in the approval process. If the Secretary believed that the
4 AG acted beyond his authority during the 2021 EPM process, she could have sought a legal
5 remedy in December 2021. What she cannot do is violate the mandatory duties in A.R.S. §
6 16-452, unilaterally issue a substitute EPM containing unlawful provisions, and then later
7 claim that the Court is powerless to rectify the situation because local election officials have
8 already relied to their detriment. The Court should deny the Secretary's request for summary
9 judgment.¹

10 **II. Legal Argument.**

11 **A. The Secretary Violated A.R.S. § 16-452 By Failing To Supply The AG And** 12 **Governor With A Legally-Compliant Draft EPM And Failing To** 13 **Promulgate An EPM Prior To December 31, 2021.**

14 As the Court is well aware by now, A.R.S. § 16-452 requires the Secretary to provide
15 the attorney general and governor with a draft EPM prior to October 1 of every odd-numbered
16 year preceding a general election. The Secretary is then required to promulgate the EPM
17 prior to December 31 of the same odd-numbered year. The Secretary violated both of those
18 requirements, first by failing to provide the AG and Governor with a legally-compliant draft
19 EPM and then by failing to promulgate an EPM for the 2022 election cycle.

20 The Secretary does not dispute that she failed to issue an EPM prior to December 31,
21 2021. That alone justifies the issuance of special action relief compelling her to comply with
22 the law. *See Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 63 ¶16 (2020).

23 The Secretary instead claims that the AG is attempting to have the Court re-write the
24 EPM statute to give him the power to unilaterally dictate the contents of the EPM. This
25 misstates the AG's position. In reality, Plaintiffs simply ask the Court to compel the Secretary

26 ¹ Plaintiffs hereby incorporate by reference the arguments contained in Plaintiffs' Reply In Support Of Complaint For Special Action Relief. Because the Secretary's arguments in her motion for summary judgment are materially similar to the arguments she made when responding to Plaintiffs' request for special action relief, the arguments in Plaintiffs' Reply apply here.

1 to comply with her mandatory duties under A.R.S. § 16-452. In complying with those duties,
2 the Secretary cannot act unlawfully, including by disregarding Arizona Supreme Court
3 precedent on the proper scope of EPM provisions. The AG does not argue that the Court
4 should strip provisions from the EPM because they are bad policy; instead, the Court should
5 strip certain provisions because they are unlawful. The AG has now supplied the Court with
6 lengthy briefing explaining the various ways in which the draft EPM the Secretary provided
7 *violated the law*. See generally Plaintiff Arizona Attorney General’s Supplemental Brief In
8 Support Of Request For Special Action Relief (“Supplemental Brief”). The Secretary will no
9 doubt take the (incorrect) position that her draft complied with Arizona law. The Court is
10 empowered (and best suited) under Arizona law, including the Rules of Procedure for Special
11 Action, to resolve this legal dispute between two elected officials (and other plaintiffs), to
12 craft a remedy to resolve the Secretary’s failure to comply with A.R.S. § 16-452, and to ensure
13 that the remedy (issuance of an EPM) is carried out consistent with Arizona statutes and legal
14 precedent. The Court should again reject the Secretary’s argument that the Court is powerless
15 to resolve a legal dispute between two statewide officials over the scope and extent of the
16 Secretary’s legal duties under A.R.S. § 16-452. See *Forty-Seventh Legislature of State v.*
17 *Napolitano*, 213 Ariz. 482, 485 ¶8 (2006) (“To determine whether a branch of state
18 government has exceeded the powers granted by the Arizona Constitution requires that we
19 construe the language of the constitution and declare what the constitution requires. Such
20 questions traditionally fall to the courts to resolve.”).

21 **B. Determining Whether The Secretary Violated A.R.S. § 16-452 Is Not A**
22 **Political Question.**

23 The AG has repeatedly explained the legal framework through which the issues raised
24 in this litigation should be resolved. First, an election rule promulgated through the EPM is
25 only lawful if it falls within the distinct categories of rules that the Legislature listed in the
26 EPM statute—namely, “early voting and voting, and . . . producing, distributing, collecting,
counting, tabulating and storing ballots.” See A.R.S. § 16-452(A); see also *McKenna v. Soto*,
250 Ariz. 469, 473 ¶20 (2021). If the proposed rule does not fall within one of those distinct

1 categories, it is not promulgated pursuant to the EPM statute and cannot be included in the
2 EPM or approved by the AG.

3 Second, even if an election rule promulgated through the EPM falls within one of the
4 distinct categories of rules listed in § 16-452(A), the rule cannot be inconsistent with the text
5 or purpose of one or more election statutes. *See Leach v. Hobbs*, 250 Ariz. 572, 576 ¶21
6 (2021). If a proposed election rule would abrogate state law by providing instructions
7 inconsistent with the text or purpose of an existing state statute, the rule cannot be included
8 in the EPM.²

9 Again, the AG provided extensive briefing applying the Court’s legal framework and
10 explaining why various provisions in the Draft 2021 EPM are unlawful thereunder. *See*
11 *generally* Supplemental Brief. The AG could not have done so if the Secretary is correct that
12 this case presents only political questions. But the Secretary persists in arguing that the Court
13 is simply unable to determine whether particular provisions contained in her draft comply
14 with that legal framework. The Arizona Supreme Court would disagree. On at least two
15 occasions in just the last two years, the Court has determined whether a particular EPM
16 provision has the force of law under the framework set forth above. *See McKenna*, 250 Ariz.
17 at 473 ¶20; *Leach*, 250 Ariz. at 576 ¶21. And on another occasion the Court concluded that
18 the Maricopa County Recorder’s proposed ballot instruction policy could not be included in
19 the EPM because it would be inconsistent with the express aim of the EPM to “maintain and
20 achieve the maximum degree of correctness, impartiality, uniformity, and efficiency.” *See*
21 *Arizona Public Integrity Alliance*, 250 Ariz. at 64 ¶24. Thus, the Supreme Court has already
22 implicitly rejected the Secretary’s argument that determining whether any particular EPM
23 provision complies with that portion of § 16-452 raises a political question.

24
25 _____
26 ² Even if an election rule falls within the categories listed in § 16-452 and is consistent with
the text and purpose of Arizona elections laws, the rule must also achieve the purpose of the
EPM statute to “maintain and achieve the maximum degree of correctness, impartiality,
uniformity, and efficiency.” The AG understands, however, that the Court has concluded that
it will not apply this particular provision to require the Secretary to add provisions to the draft
EPM the Secretary provided in October 2021.

1 The Secretary also continues to disingenuously claim that several of the AG’s
2 objections are mere policy disagreements. Take jail voting for example. The Secretary claims
3 (at 13) that the AG disagrees with the Secretary’s attempt to direct local county officials to
4 create a code for inmate voting is based on too much discretion. While too much discretion
5 is no doubt one issue with the draft provision, the AG’s actual objection is that no statute,
6 including the EPM statute, grants the Secretary the power to *force* local elections officials, at
7 the risk of criminal punishment, to draft their own procedures for voting in jails. *See*
8 Supplemental Brief at 22-23. While the Secretary may be permitted under § 16-452 to create
9 her own procedures for voting in jails, she cannot pass the buck and commandeer local
10 officials to do so instead. This is not a policy disagreement; it is a legal dispute about the
11 scope of the Secretary’s power under § 16-452. The Secretary similarly mischaracterizes the
12 legal nature of the other objections she includes as examples of policy disputes in her motion.³
13 The Court should again reject the Secretary’s political question defense. *See Chavez v,*
14 *Brewer*, 222 Ariz. 309, 317 ¶17 (2009) (rejecting an argument that the political question
15 doctrine precluded judicial review of a claim that the Secretary abused her authority in
16 certifying two voting machines that Appellants claimed did not comply with Arizona statutes).

17 **C. The Mandatory Requirements In § 16-452 Are Grounds For Special Action**
18 **Relief.**

19 Rule 3 of the Arizona Rules of Procedure for Special Actions states that a special action
20 proceeding is appropriate to decide “[w]hether the defendant has failed to exercise discretion
21 which he has a duty to exercise; or to perform a duty required by law as to which he has no
22 discretion[.]” Ariz. R. Proc. Spec. Act. 3(a). This provision is based on the traditional writ
23 of mandamus, which was “issued by a court to compel a public officer to perform an act which
24
25

26 ³ For example, the Secretary would impose criminal penalties on local election officials for failing to ensure that poll worker recruitment considers equity and diversity. The Secretary chalks up the AG’s objection to that requirement as another policy dispute. In reality, the AG objected because § 16-452 does not empower the Secretary to impose requirements for poll workers, let alone equity and diversity requirements. *See* Supplemental Brief at 24.

1 the law specifically imposes as a duty.” *Bd. of Educ. of Scottsdale High Sch. Dis. No. 22 v.*
2 *Scottsdale Ed. Ass’n.*, 109 Ariz. 342, 344 (1973).

3 The Secretary claims that Plaintiffs are not entitled to special action relief because she
4 provided a draft EPM to the AG and Governor. Putting aside that the Draft 2021 EPM the
5 Secretary provided was loaded with unlawful provisions, the Secretary completely ignores
6 the mandatory statutory duty underlying the Plaintiffs’ requested relief. A.R.S. § 16-452
7 specifically imposes a duty on the Secretary to promulgate an EPM on or prior to December
8 31 of each odd-numbered year. The relevant portions of the statute use the term “shall” in
9 reference to the Secretary’s duties in six different locations. *See* A.R.S. §§ 16-452(A), (B).
10 The Arizona Supreme Court has confirmed in no uncertain terms that the Secretary’s duties
11 under the statute are mandatory: “The Secretary must follow a specific procedure in
12 promulgating election rules.” *Arizona Public Integrity Alliance*, 250 Ariz. at 63 ¶16. And, as
13 explained, the Arizona Supreme Court has held that provisions that do not comply with the
14 mandatory dictates of § 16-452 are not promulgated under that statute and enjoy no force or
15 effect. *See McKenna*, 250 Ariz. at 473 ¶20. The Secretary failed to abide by the mandatory
16 duty to proscribe an EPM with the AG and Governor’s approval by December 31, 2021.
17 Instead, she sent county officials the Unilateral 2022 EPM and suggested they follow that
18 document. In so doing, the Secretary violated her mandatory duties under the EPM statute to
19 issue an actual EPM, and the Court is empowered under Arizona law to remedy those
20 violations.

21 The primary case upon which the Secretary relies—*Yes on Prop 200 v. Napolitano*,
22 215 Ariz. 458 (App. 2007)—does not help the Secretary’s argument. There, the court of
23 appeals refused to compel the Attorney General to provide particular legal advice to the
24 Governor and other state officials or to compel the Attorney General to force state agencies
25 to engage in rulemaking. 215 Ariz. at 467 ¶23-24. The Court merely concluded that it could
26 not use a writ of mandamus to compel the Attorney General to do something that the Attorney
General did not possess the power to do. *Id.* at 467 ¶25. Here, the Secretary has both the
power and the mandatory obligation to promulgate an EPM. Thus, the Court can use a writ

1 of mandamus (through the special action procedures) to compel the Secretary to issue an
2 EPM. Similarly, the Secretary must issue an EPM that contains lawful provisions, and thus
3 the Court can use a writ of mandamus to prevent her from including unlawful provisions.⁴

4 The Secretary also makes the erroneous argument that mandamus is not available when
5 a state official commits an abuse of discretion. To the contrary, the Rules of Procedure for
6 Special Action make clear that those rules do not alter the pre-existing scope of the writ of
7 mandamus. *See* Ariz. R. Spec. Act. 1, State Bar Comm. Note (“[T]he Rule does not alter their
8 substance but merely establishes the procedure for obtaining their remedies.”). The Arizona
9 Supreme Court has long held that mandamus relief was available where a government official
10 acted in an arbitrary or capricious manner or in an abuse of discretion. *See Rhodes v. Clark*,
11 92 Ariz. 31, 35 (1962) (explaining that mandamus relief will lie where “the officer has acted
12 arbitrarily and unjustly and in the abuse of discretion”); Ariz. R. Spec. Act. 3, State Bar
13 Comm. Note (explaining that a public officer “has no discretion to proceed arbitrarily”).
14 There is no support for the Secretary’s argument that a writ of mandamus is not available
15 when a government official (rather than a tribunal) commits an abuse of discretion. In fact,
16 the only case she cites for that proposition, *Yes on Prop 200*, says otherwise: “When an official
17 has discretion about how to perform a function, mandamus is available ‘to require him to act
18 properly,’ only if *the official abuses that discretion.*” 215 Ariz. at 465 ¶12 (emphasis added).

19 An abuse of discretion occurs when a state official has committed a “[m]isapplication
20 of law or legal principles.” *Tobin v. Rea*, 231 Ariz. 189, 194 ¶14 (2013). Thus, even if § 16-
21 452 gives the Secretary discretion to determine what should and should not be included in the
22 EPM, she abused that discretion by misapplying the law and failing to adhere to the
23 requirements of § 16-452, as interpreted in *McKenna*, *Leach*, and *Arizona Public Integrity*
24 *Alliance*. Plaintiffs are, therefore, entitled to special action relief requiring that the Secretary
25 comply with the law.

26
⁴ The Secretary does not dispute that Plaintiffs have standing to seek special action relief or that the factors used to determine whether special action jurisdiction should be accepted have been met.

1 **D. The *Purcell* Doctrine Does Not Apply.**

2 The *Purcell* doctrine, named after *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is applied
3 by federal courts as a justification for refusing to enjoin state election laws on the eve of an
4 election because doing so could result in voter confusion. *See Merrill v. Milligan*, 142 S. Ct.
5 879, 880 (2022) (Kavanaugh, J., concurring) (explaining that the *Purcell* doctrine establishes
6 that “that federal district courts ordinarily should not enjoin state election laws in the period
7 close to an election”). No Arizona appellate court has applied the *Purcell* doctrine in any
8 situation, let alone in a situation factually analogous to that here. Similarly, no Arizona court
9 has suggested that *Purcell* is appropriate when a plaintiff is requesting that a court order a
10 state official to comply with mandatory duties under the law.⁵ Plaintiffs here are not
11 requesting that the Court enjoin any state election laws, and thus *Purcell* is irrelevant. *See*
12 *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283 (App. 1989) (“Arizona courts have
13 repeatedly found laches to be the only restriction on the time for filing a petition for special
14 action.”). In fact, the relief Plaintiffs request will significantly reduce the risk of voter
15 confusion and discharge the interests identified in the EPM statute. We now know that it will
16 also eliminate the risk that local election officials will be led astray by the Secretary’s
17 Unilateral 2022 EPM.

18 The Secretary would have the Court turn a blind eye to the current state of affairs, in
19 which the Secretary ignores the requirement to promulgate an EPM and instead instructs
20 election officials to utilize the Unilateral 2022 EPM. Even if election officials ignore that
21 instruction and instead attempt to rely on the 2019 EPM, they risk acting inconsistent with
22 multiple election laws—the Unilateral 2022 EPM identifies at least *64 areas* of the 2019 EPM
23

24 ⁵ The only time the Arizona Supreme Court has referenced *Purcell*, it quoted *Purcell* for the
25 proposition that “[c]onfidence in the integrity of our electoral processes is essential to the
26 functioning of our participatory democracy. Voter fraud drives honest citizens out of the
democratic process and breeds distrust of our government.” *Arizonans for Second Chances,
Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 417 ¶81 (2020) (quoting *Purcell*, 549 U.S. at
4). The Secretary’s actions in this case could severely undermine confidence in the integrity
of the electoral process in 2022. The relief Plaintiffs seek is, therefore, consistent with the
ultimate objective of the *Purcell* doctrine.

1 that are no longer current (and there are likely more). Plaintiffs previously expressed concern
2 that “[s]ome county recorders may heed [the Secretary’s request to follow the Unilateral 2022
3 EPM] and others may not, creating a significant risk of dis-uniformity in the administration
4 of the 2022 elections.” Plaintiffs’ Reply in Support of Special Action Relief at 8. It now
5 appears, based on the declarations the Secretary submitted in support of her motion for
6 summary judgment, that is precisely what has happened. Relying on the Secretary’s
7 Unilateral 2022 EPM, certain county recorders have already printed early ballots containing
8 language inconsistent with that the Legislature required in A.R.S. § 16-547(C). Other county
9 recorders, like the Yavapai County Recorder, plan to move forward with “unstaffed” drop
10 boxes in violation of A.R.S. 16-1005(E).

11 The Secretary also expresses concern about removing the various provisions of the
12 EPM that do not fall within the scope of § 16-452 because they do not address “procedures
13 for early voting and voting, and of producing, distributing, collecting, counting, tabulating
14 and storing ballots.” As the Court recognized at oral argument, if included in the EPM, those
15 provisions will subject local election officials, paid and unpaid poll workers, and even
16 individual voters to criminal punishment without legislative authorization. As the AG has
17 repeatedly explained, the Secretary is free to issue guidance (without criminal punishment
18 attached) on each of the topics falling outside the scope of the EPM statute (for example, on
19 voter registration). The Secretary’s prediction that this will create chaos makes no sense
20 considering that all local election officials currently have to go on is the guidance in the
21 Unilateral 2022 EPM. The Secretary can immediately re-issue that guidance in identical form
22 outside of the EPM.

23 The *Purcell* doctrine is not legally applicable to the Plaintiffs’ request that the Court
24 issue special action relief requiring the Secretary to issue a valid EPM for the 2022 elections.
25 The Secretary cannot use her subsequent violation of the law in issuing the Unilateral 2022
26 EPM as reason why the Court cannot now remedy her original failure to abide by the
mandatory requirements of A.R.S. § 16-452.

E. Laches Does Not Apply.

1 The equitable doctrine of laches does not prevent the Court from requiring the
2 Secretary to abide by the law. “Laches is an equitable doctrine based on the principle of
3 fundamental fairness.” *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 560
4 ¶13 (2009). “Laches will generally bar a claim when the delay [in filing suit] is unreasonable
5 and results in prejudice to the opposing party.” *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶6
6 (2000).

7 The Secretary is not the first election official in recent time to claim that laches barred
8 a claim to require an election official to comply with the law. In *Public Integrity Alliance*,
9 the Maricopa County Recorder argued that laches barred special action relief compelling him
10 to comply with the Legislature’s requirements for ballot instructions. *See* 250 Ariz. at 65
11 ¶30. The Arizona Supreme Court rejected laches as an excuse for an election official not to
12 comply with the law: “And more importantly, Plaintiffs’ delay does not excuse the County
13 from its duty to comply with the law.” *Id.*

14 The Arizona Supreme Court has more broadly explained that “equitable defenses, such
15 as estoppel and laches, will not lie against the state, its agencies or subdivisions in matters
16 affecting governmental or sovereign functions.” *Mohave County v. Mohave-Kingman*
17 *Estates, Inc.*, 120 Ariz. 417, 421 (1978); *see also Arizona Independent Redistricting Comm’n*
18 *v. Fields*, 206 Ariz. 130, 136 ¶12 (2003) (Timmer, J.) (“[C]ourts should hesitate to enforce a
19 claim of laches against a public body that is asserting privileges designed to serve the public
20 interest.”) (“*AIRC*”).⁶ That exception applies here, where Plaintiffs, including the Chief
21 Legal Officer of the State, seek to require the Secretary to comply with her duty to promulgate
22 rules ensuring that elections are conducted in a correct, uniform, and secure manner.

23
24 ⁶ Citing *State v. Garcia*, 187 Ariz. 527, 529-30 (App. 1996), the Secretary argues that the Court
25 must apply a balancing test to determine whether laches applies to the State. The Arizona
26 Supreme Court did not apply such a balancing test in refusing to apply laches to a claim for
special action relief in *Public Integrity Alliance*. *See* 250 Ariz. at 65 ¶30. The Arizona Court
of Appeals similarly did not apply such a balancing test in refusing to apply laches against the
Arizona Independent Redistricting Commission. *See AIRC*, 206 Ariz. at 136 ¶12 (citing
Maricopa County v. Cities and Towns of Avondale, 12 Ariz. App. 109, 113, (1970)). Even the
Garcia court acknowledged that it was refusing to apply laches “under this, it is hoped,
exceptional scenario.” 187 Ariz. at 530.

1 Even if laches applies here, the Secretary has not shown unreasonable delay or that she
2 will suffer any prejudice. As to unreasonable delay, the parties (and third parties) have been
3 on notice for months of the Secretary’s failure to promulgate an EPM and the issue has never
4 “come to rest” for purposes of laches. As the Court has observed, the Secretary filed a bar
5 complaint against the AG and numerous members of his staff, which necessitated the AG
6 retaining outside counsel for purposes of interfacing with the Secretary regarding the draft
7 EPM. Then, in late February 2022, the Arizona Republican Party filed an original action in
8 the Arizona Supreme Court raising issues regarding the EPM. The AG expressly raised the
9 Secretary’s failure to promulgate an EPM with the Court and asked it to grant relief remedying
10 that failure.⁷ Within a few days of the Court denying jurisdiction in that case, the AG sent
11 correspondence to the Secretary again demanding that she provide a draft EPM. *See* AGO-
12 385 (attached as Exh. J to the Decl. of Jennifer Wright). Within days after receiving the
13 Secretary’s correspondence to the AG refusing to do so, Plaintiffs brought this action. *See*
14 AGO-388 (attached as Exh. K to the Decl. of Jennifer Wright). This is not delay, let alone
15 *unreasonable* delay. *See State ex rel. Ariz. Dept. of Economic Sec. v. Kennedy*, 143 Ariz. 341,
16 343 (App. 1985) (“[N]or would a special action brought within two months seem, on its face
17 at least, to make the invocation of the doctrine appropriate.”).

18 The Secretary has also not established that she will suffer any prejudice from merely
19 being required to comply with her mandatory statutory duty, which is fatal to her laches
20 defense. *See Sotomayor*, 199 Ariz. at 83 ¶6 (requiring “prejudice to the opposing party”).
21 While the Secretary argues that “Plaintiffs’ untimeliness also prejudices the Secretary,” she
22 then fails to establish any prejudice to her. Defendant’s Motion for Summary Judgment
23 (“MSJ”) at 10. Instead, she tries to establish prejudice to third parties, but fails to establish
24 third-party prejudice. She claims that certain unidentified boards of supervisors may be
25 prejudiced because they implemented her legal advice in the Unilateral 2022 EPM to
26

⁷ The AG’s brief filed in the Arizona Supreme Court is attached hereto as Exhibit A. The AG expressly requested that the Court “hold that the 2019 EPM is no longer valid and that the Secretary is required to provide a valid draft EPM to the AG and Governor by a date certain in the near future.” Exh. A at 3.

1 “delegate” (whatever that means) their statutory duties to other elected officials. *Id.* She also
2 claims that election officials could be prejudiced by having to give 48-hours’ notice of a logic
3 and accuracy test despite that the applicable statutes directs that “[p]ublic notice of the time
4 and place of the test shall be given ay least forty-eight hours prior thereto[.]” *Id.*; *see* A.R.S.
5 § 16-449(A). And the Secretary claims that it would be impossible for county recorders to
6 send required notices of removal from the Active Early Voting List “right now,” despite that
7 the AG’s actual position is that “[c]ounty officials are, therefore, required to begin sending
8 out AEVL notices *in January 2023* for voters who failed to vote in the required elections
9 during the 2020 and 2022 election cycles.” *Compare id.* at 11 with Supplemental Brief at 14
10 (emphasis added).

11 In any event, to the extent prejudice to third parties is sufficient for laches (it is not)
12 and any third parties would suffer prejudice here (they would not), as explained, the cause of
13 any such prejudice would be the Secretary’s decision to promulgate the Unilateral 2022 EPM,
14 not any delay by Plaintiffs. Plaintiffs, including the AG, never authorized local election
15 officials to follow the Unilateral 2022 EPM and the Secretary has not established that she
16 changed her position regarding her legal duties in reliance on any of Plaintiffs’ conduct. *See*
17 *Bostick v. General Motors Corp.*, 161 F. Supp. 212, 215 (E.D. Mich. 1958) (“[T]he anticipated
18 conduct of third parties not induced by, or consequential to, the acts of respondent is not the
19 prejudice contemplated by the doctrine of laches.”). The Secretary’s laches defenses,
20 therefore, fails.

21 **III. Conclusion.**

22 Plaintiffs respectfully request that the Court re-affirm its denial of the Secretary’s
23 affirmative defenses and deny the Secretary’s motion for summary judgment.
24
25
26

1 RESPECTFULLY SUBMITTED this 27th day of May, 2022.

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EXHIBIT 4

ARIZONA COURT OF APPEALS

DIVISION ONE

MARK BRNOVICH, in his official
capacity as Arizona Attorney General,

Plaintiff/Petitioner,

v.

KATIE HOBBS, in her official capacity
as Arizona Secretary of State,

Defendant/Respondent,

v.

DOUGLAS A. DUCEY, in his official
capacity as Governor of Arizona,

Real Party In Interest.

Court of Appeals
No.

Yavapai County Superior Court
No. P1300CV202200269

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INTRODUCTION

The Secretary of State (“Secretary”) is responsible for promulgating election procedures, through a document called the Election Procedures Manual (“EPM”), to guide election officials and others in administering Arizona elections. In 2019, the Legislature amended A.R.S. § 16–452 to require the Secretary to issue a new EPM every two years, on or before December 31 preceding the general election. A.R.S. § 16–452(B); *see* 2019 Ariz. Legis. Serv. Ch. 99 (H.B. 2238). The purpose of the EPM is “to achieve and maintain the *maximum degree* of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16–452(A) (emphasis added).

For the 2022 election cycle, the Secretary was required to provide a draft of the EPM to the Attorney General (“AG”) and Governor on or before October 1, 2021. A.R.S. § 16–452(B). Thereafter, the EPM was to be issued no later than December 31, 2021. *Id.*

The Secretary does not have unfettered discretion to include any provisions she desires in the draft EPM. In a series of cases over the last two years, the Arizona Supreme Court has provided guidance about the proper scope of the EPM. In *Arizona Public Integrity Alliance v. Fontes*, the court recognized that “[t]he Secretary must follow a specific procedure in promulgating election rules.” 250

Ariz. 58, 63 ¶16 (2020). The court later held that the Secretary has authority under § 16-452 *only* to promulgate procedures “for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” *McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). And the court explained that “an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does not have the force of law.” *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶21 (2021).

Rather than comply with the statutory requirement to provide the AG and Governor with an approvable draft EPM, the Secretary issued a draft EPM containing numerous unlawful provisions. For example, the draft included procedures that do not pertain to the topics listed in § 16-452(A), in violation of *McKenna*. The draft allowed certain votes to be counted even if cast in the wrong precinct, contrary to A.R.S. § 16-122(A). The draft allowed county recorders to give the same overvote instruction the Court rejected in *Arizona Public Integrity Alliance*. See 250 Ariz. at 64 ¶¶24-25. And the draft allowed counties to utilize unstaffed drop boxes, contrary to A.R.S. § 16-1005(E).

On December 9, 2021, the AG provided the Secretary with deletions¹ of unlawful provisions. APP-056 to -363. The Secretary responded, mostly refusing to remove the unlawful provisions. APP-365 to -372. On December 31, 2021, the Governor recognized that “[a]n accurate and updated EPM ensures both consistency throughout our 15 counties and predictability for our electorate.” APP-378. The New Year passed with no EPM.

Instead, the Secretary provided election officials with a unilateral update to the EPM. On January 12, 2022, the Secretary provided an “annotated draft of the 2019 EPM” to county recorders that she claimed identified 65 provisions impacted by legislation and court decisions and contained “nonbinding guidance, language that provides more clarification and consistency to the 2019 EPM[.]” APP-564. In reality, the guidance reflected nearly all of the provisions the AG rejected as unlawful.

The purpose of this Petition is to ensure that Arizona election officials and others have a valid and up-to-date EPM to govern the 2022 elections. Without such an EPM, approved by the AG and Governor, the risk that election officials will violate the law or otherwise fail to act efficiently and uniformly and that pre- or post-election litigation will ensue is significantly heightened. Expedited

¹ The AG did not re-write provisions of the draft EPM but merely struck those that could not lawfully be approved.

consideration of this Petition is warranted because limited time remains before the State's primary and general elections. The AG has no plain, speedy, or adequate remedy other than special action relief ordering the Secretary to provide the AG and Governor with a valid draft EPM by a date certain in the near future.

STATEMENT OF ISSUES

The Arizona Legislature has delegated power to the Secretary to draft and promulgate an Election Procedures Manual containing rules and procedures “for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). The Legislature has required the Secretary to provide a draft of the EPM to the AG and Governor for approval by a date certain. *See id.* Is the AG entitled to special action relief if the Secretary provides a draft EPM to the AG and Governor that contains provisions that are beyond the scope of the subjects listed in § 16-452 and inconsistent with Arizona election statutes, thereby requiring them to violate Arizona law by approving the draft EPM?

JURISDICTIONAL STATEMENT

This special action concerns the Secretary’s non-discretionary statutory duty to submit a legally-compliant EPM to the AG and Governor for approval. A.R.S. § 16–452(A), (B). These rules involve election rules and procedures and, in turn, affect every Arizonan and are critical to ensuring faith in the electoral process. This Court should accept jurisdiction of this special action to (1) order the Secretary to produce a good-faith version of an Election Procedures Manual to guide the 2022 elections by a date certain and (2) clarify the scope of the Secretary’s duties under A.R.S. § 16–452.

A writ of mandamus, pursued through special action, is proper when it is required to compel an act, which the law imposes as a duty resulting from an office, on the complaint of a party beneficially interested when there is no plain, adequate and speedy remedy at law. A.R.S. § 12–2021; *see* Ariz. R. P. Spec. Act. 1(a). The questions that may be raised in a special action include whether (1) the defendant has failed “to perform a duty required by law as to which he has no discretion[,]” (2) the defendant has “proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority[,]” or (3) “a determination was arbitrary and capricious or an abuse of discretion.” Ariz. R. Proc. Spec. Act. 3. This Petition implicates all three questions.

The trial court agreed with the AG that special action jurisdiction is warranted here. APP-879. That conclusion was correct, and the grounds for the exercise of special action jurisdiction by this Court are even stronger. *See* Ariz. R. P. Spec. Act. 8(a) (“Where there is no equally plain, speedy, and adequate remedy by appeal, a judgment in a special action in a Superior Court may be reviewed by a special action directed against the original defendants”).

Time is of the essence. The primary election is underway. Overseas ballots were sent by June 18 and early ballots were mailed by July 6. The primary will be on August 2. Early ballots for the general election will begin being mailed on October 12 and the general election will be held on November 8. Ariz. Sec. of State Website, *Elections Calendar & Upcoming Events*, available at <https://azsos.gov/elections/elections-calendar-upcoming-events> (last accessed July 15, 2022). Even if it is now too late for an updated EPM for the primary election, it is not too late for the general. But it is too late for the ordinary appellate process to play out. While the AG filed a notice of appeal of the trial court’s ruling, the deadline this Court set for the opening brief is September 12, 2022. *See* Docket 1 CA-CV 22-0389. Even if this Court were to grant a request for an accelerated schedule, such a procedure would not likely resolve the issues in sufficient time for the upcoming elections. *See* Ariz. R. Civ. App. Proc. (ARCAP) 29(d) (allowing

court of appeals 90 days—or, in this case, until October 13, 2022—to resolve the appeal).

Additionally, ARCAP 10, allowing for expedited review in election matters, does not apply. *See* ARCAP 10 cmt. (1) (“This rule applies only to election-related cases designated by statute for expedited consideration on appeal, such as those arising under A.R.S. § 16–351(A) (candidate nomination petitions); A.R.S. § 19–208.04 (recall); A.R.S. § 19–122 (initiative and referendum petitions); and A.R.S. § 19–141 (initiative and referendum in counties, cities, and towns). Cases that do not involve a specific statutory provision requiring expedited proceedings are governed by other provisions of these Rules or the Rules of Procedure for Special Actions.”).

Special action jurisdiction is, therefore, the only procedure and remedy available that will not render the issues presented herein moot, and thus special action jurisdiction is strongly warranted. *See Citizens Clean Elections Com’n v. Meyers*, 196 Ariz. 516, 518 (2000) (accepting special action jurisdiction “[g]iven the imminence of the year 2000 general election and its statewide importance”); *City of Flagstaff v. Mangum*, 164 Ariz. 395, 397 (1990) (“Relief by appeal is inadequate because normal appellate procedure would result in delay beyond the scheduled election.”); *Fairness and Accountability in Ins. Reform v. Greene*, 180

Ariz. 582, 586 (1994) (accepting special action jurisdiction where, “[b]ecause of time constraints, there was no adequate remedy in any other procedure or forum”).

The pure legal issues are matters of first impression and statewide importance. This case involves a dispute among top statewide officials about the rules to govern elections. At a more granular level, the case involves important issues regarding, among other things, the Secretary’s authority in drafting the EPM; judicial review of the EPM process; application of laches or the *Purcell* doctrine to claims for special action relief; the legality of draft provisions regarding out-of-precinct voting, signature verification, implementation of new law on voting lists, unstaffed drop boxes, and overvote instructions; and the continuing validity of the 2019 EPM. Each issue is a matter of first impression. Each is a pure legal issue with a developed record. Each independently justifies review. But collectively the issues make the Court’s involvement paramount.

Accordingly, this Court’s prompt review is necessary. *See Green v. Superior Court In and For Cochise County*, 132 Ariz. 468, 470 (1982) (“[I]t is only by virtue of the rather unique procedures provided for in our rules pertaining to special actions that matters such as this may be determined as expeditiously as is necessary here.”). Without this Court’s immediate intervention, state and local election officials, political parties, the courts, and others involved in the

administration of elections in Arizona will be left without updated, uniform, and binding rules and procedures for the 2022 elections.

STATEMENT OF FACTS MATERIAL TO CONSIDERATION

The material facts underlying this matter are undisputed—the parties submitted the issues to the trial court based on their written submissions and oral argument.

I. The EPM.

The purpose of the EPM is “to ensure election practices are consistent and efficient throughout Arizona.” *McKenna*, 250 Ariz. at 473 ¶20. The EPM is designed to produce rules that “achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16–452(A). The EPM is used by election officials throughout the state in administering elections and carries the force of law. When validly promulgated under A.R.S. § 16–452, courts look to the rules contained in the EPM for guidance in deciding pre- and post-election legal issues. *See, e.g., Ward v. Jackson*, CV 20–0343–AP/EL (decision order, Dec. 8, 2020). The statute governing the EPM requires the Secretary to provide the Attorney General and Governor with a draft EPM on or before October 1 of every odd-numbered year preceding a general election. A.R.S. § 16-452(B). The Secretary is then required to promulgate the EPM on or before December 31 of the same off-numbered year. *Id.*

II. History of the EPM Statute.

Beginning in 1979, the Legislature delegated to the Secretary authority to promulgate certain election-related rules. Originally, the scope was limited to “absentee voting, voting, and of collecting, counting, tabulating and recording votes.” *See* Laws 1979, Ch. 209, § 3, eff Jan. 1, 1980. For four decades, A.R.S. § 16-452(B) provided that “[s]uch rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election.” *Id.* The EPM statute also required the rules to be approved by the Governor and the AG prior to issuance. *Id.*

Arizona Secretaries of State complied with the statute, promulgating an EPM in advance of the biennial elections with approval from the AG and Governor. However, more recently, the Secretary of State failed to issue an approved manual in 2016 and 2018.

As a result, in 2019, the Legislature amended the EPM statute to create a mandatory process, requiring that a new EPM be published every two years. Laws 2019, Ch. 99, § 1, eff. Jan. 1, 2020. To achieve that requirement, the Legislature included the October 1 draft deadline and December 31 promulgation deadlines now contained in the EPM statute. *Id.*

III. The 2021 EPM Process.

On October 1, 2021, the Secretary provided the AG and Governor with what she claimed was a draft EPM (“Draft 2021 EPM”) consistent with A.R.S. § 16-452.² Contrary to the Secretary’s statement that the draft was provided “pursuant to A.R.S. § 16-452,” the draft EPM contained numerous provisions that were inconsistent with the text or purpose of Arizona election law (*see* below at pp. 23-27). Thus, the AG notified the Secretary that the Draft 2021 EPM violated A.R.S. § 16-452. APP-056. The AG provided the Secretary with a redline showing those provisions that would need to be removed before the AG would approve the draft. APP-057 to -363.

The Secretary refused to make the changes the AG identified prior to the December 31 statutory deadline for promulgating the EPM. Instead, the Secretary responded on December 17, 2021, offering to remove some offending provisions but refusing to remove others and criticizing the AG for retaining outside counsel. APP-365 to APP-372. After the Secretary responded by refusing to fully conform the Draft 2021 EPM to Arizona law, the AG again responded on December 22, 2021, stating that his prior letter and redlined Draft 2021 EPM “made clear what

² Arizona Secretary of State, *2021 Elections Procedures Manual – October 1, 2021 Submission*, available at <https://azsos.gov/about-office/media-center/documents> (last accessed July 15, 2022).

changes need to be made to assure the EPM complies with the law and does not unnecessarily expose election officials and workers to criminal penalties.” APP-374

On December 31, 2021, Governor Ducey, through counsel sent a letter to the Secretary noting that because the Secretary and the AG had not come to an agreement there was no action for him to take as he could not independently approve the Draft 2021 EPM. APP-378. The Governor explained, however, that “[a]n accurate and updated EPM ensures both consistency throughout our 15 counties and predictability for our electorate” and that as “the EPM carries with it the force of law, the first objective must always be compliance with the law by ensuring that the executive branch is not straying into the responsibilities of the legislature.” *Id.*

IV. The Secretary’s Unilateral EPM.

On December 23, 2021, the Secretary signaled to county election officials that they should continue to follow the 2019 EPM, while also acknowledging that the 2019 EPM is no longer “fully up-to-date[.]” APP-376. On January 12, 2022, the Secretary wrote again to county officials, providing an “annotated draft of the 2019 Elections Procedures Manual” that she claimed identified at least 65 provisions impacted by legislation and court decisions. APP-563-869. She also claimed that the “annotated draft” contained “non binding guidance, language that

provides more clarification and consistency to the 2019 Elections Procedures Manual.” APP-564. In reality, the Secretary decided to bypass the AG and Governor and unilaterally amend voting procedures and rules, including with some of the unlawful provisions the AG rejected, knowing that local election officials would almost assuredly rely on her “guidance.” APP-374.

V. The Arizona Republican Party Litigation.

On February 25, 2022, the Arizona Republican Party (“ARP”) filed an Application for Issuance of Writ Under Exercise of Original Jurisdiction (“Application”) in the Arizona Supreme Court against the Secretary and the State of Arizona (“the State”). In the Application, ARP requested that the Court grant it special action relief by, as relevant here, including signature verification rules in the EPM and prohibiting the Secretary from authorizing ballot drop boxes “in the 2022 general election and beyond[.]” *Arizona Rep. Party v. Hobbs*, CV-22-0048-SA, App., 44, (Feb. 25, 2022). The State and the AG responded that the Court should “order the Secretary to comply with § 16-452 by promptly providing a valid draft EPM to the AG and Governor by a date certain.” *Arizona Rep. Party v. Hobbs*, CV-22-0048-SA, State’s Resp. to App.,12, (March 11, 2022). The State and AG explained, however, that “[t]he only effective way Petitioners requested relief can be granted . . . is by ordering the Secretary to provide the AG and Governor with a valid draft EPM[.]” *Id.* at 20.

On April 5, 2022, the Arizona Supreme Court entered an Order Declining Jurisdiction. The Court explained that ARP had not convinced the Court that the issues regarding the EPM could be resolved without a factual record. The Court made clear, however, that “[t]his order is without prejudice to the parties’ refiling this case in Superior Court.” *Arizona Rep. Party v. Hobbs*, CV-22-0048-SA, Order Declining Jurisdiction, 2 (Apr. 5, 2022).

VI. The Yavapai County Litigation.

On April 11, 2022, within six days of the Arizona Supreme Court’s denial of special action jurisdiction, the AG wrote to the Secretary, giving her one week, until April 18, 2022, to provide the AG and Governor with “a legally compliant and updated EPM.” APP-436 to -437. On April 18, 2022, the Secretary responded, flatly refusing to provide the AG and Governor with a legally-compliant draft EPM for approval. APP-439 to -440.

On April 21, 2022, the AG filed a special action complaint seeking expedited relief against the Secretary in Yavapai County Superior Court and requested the court compel the Secretary to produce a legally compliant draft EPM on or before a date certain. APP-011 to -036. The trial court set an expedited briefing schedule and oral argument for April 29, 2022.

Following oral argument, the trial court issued an order adding Governor Ducey as a party to the litigation and concluding that “[a]s of now, there is no

enforceable EMP in place in violation of A.R.S. § 16-452.” APP-874. The trial court also issued an order rejecting the Secretary’s affirmative defenses, requiring supplemental briefing regarding the bases for the AG’s objections to the draft EPM, and setting further oral argument for June 2, 2022. APP-872.

On May 6, 2022, the AG filed his brief further explaining the bases for the AG’s objections to the draft EPM. APP-469 to -500. In response, the Secretary requested an additional two weeks to respond to the AG’s objections. The trial court granted that request and re-set oral argument for June 10, 2022. In the meantime, the Secretary moved for summary judgment based on her already-rejected defenses.

After six weeks of proceedings, the trial court issued its final ruling on the merits on June 17, 2022. APP-877 to -880. The court accepted jurisdiction but denied relief. APP-877. The court agreed that the draft EPM “omitted or misconstrued portions of statutes[,]” “suggest[ed] certain actions are mandatory and not discretionary[,]” and “include[d] best practice recommendations without clearly describing them as such.” APP-879. But the court concluded that the unlawful provisions were not sufficiently egregious to justify relief and that “[a]t this point in the game, there is no mechanism for the Court to assist the parties in constructing an [EPM] which complies with A.R.S. §16-452 within the timelines of the statute.” APP-880. Instead, the court concluded that the 2019 EPM

continues in effect, while speculating that election officials “were adhering to any changes occurring since its submission.” *Id.* The court issued final judgment on June 22.

The AG filed a notice of appeal and sought transfer of the appeal to the Arizona Supreme Court. Following briefing, the Court issued an order denying transfer on July 6, 2022.

ARGUMENT

I. The Court Should Grant Relief Ordering the Secretary To Provide A Lawful Draft EPM For Approval.

A. The Secretary Has A Mandatory Statutory Duty To Provide The AG And Governor With A Lawful Draft EPM.

“The Secretary must follow a specific procedure in promulgating election rules.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶16. Section 16-452 requires that the Secretary consult with “each county board of supervisors or other officer in charge of elections[.]” A.R.S. § 16-452(A). She must compile the rules “in an official instructions and procedures manual” and provide a draft to the AG and Governor on or before October 1 of each odd-numbered year. A.R.S. § 16-452(B). The EPM must then be issued on or before December 31 of each odd-numbered year before the general election, and the rules provided for therein must “be approved by the governor and the attorney general” prior to issuance. *Id.* The legislature used the word “shall” in six different locations within the statute in describing these duties. A.R.S. § 16-452. The use of the word “shall” indicates that the Secretary’s actions are mandatory. *See Phx. Newspapers, Inc. v. Superior Ct. In & For Cnty. of Maricopa*, 180 Ariz. 159, 161 (1993) (“The word ‘shall’ usually indicates a mandatory provision.”).

Additionally, the EPM must be confined to the topics enumerated in § 16–452. The Arizona Supreme Court has already held that an election rule

promulgated through the EPM is only lawful if it falls within the distinct categories of rules that the Legislature listed in the statute—namely, “early voting and voting, and . . . producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). When the EPM contains guidance on matters outside of those enumerated in § 16-452(A) with no basis in statute, such rulemaking does not have “the force of law.” *McKenna*, 250 Ariz. at 473–74 ¶¶20–21; *see also Leach*, 250 Ariz. at 576 ¶21 (“[A]n EPM regulation that exceeds the scope of its statutory authorization . . . does not have the force of law.”). If a proposed rule does not fall within one of those distinct categories, it is not promulgated pursuant to § 16-452 and cannot be approved by the AG.³

The EPM must be consistent with existing state statutes. Even if an election rule promulgated through the EPM falls within one of the distinct categories of rules listed in §16-452(A), the rule cannot be inconsistent with the text or purpose of one or more election statutes. *See id.* (“[A]n EPM regulation that . . . contravenes an election statute’s purpose does not have the force of law.”). The statute provides that the Secretary shall prescribe rules to “*achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency[.]*” A.R.S. § 16-452(A) (emphasis added). The purpose of the EPM is to ensure

³ No statute grants the AG authority to approve guidance issued by the Secretary.

election practices are “consistent and efficient throughout Arizona.” *McKenna*, 250 Ariz. at 473 ¶20. Thus, to provide elections officials and Arizonans with a consistent, efficient, and correct set of rules, the rules must be legally sound. An illegal rule—or a rule in conflict with statute or case law—does not achieve the goals of §16-452. Thus, if a proposed election rule would abrogate state law by providing instructions inconsistent with the text or purpose of an existing state statute, the rule cannot be included in the EPM. This restriction on the scope of the EPM is particularly vital in light of the fact that “[a] person who violates any rule adopted pursuant to [16-452] is guilty of a class 2 misdemeanor.” A.R.S. § 16-452(C).

While the Secretary may have discretion to determine which *lawful* provisions she includes in her draft EPM, she does not possess discretion to promulgate *unlawful* provisions. Further, there can be little doubt that when the Legislature required the Secretary to provide the AG and Governor with a draft EPM, the Legislature mandated that the draft be one that the AG and Governor could lawfully approve. The Secretary cannot expose the AG and Governor to liability by forcing them to approve EPM provisions that are inconsistent with the scope of the EPM statute or Arizona election statutes. Thus, if the Secretary provides the AG and Governor with a draft EPM that cannot be lawfully approved, she has not complied with her statutory duty to provide an approvable EPM, has

acted beyond the authority or jurisdiction granted her in § 16-452, and has abused her discretion. *See* Ariz. R. Proc. Spec. Act. 8.

Finally, the Secretary has argued—mostly through counsel at oral argument—that the courts are powerless to order her to promulgate a new draft EPM or to superintend what she includes in the draft. This is nonsense. Not only is the argument inconsistent with basic notions of separation of powers, judicial review, and the Rules of Procedure for Special Actions, it is inconsistent with the reality that the courts have exercised supervision over the drafting of election documents in several contexts. Most applicable, of course, are the recent cases, *McKenna* and *Leach*, where the Arizona Supreme Court has determined whether provisions of the finalized EPM were properly included therein. The Secretary gives no reason why the final product of the EPM process is subject to judicial review, but the raw material subject to AG and Governor approval is not, particularly when a justiciable controversy between the AG and Secretary materializes.

The Secretary’s argument is further undercut by the reality that the courts have exerted special action jurisdiction over the Legislative Council’s draft description of ballot measures to be included in the publicity pamphlet mailed to voters and the Secretary’s proposed ballot language for ballot measures (which similarly requires approval by the AG). *See Greene*, 180 Ariz. at 590 (“Section

19–124 would be meaningless if this court had no power to review the actions of the Council and determine whether it carried out its statutory responsibility to prepare an impartial analysis and description of Proposition 103.”); *Ariz. Legislative Council v. Howe*, 192 Ariz. 378, 384 ¶21 (1998) (analyzing whether “the descriptive title language used by the Secretary of State on the ballot, together with the ‘yes/no’ formulation” violated A.R.S. § 19-125).

B. The Secretary Failed To Provide An Approvable Draft To The AG And Governor.

The Secretary violated her mandatory duty, acted beyond her authority and jurisdiction, and abused her discretion by providing the AG and Governor with a draft EPM that they could not lawfully approve. On October 1, 2021, the Secretary issued a draft EPM containing numerous unlawful provisions that the AG could not possibly approve. The following are just a few of the examples of unlawful provisions the Secretary included.

First, the draft EPM included numerous rules and procedures falling outside the topics listed in § 16-452(A), including rules regarding candidate nomination petition circulators and regulation of petition circulators that the Court held in *McKenna* cannot be promulgated through § 16-452. APP-475 to -476, -477. The draft also included provisions relating to voter registration (APP-472 to -474), accommodating voters with disabilities (APP-475), post-canvass reports (APP-476), post-election ballot security (APP-476), political party recognition (APP-477

TO -478), and regulation of enforcement officers under campaign finance laws (APP-478). None of those topics fall within the list of categories contained in § 16-452. But the Secretary refused to delete many of those provisions when the AG refused to approve them. APP-365 to -372. The trial court largely agreed they should not have been included as mandatory provisions. APP-882.

Second, despite suffering defeat in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Secretary’s draft EPM allowed certain votes to be counted even if cast in the wrong precinct, contrary to A.R.S. §§ 16-122(A) and 16-584(E). Those statutory provisions are clear—if the county recorder is unable to verify that the voter lives in the precinct where the ballot was cast, the provisional ballot envelope cannot be opened, and the vote cannot be counted. Despite those statutes, the Secretary included provisions in her draft EPM informing voters that ballots cast out of precinct will nonetheless be counted for certain races and provides procedures to allow for duplicating out-of-precinct ballots for certain races. APP-493 to 495. The Secretary refused to remove those provisions when the AG struck them from the draft. APP-365 to -372. The trial court agreed that the draft provisions were inconsistent with Arizona law. APP-882.

Third, ignoring the holding and reasoning in *Arizona Public Integrity Alliance*, the draft EPM attempted to change the “Required Instructions to Voters”

to permit county recorders to allow voters to correct mistakes made in voting for candidates by instructing voters to intentionally overvote a ballot so long as the voter “make[s] their intent clear[.]” APP-484 to -485. This is inconsistent with the Arizona Supreme Court’s holding that county recorders cannot instruct “voters to create an invalid overvote ballot that cannot be tabulated by the electronic voting machine, and, depending on the judgment of election officials, may or may not be counted.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 64, ¶24. In this instance, the AG edited the Draft 2021 EPM to return to the language contained in the 2019 EPM, and approved by the Arizona Supreme Court, rather than striking the provision all together. APP-485. But the Secretary refused to remove the draft provision. APP-365 to -372.

Fourth, the draft EPM prohibited implementation of 2021 legislation regarding the Active Early Voting List (“AEVL”) until 2027. The Secretary suggested that applying the law to voters on the AEVL before the completion of 2026 election cycle would somehow result in retroactive application of the law. APP-123. But the Secretary does not have the authority under the EPM statute to forbid local election officials, under threat of criminal prosecution, from implementing a statute on grounds that she (erroneously) believes doing so will result in retroactive application of that statute. APP-482. This is particularly true when the plain language of the statute requires the procedures contained therein to

begin after the 2022 elections. *See* A.R.S. § 16-544. The Secretary refused to remove her legal opinion, which would have the force of law, about the effective date of the new AEVL statute. APP-368.

Fifth, the draft EPM allowed counties to utilize unstaffed drop boxes in violation of Arizona law. According to the draft EPM, a *staffed* ballot drop-off location or drop-box is defined as one that is “within the view and monitoring of an employee or designee of the County Recorder or officer in charge of elections” whereas an *unstaffed* drop-off location or drop-box is defined as “not within the view and monitoring of an employee or designee of the County Recorder or officer in charge of elections.” APP-487 to -488. Arizona law, however, does not allow the use of unstaffed drop boxes, particularly as defined by the Secretary. *Id.* More specifically, A.R.S. § 16-1005(E) makes it a class 5 felony for “a person or entity” to serve “as a ballot drop off site, other than those *established and staffed* by election officials.” (emphasis added). The trial court agreed that the draft provisions regarding unstaffed drop boxes were inconsistent with Arizona law, but the Secretary refused to remove them. APP-882; APP-365 to -372.

Sixth, the Secretary’s draft EPM restricted counties from rejecting early ballots even where the signature reflected on the ballot affidavit does not match the voter’s signature on file with the State. APP-489. Specifically, the draft EPM forbade counties from rejecting an early ballot returned through means other than

mail (e.g., ballot drop box or in-person voting location) with a mismatched signature unless there is “other evidence that the signatures were not made by the same person.” *Id.* This “other evidence” requirement is inconsistent with the statutory requirement that “the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on the elector's registration record.” A.R.S. § 16-550(A). County recorders are not permitted to differentiate between early ballots dropped off without providing photo identification and those cast after presenting identification at an early voting location. Furthermore, there is no “in-person” early voting exception to the signature verification requirements in A.R.S. § 16-550(A). Because the “other evidence” requirement is inconsistent with the text and purpose of Arizona law, the AG could not lawfully approve it.

These are explanations for just some of the AG’s objections to the more egregiously unlawful provisions included in the Secretary’s draft EPM. The AG provided the trial court with a detailed explanation for all of his objections. APP-469 to -500. The trial court’s rulings regarding those objections, with citations to the transcript record, can be found at APP-882.

II. The Secretary's Defenses Fail.

The Secretary interposed several legal defenses to the AG's request for special action. The trial court twice rejected those defenses as a matter of law. APP-872; -877. The trial court was correct to do so.

A. The Secretary's Mandatory Duties in § 16-452 Support Special Action Relief.

The Secretary argued below that she has no mandatory duty under § 16-452 that can support special action relief. This argument gives short shrift to the Legislature's instructions in § 16-452 and the purpose behind the Legislature's 2019 revision to that statute.

The EPM statute requires the Secretary to provide the AG and Governor with a draft EPM on or before October 1 of every odd-numbered year preceding a general election. As explained, this necessarily requires the Secretary to provide a draft that the AG and Governor could approve without violating the law. The Secretary is then required to promulgate the EPM on or before December 31 of the same odd-numbered year. The Secretary violated both of those requirements here—first by failing to provide the AG and Governor with a legally-compliant draft EPM and then by failing to promulgate an EPM for the 2022 election cycle.

The Secretary claims that the AG is attempting to have the courts re-write the EPM statute to give him the power to unilaterally dictate the contents of the EPM. This misstates the AG's position. The AG merely asks the Court to compel

the Secretary to comply with her mandatory duties under A.R.S. § 16-452. In complying with those duties, the Secretary cannot act unlawfully, including by providing the AG with a draft EPM that he cannot lawfully approve under binding Arizona Supreme Court precedent. The AG does not assert that he could not approve the draft EPM because it included rules he believes are bad policy; instead, he could not approve the draft EPM because it contained provisions that are unlawful or beyond the Secretary's authority. *See generally* APP-469 to -500. Regardless, the judiciary is empowered (and best suited) under Arizona law, including the Rules of Procedure for Special Action, to resolve this legal dispute between two state elected officials alleging a failure to comply with A.R.S. § 16-452, and to ensure that the remedy (issuance of an approvable draft EPM) is carried out consistent with Arizona statutes and legal precedent.

B. Determining Whether The Secretary Violated A.R.S. § 16-452 Is Not A Political Question.

The Court is perfectly capable of determining whether a particular provision in the draft EPM is consistent with Arizona law. The AG has already explained the legal framework through which the issues raised should be resolved. First, an election rule promulgated through the EPM only falls within § 16-452 if it falls within the categories of rules that the Legislature listed in the EPM statute—namely, “early voting and voting, and . . . producing, distributing, collecting, counting, tabulating and storing ballots.” *See* A.R.S. § 16-452(A); *see also*

McKenna, 250 Ariz. at 473 ¶20. If the draft rule does not fall within one of those categories, it is not promulgated pursuant to the EPM statute and cannot be included in the EPM or approved by the AG.

Second, even if an election rule promulgated in the EPM falls within one of the categories listed in § 16-452(A), the rule cannot be inconsistent with the text or purpose of one or more election statutes. *See Leach*, 250 Ariz. at 576 ¶21. If a proposed election rule is inconsistent with the text or purpose of an existing state statute, the rule cannot be included in the EPM.

The AG provided the trial court with extensive briefing applying the Arizona Supreme Court’s legal framework and explaining why various provisions in the draft EPM are unlawful thereunder. *See generally* APP-469 to -500. The AG could not have done so if the Secretary is correct that this case presents only political questions. Arizona Supreme Court cases from just the last two years also doom the Secretary’s political question argument. In those cases, the Court has determined whether a particular EPM provision has the force of law under the framework set forth above. *See McKenna*, 250 Ariz. at 473 ¶20; *Leach*, 250 Ariz. at 576 ¶21. And on another occasion the Court concluded that the Maricopa County Recorder’s proposed ballot instruction could not be included in the EPM because it would be inconsistent with the express aim of the EPM to “achieve and maintain the maximum degree of correctness, impartiality, uniformity, and

efficiency.” *See Ariz. Pub. Integrity All.*, 250 Ariz. at 64 ¶24. Thus, the Supreme Court has tacitly rejected the Secretary’s political question defense. *See Chavez v. Brewer*, 222 Ariz. 309, 316 ¶17 (2009) (rejecting an argument that the political question doctrine precluded judicial review of a claim that the Secretary abused her authority in certifying two voting machines that appellants claimed did not comply with Arizona statutes).

C. The *Purcell* Doctrine Does Not Apply.

The *Purcell* doctrine, named after *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is applied by federal courts as an equitable justification for refusing to enjoin state election laws on the eve of an election because doing so could result in voter confusion. *See Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (explaining that the *Purcell* doctrine establishes that “that federal courts ordinarily should not enjoin a state’s election laws in the period close to an election”). No Arizona appellate court has applied the *Purcell* doctrine in any situation, let alone in a situation factually analogous to that here. Similarly, no Arizona court has suggested that *Purcell* is appropriate when a plaintiff is requesting a court to order a state official to comply with mandatory duties under the law. The AG is not requesting that the Court enjoin any state election laws, and thus *Purcell* is irrelevant. *See State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283 (App. 1989) (“Arizona courts have repeatedly found laches to be the only

restriction on the time for filing a petition for special action.”). In fact, the special action relief the AG requests will significantly reduce the risk of voter confusion and discharge the interests identified in the EPM statute.

The *Purcell* doctrine is not legally applicable to the AG’s request that the Court issue special action relief requiring the Secretary to issue a draft EPM the AG and Governor can actually approve for the 2022 elections. The Secretary cannot use her own violation of the law in unilaterally issuing an annotated EPM she labeled as “guidance” as a reason why the Court cannot remedy her original failure to abide by the mandatory requirements of A.R.S. § 16-452.

D. Laches Does Not Apply.

The equitable doctrine of laches does not prevent the Court from requiring the Secretary to abide by the law. “Laches is an equitable doctrine based on the principle of fundamental fairness.” *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 560 ¶13 (2009). “Laches will generally bar a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party.” *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶6 (2000).

The Secretary is not the first election official in recent time to claim that laches barred a claim to force compliance with the law. In *Arizona Public Integrity Alliance*, the Maricopa County Recorder argued that laches barred special action relief compelling him to comply with the Legislature’s requirements for ballot

instructions. *See* 250 Ariz. at 65 ¶30. The Arizona Supreme Court rejected laches as an excuse for an election official's failure to comply with the law: "And more importantly, Plaintiffs' delay does not excuse the County from its duty to comply with the law." *Id.*

The Arizona Supreme Court has more broadly explained that "equitable defenses, such as estoppel and laches, will not lie against the state, its agencies or subdivisions in matters affecting governmental or sovereign functions." *Mohave Cnty v. Mohave-Kingman Ests., Inc.*, 120 Ariz. 417, 421 (1978); *see also Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136 ¶12 (App. 2003) (Timmer, J.) ("[C]ourts should hesitate to enforce a claim of laches against a public body that is asserting privileges designed to serve the public interest.") ("*AIRC*"). That exception applies here, where the AG seeks to require the Secretary to comply with her duty to promulgate rules ensuring that elections are conducted in a correct, uniform, and secure manner.

Even if laches applies, the Secretary has not shown unreasonable delay or that she will suffer any prejudice. As to unreasonable delay, the parties (and third parties) have been on notice for months of the Secretary's failure to promulgate an EPM and the issue has never "come to rest" for purposes of laches. The Secretary filed a bar complaint against the AG and numerous members of his staff, which necessitated the AG retaining outside counsel for purposes of interfacing with the

Secretary regarding the draft EPM. Then, in late February 2022, the Arizona Republican Party filed an original action in the Arizona Supreme Court raising issues regarding the EPM. *Arizona Rep. Party v. Hobbs*, CV-22-0048-SA, App., 44, (Feb. 25, 2022). The AG expressly raised the Secretary's failure to promulgate an EPM with the Court and asked it to grant relief remedying that failure. *Arizona Rep. Party v. Hobbs*, CV-22-0048-SA, State's Resp. to App., (March 11, 2022). Within a few days of the Court denying jurisdiction in that case, the AG sent correspondence to the Secretary again demanding that she provide a draft EPM. APP-436 to -437. Within days after receiving the Secretary's correspondence to the AG refusing to do so, Plaintiffs filed for special action in the Yavapai Superior Court. APP-011 to -046. Within days of the trial court's final ruling, the AG sought to transfer his appeal to the Arizona Supreme Court. And within days of the Court's denial of transfer, the AG has filed this Petition. This is not delay, let alone unreasonable delay. *See State ex rel. Ariz. Dept. of Economic Sec. v. Kennedy*, 143 Ariz. 341, 343 (App. 1985) (“[N]or would a special action brought within two months seem, on its face at least, to make the invocation of the doctrine appropriate.”).

The Secretary has also never established that she will suffer any prejudice from merely being required to comply with her mandatory statutory duty, which is fatal to her laches defense. *See Sotomayor*, 199 Ariz. at 83 ¶6 (requiring

“prejudice to the opposing party”). While the Secretary has argued that “Plaintiffs’ untimeliness also prejudices the Secretary,” she failed to establish any prejudice to her. The trial court was correct to twice deny the Secretary’s laches defense.

III. Sufficient Time Remains For The Secretary To Provide An Approvable EPM.

As explained, the Secretary argued below that the AG’s request for special action relief was barred by the *Purcell* and laches doctrines. The trial court correctly rejected those defenses—twice. But the trial court nonetheless denied relief, believing that there is insufficient time to get an updated EPM in place.

The trial court was mistaken. The AG has been attempting to obtain the relief requested herein since March 2022. As of the date of this filing, there remains almost three months until early ballots for the general election are mailed and the general election is held. The AG, through the relief requested herein, does not seek to have local election officials undo any actions that they have already taken for the primary election. The timing of this filing leaves plenty of time for an updated and legal EPM to be put in place. The Court is, thus, not powerless to address the issue. An order requiring the production of a legally-compliant and thus approvable EPM by a date certain within the next few weeks will still allow plenty of time for use in the State’s upcoming general election.

Instead, the Secretary aims to run out the clock on her statutory duties. If permitted, the Secretary's actions will create precedent and significantly undercut the new requirements added to § 16-452 in 2019, allowing the Secretary to unilaterally determine whether he or she will comply with those requirements. And why would any Secretary go through the inconvenient process of obtaining AG and Governor approval of an EPM when he or she can simply unilaterally amend a prior EPM and suggest that local election officials follow it as "guidance?" The Secretary likely will not do so, significantly harming the rule of law and undermining confidence in election results.

IV. The 2019 EPM Is No Substitute For An Updated EPM.

The statewide officials party to this litigation—the AG, Governor, and Secretary—have taken conflicting positions on the validity of the 2019 EPM. Given the amendments the Legislature made to the EPM statute in 2019, it is the AG's position that the 2019 EPM is no longer valid. Allowing an out-of-date and stale EPM to remain in place is inconsistent with the Legislature's intent in amending the EPM statute to require the Secretary to abide by strict deadlines for drafting and promulgating the EPM. APP-023. The Governor has taken the position that the 2019 EPM remains binding and enforceable. And the Secretary has not really taken a position on the continuing validity of the 2019 EPM,

preferring that election officials just follow her unilateral EPM that she characterized as “guidance.”

Regardless of where the Court might fall on the continuing validity of the 2019 EPM, the EPM statute (§ 16-452) in 2021 unquestionably required the Secretary to provide the AG and the Governor with a draft that they could approve without running afoul of numerous election statutes.⁴ And the most effective way for the Court to avoid any confusion about the legally-applicable EPM is to require the Secretary to provide the AG and Governor with a draft they can lawfully approve, and the Court can make clear that the newly-approved EPM is the binding and legal EPM for purposes of the 2022 elections.

⁴ The trial court got hung up on ordering the Secretary to provide the AG and Governor with a new draft when there is no guarantee that they will approve the draft. But that concern ignores that (1) special action relief is not dependent on the second step in a multi-step statutory process (*see Brewer v. Burns*, 222 Ariz. 234, 236 ¶3, 242 ¶39 (2009) (ordering the Legislature to transmit bills to the Governor despite the Governor publicly indicating she would, at least in part, veto the underlying legislation), (2) the AG and Governor are parties to this litigation and therefore can be ordered to grant approval consistent with the law, and (3) the relief requested—providing a draft that is legally approvable—eliminates one primary reason (illegality) why the AG or Governor might withhold approval.

CONCLUSION

The AG respectfully requests that the Court accept special action jurisdiction and grant relief by compelling the Secretary to perform her non-discretionary duty to provide the AG and Governor with a draft EPM they can approve without violating Arizona law.

RESPECTFULLY SUBMITTED this 15th day of July, 2022.

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EXHIBIT 5

ARIZONA SUPREME COURT

MARK BRNOVICH, in his official
capacity as Arizona Attorney General,

Plaintiffs/Appellants,

v.

KATIE HOBBS, in her official capacity as
Arizona Secretary of State,

Defendant/Appellee,

and

DOUGLAS A. DUCEY, in his official
capacity as Governor of Arizona,

Real Party in Interest.

Arizona Supreme Court No. CV-

Arizona Court of Appeals No.
No. 1 CA-CV 22-0389

Yavapai County Superior Court
No. P1300CV202200269

ARIZONA ATTORNEY GENERAL MARK BRNOVICH'S PETITION FOR TRANSFER

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Uniform rules and procedures are essential to fair, uniform, and secure elections. Updating those rules to reflect current law is vital. Arizona election officials are currently without updated rules and procedures. The Attorney General (“AG”) is attempting to remedy that situation. But the superior court refused to grant the AG’s requested relief largely because it believes there is insufficient time to right the ship. The superior court held that, instead, election officials should rely on three-year-old procedures. While there remains time to issue updated procedures, there is insufficient time for the ordinary appellate process.

BACKGROUND

The Election Procedures Manual (“EPM”) provides uniform rules and procedures—with the force of law—for Arizona election officials. The EPM’s aim is “to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency” for Arizona elections. A.R.S. § 16-452.

Following a four-year period with no EPM, the Legislature in 2019 created a mandatory process to ensure that a new EPM is published every two years. The Legislature required that the Secretary of State (“Secretary”) provide the EPM to the Attorney General (“AG”) and Governor on or before October 1 of each odd-numbered year. A.R.S. § 16-452(B). Once the AG and Governor approve, the Secretary must issue the EPM no later than December 31. *Id.*

In *Arizona Public Integrity Alliance v. Fontes*, the Court recognized that “[t]he Secretary must follow a specific procedure in promulgating election rules.” 250 Ariz. 58, 63 ¶16 (2020). The Court then held that the Secretary has authority under § 16-452 *only* to promulgate procedures “for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” *McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). And the Court explained that “an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does not have the force of law.” *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶21 (2021).

On October 1, 2021, the Secretary issued a draft EPM containing numerous unlawful provisions. The following are examples:

- The draft included procedures that do not pertain to the topics listed in § 16-452(A), including rules the Court held in *McKenna* cannot be promulgated through § 16-452.
- After suffering defeat in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the draft allowed certain votes to be counted even if cast in the wrong precinct, contrary to A.R.S. §§ 16-122(A), 16-584(E).
- The draft allowed county recorders to give the same overvote instruction the Court rejected in *Arizona Public Integrity Alliance*. See 250 Ariz. at 64 ¶¶24-25.

- The draft prohibited implementation of 2021 legislation regarding the Active Early Voting List until 2027, contrary to A.R.S. § 16-544.
- The draft allowed counties to utilize unstaffed drop boxes, contrary to A.R.S. § 16-1005(E).
- The draft forbade counties from rejecting an early ballot returned through means other than mail (e.g., ballot drop box or in-person voting location) with a mismatched signature unless there is “other evidence that the signatures were not made by the same person,” contrary to A.R.S. §§ 16-550 and -552.¹

On December 9, 2021, the AG provided the Secretary with deletions² of unlawful provisions. The Secretary responded, mostly refusing to remove the unlawful provisions. On December 31, 2021, the Governor recognized that “[a]n accurate and updated EPM ensures both consistency throughout our 15 counties and predictability for our electorate.” The New Year passed with no EPM.

The Secretary then provided election officials with a unilateral update to the EPM. On January 12, 2022, the Secretary provided an “annotated draft of the 2019 EPM” that she claimed identified 65 provisions impacted by legislation and court decisions and contained “nonbinding guidance, language that provides more

¹ See Exh. E for additional detail about the AG’s objections.

² The AG did not re-write provisions of the draft EPM.

clarification and consistency to the 2019 EPM[.]” In reality, the guidance reflected nearly all of the provisions the AG rejected as unlawful.

On February 25, 2022, the Arizona Republican Party filed an action in this Court against the Secretary and the State of Arizona on issues relating to the 2019 EPM. On March 11, the AG responded that “the Court must resolve . . . whether the Secretary must comply with her mandatory duty under § 16-452 to provide a valid draft EPM to the AG and Governor.” The Court declined jurisdiction on April 5.

The AG filed a special action complaint against the Secretary in Yavapai County Superior Court on April 21. The AG sought expedited relief compelling the Secretary to provide a legally-compliant draft EPM. *See* Exh. A. The court joined Governor Ducey.

After six weeks, the trial court ruled on June 17. *See* Exh. B. The court accepted jurisdiction but denied relief. The court agreed that the draft EPM “omitted or misconstrued portions of statutes[,]” “suggest[ed] certain actions are mandatory and not discretionary[,]” and “include[d] best practice recommendations without clearly describing them as such.” Exh. B at 3. But the court concluded that “at this point in the game, there is no mechanism for the Court to assist the parties in constructing an [EPM] which complies with A.R.S. §16-452 within the timelines of the statute.” *Id.* Instead, the court concluded that the 2019 EPM continues in effect. *Id.* The court issued final judgment on June 22. *See* Exh. C.

ARGUMENT

The extraordinary circumstances here warrant transfer with expedited briefing. Ariz. R. Civ. App. P. 19(a).

Time is of the essence. The primary election is underway. Overseas ballots were sent by June 18 and early ballots will begin going out July 6. The primary will be on August 2. Early ballots for the general election will begin going out on October 12 and the general will be held on November 8. Even if it is now too late for an updated EPM for the primary election, it is not too late for the general. But it is too late for the ordinary appellate process to play out.

The legal issues are of statewide importance. This case involves a dispute among top statewide officials about the rules to govern elections. At a more granular level, the case involves important issues regarding, among other things, the Secretary's authority in drafting the EPM; judicial review of the EPM process; application of laches or *Purcell* to claims for special action relief; the legality of draft provisions regarding out-of-precinct voting, signature verification, AEVL implementation, unstaffed drop boxes, and overvote instructions; and the continuing validity of the 2019 EPM. Each issue is a matter of first impression. Each is a pure legal issue with a developed record. Each independently justifies review. Collectively, the issues make the Court's involvement paramount.

The trial court erred. The AG will not belabor arguments he will make upon transfer, but the trial court erred. The court correctly denied the Secretary's defenses and concluded that the draft the Secretary provided was unlawful. But the court concluded that it is powerless to grant relief because the Secretary's draft was not sufficiently unlawful. Nothing in § 16-452 grants the Secretary discretion to include *unlawful* provisions in the draft EPM, or to refuse to remove such provisions. The trial court's conclusion that it is powerless to grant relief here is inconsistent with separation of powers, the scope of special action relief, the new process outlined in § 16-452, and the Court's holdings in analogous situations. *See Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 589-90 (1994) (judicial review of the Legislative Council's draft description of ballot measures).

The trial court further erred in withholding relief based on timing. The trial court correctly rejected the Secretary's laches and *Purcell* defenses—both are legally and factually flawed. *See* Exh. D at 10-14. Yet the court rejected relief based on insufficient time, criticizing the AG for waiting until April to file. In reality, the AG raised these issues with the Court in March (in an action filed in February) and was prevented from acting earlier by a bar complaint the Secretary filed. Regardless, practically speaking, there is sufficient time. The general election is four months away, allowing for expedited briefing and decision. The trial court's conclusion is belied by *Arizona Public Integrity Alliance*, where this Court granted relief (and

rejected laches) on September 10, 2020, in a case involving the general election.
See 250 Ariz. at 60 ¶1.

CONCLUSION

The AG respectfully requests that the Court grant transfer and order expedited briefing.

RESPECTFULLY SUBMITTED this 24th day of June, 2022.

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