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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

ARIZONA PUBLIC INTEGRITY
ALLIANCE, INC., et al.,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity
as Maricopa County Recorder, et al.,

Defendants.

Case No: LC2020-000252-001 DT

**AMICUS BRIEF OF ARIZONA
ATTORNEY GENERAL MARK
BRNOVICH IN SUPPORT OF
PLAINTIFFS**

(Hon. James D. Smith)

INTRODUCTION

Arizona Attorney General Mark Brnovich submits this amicus brief in support of Plaintiffs' special action complaint seeking declaratory and injunctive relief. Under Arizona law, the Attorney General is authorized to enforce provisions of Title 16 "[i]n any election for state office, members of the legislature, justices of the supreme court,

1 judges of the court of appeals or statewide initiative or referendum ... through civil and
2 criminal actions.” A.R.S. § 16-1021. Accordingly, the Attorney General has authority
3 to enforce provisions of Title 16 for the upcoming General Election on November 3,
4 2020 (“November Election”), which includes all the aforementioned races. The
5 Attorney General also approves the Election Procedures Manual (“EPM”), which is
6 promulgated by the Secretary of State (“Secretary”) and carries the force of law. A.R.S.
7 § 16-452(B), (C).¹

8 This special action seeks to enjoin Defendants, Maricopa County Recorder Adrian
9 Fontes (“Recorder”) and the Maricopa Board of Supervisors (“Board”), from mailing
10 instructions that accompany early ballots to voters that are contrary to provisions of Title
11 16 and the EPM. *See* Verified Complaint for a Special Action (“Complaint”), ¶33.
12 Given the Attorney General’s interests at stake in this special action, the Attorney
13 General submits this amicus brief in lieu of intervention as-of-right to conserve judicial
14 resources and facilitate an expeditious determination of this matter. *See* Ariz. R. P. Spec.
15 Actions 2(b) (court “may allow other persons to intervene” under Ariz. R. Civ. P. 24 “or
16 may allow them to participate [as] amicus curiae”); Ariz. R. Civ. P. 24(a)(2).

17 As discussed below, the Attorney General agrees with Plaintiffs that Defendants
18 exceeded their constitutional and statutory authority in promulgating the instruction at
19 issue. This Court should enjoin Defendants from distributing early ballot instructions
20 that conflict with Arizona’s election laws and procedures.

21 **BACKGROUND**

22 The Attorney General, through the Election Integrity Unit of the Attorney
23 General’s Office, received several complaints from Arizona voters surrounding the
24 Recorder’s early ballot instructions in the Primary Election on August 4, 2020.
25 Specifically, the instruction permitted voters to “[c]ross out [a] mistake” and “[f]ill in the
26 oval next to [the voter’s] corrected selection” and displayed an image showing two

27 ¹ The 2019 EPM, which applies in the 2020 General Election, is available here:
28 https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_AP_PROVED.pdf (last visited Aug. 31, 2020).

options selected where only one selection is permitted (“Mistake Instruction”). *See* Exhibit (“Ex.”) A; *see also* Complaint, ¶¶ 21-22.²

The Attorney General concluded the Mistake Instruction did not satisfy State requirements for ballot instructions—most notably, the following unambiguous requirement in Chapter 2, § I(C)(3) of the EPM, which applies to all county recorders:

A County Recorder must supply printed instructions that:

...

3. Inform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote.

See EPM at 56 (attached as Ex. B) (“Overvote Instruction”).

On August 11th, the Attorney General sent a letter to the Recorder, copying the Board and the Secretary, stating that the Mistake Instruction was deficient and demanding the Recorder ensure that the early ballot instructions for the November Election comply with State requirements. *See* Ex. C.

On August 24th, the Recorder sent a written response to the Attorney General’s letter. *See* Ex. D.³ Significantly, the Recorder acknowledges the rules promulgated by the Secretary in the EPM under A.R.S. § 16-452 “ha[ve] the force of law” and that “the EPM still requires the Recorder to include” the Overvote Instruction. Ex. D at 3. Nonetheless, the Recorder insists that he is empowered to violate the EPM and promulgate his own election rules, based only on the Recorder’s unilateral (and erroneous) determination that the Overvote Instruction is invalid. *See id.* at 3-4.

² The Complaint correctly refers to the instruction as a “New Instruction.” In 2016, Maricopa County told voters to request a new ballot if they made a mistake, as required by the EPM. *See* Jessica Boehn, *Can you correct a mistake on your ballot? New instruction spurs debate in Maricopa County* (Aug. 20, 2020), <https://www.msn.com/en-us/news/politics/can-you-correct-a-mistake-on-your-ballot-new-instruction-spurs-debate-in-maricopa-county/ar-BB18bNIR> (last visited Aug. 31, 2020).

³ While the Attorney General initially sought a response by August 19th, the Attorney General granted the Recorder a brief extension to permit the Board an opportunity to review and discuss the instruction issue at the Board’s August 24th Special Executive Session.

Unbeknownst to the Attorney General, Plaintiffs, on their own accord, sent a cease-and-desist letter to the Recorder, similarly pointing out that the Mistake Instruction violates provisions of Title 16 and must not be included in the early ballot instructions for the November Election. *See* Motion for Preliminary and Permanent Injunction (“PI Motion”), Ex. B. Similar to the letter sent to the Attorney General, the Recorder’s letter to Plaintiffs states the Recorder refuses to comply with Plaintiffs’ demands. *See* PI Motion, Ex. C.

Consequently, Plaintiffs initiated the instant special action proceedings, seeking to enjoin Defendants from including the Mistake Instruction with early ballot instructions and requesting an Order to Show Cause hearing. The Order to Show Cause hearing is currently scheduled for September 3rd. As Plaintiffs note, time is of the essence in light of impending ballot-printing deadlines. *See* PI Motion at 2; EPM at A34 (reflecting September 19th deadline for Recorder to mail early ballots to “persons who are subject to the uniformed and overseas citizens absentee voting act of 1986” under A.R.S. § 16-543(C), and October 1st deadline for the Board to print early ballots and deliver them to county recorders).

ARGUMENT

Plaintiffs’ request for a preliminary and permanent injunction prohibiting Defendants from providing the Mistake Instruction, or any substantially similar instruction, with early ballots in the November Election is an appropriate and equitable request for relief because Defendants have exceeded their statutory authority. *See McCluskey v. Sparks*, 80 Ariz. 15, 20-21 (1955) (holding injunction was appropriate where plaintiffs sought to require officials “to comply with the statutes and constitutions of Arizona and of the United States”); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 616, ¶ 16 (App. 2017) (noting that courts may grant injunctive relief “when a public officer enforces a public statute in a manner that exceeds the officer’s power”); *see, e.g., Hess v. Purcell*, 229 Ariz. 250, 252, ¶ 4 (App. 2012) (appeal arising from superior court’s grant of mandamus relief ordering Maricopa County to comply with EPM).

1 And even assuming for the sake of argument that the Mistake Instruction is
2 theoretically permissible under Arizona law, the Court should nonetheless require
3 Defendants to adhere to established election procedures and provide the Overvote
4 Instruction because: (1) Defendants' belated challenge to the EPM's Overvote
5 Instruction is unreasonable and barred by equitable principles; and (2) the preliminary
6 injunction factors weigh in Plaintiffs' favor.

7 **I. Defendants Lack Legal Authority to Violate the EPM and Provide Voters**
8 **with an Instruction that Is Contrary to Arizona Law**

9 Defendants cannot demonstrate that the Mistake Instruction is a lawful exercise of
10 their authority under Arizona law. See ARIZ. CONST. art. 12, § 4 (powers of county
11 officers are limited to those "prescribed by law"); A.R.S. § 11-201(A) ("The powers of a
12 county shall be exercised only by the board of supervisors or by agents and officers
13 acting under its authority and authority of law."). Arizona courts "have consistently
14 required counties and county boards of supervisors to show an express grant of power
15 whenever they assert that [] statutory authority exists" for exercising such power.
16 *Marsoner v. Pima County*, 166 Ariz. 486, 488 (1991). "They have only those powers
17 that are expressly or by necessary implication delegated to them by the legislature." *Id.*
18 And "the burden is on the county to point out the constitutional or statutory power that
19 permits the conduct." *Southwest Gas Corp. v. Mohave County*, 188 Ariz. 506, 509 (App.
20 1997).

21 As relevant here, the Board is statutorily required to "prepare and provide ballots"
22 and make them available for inspection "at least ten days before a general election[.]"
23 A.R.S. § 16-503(A), and "[p]repare the official early ballot and deliver a sufficient
24 number to the recorder or other officer in charge of elections not later than the thirty-
25 third day before the election[.]" A.R.S. § 16-545(B). The Recorder must "supply printed
26 instructions to early voters that direct them to sign the affidavit, mark the ballot and
return both in the enclosed self-addressed envelope[.]" A.R.S. § 16-547(C).

27 As discussed below, this statutory authority does not empower the Board or the
28 Recorder to issue the Mistake Instruction to voters.

1 **A. The Legislature Delegated the Duty of Promulgating Election Rules**
2 **And Procedures to the Secretary**

3 Defendants cannot contend they have any inherent or statutory authority to
4 promulgate election rules or procedures. The Legislature expressly delegated those
5 duties to the Secretary, who “shall prescribe the rules to achieve and maintain the
6 maximum degree of correctness, impartiality, uniformity and efficiency on the
7 procedures for early voting and voting, and of producing, distributing, collecting,
8 counting, tabulating and storing ballots.” A.R.S. § 16-452(A).

9 Notably, the Secretary is required to prescribe such rules “[a]fter consultation
10 with each county board of supervisors or other officer in charge of elections[.]” *Id.* And
11 promulgation of the election procedures rules is not optional; the Secretary must obtain
12 approval by the Governor and the Attorney General prior to issuing the EPM and issue it
13 in “official” form by “December 31 of each odd-numbered year immediately preceding
14 the general election.” A.R.S. § 16-452(B).

15 Here, the Recorder’s intentional disregard of the EPM—which unambiguously
16 requires county recorders to provide the Overvote Instruction to voters and leaves no
17 room for discretion—undermines the statutory goals of A.R.S. § 16-452(A). The
18 Mistake Instruction advises voters to “cross out” a mistake and make a “corrected
19 selection” (Ex. A) while the approved Overvote Instruction advises voters to “request a
20 new early ballot” if they make a mistake (Ex. B). The instructions cannot be reconciled
21 and therefore cannot stand together. And because the Secretary is the only official
22 authorized to prescribe rules in the EPM under A.R.S. § 16-452, Defendants cannot
23 claim that the Mistake Instruction prevails over the EPM’s Overvote Instruction.

24 **B. The EPM’s Overvote Instruction Is Consistent With Arizona Law**

25 The Recorder will likely contend, as he did in response to the Attorney General’s
26 letter (*see* Ex. D), that the Overvote Instruction is “invalid” because recent amendments
27 to A.R.S. §§ 16-602 and -621 (through Senate Bill (“S.B.”) 1135),⁴ which govern the

28

⁴ Senate Bill 1135 is available here:
<https://www.azleg.gov/legtext/54leg/2R/laws/0001.pdf> (last visited Sept. 1, 2020).

1 Electronic Adjudication process, “superseded” the Overvote Instruction. The Recorder
2 may even speculate that inclusion of the Overvote Instruction in the 2019 EPM “was
3 probably an oversight.” *See* Ex. D at 4. Not so. The drafting, reviewing, and approving
4 of the EPM requires hundreds, if not thousands, of hours contributed by county election
5 officials in Arizona’s 15 counties, the public, the Secretary, the Attorney General, and
6 the Governor.⁵

7 In any event, the Recorder cannot justify his refusal to comply with the EPM
8 because the Overvote Instruction is entirely consistent with Arizona law, including the
9 laws and procedures that apply during the tabulation and counting process. Senate Bill
10 1135 was signed into law on February 3, 2020, and establishes the requirements for
11 utilizing electronic adjudication features of ballot tabulation equipment. *See* Ex. E
12 (Electronic Adjudication Addendum to the 2019 EPM) (“Addendum”).⁶ Of course, the
13 Recorder cannot invoke any statutory authority to direct, control, or interfere with
14 tabulation procedures. That authority rests with the Board. *See* A.R.S. § 16-621(A)
15 (“[a]ll proceedings at the counting center shall be under the direction of the board of
16 supervisors”). Consequently, the Recorder’s attempt to unilaterally impose a tabulation
17 requirement on the Board through the Mistake Instruction not only usurps the Board’s
18 authority; it undermines the Secretary’s authority to create statewide uniform tabulation
19 requirements pursuant to A.R.S. § 16-452.

20 The Addendum—which implements the new provisions in A.R.S. § 16-621(B)—
21 allows the Board to appoint “Electronic Vote Adjudication Boards” to “evaluate over-
22 vote conditions to determine the voter’s intent” as “an alternative to manual duplication
23 of ballots performed by the Ballot Duplication Board.” *See* Ex. E; *see also* EPM at 201-

24 ⁵ The Recorder may imply that the Attorney General’s approval of the EPM somehow
25 sanctioned the Mistake Instruction. But the Attorney General was never given an
26 opportunity to review the Recorder’s Mistake Instruction. The Attorney General
27 certainly could not have anticipated that the Recorder would disregard the Overvote
28 Instruction without initiating a judicial proceeding or taking any other steps to obtain
approval of the Mistake Instruction before mailing it to voters.

29 ⁶ The Addendum is also available here:
30 https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf (last visited Aug. 31, 2020).

02 (providing that “over-voted ballots shall be sent to the Ballot Duplication Board ... [and i]f voter intent can be determined, the ballot shall be duplicated and counted”). Simply put, S.B. 1135 has nothing to do with Arizona laws or procedures governing the written instructions that county recorders must supply with early ballots. Instead, the law allows the Board to appoint Electronic Vote Adjudication Boards to determine a voter’s intent when over-vote conditions are present.

Moreover, neither the EPM nor A.R.S. § 16-621 permits voters to intentionally overvote, i.e., vote for more candidates than permitted. Rather, both the EPM and A.R.S. § 16-621 demand deference to A.R.S. §§ 16-610 and -611, which require elections officials to *reject* overvotes. *See* A.R.S. § 16-610 (“If on any ballot the names of more persons are designated for the same office than are to be chosen, or if for any reason it is impossible to positively determine the voter’s choice, all the names designated for that office shall be rejected.”); § 16-611 (“If the voter marks more names than there are persons to be elected to an office, or if from the ballot it is impossible to determine the voter’s choice for an office, his ballot shall not be counted for that office.”).

The Recorder appears to overlook the important purpose underlying the Overvote Instruction: to enable elections officials to discern the intent of the voter in the clearest manner possible, and thereby safeguard the integrity of the election, by striving for clean ballots with single selections for each contest. *See* ARIZ. CONST. art. 7 § 12 (“There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise”); A.R.S. § 16-452(A) (one purpose of the EPM is “to achieve and maintain the maximum degree of correctness ... on the procedures for ... counting [and] tabulating ... ballots”). Defendants cannot show that the Overvote Instruction has been superseded by state law or that it is invalid for any reason.

C. The Mistake Instruction Is Inconsistent With Arizona Law

The Mistake Instruction, however, should be declared invalid because not only is it an unlawful exercise of the Recorder’s authority, it does not comport with Arizona

1 election laws. As discussed above, Arizona law does not contemplate that voters will
2 select “more names than there are persons to be elected to an office” because when this
3 occurs, Arizona law directs that such “ballot[s] *shall not to be counted for that office.*”
4 A.R.S. § 16-611; *see also* A.R.S. § 16-502(F) (requiring ballots to include the words:
5 “Vote for not more than ____” with the respective “number to be elected” below each
6 office).

7 Yet the Mistake Instruction tells voters to “[c]ross out [a] mistake” after having
8 selected one name, and “[f]ill in the oval next to [the voter’s] corrected selection.” Ex.
9 A. But the damage to the ballot is already done. The Recorder’s suggestion to a voter
10 who makes a “mistake” that the voter should make another selection on the same ballot
11 to clarify the voter’s intent finds no support in statute. To the contrary, A.R.S. §§ 16-610
12 and -611 establish that marking more names than are allowed on a ballot is a defect that
13 invalidates that particular vote; a mistake, once marked, cannot be remedied in the non-
14 statutory fashion suggested by the Recorder.

15 As a practical matter, the Mistake Instruction promotes defaced, marked-up, and
16 potentially unreadable ballots, which will necessitate the subjective judgment of two
17 election workers to determine the voter’s intent. *See* Ex. E (“If the voter’s choice for a
18 specific race or ballot measure cannot be positively determined, no selection shall be
19 counted for that race or ballot measure.”). The Recorder appears to believe that the
20 Legislature’s creation of an electronic tabulation procedure to rehabilitate *potential*
21 overvotes, i.e., those created by pen rests, ink blots, bleed through, smudges, or other
22 unintentional defects, empowers the Recorder to unilaterally create a Mistake Instruction
23 that encourages voters to intentionally spoil their ballots. But the Recorder’s authority
24 under A.R.S. § 16-547(C) does not extend so far.

25 **II. Notwithstanding the Legal Deficiencies Associated With the Mistake Instruction, The Equities Still Favor An Injunction**

26 Even assuming, *arguendo*, that Defendants could demonstrate both lawful
27 authority to issue the Mistake Instruction with early ballots for the November Election,
28 *and* that the Mistake Instruction complies with Arizona law, the Court should

1 nonetheless grant Plaintiffs' PI Motion under equitable principles and upon weighing the
2 preliminary injunction factors.

3 **A. Defendants' Apparent Challenge to the EPM's Overvote Instruction Is**
4 **Barred By Equitable Estoppel Principles**

5 First, to the extent Defendants may contest the validity of the EPM's Overvote
6 Instruction in this lawsuit, Defendants' delay in making such an argument is
7 unreasonable, untimely, and procedurally improper. *See Sotomayor v. Burns*, 199 Ariz.
8 81, 82-83, ¶ 6 (2000) ("The defense of laches is available in election challenges [and] "is
9 an equitable counterpart to the statute of limitations, designed to discourage dilatory
10 conduct."). If Defendants perceived a legal error in the EPM or a conflict between the
11 EPM and Arizona law, it was incumbent on them and the Secretary to identify any such
12 error or conflict and take corrective action. As noted above, S.B. 1135 took effect in
13 February 2020, and the Secretary issued the Addendum incorporating those statutory
14 changes on February 28, 2020—five full months before the August Primary Election.
15 *See* Ex. E. Neither the Recorder nor the Board can excuse their delay in failing to bring
16 timely challenges to the EPM, which has the force of law. *See* A.R.S. § 16-452; *Harris*
17 *v. Purcell*, 193 Ariz. 409, ¶¶ 15, 17 (1998) ("[i]n election matters, time is of the essence"
18 and delayed challenges "place[] an unreasonable burden on the court"); *League of*
19 *Women Voters of Ariz. v. Reagan*, 2018 WL 4467891, *6 (D. Ariz. 2018) (unpublished)
20 (observing that unilateral decisions to violate provisions of the EPM are not authorized
21 by A.R.S. § 16-452, which requires that EPM modifications occur after "consultation
22 with each county board of supervisors" and with approval by the governor and Attorney
23 General). Notably, it is neither the Recorder nor the Board seeking to remedy the
24 perceived legal error; instead, they appear to be begging for forgiveness after failing to
25 ask for permission. The Court should refuse to endorse such audacious conduct by
26 trusted election officials.

27 Accordingly, the Court should apply the laches doctrine or other equitable
28 principles to bar any claim by Defendants that they are entitled to deviate from the
EPM's Overvote Instruction just weeks before printing deadlines in connection with the

1 November Election. *See Sotomayor*, 199 Ariz. at 83, ¶¶ 6, 9 (explaining “[l]aches will
2 generally bar a claim when the delay is unreasonable and results in prejudice to the
3 opposing party” and that the prejudicial effects of delay in election cases “extend far
4 beyond the interests of the parties” by requiring courts to “steamroll through the delicate
5 legal issues,” which implicates fairness concerns for “the voters of Arizona”) (citations
6 omitted).

7 **B. The Preliminary Injunction Factors Weigh In Plaintiffs’ Favor**

8 Second, the preliminary injunction factors do not support Defendants. “The party
9 seeking a preliminary injunction is obligated to establish four traditional equitable
10 criteria: 1) A strong likelihood that he will succeed at trial on the merits; 2) The
11 possibility of irreparable injury to him not remediable by damages if the requested relief
12 is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the
13 injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

14 For the reasons discussed above (*see supra*, Section I), Plaintiffs are likely to
15 succeed on the merits of their claim that Defendants exceeded their legal authority in
16 promulgating the Mistake Instruction contrary to Arizona law and the EPM. Thus, the
17 first likelihood-of-success factor supports Plaintiffs.

18 The second factor, possibility of irreparable injury, also supports Plaintiffs
19 because an injunction would properly prevent public officials from exceeding their
20 authority in an upcoming election—a form of irreparable injury. *See McCluskey*, 80
21 Ariz. at 20-21; *Boruch*, 242 Ariz. at 616, ¶ 16. Moreover, if Defendants are permitted to
22 issue the erroneous Mistake Instruction to voters, this could very well delay or call into
23 question election results and lead to post-election challenges. *See, e.g.*, A.R.S. § 16-
24 672(A)(1) (providing “misconduct on the part of election boards” as one of several
25 grounds for contesting an election). Allowing the Mistake Instruction does not promote
26 “public confidence in the integrity of the electoral process,” which the United States
27 Supreme Court has stated “has independent significance.” *Crawford v. Marion County*
28 *Election Bd.*, 553 U.S. 181, 197 (2008).

1 The third balance-of-hardships factor also weighs in Plaintiffs' favor because
2 Defendants cannot claim any hardship associated with being required to comply with
3 mandatory provisions in the EPM. To the extent Defendants may contend that the
4 impending ballot-printing deadlines present any hardship, such a harm is self-inflicted.
5 The Attorney General notified Defendants of the legal deficiencies in the Mistake
6 Instruction on August 11th. *See* Ex. C. And Plaintiffs brought this lawsuit immediately
7 upon learning that Defendants did not intend to comply with the EPM. Defendants still
8 have more than adequate time to prepare and print accurate early ballot instructions that
9 comply with state requirements.

10 Finally, the public policy factor favors an injunction because it is in the public
11 interest to require Defendants to adhere to the generally-applicable and neutral
12 procedures, including the Overvote Instruction, which are outlined in the EPM. Because
13 states are "primarily responsible for regulating federal, state, and local elections," they
14 have a "strong interest in their ability to enforce state election law requirements."
15 *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). The
16 public interest is also served by promoting certainty with elections and protecting against
17 "voter confusion and consequent incentive to remain away from the polls." *Purcell v.*
18 *Gonzalez*, 549 U.S. 1, 5 (2006); *see also Tedards v. Ducey*, 398 F.Supp.3d 529, 548 (D.
19 Ariz. 2019) (recognizing the state has a "substantial interest[]" in "lessening voter
20 confusion").

21 Defendants cannot point to the interest in avoiding voter confusion to justify their
22 actions or to argue against an injunction of the Mistake Instruction. Notably, the
23 Recorder neglected to respond to the Attorney General's observation that the Recorder's
24 own website is consistent with the EPM's Overvote Instruction, *not* the Mistake
25 Instruction. The Recorder's website explicitly tells voters, "If you make a mistake in
26 marking your ballot, do not try to correct it" and directs voters to call the Recorder's
27 Office to obtain "a new ballot."⁷ To this day, the Recorder's website gives conflicting

28 ⁷ *See* <https://recorder.maricopa.gov/site/faq.aspx> (last visited Aug. 31, 2020).

1 information to voters, even though the Attorney General notified the Recorder of this
2 conflict weeks ago. Allowing the Recorder to continue giving voters conflicting
3 information about how to properly cast a ballot encourages voter confusion and
4 undermines public confidence in Arizona's election processes.


5 It is in the public interest to adhere to the established election procedures in the
6 EPM instead of allowing some county officials to deviate and make up their own
7 election rules without state oversight or any collaboration with other county election
8 officials. Particularly within two months of the November Election and in the midst of a
9 pandemic, it serves the public interest to require Defendants to comply with the EPM,
10 just as all other county officials in Arizona are expected to follow its provisions.

11 CONCLUSION

12 Defendants' belated attempt to modify Arizona's election procedures are not
13 statutorily authorized and are contrary to Arizona law. If the Mistake Instruction stands,
14 it could very well lead to disenfranchisement of voters, voter confusion, delayed election
15 results, and unnecessary post-election challenges. The State "indisputably has a
16 compelling interest in preserving the integrity of its election process." *Eu v. San*
17 *Francisco Cty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989). The Court should grant
18 Plaintiffs' PI Motion and order Defendants to supply the required Overvote Instruction
19 with early ballots in the November Election to prevent Defendants from exceeding their
20 statutory authority and to maintain the integrity of the election.

21 Respectfully submitted this 2nd day of September, 2020.

22 MARK BRNOVICH
23 ATTORNEY GENERAL

24 
25 Joseph A. Kanefield
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27 Brunn (Beau) W. Roysden III

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Arizona Attorney General Mark Brnovich

1 I hereby certify that the foregoing document
2 was filed this 2nd day of September, 2020.


3 Copy of the same served via email this 2nd
4 day of September, 2020, to:

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17 Courtesy copy of the same e-mailed this date to:

18 Honorable James D. Smith

19 
20 _____
21 Jennifer Wright

**Index of Exhibits to Amicus Brief of Arizona Attorney General
In Support of Plaintiffs**

Description	Exhibit
Mistake Instruction	A
Overvote Instruction Required By Chapter 2, § I(C)(3) of the Elections Procedures Manual	B
Attorney General's August 11, 2020, Letter to Maricopa County Recorder	C
Maricopa County Recorder's August 24, 2020, Letter to Attorney General	D
Electronic Adjudication Addendum to the 2019 Elections Procedures Manual	E

Exhibit A

INSTRUCTIONS | INSTRUCCIONES

STEP 1 | PASO 1

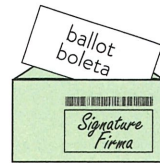
Vote your ballot.
Vote su boleta.

OPTION | OPCIÓN 1
OPTION | OPCIÓN 2



STEP 2 | PASO 2

Fold your ballot and
seal it in the
envelope.
Doble su boleta y
sélela en el sobre.



STEP 3 | PASO 3

Sign your ballot and
provide your phone
number.

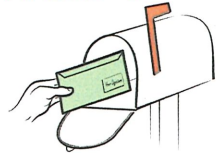
Firme su boleta y
proporcione su número
de teléfono.



STEP 4 | PASO 4

Mail your ballot or
drop it off.
Envíe su boleta por
correo o déjela.

Locations.Maricopa.Vote
Ubicaciones.Maricopa.Voto

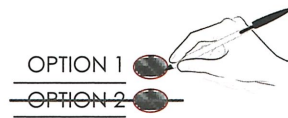


TO VOTE

- ✓ Use a black ballpoint pen (no red ink)
- ✓ Fill in the oval next to your selection
- ✓ For Candidate Offices, vote for no more than the number to elect as noted on your Official Ballot (e.g. VOTE FOR NOT MORE THAN __)

MADE A MISTAKE?

- ✓ Cross out your mistake
- ✓ Fill in the oval next to your corrected selection



WRITE-IN CANDIDATES

- ✓ Write a valid* Write-In Candidate's name
- ✓ Fill in the oval next to that name



*For a list of valid **WRITE-IN** candidates and/or **WITHDRAWN** candidates, if applicable, please visit **CandidateList.Maricopa.Vote**.

PARA VOTAR

- ✓ Use un bolígrafo negro (no use tinta roja)
- ✓ Rellene el óvalo enseguida de su selección
- ✓ Para Cargos de Candidatos, vote por no más del número a elegir como se indica en su Boleta Electoral Oficial (por ej. VOTE POR NO MÁS DE __)

¿COMETIÓ UN ERROR?

- ✓ Tache su error
- ✓ Rellene el óvalo a la par de su selección correcta



CANDIDATOS POR ESCRITO

- ✓ Escriba un nombre válido* de un Candidato por Escrito
- ✓ Rellene el óvalo a la par de su selección



*Para una lista de candidatos válidos **POR ESCRITO** y/o candidatos **RETIRADOS**, si aplica, por favor visite **ListaDeCandidatos.Maricopa.Voto**.

NOTICE: In order for your ballot to be received on time, mail your ballot
NO LATER THAN 6 DAYS prior to Election Day.

AVISO: Para que su boleta sea recibida a tiempo, envíe su boleta por
correo a **MÁS TARDAR 6 DÍAS ANTES** del Día de la Elección.

THE FINE PRINT

ONLY BALLOTS RECEIVED BY 7 P.M. ON ELECTION DAY CAN BE COUNTED

Per A.R.S. §16-547(c)-In order to be valid and counted, the ballot and signed affidavit envelope must be delivered to the Maricopa County Recorder's Office, other officer in charge of elections, or may be deposited at any Vote Center/Polling Location in the county no later than 7 p.m. on Election Day (see top of ballot for the election date). **WARNING**-It is a felony to offer or receive any compensation for a ballot.

LA LETRA PEQUEÑA

SÓLO LAS BOLETAS RECIBIDAS PARA LAS 7 P.M. EL DÍA DE LA ELECCIÓN PODRÁN SER CONTADAS

De Acuerdo con A.R.S. §16-547(c)-Para que su boleta sea válida y contada, la boleta y el sobre de declaración jurada firmado deben entregarse a la Oficina del Registrador del Condado de Maricopa, o a otro funcionario encargado de las elecciones, o depositarlas en cualquier Centro de Votación/Lugar de Votación en el condado a más tardar a las 7 p.m. el Día de la Elección (vea la fecha de la elección en la parte superior de la boleta). **ADVERTENCIA**-Es un delito grave ofrecer o recibir cualquier compensación por una boleta.

Exhibit B

3. Required Instructions to Voters

A County Recorder must supply printed instructions that:

1. Direct voters to sign the voter affidavit, mark the ballot, and return the voted ballot in the enclosed return envelope;
2. Include a website address where the following information will be posted: (1) official locations where early ballots may be deposited; and (2) official write-in candidates and withdrawn candidates for all jurisdictions on the ballot, [A.R.S. § 16-343\(G\)](#); and (2);
3. Inform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote;
4. Recommend that voters mail a ballot-by-mail at least six calendar days before the election to best ensure the ballot will be timely received by 7:00 p.m. on Election Day;
5. Informs voters regarding the appropriate marking devices to be used when marking the ballot; and
6. Include the following language:
 - In order to be valid and counted, the ballot and affidavit must be delivered to the County Recorder or other officer in charge of elections or may be deposited at any polling place in the county no later than 7:00 p.m. on Election Day; and
 - WARNING - It is a felony to offer or receive any compensation for a ballot.

[A.R.S. § 16-547\(C\)](#). The County Recorder may substitute “vote center” for “polling place” if the county uses vote centers. If applicable, the County Recorder may add additional ballot drop-off locations to the statutorily-prescribed language. All ballot drop-off locations and drop-boxes shall be approved by the Board of Supervisors (or designee).

A County Recorder in a covered jurisdiction, as designated by the Census Bureau in the current Federal Register publication, must provide these instructions in English and any additional written language(s) required under the federal Voting Rights Act. *See* [Chapter 8, Section VI](#).

D. Mailing Ballots-by-Mail

1. Methods of Transmitting Ballots-by-Mail

A ballot-by-mail must be mailed to voters by first-class, non-forwardable mail. The ballot-by-mail must be accompanied by an early ballot affidavit, instructions to voters, and a postage-prepaid return envelope.

UOCAVA ballots may be transmitted by mail, fax, email, or other secure method of online transmittal, in accordance with the delivery method selected by the voter on the FPCA. UOCAVA mailing requirements apply to all elections, not just federal elections. [A.R.S. § 16-543\(A\)](#).

Exhibit C



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL

August 11, 2020

Via Email and Certified Mail

The Honorable Adrian Fontes
Maricopa County Recorder
111 S. 3rd Avenue
Phoenix, Arizona 85003
afontes@risc.Maricopa.gov

Re: Maricopa County Voting Instruction Failures In Connection With August Primary

Dear Mr. Fontes:

This letter is to notify you that the Maricopa County Voting Instructions ("Maricopa Voting Instructions") mailed with the early ballots for the August primary did not satisfy State requirements. The Attorney General's Office is authorized to enforce provisions of Title 16 of the Arizona Revised Statutes and the Elections Procedures Manual ("Manual"). See A.R.S. §§ 16-452(C); -1021.

In particular, the Maricopa Voting Instructions, which accompanied the early ballots mailed to voters in advance of the August 4, 2020 Primary Election, included directions on how to correct "mistakes"—to draw a line through the original vote cast and make a new selection. Critically, this direction fails to track with Chapter 2, § I(C)(3) of the 2019 Manual, which states in relevant part that "[a] County Recorder must supply printed instructions that... [i]nform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote[.]"¹

Moreover, this direction conflicts with the Maricopa County Recorder's Office website, and also with specific instructions provided by Recorder's Office staff when voters called to ask about mistakes and overvotes (according to complaints received by the Attorney General's Office).

Please let us know by August 21, 2020, what steps the Maricopa County Recorder's Office will take to ensure that the instructions accompanying the early ballots for the November 3, 2020 General Election comply with the Manual's requirements. If you have any questions, I can be reached at (602) 542-8255.

Sincerely,

Jennifer Wright
Assistant Attorney General

cc: Hon. Katie Hobbs, Arizona Secretary of State
Hon. Clint Hickman, Chairman, Maricopa County Board of Supervisors

¹ See https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

Exhibit D



Maricopa County Attorney

ALLISTER ADEL

August 24, 2020

Jennifer Wright, Esq.
Assistant Attorney General
Office of the Attorney General
2005 North Central Avenue
Phoenix, Arizona 85004

Sent by email only, to:

- jennifer.wright@azag.gov

Re: Maricopa County Early Ballot Instructions

Dear Ms. Wright,

We represent Maricopa County Recorder Adrian Fontes. We are in receipt of your August 11, 2020, letter to Recorder Fontes concerning the instructions he included with early ballots for the August, 2020, primary election (the "Instructions"). Your letter suggests that the Instructions did not satisfy state law requirements because they did not inform early-ballot voters that overvotes would not be counted, but instead instructed voters concerning how to correct any votes they made by mistake.

As explained herein, the Instructions comply with both Arizona and federal law. They also further the County's interests in protecting the integrity of the election, avoiding voter confusion, and protecting taxpayer resources.

1. The 2019 Elections Procedures Manual Changed the Law to Require the County to Count Early Ballots With Overvotes.

Arizona law provides that early ballots are to be processed according to the rules promulgated by the Secretary of State in the Elections Procedures Manual (the "EPM"). A.R.S. § 16-551(C). The EPM, once approved by the Governor and the Attorney General, has the force of law. A.R.S. § 16-452. The former version of the EPM, enacted in 2014,¹ required the county recorders to include

¹ The 2014 version of the EPM is available at https://azsos.gov/sites/default/files-/election_procedure_manual_2014.pdf.

instructions with early ballots informing voters that overvotes² would not be counted, EPM (2014) at 59, and also effectively prohibited the duplicating (and so, the counting) of early ballot overvotes, EPM (2014) at 177. But an important change was made to the 2019 version of the EPM,³ which is the current, operative version. It requires early ballot overvotes to be counted when the voter's intent can be determined. EPM (2019) at 201-02; *see also* A.R.S. § 16-602(G) (“During any hand count of early ballots, the county officer in charge of elections and election board workers shall attempt to determine the intent of the voter in casting the ballot”). Significantly, Attorney General Brnovich and Governor Ducey each approved the 2019 version of the EPM, including the change requiring the counting of early ballot overvotes.⁴

Although the EPM describes a corrected vote as an overvote, and so we are using that term as well, *corrected* votes are not true overvotes. An overvote is a vote for more candidates than allowed. Where the voter is allowed to vote for one candidate, and mistakenly voted for a candidate she did not intend, and then indicates her intent to change her vote from that candidate to her preferred candidate, she has not voted for more candidates than allowed.

2. Senate Bill 1135 Amended the Law to Allow for Electronic Adjudication of Overvotes.

Additionally, on February 3, 2020, Governor Ducey signed Senate Bill 1135, Fifty Fourth Legislature, 2nd Regular Session, which amended A.R.S §§ 16-602 and -621 to provide for electronic vote adjudication. To “adjudicate” a vote is to determine what the voter's intent was when the vote tabulation machines reject ballots as “blank,” and so allow that vote to be counted. Vote tabulation machines reject ballots for several reasons, including if they contain an overvote (including a corrected vote), or if the voters cast an “improper” vote, such as if they did not fill in the oval to indicate their choice, but indicated their vote some other way (such as, by circling the name of the candidate).

Senate Bill 1135 authorized electronic adjudication of ballots that were rejected by the tabulation machines. A.R.S. § 16-621(B). It also expressly requires counties, like Maricopa County, that use electronic vote adjudication software at the vote counting center to determine voter intent, if possible, on ballots rejected by the vote tabulation machines and to count those votes. A.R.S. § 16-621(B)(2).

² An “overvote” occurs when an elector casts her vote for more candidates than she is allowed to choose in a particular contest, or votes for a candidate and also writes that candidate's name in as a write-in vote for the same office.

³The 2019 version of the EPM is available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

⁴ Governor Ducey approved the 2019 version of the EPM on December 20, 2019. Attorney General Brnovich approved it one day earlier, on December 19, 2019. Their letters to Secretary of State Hobbs, announcing their approval, are included as unnumbered pages at the beginning of the EPM (2019).

Before Senate Bill 1135, ballot duplication boards comprised of two duplication judges—one Republican, and the other Democrat—and a third member (a duplication inspector) duplicated by hand every vote on each rejected ballot onto a new ballot, correcting the overvotes and improper votes if they could determine the voter’s intent, so that the ballot could be counted by the vote tabulation machines. Duplicating the ballot was a time-consuming, tedious, and laborious process. In 2018, it took on average 12 minutes, per ballot, to perform the required duplication. This was the primary reason that it took Maricopa County over ten days to finish counting the ballots in the 2018 general election.

Senate Bill 1135, however, was a sea change. It provided that electronic vote adjudication boards—still consisting of a Republican and Democratic judge and an inspector—can use electronic equipment to avoid having to manually duplicate the ballot. Instead, the three-member vote adjudication boards review an electronic copy of the ballot to determine whether voter intent on rejected ballots is clear and, if so, they make the voter’s intended vote electronically so the vote is counted. If the voter’s choice is not clear, the electronic adjudication board leaves the vote as an over-vote, which is not counted.

Adjudicating ballots with this process saves a tremendous amount of time—often more than 10 minutes per ballot. This, in turn, increases the speed with which the final vote totals can be reported, and the vote can be canvassed and certified.

3. The Electronic Adjudication Addendum Amended the Elections Procedures Manual to Allow for Electronic Adjudication.

After Senate Bill 1135 was signed into law by the Governor, the Secretary of State proposed what is known as “The Electronic Adjudication Addendum” to amend the 2019 EPM to allow for electronic adjudication of ballots.⁵ The Addendum was approved by Governor Ducey and Attorney General Brnovich.⁶ It expressly allows the Board of Supervisors to appoint electronic adjudication boards to utilize certified adjudication programs to adjudicate votes, and specifically states that overvotes may be so adjudicated. Addendum at 1.

4. The Requirement that the Recorder Include Instructions Informing Early Voters That Overvotes Will Not be Counted Has Been Superseded.

Despite these changes in the law just discussed, the 2019 EPM still requires the Recorder to include instructions with the early ballots that state that overvotes will not be counted and voters who make a mistake when voting must request a new early ballot. The failure to change that requirement

⁵ The Electronic Adjudication Addendum is available at https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf.

⁶ Attorney General Brnovich approved the Addendum on February 27, 2020, and Governor Ducey approved it on February 28, 2020. Both officials’ letters of approval are provided in the opening of the Addendum.

was probably an oversight. But these two provisions are not compatible. On one hand, the 2019 EPM requires that early ballot overvotes *must* be counted when the voters' intent can be discerned, and the Electronic Adjudication Addendum provides the authority for establishing early ballot adjudication boards to do just that. On the other hand, the Recorder is still supposed to tell early voters that their early ballots will not be counted if they contain overvotes.

This conflict put the Recorder in an impossible situation: wrongly telling voters that overvotes would not be counted, when the law requires overvotes to be counted when voter intent can be determined, would create voter confusion. Fortunately, no actual conflict exists. There is a principle in Arizona law that a subsequent statute, law and rule supersedes and abrogates any preceding, contradictory law. *See, e.g.,* A.R.S. § 1-245 (discussing conflicts resulting from statutory changes); *Snyder v. Betsch*, 59 Ariz. 535, 540 (1942) (holding that all prior court rules that conflicted with new court rules were superseded by the new rules). Thus, the change to the 2019 version of the EPM, requiring that early ballot overvotes must be counted when voter intent can be determined, necessarily supersedes the requirement in the 2014 EPM, which was continued in the 2019 version, that the Recorder tell early ballot voters that overvotes will not be counted. That notification requirement, being superseded, no longer has any validity.

5. The Instructions the Recorder Provided with the 2020 Primary Election Early Ballot Comply With State and Federal Law.

The 2019 EPM requires the counting of overvotes on early ballots. EPM (2019) at 201-02. The Recorder included the Instructions with the 2020 primary election early ballots, which expressly informed voters how they can correct a vote if they make a mistake, change their mind, or accidentally smudge their ballots. The Instructions comply with the Recorder's general duty under Arizona law to provide instructions with the early ballot that will assist early ballot voters with casting their ballots. EPM (2019) at 56.

The Instructions also comply with the requirements of the Help America Vote Act (the "HAVA," codified at 52 U.S.C. § 20901 *et seq.* The HAVA expressly requires that a mail ballot "provid[e] the voter with instructions on how to correct the ballot before it is cast and counted" 52 U.S.C. § 21081(a)(1)(B)(ii). One *possible* instruction, provided as an option by HAVA, is the voter must request a new early ballot. *Id.* However, that is only an option for compliance, it is not the sole possibility for compliance. The HAVA contemplates that, in some states, voters might be able to correct their early ballots without having to request a new one—the very result for which the 2019 EPM provides. In those states, the HAVA's requirement is satisfied when the instructions included with the mail-in ballot explain to the voters how they may correct any mistaken votes on their early ballots, *id.*, which is precisely what the Instructions provided by the Recorder do.

6. The Instructions Further the County's Interest in Protecting the Integrity of the Election, Avoiding Voter Confusion, and Protecting Taxpayer Resources.

The Instructions were designed to provide clear guidance to voters while furthering integrity, consistency, and efficiencies when processing ballots in these situations. The Instructions inform

the voter how they can correct their vote and still have it be counted by the bipartisan electronic adjudication teams. This furthers three important County interests.

First, because the Instructions provide explicit guidance regarding how to correct mistaken votes, they help safeguard the integrity of the election itself. Providing instructions for voters to follow makes the job of the electronic adjudication boards to discern the intent of the voter easier, and makes their adjudication judgments more reliable.

Second, the Instructions help avoid voter confusion. They clearly inform voters what steps they should take to correct or clarify their votes. And they avoid the confusion that would necessarily result if the Recorder wrongly told voters that early ballot overvotes would not be counted, when the law now requires that they be counted.

Finally, the Instructions help protect taxpayer resources. Previously, voters who needed to correct a vote on their early ballots were told to request a new early ballot. Early ballots are costly to create and send. By providing the Instructions, the Recorder is saving Maricopa County money, which benefits all its residents.

7. The County's Electronic Adjudication Program Provides for Stringent Ballot Security.

To ensure the integrity of the process, the Electronic Adjudication Addendum to the 2019 EPM provides a detailed process that the counties must follow if they choose to utilize electronic adjudication. Accordingly, the Maricopa County Recorder's Office and Elections Department have implemented stringent controls and oversight for processing early ballots including:

- 100% signature verification,
- using bipartisan early processing boards to separate ballots from the envelope,
- allowing only red and green pens in the early ballot processing rooms (colors that cannot be read by the vote tabulation machines),
- immediately transferring early ballots to the secure ballot tabulation center,
- providing 24/7 live video feeds of the ballot tabulation center and processing boards,
- inviting political party observers to monitor the process, and
- using bipartisan electronic adjudication boards.

Moreover, the electronic adjudication system logs every action taken by the tabulators and the electronic adjudication board members. An audit mark is affixed to all digital copies of ballots flagged for adjudication. The original hard copy paper ballot is never marked and is immediately stored. The original ballot is preserved and may be retrieved at any time. In addition, the boards manually log all of their actions taken within the Election Adjudication System. This manual log is later compared to a system produced digital copy that is signed by the adjudication board.

8. The Risk That Someone Might Intercept an Early Ballot and Change Votes Is Miniscule at Best.

Some have recently suggested that a voted early ballot might be stolen from a voter's mailbox by someone with nefarious intent, who might steam open the early ballot, change the votes by following the Instructions, re-seal the envelope, and return it to the mail to be processed by the Elections Department. The risk that this could actually happen is miniscule at best.

In 2016, the Arizona Capitol Times, with the help of Matthew Roberts, who was then the Communications Director for Secretary of State Michele Reagan, conducted an experiment to see if they could steam open an early ballot envelope. They placed the envelope in a microwave with a bowl of water, and ran the microwave for lengthy periods of time to determine if they could cause the seal on the envelope to weaken sufficiently to open it without destroying the envelope. They could not. They made a video showcasing their results, which is still viewable today.⁷

Regardless, if someone has nefarious intent, the presence or absence of the Instructions has no effect. Arizona law requires overvotes on early ballots to be counted, whether the Instructions are sent or not. EPM (2019) at 201-02. The Instructions do not make voter fraud more likely. They *do*, however, make it more likely that the electronic adjudication boards can correctly determine the intent of early ballot voters who change their votes, and so make it more likely that every vote that should count, does count.

9. Conclusion.

As explained above, the Instructions comply with both Arizona and federal law. They also further important County interests, including its interest in election integrity, voter education, and fiscal responsibility. As a result, the Recorder will continue to provide the Instructions with early ballots.

I would be happy to discuss this further with you if you would like. I can be reached at (480) 737-1321.

Sincerely,

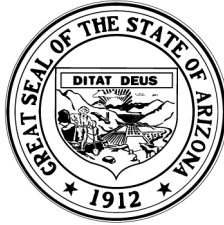
ALLISTER ADEL
MARICOPA COUNTY ATTORNEY



Joseph E. La Rue
Deputy County Attorney

⁷ Arizona Capitol Times Staff, *Can you really open a ballot envelope using a microwave?* (April 5, 2016), available at <https://azcapitoltimes.com/news/2016/04/05/can-you-really-open-a-ballot-envelope-using-a-microwave/>.

Exhibit E



KATIE HOBBS
SECRETARY OF STATE
State of Arizona

**Electronic Adjudication Addendum
to the 2019 Elections Procedures Manual**

**Arizona Secretary of State's Office
February 28, 2020**

Pursuant to A.R.S. § 16-452 and in accordance with Senate Bill 1135, Fifty-fourth Legislature, Second Regular Session, 2020, the Secretary of State's Office, in consultation with County Recorders and Election Officials, developed the procedures in the enclosed Electronic Addendum to the 2019 Elections Procedures Manual. This Electronic Adjudication Addendum was approved by the Attorney General's Office on February 27, 2020 and approved by the Governor's Office on February 28, 2020 and is now in effect.

Contact Us:

Office of the Secretary of State

1700 W. Washington Street, 7th Floor
Phoenix, AZ 85007
Telephone: 602-542-4285
Toll-Free: 1-800-458-5842
TDD: 602-255-8683
Website: www.azsos.gov

Elections Services Division

Telephone: 602-542-8683
Fax: 602-542-6172
Email: elections@azsos.gov
Website: www.azsos.gov/elections

Requests for alternate formats or accommodations can be made by contacting the Secretary of State ADA Coordinator at 601-542-4285. The Office cannot offer legal advice or otherwise offer recommendations on information in this publication. The Office advises consultation with an attorney in such cases.

The Elections Services Division strives for accuracy in its publications. If the user finds a misprint or error, please contact our office at (602) 542-8683 or elections@azsos.gov.



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

February 27, 2020

Honorable Katie Hobbs
Arizona Secretary of State
1700 E. Washington Street
Phoenix, Arizona 85007

Re: Approval of the Electronic Adjudication Addendum to the 2019 Elections
Procedures Manual

Dear Secretary Hobbs:

On February 3, 2020, emergency measure Senate Bill 1135, Fifty-fourth Legislature, Second Regular Session, 2020, was signed into law by Governor Ducey, which amended A.R.S. §§ 16-602 and 16-621 in order to establish the requirements for utilizing electronic adjudication features of ballot tabulation equipment. In response to those legislative changes, your office prepared and drafted uniform procedures to be added to the recently approved and adopted 2019 Elections Procedures Manual.

Pursuant to A.R.S. § 16-452(B), the Attorney General's Office has reviewed the Electronic Adjudication Addendum to the 2019 Elections Procedures Manual ("Addendum"). Based upon our review, we believe the Addendum complies with Arizona election statutes, and, in particular, the amendments to A.R.S. § 16-621. Accordingly, I approve the Addendum.

Sincerely,

A handwritten signature in blue ink that reads "Mark Brnovich". The signature is stylized with a large "M" and a long, sweeping underline.

Mark Brnovich
Attorney General
State of Arizona

cc: Governor Doug Ducey



STATE OF ARIZONA
OFFICE OF THE GOVERNOR

DOUGLAS A. DUCEY
GOVERNOR

EXECUTIVE OFFICE

February 28, 2020

The Honorable Katie Hobbs
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007

Dear Secretary Hobbs:

On February 3, 2020, I signed into law Senate Bill 1135, Fifty-fourth Legislature, 2nd Regular Session, which amended A.R.S. §§ 16-602 and 16-621 to provide for electronic vote adjudication.

My office has reviewed the Electronic Adjudication Addendum to the 2019 Elections Procedures Manual ("Addendum") that you drafted in response to the recent amendments and submitted for approval on February 26, 2020.

Based upon review and approval submitted on February 27, 2020 by the Attorney General's Office that the Addendum complies with the Arizona election laws, including the amendments to A.R.S. § 16-621, and my office's review, I hereby approve the Addendum in accordance with A.R.S. § 16-452(B).

Sincerely,

Douglas A. Ducey
Governor
State of Arizona

*ELECTRONIC ADJUDICATION ADDENDUM
TO THE 2019 ELECTIONS PROCEDURES MANUAL*

**ELECTRONIC ADJUDICATION ADDENDUM
TO THE 2019 ELECTIONS PROCEDURES MANUAL**

As an alternative to manual duplication of ballots performed by the Ballot Duplication Board, the board of supervisors or officer in charge of elections may appoint Electronic Vote Adjudication Boards and utilize a certified electronic adjudication program to process specific votes requiring adjudication. Any electronic vote adjudication shall be done in compliance with [A.R.S. § 16-621](#). Further, procedures must comply with the requirements in this Section, unless the Secretary of State has granted a jurisdiction written approval to use alternate procedures. A jurisdiction wishing to deviate from the procedures in this Section must make a request in writing no later than 90 days prior to the election for which the exception is requested. To be approved, the deviation must be compliant with [A.R.S. § 16-621](#).

The following types of votes may be adjudicated using electronic adjudication:

- Over-votes: The Electronic Vote Adjudication Board may evaluate over-vote conditions to determine the voter's intent and make corresponding adjustments to the record if the voter's intent is clear. If the voter's choice for a specific race or ballot measure cannot be positively determined, no selection shall be counted for that race or ballot measure. [A.R.S. § 16-610](#); [A.R.S. § 16-611](#).
- Votes on ballots read as blank or unclear: The Electronic Vote Adjudication Board may review ballots read by the tabulation machine as blank or unclear, determine if voter intent is clear on some or all races or ballot measures, and make corresponding adjustments to the record. If the voter's choice for a specific race or ballot measure cannot be positively determined, no selection shall be counted for that race or ballot measure. [A.R.S. § 16-610](#); [A.R.S. § 16-611](#).

Votes that do not meet the above criteria shall not be electronically adjudicated.¹ Ballots that are damaged or defective such that they cannot be read or scanned by the tabulation equipment must be manually duplicated and shall not be electronically adjudicated. [A.R.S. § 16-621\(A\)](#).

A. EMS Requirements

To utilize electronic adjudication, the following minimum system and application requirements must be met:

1. The electronic adjudication application must be part of an election management system (EMS) that has received federal and state certification and is authorized for use in elections in Arizona.
 - The application must be installed with the EMS on a secure, isolated, closed network and shall not be connected to the internet or an external network.

¹ The Write-In Tally Board may also use a certified electronic adjudication program to electronically tally write-in votes for qualified write-in candidates (in lieu of manual tallying of write-in votes). See 2019 Elections Procedures Manual, Chapter 10, Section II(G)(2).

*ELECTRONIC ADJUDICATION ADDENDUM
TO THE 2019 ELECTIONS PROCEDURES MANUAL*

2. The application shall provide distinct security roles, with separate usernames and secure passwords for each user or station. These security roles must have different functions. Each election worker shall be given access to only the components of the application necessary to perform their duties. If a secured username and password are used for each station rather than each user, a detailed log of who utilized each station and at what time(s) shall be maintained.
3. Users (and, if applicable, stations) shall have unique usernames and secure passwords. Vendor-supplied generic passwords may not be used.
4. Log-in must be required each time the electronic adjudication application is started. The application and/or tabulation system shall be capable of identifying ballots that contain over-votes or that are read as blank or unclear.
5. The application shall provide comprehensive logging of any changes to the ballot record for audit purposes, as well as validation of all changes through the use of multiple electronic “signatures” before committing any changes to the EMS results.
6. The application shall allow election officials to review, evaluate, and adjudicate votes, based on the voter’s intent, through the application without physical duplication of the ballot and record those changes and any modified totals in the results report.
7. The application shall allow for each transaction to be reviewed and approved by at least two election officials of different political party affiliation.
8. There must be an efficient and reliable means of identifying and locating the physical ballots that have been electronically adjudicated if needed for auditing. For example, the tabulation machine may be programmed to out-stack and/or print an identifying mark on the ballots to be electronically adjudicated.

Even if electronic adjudication is not utilized, the tabulation equipment may be programmed to stop on, sort, or flag write-in votes for races with official write-in candidates. Official write-in candidates may be entered into the EMS after the write-in filing deadline to facilitate this process as long as doing so does not modify the election programming if L&A testing has been completed.

B. L&A Testing Requirements

If electronic adjudication will be utilized for an election, that functionality of the tabulation system will also be tested during the L&A test for that election to ensure proper and secure functioning. [A.R.S. § 16-621\(B\)\(1\)](#); see 2019 Elections Procedures Manual, Chapter 4, Section II. In addition, a paper audit log must be produced, verified, and signed off on by the Electronic Vote Adjudication Board members *before* committing their selections to the EMS for the purpose of updating results. See Section D, below.

C. Electronic Vote Adjudication Board Composition

If the officer in charge of elections elects to use electronic adjudication, they must appoint an Electronic Vote Adjudication Board consisting of two judges, overseen by an inspector. The two

*ELECTRONIC ADJUDICATION ADDENDUM
TO THE 2019 ELECTIONS PROCEDURES MANUAL*

judges shall be divided as equally as practicable between the two largest political parties as required by [A.R.S. § 16-531\(D\)](#). [A.R.S. § 16-621\(B\)\(2\)](#).

D. Electronic Vote Adjudication Procedures

Prior to electronically adjudicating any ballots, the Electronic Vote Adjudication Board must be trained in their duties and application functionality.

1. The electronic adjudication of votes must be performed in a secure location, preferably in the same location as the EMS system, but open to public viewing.
2. The officer in charge of elections shall make a back-up of the election from the EMS prior to the start of electronic adjudication and again after electronic adjudication is complete in order to have a record of the results as initially read by the tabulator and after electronic adjudication.
3. The Electronic Vote Adjudication Board shall use the electronic adjudication application to: (a) review votes on ballots read as over-voted, blank, or unclear; (b) determine voter intent; and (c) electronically attribute votes according to the clear intent of the voter.
 - The general guidelines for determining voter intent in the 2019 Elections Procedures Manual, Chapter 11, Section IX should be followed to the extent they do not conflict with any requirements in this Section.
 - The Electronic Vote Adjudication Board may decide to: (i) approve the ballot with no changes to any races; or (ii) approve the ballot with changes based on the board's adjudication of voter intent.
 - The Electronic Vote Adjudication Board shall only adjudicate votes that are marked by the voter in a manner that prevents the tabulation machine from accurately counting the race as the voter intended. If it is not possible to positively determine the voter's choice for a particular race or ballot measure, the Electronic Vote Adjudication Board shall not designate a choice for that race or ballot measure. [A.R.S. § 16-610](#); [A.R.S. § 16-611](#).
4. Electronic adjudication of voter intent should generally be performed separate and apart from the electronic tallying of official write-in votes and by separate boards, and the results of adjudication of voter intent and tallying of official write-in votes shall be reported and verified on separate paper audit logs.
 - If electronic adjudication of voter intent and tallying of official write-in votes is done together for each ballot requiring such action, the board performing the joint electronic adjudication of voter intent and electronic tallying of official write-in votes shall meet all the requirements applicable to both the Electronic Vote Adjudication Board, as described in this Addendum, and the Electronic Write-In Tally Board, *see* 2019 Elections Procedures Manual, Chapter 10, Section II(G)(2). In this case, the board's actions on the adjudication of voter intent and tallying of official write-in votes may be reported and verified on the same paper audit log.

*ELECTRONIC ADJUDICATION ADDENDUM
TO THE 2019 ELECTIONS PROCEDURES MANUAL*

5. The EMS and/or electronic adjudication application shall provide a report on the ballots and votes electronically adjudicated by each Electronic Vote Adjudication Board, the selections made by the Electronic Vote Adjudication Board, the names of the members of the Electronic Vote Adjudication Board that processed the votes on the report, and the date of processing.
6. The electronic adjudication process shall include production of a paper audit log of the Electronic Vote Adjudication Board's dispositions as to each ballot/vote electronically adjudicated. The paper audit log must be verified and signed off on by the board members, who shall verify that the paper audit log accurately reflects the board's selections and that those selections are accurately reflected in the electronic adjudication application prior to committing the selections to the EMS for the purpose of updating results. The paper audit log shall be maintained in case resolution of any discrepancy or audit of the electronic adjudication process is needed. [A.R.S. § 16-621\(B\)\(3\)\(b\)](#).
7. To meet the requirement of a board-verified paper audit log, the Electronic Vote Adjudication Board shall either:
 - Maintain a manual, hard-copy log of its selections for each ballot/vote electronically adjudicated by the board; or
 - Print from the application a log of the ballots and votes electronically adjudicated the board and the selections made by the board for each ballot and vote, verify that the printed log accurately reflects the board's selections, and confirm that those selections are accurately reflected in the electronic adjudication application prior to committing the selections to the EMS for the purpose of updating results.
8. The officer in charge of elections shall provide for a method to retain, track, and account for the original ballot and the digital duplicate of the ballot created by the electronic adjudication application that includes a serial number on the digital image, which can be used to track Electronic Vote Adjudication Board actions. [A.R.S. § 16-621\(B\)\(3\)\(a\), \(c\)](#).
9. After adjudication is complete, and the board has verified that the paper audit log of its selections are accurate and verified that those selections are accurately reflected in the application, the results shall be committed to the EMS and the election results will be updated with new totals.