ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, et al. Petitioners, v. KATIE HOBBS, et al. Respondents.	Case No. CV-22-0048-SA

THE STATE OF ARIZONA AND THE ATTORNEY GENERAL'S RESPONSE TO THE SECRETARY OF STATE'S MOTION TO STRIKE

MARK BRNOVICH
Attorney General
(Firm State Bar No. 14000)

Joseph A. Kanefield (Bar No. 15838)
Chief Deputy & Chief of Staff

Brunn ("Beau") W. Roysden III (Bar No. 28698)
Solicitor General

Michael S. Catlett (Bar No. 25238)
Deputy Solicitor General
Jennifer Wright (Bar No. 27145)
Assistant Attorneys General
2005 North Central Avenue
Phoenix, Arizona 85004
(602) 542-7751
Michael.Catlett@azag.gov

Attorneys for Respondent State of Arizona and Amicus Curiae Arizona Attorney General Mark Brnovich

Pursuant to the Court's March 16, 2022 Order, the State of Arizona and the Attorney General (collectively, the "State and Attorney General") hereby respond to the Secretary of State's Motion to Strike. Simply put, the State and Attorney General's combined Response and Amicus Curiae brief ("Response") was filed to assist the Court in determining whether to exercise its discretionary jurisdiction over this matter and to identify issues that would need to be addressed if the Court accepts jurisdiction—including related to a threshold question and appropriate remedy. The Petition specifically asks for a remedy of requiring additional provisions to be included in the EPM. It is thus completely appropriate for the State and Attorney General to raise the threshold issue of whether there in a valid EPM in the first place and the remedial issue of, if the Court were inclined to order that additional provisions, what EPM they must be included in.

It is disappointing but not surprising that the Secretary bristles at this, because she does not want any sunlight shone on her actions in failing to provide the Attorney General and Governor with a ***valid*** draft Elections Procedures Manual ("EPM") for the upcoming 2022 elections. Her failure contravened A.R.S. § 16-452 and this Court's recent cases interpreting that statute. It also now risks substantial confusion and chaos because there is no valid EPM for the upcoming elections, and the EPM serves a critical function in ensuring consistency in election procedures across the State's fifteen counties. *See, e.g.*, *Charfauros v. Bd. of*

Elections, 249 F.3d 941, 951 (9th Cir. 2001) ("[W]e must determine whether the voter challenge procedures adopted by the [body overseeing elections] 'are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.'" (quoting *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam)). This is a fundamental function of the Secretary's Office, and one that should be completed as soon as possible.

As but one example of the type of harms at issue here—the Secretary has a mandatory statutory duty under §§ 16-316 and 16-318 to maintain an electronic system for candidates to collect signatures (E-Qual), and the collection period extends through April 4. After telling prospective candidates in December that "E-Qual will allow voters to sign for candidates throughout the filing process,"[1] then the Secretary did an abrupt about-face. She knowingly took down the system on March 17, 2022—depriving candidates and voters of the electronic system for up to the last 2.5 weeks of the statutory signature-collection period. Her reason for not performing a duty imposed by Title 16: some individual county officials may perform maintenance before the end of the signature collection period, and that maintenance *could* break some functionality in her statutorily mandated system. The county-level discretion that apparently could break some functionality in her system is a direct result of the lack of statewide rules, and precisely why there must

[1] Secretary of State, *2022 Candidate Redistricting Guide* at 4 (Dec. 29, 2021).

be an EPM in place for the 2022 elections—over those matters that are covered within § 16-452—to avoid similar types of issues in the future.

The State cannot suffer any more of these types of risks, and therefore the Court can and should reach the threshold EPM issue as part of this case.

The statute at issue, A.R.S. 16-452, is very clearly worded to require the secretary to "prescribe rules to ***achieve and maintain the maximum degree*** of correctness, impartiality, uniformity and efficiency" related to certain election procedures. A.R.S. § 16-452(A) (emphasis added). This statute thus supports special action mandamus review, in the nature of mandamus, under the arbitrary and capricious standard. *See, e.g.*, *Collins v. Krucker*, 56 Ariz. 6, 12 (1940). ("[I]f it clearly appears that the officer has acted arbitrarily and unjustly and in the abuse of discretion, [an action in mandamus] may still be brought."); *see also Rhodes v. Clark*, 92 Ariz. 31, 35 (1962) (mandamus appropriate where "the officer has acted arbitrarily and unjustly and in the abuse of discretion" and there is no other equally "plain, speedy and adequate remedy at law." (quotations omitted)). And the stakes could not be more important.

The Petition specifically asks for a remedy of requiring additional provisions to be included in the EPM. Is it thus appropriate for the State and Attorney General to raise the interrelated issue of whether there in a valid EPM in the first place and the remedial issue of, if the Court were inclined to order that additional provisions

be included in the EPM, which EPM they must be included in. It's really that simple.

The Secretary's authorities in her motion do not compel the extraordinary relief of striking the Response filed by the duly elected Attorney General on behalf of the State. First, the Secretary (at 2-3) mischaracterizes the Response as "asking the Court to decide issues not raised in the Petition, and provide affirmative relief Petitioners didn't ask for." But the first category of relief requested in the Petition is: "(1) ordering the Secretary to include the Signature Verification Guide in ***the current EPM or an addendum thereto*** and submit it to the Governor and Attorney General for their review and approval." Petition at 44 (emphasis added).[2] The Response addresses that issue from both a threshold perspective of what is the "current" EPM and the remedial perspective of, if the Court were inclined to grant Petitioners' relief, how it could go about doing so.

The Secretary cites a snippet of Rule 7(d) providing that "objections to petitioners' relief" shall be contained in a response. The Secretary never applies that language to inquire whether the State and Attorney General's response is in fact such an "objection." It is. The objection is simple—the Court cannot order matters be included in the 2019 EPM because that EPM is no longer valid.

[2] The Petition is also in the nature of mandamus, *see* Petition at 6, 10 and PDF p. 56 verification citing to mandamus statute).

Moreover, there is nothing in Rule 7(d) indicating that the Court's intent in promulgating that rule was to require, on pain of being stricken, that a response contain *only* "objections." If this were true, a respondent would be prohibited from conceding any threshold points whatsoever. That is a nonsensical reading of the rule.

The Secretary's cases also do not support her request to strike the Response. As a preliminary matter, none of her cases involve striking pleadings—the relief she asks for here. In *Costa v. Mackey*, the Court merely declined jurisdiction of an issue raised by the State that was not a necessary threshold issue to resolving a petition. 227 Ariz. 565, 572 ¶14 (App. 2011). The defendant challenged the amount of bail set as excessive; in response, the State questioned whether bail was even available. *Id.* ¶1. The Court could decline relief for the defendant without necessarily having to reach the State's issue. Similarly, in *State ex rel. Thomas v. Contes*, the State filed a petition for special action and the defendant asked the Court, if it accepted the petition, to dismiss the underlying criminal case with prejudice. 216 Ariz. 525, 527 ¶5 n.3 (App. 2007). Again, that was neither a threshold issue nor a remedial issue encompassed in the relief the State (i.e. the petitioner) was seeking there. Finally, in *State v. Superior Court*, the court merely noted that the only relief sought was "setting aside the order granting the motion for redetermination of probable cause." 26 Ariz. App. 482, 485 (App. 1976).

In clear contrast to the foregoing cases cited by the Secretary, for the Court to grant Petitioners relief here (and require a new provision be included in the "current" EPM), it must necessarily determine what is the current EPM. This is thus not a request for affirmative relief independent of Petitioners' request. Moreover, the Court often rephrases questions presented when accepting jurisdiction, and it is proper for the State and Attorney General to bring to the Court's attention an interrelated issue to that raised by the Petition. The Secretary identifies no actual prejudice from any of this other than her desire to have more words to respond, which can be accommodated if the Court accepts jurisdiction here.

Having failed in her first move of attacking the Response as a response, the Secretary then shifts gears (at 4-7) to attack the Response in its function as the Attorney General's amicus brief. The reason the Attorney General filed this as a single brief was to save the Court and the Parties from receiving two briefs, nothing more.

The Court's original jurisdiction is an important reservoir of judicial authority to ensure that the rule of law prevails in this State. The State is about to begin the 2022 primary and general election cycle in earnest, but without the benefit of the statutorily mandated Election Procedures Manual. This risks major disruption and confusion that no one should want. Rather than simply comply with

16-452 and provide the Attorney General and Governor with a valid draft EPM, the Secretary goes on attack with her unprecedented Motion to Strike. For the reasons discussed above, this attack fails and the Motion should be denied.

RESPECTFULLY SUBMITTED this 18th day of March, 2022.

MARK BRNOVICH
Arizona Attorney General

Joseph A. Kanefield
Chief Deputy & Chief of Staff

/s/*Brunn W. Roysden III*
Brunn ("Beau") W. Roysden III
Michael S. Catlett
Jennifer J. Wright
Assistant Attorneys General