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SENT VIA EMAIL TO

Mohave County Board of Supervisors
Chairman Travis Lingenfelter
Supervisor Hildy Angius
Supervisor Buster Johnson
Supervisor Jean Bishop
Supervisor Ron Gould

Re: Counting ballots manually instead of by automatic tabulating equipment

Dear Supervisors:

I understand that you will be voting tomorrow on whether to direct the Mohave County Elections Department to count the ballots for the 2024 elections by hand, rather than automatic tabulating equipment. Before you take that vote, I want to make sure you know that a “yes” vote would direct your Elections Department to violate the law. As Arizona’s chief law enforcement officer, I have an obligation to warn you that the legal consequences would be serious.

Equally important, I am concerned that this Board has received incorrect legal advice from bad-faith actors who are attempting to sow doubt in Arizona’s elections and ultimately undermine Arizona’s democratic process. Full hand counts are impracticable to perform within the time permitted to certify election results, less accurate than tabulating machines, and more importantly are illegal under Arizona law. The resulting delays, inaccurate results, and illegal procedures from hand counts will then be used to call into doubt valid election results. The Board should not endorse this attack on the democratic process.

I. Directing the Elections Department to hand count all ballots would violate the law.

It is well settled in Arizona that counties have only the authority “expressly, or by necessary implication, delegated to them by constitution or by the legislature.” *Vangilder v. Ariz. Dep’t of Revenue*, 252 Ariz. 481, 488 ¶ 24 (2022). Likewise, county officers “may exercise no powers except those specifically granted by statute and in the manner fixed by statute.” *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (citation omitted). The powers of counties and county officers are “strictly construed,” and any doubt “as to the power sought to be exercised must be resolved against” them. *Vangilder*, 252 Ariz. at 492 ¶ 45 (citation omitted).

Arizona law does not allow counties to make a blanket decision to count ballots by hand.

Instead, the relevant statutes repeatedly provide that ballots shall be counted by automatic tabulating equipment. *See, e.g.*, A.R.S. §§ 16-449, 16-468, 16-602, 16-621, 16-622. In particular, section 16-622(A) of the Arizona Revised Statutes provides that “[t]he result printed by the vote tabulating equipment, to which have been added write-in and early votes, shall, when certified by the board of supervisors or other officer in charge, constitute the official canvass of each precinct or election district.” Except when expressly allowed by statute, votes counted by hand do not constitute part of the official canvass. Thus, the proposed measure could end up disenfranchising your constituents.

The officer in charge of elections may direct that ballots “be counted manually” only if “it becomes impracticable to count all or a part of the ballots with tabulating equipment.” A.R.S. § 16-621(C). No evidence supports a general finding that counting ballots with tabulating equipment is impracticable. Rather, as the recent analysis from the Mohave County Elections Department shows, manually counting all ballots would be impracticable in several ways. *See Mohave County, Ballot Hand Tally Analysis*, <https://portal.mohavecounty.us/bos/0/doc/2038269/Page1.aspx> (explaining that a full manual count may compromise confidentiality, hurt the timeliness and accuracy of results, and significantly increase costs). Outside of a specific scenario in which counting ballots with tabulating equipment is impracticable, the Legislature has not provided counties with authority to count ballots by hand instead of via tabulating equipment, and counties may not independently choose to do so. *See State v. Stapley*, 227 Ariz. 61, 64–65, ¶ 15 (App. 2011) (“[T]he Board can exercise only those powers specifically granted to it by the legislature.”)

The Elections Procedures Manual similarly makes clear that ballots shall be counted by machine. For example, Chapter 11 provides for a “limited” hand count audit, the purpose of which “is to compare the result of the machine count to the hand count to assure that the machines are working properly and accurately counting votes.” Elections Procedures Manual at 213. The manual goes on to provide a four-stage process for hand counts: (1) precinct hand count; (2) second precinct hand count; (3) expanded precinct hand count; and (4) full precinct hand count. It authorizes a full precinct hand count audit only when certain error thresholds were met in stages 1, 2, and 3.

In 2022, Cochise County engaged in a misguided and illegal effort to do a full hand-count audit of all ballots cast in the 2022 general election. The superior court concluded that this was unlawful. The Court of Appeals agreed. *See Arizona All. for Retired Americans, Inc. v. Crosby*, --- P.3d ---, 2023 WL 6854102 (Ariz. Ct. App. Oct. 18, 2023). “[A] complete hand-count audit is permitted only after a multi-step process that includes conducting the preliminary and expanded audits described in § 16-602(C)-(D). Interpreting § 16-602(B)-(E) to allow a county to begin with a full hand-count audit of all precincts would render the statute's multi-step process superfluous. We will not interpret a statute in a manner that renders a provision superfluous.” *Id.*

A court would reach the same conclusion here. Indeed, the letter from Brian Blehm in your packet does not cite *any* legal authority for his unsupported theory that a county can hand count all ballots. That should tell you all you need to know.

II. The Board should not direct the Elections Department to violate the law.

We all took an oath to support “the laws of the State of Arizona” and to “bear true faith and allegiance” to them. A.R.S. § 38-231. To uphold that oath, the Board should not direct the Elections Department to act illegally. If it does, we will promptly sue and obtain a court order. The court may also hold members of the Board who voted for an illegal action liable for misconduct, *see* A.R.S. § 11-223, and subject them to personal liability for any public funds used for this illegal purpose, *see* A.R.S. § 35-212(C).

Those encouraging you to hand count elections results are encouraging you to violate the law. In addition to the above civil remedies, you should be aware that an illegally expanded hand count may result in various felony and misdemeanor criminal penalties. We hope you will choose not to violate the law and thus that it will not be necessary for us to consider whether criminal prosecution is warranted for conducting an illegal hand count.

III. Conclusion

I urge you to fulfill your oath by declining to direct the Elections Department to violate the law and by not risking that you violate the law yourselves. My office is committed to upholding the sanctity of Arizona’s elections and democratic process. It will pursue to the fullest extent of the law all possible remedies to ensure the sanctity of Arizona’s elections.

Sincerely,



KRIS MAYES
Arizona Attorney General

cc: Matthew J. Smith, Mohave County Attorney