

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

3 Firm State Bar No. 14000

4 Joseph A. Kanefield (State Bar No. 15838)
5 Brunn W. Roysden III (State Bar No. 28698)
6 Michael S, Catlett (State Bar No. 25238)
7 Jennifer J. Wright (State Bar No. 27145)

8 *Assistant Attorneys General*

9 2005 N. Central Ave.

10 Phoenix, Arizona 85004

11 Telephone: (602) 542-8958

12 ACL@azag.gov

13 *Attorneys for Plaintiff Mark Brnovich,*
14 *Arizona Attorney General*

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,

24 Plaintiffs

25 vs.

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

Defendant.

Case No: P1300CV202200269

**PLAINTIFF ARIZONA ATTORNEY
GENERAL'S SUPPLEMENTAL BRIEF
IN SUPPORT OF REQUEST FOR
SPECIAL ACTION RELIEF**

[EXPEDITED ELECTION CASE]

(Assigned to the Hon. John Napper)

(Hearing Set for June 2, 2022 at 1:30 PM)

1 At the April 29, 2022 show-cause hearing in this matter, the Court ordered Arizona
2 Attorney General Mark Brnovich (the “AG”)¹, in his official capacity, to provide additional
3 information supporting the redlines deletions provided to the Secretary of State on December 9,
4 2021 (*see* AGO-005). Pursuant to that instruction, the AG hereby files this supplemental brief
5 in support of Plaintiffs’ request for special action relief.

6 It is important to emphasize that without a ruling from this Court, there will be no
7 enforceable EPM governing 2022 primary and general elections. Section 16-452, as amended in
8 2019, requires a new manual approved by the Attorney General and Governor be “issued not
9 later than December 31 of each odd-numbered year immediately preceding the general election.”
10 For reasons explained in the Complaint, that did not happen by December 31, 2021. Although
11 the Secretary, Attorney General and Governor can work towards agreement on a new EPM under
12 the direction of the court, any manual approved by the Attorney General and Governor will not
13 be effective for the upcoming elections without an order from the Court. And under § 16-452(B),
14 any EPM approved now without a court order would only be enforceable for the 2024 election
15 cycle.

16 The AG spent a significant amount of time reviewing the Draft 2021 EPM received from
17 the Secretary of State (“Secretary”) in early October 2021. In so doing, the AG reviewed each
18 provision to ensure that it was consistent with the Legislature’s delegation of authority to the
19 Secretary in A.R.S. § 16-452 and the recent guidance provided by the Arizona Supreme Court in
20 *McKenna, Leach*, and *Arizona Public Integrity Alliance*. Relying on the legal framework from
21 those cases, the AG struck (but did not attempt to re-write) those provisions that ran afoul of §
22 16-452 and the Supreme Court’s case law. The sheer quantity of those redlines reflects the
23 Secretary’s inability to heed the law and her desire to weaponize the EPM, not the AG’s attempt
24

25
26

¹ As used throughout this Brief, AG refers to both the Attorney General himself, and the Attorney
General’s Office generally, unless context suggests otherwise.

1 to impose any policy preferences through the EPM. What follows is the additional information
2 requested about the AG’s objections.

3 **I. The Draft 2021 EPM Contained Numerous Sections Beyond The Scope Of The**
4 **Topics Contained In A.R.S. § 16-452**

5 A.R.S. § 16-452 is the enabling statute that provides the Secretary the authority to
6 promulgate what is referred to as the Elections Procedures Manual. In addition to A.R.S. § 16-
7 452, there are several statutes that further clarify or define specific items that must be included.
8 *See* A.R.S. §§ 16-168(I), -246(G), -315(D), -341(H), -411(B)(5)(b), -411(J), -449(A)-(B), -
9 513(A), -513.01, -542(A), -542(E),(I), -543(A)-(B), -544(B), -579(A)(2), -579(E), -602(B), -
10 621(A), -926(A), -938(B), 19-118(A), -121(A)(5), and -205.01(A). For the Court’s convenience,
11 the statutory text of these provisions is replicated in Exh. A. The AG considered every relevant
12 statute to determine precisely what the legislature has authorized to be included in the Elections
13 Procedures Manual (“EPM”).

14 An election rule promulgated through the EPM is only lawful if it falls within the distinct
15 categories of rules that the Legislature listed in the EPM statute—namely, “early voting and
16 voting, and . . . producing, distributing, collecting, counting, tabulating and storing ballots.” *See*
17 A.R.S. § 16-452(A); *see also McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). If the proposed
18 rule does not fall within one of those distinct categories, it is not promulgated pursuant to the
19 EPM statute and cannot be included in the EPM or approved by the AG (but the Secretary can
20 separately issue the provision as guidance without the force of law attached). No Arizona statute,
21 including A.R.S. § 16-452, allows the AG to approve an EPM provision exceeding the scope of
22 its statutory authorization. Put differently, the AG has no statutory authority to approve election
23 procedures not adopted “pursuant to § 16-452” and which are mere guidance. Moreover, as the
24 Court recognized during the April 29, 2022 show-cause hearing, both election officials and the
25 public are entitled to exceedingly clear notice of those provisions lawfully promulgated under
26

1 the EPM statute, because such provisions carry the force of law and are subject to criminal
2 penalties.

3 Based on *McKenna*, the AG struck any provision that did not fall within “rules . . . for
4 early voting and voting, and of producing, distributing, collecting, counting, tabulating and
5 storing ballots” or were not authorized by any statutory provision that clarified or defined specific
6 content. Numerous provisions contained within the Draft 2021 EPM violated this principle.
7 What follows is a description of each provision that the AG struck based on the limitation in
8 *McKenna*.

9 **A. Chapter 1 – Voter Registration Chapter (AGO-016 to -064)**²

10 The Draft 2021 EPM contained an entire chapter dedicated to voter registration rules.
11 While this may be useful guidance, nothing in A.R.S. § 16-452 gives the Secretary authority to
12 promulgate rules related to how county recorders are to administer the recorder’s statutorily
13 prescribed duties as delineated in Chapter 1 of Title 16.³ Although A.R.S. § 16-168(I) does give
14 the Secretary the authority to prescribe the method to “protect access to voter registration
15 information in an auditable format” – nothing gives her the authority to dictate to county
16 recorders how to process voter registration forms, subject to criminal prosecution. Accordingly,
17 the AG struck AGO-016 to -032, AGO-034 to 043, AGO-045 to 060. However, portions of
18 AGO-033 to -034, AGO-043 to 045, AGO-060 to 064 appeared to reasonably relate to the
19
20

21 ² To aid the Court, this brief uses pinpoint citations to Exhibit B of the Wright Declaration at ¶4
22 using the bates-stamped numbers.

23 ³ Notably, the Secretary has several pages on her website that include a host of guidance for
24 candidates (<https://azsos.gov/elections/running-office>), election officials
25 (<https://azsos.gov/elections/arizona-election-laws-publications>), petition circulators
26 (<https://azsos.gov/elections/requirements-paid-non-resident-circulators>), initiative and
referendum committees (<https://azsos.gov/elections/initiative-referendum-recall>), political parties
(<https://azsos.gov/elections/information-about-recognized-political-parties>), and voters
(<https://azsos.gov/elections/voting-election>)

1 Secretary’s duty to promulgate procedures to protect voter registration information in an
2 auditable format. Thus, the AG did not strike those proposed rules.

3 The Secretary has taken the position that voter registration provisions fall within the scope
4 of “voting” in § 16-452 because registering to vote is a pre-requisite to voting. But § 16-452
5 does not grant the Secretary the authority to promulgate rules about “prerequisites to voting”; it
6 instead refers only to “voting.” The two are notably different as evidenced by the Legislature’s
7 placement of voter registration in chapter 1 of Title 16 (“Qualification and Registration of
8 Electors”) and the EPM (A.R.S. § 16-452) in chapter 4 (“Conduct of Elections”). *State ex rel.*
9 *Montgomery v. Harris*, 237 Ariz. 98, 103 ¶ 19 (2014) (legislative intent determined by statutes
10 placement within the statutory scheme). Had the Legislature intended to provide the Secretary
11 authority to promulgate rules in the EPM regarding a prerequisite to voting, it would have said
12 so clearly in A.R.S. § 16-452 or provided specific authority to the Secretary in Chapter 1, like it
13 did in A.R.S. § 16-168(I). *Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 177 Ariz. 526, 529
14 (1994)(legislative intent is established by clear statutory language).

15 Accepting the Secretary’s logic would expand the scope of § 16-452 beyond recognition
16 and render large portions of that statute superfluous. If the Secretary is empowered to issue rules
17 relating to all subjects that are “pre-requisites” or qualifications to voting, then the Legislature
18 did not need to include early voting and the handling of ballots as separate topics allowable under
19 the statute. *Marlar v. State*, 136 Ariz. 404, 411 (App. 1983) (a statute is to be given such an
20 effect that no clause, sentence or word is rendered superfluous, void, contrary or
21 insignificant). But the Legislature did so because it did not intend that including “voting” as a
22 permissible topic of regulation would sweep in all pre-requisites to voting. The Legislature has
23 delegated exclusive authority to the county recorders to register voters in accordance with Article
24 7, Section 12 and Article 12, Section 4 of the Arizona Constitution. One can register to vote
25 without ever actually voting because they are separate actions. If the Secretary’s argument about
26 “pre-requisites to voting” were correct, then the Arizona Supreme Court would have concluded

1 that candidate nominating petitions fall within the topic of voting because voting cannot occur
2 without candidates upon which to vote. But the Court rejected that rules regarding candidate
3 nominating petitions were validly promulgated under § 16-452. *See McKenna*, 250 Ariz. at 473
4 ¶20; *Leach*, 250 Ariz. at 576 ¶21. While the Secretary is free to issue non-binding guidance about
5 voter registration, she cannot dictate, through criminal penalties, how county recorders handle
6 voter registration forms.

7 **B. Chapter 4 – Voting Equipment (AGO-099 to -126)**

8 The Draft 2021 EPM contained an entire chapter dedicated to rules regarding voting
9 equipment, the first half of which deals with certification of voting equipment. Notably, A.R.S.
10 § 16-442 contains the procedures the Secretary is required to follow when certifying voting
11 equipment, and those procedures require the Secretary to consult with a committee. Specifically,
12 § 16-442 provides that “[t]he committee shall submit its recommendations to the secretary of
13 state *who shall make final adoption of the type or types, make or makes, model or models to be*
14 *certified for use in this state.*” (Emphasis added). Nothing in A.R.S. § 16-442 specifies that
15 procedures for the Secretary’s certification are to be included in the EPM. Finally, there is no
16 indication on the face of the procedures that the Secretary fulfilled her statutory obligation to
17 consult with the committee as it relates to the equipment certification process.⁴ Neither the AG
18 nor Governor can approve rules that are subject to committee approval without knowledge
19 whether such approval was properly obtained. Instead, the Secretary, in consultation with the
20 committee, is solely responsible for certifying equipment. If the Secretary desires to publish
21

22 ⁴ Notably, under Secretary of State Ken Bennett, the Voting Equipment Certification, Voting
23 System Emergency Conditional Certification, and Certification of Voting System Engineering
24 Changes were included, however those procedures included an attestation from Secretary Bennett,
25 under the Great Seal of the State of Arizona, that the procedures were adopted in accordance with
26 A.R.S. § 16-442. *See Arizona Secretary of State, Elections Procedures Manual Revised 2014*
(June 2014), available at
https://azsos.gov/sites/default/files/election_procedure_manual_2014.pdf (last accessed May 2,
2022).

1 guidance indicating what qualifications they will require when doing so, they are free to do so
2 outside the EPM and without AG and Governor approval. But that guidance does not fall within
3 the scope of § 16-452. Accordingly, the AG struck AGO-099 to -110.

4 **C. Chapter 5 – Accommodating Voters With Disabilities (AGO-128 to -134)**

5 The Draft 2021 EPM contained an entire chapter dedicated to accommodating voters with
6 disabilities that, while perhaps useful as guidance, falls outside the scope of the EPM. The first
7 section related to voter registration (AGO-128) falls outside of A.R.S. § 16-452. *See supra* I(A).
8 The chapter goes on to state counties *shall* provide specific accessible information on their
9 websites (AGO-130) and without citing statutory authority, the Secretary delineates “state
10 requirements” related to seating, stair treads, nosings, railings, rest stops, lighting, and more that
11 counties *must* ensure are complied with. *See* AGO-128 to -132. The Secretary states that
12 “counties shall submit” inspection and accessibility reports to the Secretary. Although the
13 Secretary may have some responsibilities under the Help America Vote Act to ensure accessible
14 locations, she has no authority to promulgate rules in the EPM that subject county election
15 officials to criminal prosecution for having stair treads that are 10.5 inches wide instead of 11.
16 *See* AGO-131. Accordingly, General Brnovich struck portions of AGO-128 to 132. To the
17 extent that certain sections of Chapter 5 appear to clarify or restate federal or state regulations or
18 reasonably appear to be a uniform rule for voting, those were not struck. However, some of those
19 simple restatements may be inappropriate for inclusion in the EPM given the associated criminal
20 penalties for violations.

21 **D. Chapter 6 – Candidate Nomination (AGO-135 to -152)**

22 The Draft 2021 EPM contained an entire chapter on a topic that the Arizona Supreme
23 Court has already determined is beyond the scope of the EPM. *See McKenna*, 250 Ariz. at 473
24 ¶20 (“The EPM also contains guidance on matters outside these specific topics, including
25 candidate nomination petition procedures” that “fall outside the mandates of § 16-452 and do not
26 have any other basis in statute” and “were not adopted ‘pursuant to’ § 16-452.”). While this

1 chapter may be useful guidance to be published outside of the EPM, nothing in A.R.S. § 16-452
2 gives the Secretary authority to promulgate rules pertaining to candidate nominating petitions.
3 Further, to the extent that portions of this chapter simply recite Arizona law, election officials are
4 subject to those laws irrespective of their inclusion in the EPM. Including those statutes in the
5 EPM may subject election officials to criminal prosecution if violated. Accordingly, the AG
6 struck AGO-135 to -152. Tellingly, in December 2021, the Secretary agreed to remove these
7 provisions from the EPM. AGO-320.

8 **E. Chapter 13(II)(A)(4) Post-Canvass Reports (AGO-278 to -281)**

9 The Draft 2021 EPM contained a section that prescribes certain reports that the “County
10 Recorder or other office in charge of elections *must* submit” to the Secretary of State with the
11 canvass. AGO-278 to -280 (emphasis added). Mandating certain post-election reports falls
12 outside of the scope of A.R.S. § 16-452, and violations should not subject election officials to
13 criminal prosecution. Instead, reports that may be necessary to obtain state and federal election
14 funding should be prescribed outside of the EPM. According, the AG struck AGO-278 to -280.

15 **F. Chapter 13(IV) Post-Election Ballot Security And Chain Of Custody Provisions** 16 **(AGO-287)**

17 The Secretary also attempted to promulgate rules pertaining to court ordered or
18 compulsory processes that may occur after the conclusion of an election. AGO-287. In so doing,
19 the Secretary attempts to bind co-equal branches of government, such as the courts and
20 legislature, through the EPM and subject local election officials to punishment for not
21 implementing “adequate procedures” in the face of a court order. The Secretary has claimed that
22 these regulations fall with the phrase “storing ballots.” Nothing in § 16-452, however, allows the
23 Secretary to pre-emptively dictate security measures when ballots are subject to compulsory
24 process or court order. This is particularly so when the draft regulation subjects local election
25 officials to criminal penalties if they fail to implement “adequate procedures.” AGO-287. What
26 is adequate should be dictated in the individual circumstance by the court issuing an order or

1 compulsory process, not through overbroad and vague EPM rules. Accordingly, the AG struck
2 provisions at AGO-287.⁵

3 **G. Chapter 14(III) Signature Gathering And Verification Requirements (AGO-292)**

4 The Draft 2021 EPM contained a section purporting to regulate how petition circulators
5 gather and verify signatures for initiative, referendum, recall, candidate nominating, and new
6 party recognition petitions. Although A.R.S. §§ 16-315(D), -341(H), 19-118(A), and -205.01(A)
7 provide the Secretary shall include methods for *registering* circulators and provide methods for
8 serving circulators for judicial proceedings, like the chapter on Nominating Candidates, *supra*
9 I(D), this particular provision is outside the scope of the EPM. Notably, the EPM already directs
10 individuals to the Secretary’s website for more information on signature collection requirements
11 (AGO-292), where the Secretary may provide guidance on such topics without the threat of
12 criminal prosecution for purported violations. *See also* [https://azsos.gov/elections/requirements-](https://azsos.gov/elections/requirements-paid-non-resident-circulators)
13 [paid-non-resident-circulators](https://azsos.gov/elections/requirements-paid-non-resident-circulators) (last accessed May 2, 2022). Accordingly, the AG struck that
14 provision at AGO-292. In December 2021, the Secretary agreed to remove these provisions from
15 the EPM. AGO-321.

16 **H. Chapter 15 – Political Party Recognition (AGO-293 to -302)**

17 The Draft 2021 EPM contained an entire chapter dedicated to political party recognition.
18 While this may be useful guidance, this topic is outside the scope of A.R.S. § 16-452, and has no
19 other statutory authority for being within the EPM. Notably, the Secretary has a section of her
20 website dedicated to this issue, with several guides on related topics. *See*
21 <https://azsos.gov/elections/information-about-recognized-political-parties> (last visited May 2,
22 2022). Further, it is unclear who this chapter is even attempting to regulate. There are provisions
23

24
25 ⁵ Footnote 85 in the Draft EPM is merely a recitation of the Secretary’s views on what the United
26 States Department of Justice requires in terms of ballot retention. Other than attempting to create
state-law criminal liability for violation of federal agency interpretations of federal law, the
footnote serves no purpose. Thus, the AG struck it. *See* AGO-287 n.85.

1 related to what “qualified electors *must*” do, what “County Recorders *shall*” do, what the
2 “Secretary of State *must*” do, and even what “city or town clerk[s] *must*” do in order to comply
3 with the provisions delineated in Chapter 15. AGO-293 to -302 (emphasis added). Accordingly,
4 the AG struck all of Chapter 15, AGO-293 to -302. In December 2021, the Secretary agreed to
5 remove these provisions from the EPM. AGO-321.

6 **I. Chapter 16(II)(D) Regulation Of Enforcement Officers Under Campaign Finance**
7 **Laws (AGO-309 to 311)**

8 The Draft 2021 EPM contained several sections purporting to regulate the actions of
9 enforcement officers under Arizona’s campaign finance laws. AGO-309 to -311. Although the
10 Secretary has statutory authority to promulgate rules for *filing officers* within the EPM, she lacks
11 such authority as to *enforcement officers*. Under A.R.S. § 16-938(B), the Secretary must establish
12 “the procedures, timelines and other processes that apply to investigations by all filing officers
13 in this state” for complaints related to campaign finance violations (emphasis added). The statute
14 further clarifies who filing officers are (secretary of state, county filing officer, and city/town
15 filing officers) and who the enforcement officers are (attorney general, county attorney, and
16 city/town attorney). A.R.S. § 16-938(C). Although some of what purports to bind enforcement
17 officers in these sections of the EPM tracks with the campaign finance laws, many provisions do
18 not. *Compare, i.e.,* AGO-309 (“Upon receipt of a reasonable cause finding from a filing officer,
19 an enforcement officer *must*:”) to A.R.S. § 16-938(E)(“Only after receiving a referral from the
20 filing officer, the enforcement officer *may*:”)(emphasis added); *see also* AGO-309 (“an
21 enforcement officer *must*... review the matter for potential conflicts of interest;” which
22 requirement has no basis in statute). Regardless, even where EPM provisions simply restate
23 statutes, when those provisions are included in the EPM, they subject enforcement officers (the
24 attorney general, county attorneys, and city/town attorneys) to potential criminal prosecution.
25 Accordingly, the AG struck portions of AGO-309 to AGO-311. In December 2021, the Secretary
26 agreed to remove these provisions from the EPM. AGO-321.

1 **II. The Draft 2021 EPM Contained Numerous Provisions That Are Inconsistent With**
2 **The Text Or Purpose Of Arizona Election Law.**

3 Even if an election rule promulgated through the EPM falls within one of the distinct
4 categories of rules listed in § 16-452(A), the rule cannot be inconsistent with the text or purpose
5 of one or more election statutes. *See Leach*, 250 Ariz. at 576 ¶21. If a proposed election rule
6 would abrogate state law by providing instructions inconsistent with the text or purpose of an
7 existing state statute, the rule cannot be included in the EPM. Numerous provisions contained
8 within the Draft 2021 EPM violated this principle. What follows is a description of each
9 provision that the AG struck based on the limitation in *Leach*.

10 **A. Early Ballot Mailing Dates (AGO-068, -069, & -078)**

11 On AGO-068, -069, & -078, the Draft 2021 EPM contained provisions that contravene
12 A.R.S. § 16-542. Specifically, on both AGO-068 and -069, the EPM provisions directly conflict
13 with A.R.S. § 16-542(E) that unequivocally states, “*In order to... receive an early ballot by mail..*
14 *all of the information prescribed... must be received... no later than 5:00 p.m. on the eleventh*
15 *day preceding the election.*” (emphasis added). The purpose of this statute is to make certain
16 that ballots mailed to electors are received with adequate time to return the voted ballot before
17 the 7:00pm election day deadline. *See* A.R.S. § 16-548(A). Although Arizona law does not have
18 a mandatory mail-by date for mailing voted ballots, most counties strongly recommend to
19 electors that ballots returned by mail should be mailed no later than seven days before the
20 election. *See e.g.* <https://recorder.maricopa.gov/elections/electioncalendar.aspx> (last visited May
21 3, 2022) (Election calendar notes that the “Last Day to Mail Back Your Ballot” for the August 2
22 primary election is July 26 and for the November 8 general election is November 1.). Despite
23 not only the plain language of A.R.S. § 16-542(E), but also its intent to ensure timely return of
24 early ballots, the Draft 2021 EPM permits County Recorders to mail early ballots *after* the 11th
25 day before the election *if the Recorder has time to do so*. Such a discretionary standard,
26 especially one that contravenes the law, has no place in a manual that is intended “to achieve and

1 maintain the maximum degree of correctness, impartiality, uniformity and efficiency[.]” A.R.S.
2 § 16-452(A). *See Leach*, 250 Ariz. at 576 ¶21. Accordingly, the AG struck provisions on AGO-
3 068 and -069.

4 Turning to AGO-078, the Draft 2021 EPM provision rewrites A.R.S. § 16-542(C),
5 changing not only the text of the statute, but purpose. A.R.S. § 16-542(C) states:

6 The county recorder or other officer in charge of elections shall mail the early ballot and
7 the envelope for its return postage prepaid to the address provided by the requesting elector
8 within five days after receipt of the official early ballots from the officer charged by law
9 with the duty of preparing ballots pursuant to § 16-545, except that early ballot distribution
10 shall not begin more than twenty-seven days before the election. If an early ballot request
11 is received on or before the thirty-first day before the election, the early ballot shall be
12 distributed not earlier than the twenty-seventh day before the election and not later than
13 the twenty-fourth day before the election.

14 However, the Draft 2021 EPM suggests county recorders only need to follow the directives of
15 A.R.S. § 16-542(C) “if practicable” a recorder “remains in compliance” with the law even if they
16 wait more than five days to mail an early ballot to an elector as long as it is “mailed no later than
17 the 24th day before the election.” The directives of Arizona law are clear, officials “*shall* mail
18 the early ballot within five days” after the request is received, unless the received on or before
19 the thirty-first day before the election. The Draft 2021 EPM misstates the law. Accordingly, the
20 AG struck those portions of AGO-078.

21 Notably, the Legislature has forbidden election officials, including the Secretary and
22 county officials following the EPM, from extending an “election-related date that is provided for
23 in statute.” *See* A.R.S. § 16-407.03 (“Except when prescribed by a court of competent
24 jurisdiction, no officer or agent of this state, a political subdivision of this state or any other
25 governmental entity in this state may modify or agree to modify any deadline, filing date,
26 submittal date or other election-related date that is provided for in statute. A person who violates
this section is guilty of a class 6 felony.”). The Secretary’s draft provisions would violate that
proscription.

1 **B. The Active Early Voting List (AGO-069 to -070, & -072 to -074)**

2 In several places, the Draft 2021 EPM contravenes the text and purpose of Arizona
3 election laws related to the Active Early Voting List (“AEVL”). Specifically, on AGO-069 to -
4 070, the Draft 2021 EPM contravenes the purpose of A.R.S. § 16-544(B), which requires the
5 Secretary to promulgate a standard form for voters to request to be added to the active early
6 voting list. While voters may use other forms to make an AEVL request, regardless of what form
7 is used, the law *requires* the voter to provide certain information—namely, “the voter’s name,
8 residence address, mailing address in the voter's county of residence, date of birth and signature
9 and shall state that the voter is attesting that the voter is a registered voter who is eligible to vote
10 in the county of residence.” Contrary to that requirement, the EPM permits “any other written
11 request that contains the minimum required information” and later states a “voter may use any
12 other substantially similar written document” to be added to the AEVL. These provisions could
13 be read to allow a voter to be added to AEVL even if they do not provide all of the information
14 required under § 16-544(B) and instead provide information that is “substantially similar.”
15 Contrary to both the plain language and intent of A.R.S. § 16-544(B), the Secretary provides
16 ambiguous guidance rather than uniform rules.

17 Furthermore, at AGO-070, in the section entitled “Minimum Requirements for Requesting
18 Placement on the AEVL” the EPM excludes two statutorily required statements (this section is
19 referred to at AGO-072). Namely, A.R.S. § 16-544(B) requires that “the voter shall make a
20 written request specifically requesting that the voter’s name be added to the active early voting
21 list for all elections in which the applicant is eligible to vote” and “shall state that the voter is
22 attesting that the voter is a registered voter who is eligible to vote in the county of residence.”
23 Neither of those statements are included in the Draft 2021 EPM’s “Minimum Requirements[.]”
24 Although the statute does not require a *specific* application, it does mandate that written requests
25 “contain[] the required information[;]” yet the EPM suggests that third-parties can promulgate
26 and county recorders can accept, statutorily deficient AEVL requests. As such, the Draft 2021

1 EPM fails to provide a uniform set of information required of all requests that comport with the
2 requirements of A.R.S. § 16-544(B). Accordingly, the AG struck portions of AGO-069, -070,
3 and -072.

4 As to the following several sections on how to process incomplete requests for placement
5 on the AEVL and removing voters from the AEVL, as indicated *supra* at I(A), the Secretary has
6 no authority to promulgate rules to dictate how county recorders conduct statutorily prescribed
7 duties related to maintaining county voter registration records. Accordingly, the AG struck
8 portions of AGO-071 and -072.

9 On AGO-072, footnote 25 purports to amend the constitutionally prescribed effective date
10 of Senate Bill 1485 (55th Leg., 1st Reg. Sess.) from September 29, 2021 to what appears to be
11 January 15, 2027. Ariz. Const. Art. IV, Pt. 1, § 1(3); *see also* [https://www.azleg.gov/general-
12 effective-dates/](https://www.azleg.gov/general-effective-dates/) (last visited May 3, 2022). In support of her “legal opinion” altering the effective
13 date, the Secretary suggests that applying the law to voters on the active early voting list before
14 the completion of 2026 election cycle would somehow result in retroactive application of the
15 law. Although the Secretary may be the Chief Elections Officer, she is not the Chief Legal
16 Officer; as such, she is neither qualified nor statutorily authorized to provide binding legal
17 opinions. *Compare* A.R.S. §§ 41-193(A)(7), 11-532(A)(7) (giving statutory authority to the
18 Attorney General and county attorneys respectively to provide legal opinions) *with* A.R.S. §§ 41-
19 121 (prescribing the Secretary’s duties), 16-142(A)(1) (assigning the Secretary as the chief state
20 election officer for purposes of the national voting rights act (“NVRA”)). The statute went into
21 effect when the Arizona Constitution says it went into effect (September 2021). County officials
22 are, therefore, required to begin sending out AEVL notices in January 2023 for voters who failed
23 to vote in the required elections during the 2020 and 2022 election cycles. The Secretary does
24 not have the authority to use the EPM to unilaterally alter the effective date of statutes and impose
25 criminal penalties on those who act contrary to her faulty legal conclusions. Accordingly, the
26 AG struck footnote 25 on AGO-072.

1 On AGO-073, the Draft 2021 EPM mandates that counties include information on the
2 statutorily defined and required notice to voters that is not delineated in the statute. *See* A.R.S.
3 § 16-544(D). Although the additional information that the EPM claims “must” be included may
4 be useful, it is not lawfully required and there is no statutory authority for the Secretary to
5 promulgate such rules. Importantly, the allotment for a checkbox to remove a voter’s name from
6 the AEVL lacks necessary elements prescribed under A.R.S. § 16-544(I), making the checkbox
7 statutorily inadequate. Accordingly, the AG struck portions of AGO-073.

8 Finally, on AGO-074, the Draft 2021 EPM not only rewrites A.R.S. § 16-544(E), but also
9 encroaches upon the county recorder’s statutory responsibilities to maintain voter registration
10 files. *Supra* I(A). A.R.S. § 16-544(E) provides that if a 90-day notice “is returned undeliverable
11 by the postal service, the county recorder or other officer in charge of elections shall take the
12 necessary steps to contact the voter at the voter's new residence address in order to update that
13 voter's address or to move the voter to inactive status as prescribed in § 16-166, subsection A.”
14 However, the Draft 2021 EPM mandates county recorders use a process different than the
15 procedures set forth in A.R.S. 16-166(A).⁶ Accordingly, the AG struck portions of AGO-074.

16 **C. Creating And Preparing Early Ballots (AGO-074 to -075)**

17 The Draft 2021 EPM contravenes the text and purpose of Arizona election laws regarding
18 the creation and preparation of early ballots. Specifically, at AGO-074 and -075, the EPM
19 unilaterally asserts that the Board of Supervisors may lawfully delegate their statutory
20 responsibilities under title 16, it provides a legal opinion as to what “shall” be considered
21 substantially similar language to A.R.S. § 16-547(C), and slightly alters statutory language
22 prescribed in A.R.S. § 16-545(B)(2) such that it violates the purpose of the law.
23

24
25 ⁶ Notably, the federal process the Secretary instead attempts to force county officials to follow
26 only applies when voters are *removed* from the official list of eligible voters. *See generally* 52
U.S.C.A. § 20507(c)-(f). Voters moved to the inactive list remain eligible to vote in subsequent
elections and are not removed as eligible voters. *See* A.R.S. §§ 16-166(C), -583.

1 Notwithstanding the Arizona Supreme Court’s warning in *Leach*, the Draft 2021 EPM at
2 AGO-074 authorizes county boards of supervisors to abrogate their statutory duties by delegating
3 them to the officer in charge of elections. *See Leach*, 250 Ariz., at ¶20 (questioning whether the
4 EPM “may abrogate a statutory duty”). In so doing, the Secretary attempts to appropriate the
5 power of the legislature by unilaterally authorizing a county to avoid statutorily prescribed duties.
6 To the extent that a county may enter into intergovernmental agreements or contracts to perform
7 certain duties, it does not relieve the supervisors of their statutory obligations. A.R.S. §§ 11-952,
8 -954.

9 At AGO-074, the Secretary again appropriates legislative power by commanding county
10 recorders abandon statutorily prescribed language from A.R.S. § 16-547(C) and instead requiring
11 that they use her substitute language, which she then concludes “shall be considered substantially
12 similar to the language in the statute[.]” *See supra* II(B). The Secretary does not possess the
13 power to do so under the EPM. Accordingly, the AG struck portions of AGO-074.

14 While subtle, at AGO-075, the Draft 2021 EPM changes the statutory language in A.R.S.
15 § 16-545(B)(2) from “Ensure that the ballot return envelopes are of a type that does not reveal
16 the voter's selections” to “Be opaque so as not to reveal the voter’s vote choices.” In so doing,
17 the EPM effectively exempts ballot return envelope designs that contain large holes or address
18 windows that could reveal votes, and rewrites the statute to only restrict the color or thickness of
19 a ballot return envelope. As such, the Draft 2021 EPM language contravenes the purpose of an
20 election law. In this instance, the AG merely revised the language to comport with the statute,
21 rather than striking the provision all together.

22 **D. Overvote Instructions (AGO-076)**

23 Ignoring the holding and reasoning in *Arizona Public Integrity Alliance v. Fontes*, at
24 AGO-076, the Draft 2021 EPM attempted to change the “Required Instructions to Voters” from
25 requiring county recorders to provide instructions that direct voters to obtain a new ballot in the
26

1 event of an overvote (*see* 2019 EPM at 56)⁷ to permitting county recorders to allow voters to
2 correct their mistakes by intentionally overvoting a ballot so long as the voter “make[s] their
3 intent clear[.]” In no unmistakable terms, Arizona’s Supreme Court has already found that
4 “[u]nder Arizona law, an overvote is invalid and is not counted.” 250 Ariz. 58, 63 ¶20 (2020).
5 The Court went on to find that allowing voters to intentionally overvote, rather than obtain a new,
6 clean ballot if they make a mistake, contradicts the purpose of the EPM. *Id.* at 64, ¶24. In fact,
7 the court found that “requiring voters to correct their improperly marked ballots in the clearest
8 manner possible” and “submit a clean ballot that can be read and tabulated by an electronic voting
9 machine... ensures that their votes will be counted[.]” serving the essential purpose of the EPM.
10 Whereas directing “voters to create an invalid overvote ballot that cannot be tabulated by the
11 electronic voting machine, and, depending on the judgment of election officials, may or may not
12 be counted” does not “achieve and maintain the maximum degree of correctness, impartiality,
13 uniformity and efficiency.” *Id.* In this instance, the AG edited the Draft 2021 EPM to return to
14 the language contained in the 2019 EPM, and approved by the Arizona Supreme Court, rather
15 than striking the provision all together.

16 **E. Extension Of Election-Related Deadlines (AGO-081, -090, & -215)**

17 As already mentioned, during the last legislative session, the Legislature added A.R.S. §
18 16-407.03, which provides as follows:

19 Except when prescribed by a court of competent jurisdiction, no officer or agent of this
20 state, a political subdivision of this state or any other governmental entity in this state may
21 modify or agree to modify any deadline, filing date, submittal date or other election-related
22 date that is provided for in statute. A person who violates this section is guilty of a class 6
23 felony.

24
25 ⁷ Arizona Secretary of State, *2019 Elections Procedures Manual* (Dec. 19, 2019), available at
26 https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf, (last accessed May 3, 2022).

1 Undeterred by the serious consequences of modifying election deadlines provided for in statute,
2 the Draft 2021 EPM contains several instances where the Secretary unilaterally extends election-
3 related deadlines.

4 First, the Draft 2021 EPM permits the election day ballot return deadline to be extended
5 to “5:00 p.m. on the third business day after the election” for UOCAVA voters when an
6 indeterminate national or local emergency “makes substantial compliance with the UOCAVA
7 statute impracticable[.]” AGO-081. If emergency conditions are such that warrant an extension
8 of the election day receipt deadline for UOCAVA ballots, A.R.S. § 16-407.03 necessitates that
9 “a court of competent jurisdiction” must make that determination, not the Secretary or local
10 election officials through more permissive EPM regulations. A.R.S. § 16-548(A) is exceedingly
11 clear, all ballots must be received by 7:00 p.m. on election day. Accordingly, the AG struck
12 portions of AGO-081.

13 Second, under A.R.S. § 16-550, if the signature on an early ballot affidavit is inconsistent
14 with the signature in the elector’s registration record, the county recorder “shall allow signatures
15 to be corrected not later than the fifth business day after a primary, general or special election
16 that includes a federal office or the third business day after any other election.” A.R.S. § 16-
17 550(A). However, the Draft 2021 EPM states that “for counties that operate under a four-day
18 workweek, only days on which the applicable county office is open for business are considered
19 ‘business days.’” AGO-090, -215. This language extends the statutory deadline for *some* (but
20 not all) counties in contravention of the purpose of A.R.S. §§ 16-550 and 16-579(A)(2) to
21 establish statewide, uniform deadlines for curing mismatched signatures and conditional-
22 provisional ballots. It is inconsistent with the Legislature’s instruction regarding the calculation
23 of statutory deadlines and the ordinary meaning of a “business day,” which includes all days
24
25
26

1 other than weekends and holidays (not days when county offices choose to close).⁸ It further
2 fails “to achieve and maintain the maximum degree of correctness, impartiality, uniformity and
3 efficiency” in contravention of A.R.S. § 16-452(A), which can only be achieved by instructing
4 counties that they are not permitted to close election offices during the post-election cure period.
5 Accordingly, the AG struck portions of AGO-090 and -215.

6 **F. Unstaffed Ballot Drop Boxes (AGO-082 & -084)**

7 Contrary to the plain language of A.R.S. § 16-1005(E) (making it a class 5 felony for “a
8 person or entity” to serve “as a ballot drop off site, other than those *established and staffed* by
9 election officials” (emphasis added)), the Draft 2021 EPM permits counties to establish *unstaffed*
10 drop-boxes. AGO-082. According to the EPM, a *staffed* drop-off location or drop-box is defined
11 as one that is “within the view and monitoring of an employee or designee of the County Recorder
12 or officer in charge of elections” whereas an unstaffed drop-off location or drop-box is defined
13 as “not within the view and monitoring of an employee or designee of the County Recorder or
14 officer in charge of elections.” To comport with Arizona law, and prevent putting county officials
15 at risk of violating Arizona law, the provisions as written in the Draft 2021 EPM cannot remain.
16 Thus, the AG struck the provisions allowing counties to establish unstaffed drop-boxes, thereby
17 requiring ballot drop boxes to be staffed (*i.e.* “within the view and monitoring of an employee or
18 designee of the County Recorder or officer in charge of elections”).

19 Also within the section pertaining to “Ballot Drop-Off Locations and Drop-Boxes[,]” the
20 EPM contains provisions that violate not only the purpose of Arizona election law, but may
21 unconstitutionally restrain protected first amendment activities. At AGO-084, the EPM directs
22

23 ⁸ Notably, several provisions of Arizona law utilize the term “business day” consistent with the
24 common definition, as stated in Black’s Law Dictionary, as “[a] day most institutions are open for
25 business, usually a day on which banks and major stock exchanges are open, excluding Saturdays,
26 Sundays, and certain major holidays.” See A.R.S. §§ 1-213, -218(D); see also A.R.S. §§ 11-
1901(A)(8), 38-401. Further, “business day” is used over 50 times in the Draft 2021 EPM; only
in these two contexts is a business day deadline altered based on a county’s stated work week.

1 that county officials “may restrict activities that interfere with the ability of voters and/or staff to
2 access the ballot drop-off location free from obstruction or harassment.” That proposed provision
3 is both overbroad and vague. The terms “activities,” “obstruction,” and “harassment” are not
4 defined and could be read to encompass constitutionally and statutorily protected activities, such
5 as electioneering. *See i.e.* A.R.S. § 16-411(H). Accordingly, the AG struck portions of AGO-
6 084.

7 **G. On-Site Early Voting (AGO-085)**

8 At AGO-085, the Draft 2021 EPM mandates that county recorders establish early voting
9 locations. However, A.R.S. § 16-542(A) specifically states that “[t]he county recorder *may*
10 establish on-site early voting locations at the recorder's office,” not shall. (emphasis added). The
11 AG is not aware of any county that does not allow voters to vote early in-person at the county
12 recorder’s office. However, the Secretary does not have the authority to impose penalties on
13 county officials when and if they choose not to do so. If the Secretary believes that counties
14 should be required to allow voting at the county recorder’s office, she should take that up with
15 the Legislature. In the meantime, the AG struck portions of AGO-085.

16 **H. Challenges To Early Ballots (AGO-089)**

17 Arizona law permits electors to “challenge a person offering to vote as not qualified
18 under [§ 16-121.01](#) or on the ground that the person has voted before at that election.” A.R.S. §
19 16-591. This challenge procedure for in-person voting is extended to political parties to make
20 challenges to early ballots. A.R.S. § 16-552(D) (“An early ballot may be challenged on any
21 grounds set forth in § 16-591. All challenges shall be made in writing with a brief statement of
22 the grounds before the early ballot is placed in the ballot box.”). Rather than comport to the
23 statutory language, AGO-089 would make a subtle, but critical change: “Challenges to early
24 ballots must be submitted prior to the opening of the early ballot affidavit envelope.” Otherwise,
25 the challenge “must be summarily denied as untimely.” AGO-089. However, some counties use
26 envelope opening machines at some early stage of ballot processing, which may or may not be

1 immediately before the ballot is “placed in the ballot box.” A.R.S. § 16-552(D). If envelopes are
2 automatically opened early in the process before any political party could possibly have a
3 meaningful opportunity to challenge a ballot, the Secretary’s proposed limitations period could
4 render § 16-522 nugatory in certain counties. Because the provision contravenes the purpose of
5 the statute (providing a meaningful opportunity for political parties to challenge ballots based on
6 specific criterion), it cannot be included in the EPM. Accordingly, the AG struck portions of
7 AGO-089.

8 **I. Signature Verification For Non-Mailed Early Ballots (AGO-090 to -092)**

9 On AGO-090 to -091, the Secretary would exempt early ballots from mandatory signature
10 verification if they are cast “at an on-site early voting location, emergency voting center, or
11 through a special election board.” Instead, she would require “other evidence that the signatures
12 were not made by the same person.” In this way, the Secretary would write out the statutory
13 requirement that “the county recorder or other officer in charge of elections shall compare the
14 signatures thereon with the signature of the elector on the elector's registration record,” A.R.S. §
15 16-550(A), and the separate and distinct requirement that boards of supervisors, through early
16 election boards, must “check the voter’s affidavit on the envelope containing the early ballot”
17 and only allow votes to be counted where the affidavit is “sufficient,” A.R.S. § 16-552(B). The
18 Secretary’s purported justification is that ballots cast through an approved in-person early voting
19 location already provided sufficient identification. AGO-091. There is no mechanism in Arizona
20 law or the EPM requiring county recorders to differentiate between early ballots dropped off
21 (without providing photo identification) and those cast after presenting identification at an early
22 voting location. Furthermore, there is no “in-person” early voting exception to the signature
23 verification requirements in A.R.S. §§ 16-550(A) and -552(B). Because the provisions are
24 inconsistent with the text and purpose of Arizona law, the AG struck those portions of AGO-090
25 to -091.

1 As to footnote 30 on AGO-091, rather than providing instructions that ensure “the
2 maximum degree of correctness, impartiality, uniformity and efficiency[.]” the Secretary
3 instructs county recorders to “ensure that staff performing signature verification are properly
4 trained,” thus subjecting county recorders to criminal penalties for failing to do so, while
5 simultaneously failing to provide any rules in the EPM about how proper signature verification
6 should be performed. So, the AG struck footnote 30 on AGO-091.

7 Finally, at AGO-092, the Draft 2021 EPM conflates the roles of the county recorder and
8 the board of supervisors. As noted above, A.R.S. § 16-550(A) sets forth the statutory
9 responsibilities of the county recorder pertaining to the verification of early ballot affidavits,
10 while A.R.S. § 16-552(B) sets forth the statutory responsibilities of the board of supervisors
11 through the early election board (established under A.R.S. § 16-551(A)). Under Arizona law,
12 both the county recorder and the board of supervisors have independent obligations to review the
13 ballot affidavit; the county recorder must compare the signature against the elector’s registration
14 record and the board must assess whether or not the ballot affidavit is “sufficient[.]” At AGO-
15 092, the Draft 2021 EPM would eliminate the board of supervisors’ responsibility to determine
16 whether ballot affidavits are sufficient before they are counted. For this reason, the AG struck
17 one paragraph on AGO-092.

18 **J. Jail Voting (AGO-094)**

19 The Draft 2021 EPM states that the “County Recorders *shall* coordinate with the sheriff’s
20 office, jail, or other detention facilities... to develop and implement reasonable procedures to
21 facilitate voter registration and voting, including the receipt and return of a ballot by mail, by
22 eligible voters held in jail or detention facilities.” AGO-094 (emphasis added). Although this
23 statement *could* relate to early voting (although it is questionable the Secretary can mandate a
24 multi-agency county program absent legislative authorization and appropriation), it fails to
25 “prescribe rules to achieve and maintain the maximum degree of correctness, impartiality,
26 uniformity and efficiency[.]” By commandeering county officials to create procedures for extra-

1 statutory jail voting programs, the Secretary is injecting dis-uniformity into the election processes
2 in Arizona. If the Secretary believes that additional procedures are required with respect to voting
3 in jails, then the Secretary should have included proposed statewide rules in the EPM, rather than
4 ordering county recorders to create such procedures on a county-by-county basis. Because that
5 is not the route the Secretary took, the AG struck the jail voting provision on AGO-094.

6 **K. Logic & Accuracy Test Timing (AGO-112)**

7 A.R.S. § 16-449(A) provides that although the Secretary may choose when the logic and
8 accuracy tests of voting equipment shall be conducted prior to election day, the statute includes
9 a specific notice requirement: “Public notice of the time and place of the test shall be given at
10 least forty-eight hours prior thereto by publication once in one or more daily or weekly
11 newspapers published in the town, city or village using such equipment, if a newspaper is
12 published therein, otherwise in a newspaper of general circulation therein.” However, AGO-112
13 dispenses with this 48-hour notice requirement if a board of supervisors is unable to give the
14 required amount of notice because the Secretary reschedules the logic and accuracy tests. This
15 exemption is contrary to the express requirements and the core purpose of A.R.S. § 16-449(A)
16 (i.e., providing representatives of the political parties, candidates, the press and the public with
17 sufficient time to make arrangements to attend). Thus, the AG struck the alternative notice
18 provisions on AGO-112.

19 **L. Voting Locations In Police Stations And Courthouses (AGO-160)**

20 Although the Secretary may prescribe procedures for voting, nothing in A.R.S. § 16-452
21 permits her to dictate what factors should be considered for selecting voting locations; instead,
22 that power is assigned to the county boards of supervisors. *See* A.R.S. § 16-411. Although many
23 of the factors included in the Draft 2021 EPM are common sense, one factor is not only arbitrary
24 and capricious, it inappropriately states that “voting locations should not be placed inside of
25 police stations, courthouses, or other locations with a regular uniformed police presence[.]” Not
26

1 only does the factor usurp the county’s statutory authority, but it disregards smaller towns and
2 communities where the courthouse complex is the town center and represents an anti-law
3 enforcement sentiment. Although the entirety of “Factors to Consider When Selecting Voting
4 Locations” at AGO-159 to -160 is “guidance” that could be struck, the AG instead struck only
5 the inappropriate limitation on the use of courthouses and police stations as voting locations.

6 **M. Poll Worker Diversity (AGO-163 & -231)**

7 Under A.R.S. § 16-531, the Legislature has not only tasked the county boards of
8 supervisors with appointing election boards, it has dictated the factors to consider when making
9 such appointments. Specifically, the county is statutorily required to not only prioritize qualified
10 voters who live in the precinct and political party affiliation over all other considerations, but
11 also work first from the names provided by the county party chairman, before appointing based
12 on broad qualifications. *See* A.R.S. § 16-531(A). The statute is clear that boards for partisan
13 elections must be appointed such that the members “shall be divided equally between these two
14 parties.” *Id.* Disregarding the statutory requirements, the Secretary attempts to relieve counties
15 of their statutory obligation to staff partisan boards. AGO-163 n.59; *see also* AGO-231 n.78.
16 The Secretary would also impose an additional mandatory requirement for the recruitment of poll
17 workers by including a provision that “[t]he officer in charge of elections shall also ensure that
18 community poll worker recruitment is conducted in an equitable manner, in an effort to recruit a
19 diverse pool of poll workers that reflect the community.” AGO-163 n.58. The Secretary thereby
20 subjects local election officials to criminal penalties for failing to ensure the equitable recruitment
21 of poll workers. Thus, the AG struck footnote 58 and 59 on AGO-163 and footnote 78 on AGO-
22 231.

23 **N. Observer Qualifications (AGO-169)**

24 Arizona law statutorily authorizes the presence of observers at voting locations, A.R.S. §
25 16-590(A)-(B), and “all proceedings at the counting center,” A.R.S. § 16-621(A). Arizona law
26 further provides that the provisions in Title 16, including observers, “apply to all elections in this

1 state.” A.R.S. § 16-191. On AGO-169, the Secretary erroneously concludes that observers at
2 nonpartisan elections is “at the discretion of the officer in charge of elections[,]” which is
3 inconsistent the very laws she cites. Arizona law specifically provide for observers at the
4 counting center for non-partisan elections. *See* A.R.S. § 16-621(A) (“The proceedings at the
5 counting center may also be observed by up to three additional people representing a candidate
6 *for nonpartisan office*, or representing a political committee in support of or in opposition to a
7 ballot measure, proposition or question.” (emphasis added)). Similarly, because A.R.S. § 16-191
8 makes the requirements in A.R.S. § 16-590 applicable to all elections, counties must allow for
9 observers at voting locations during partisan and non-partisan elections.

10 Arizona law also specifies that “a challenger or party representative shall be a resident of
11 this state and registered to vote in this state.” A.R.S. § 16-590(D). However, the Draft 2021 EPM
12 allows election officials to limit observers to “voters of the county.” AGO-169. Restricting
13 observers based on the observer’s county of residence, rather than state of residence, is
14 inconsistent with Arizona law. Accordingly, the AG struck portions of AGO-169.

15 **O. Delegation Of Statutory Duties (AGO-173 & -189)**

16 Once again, the Draft 2021 EPM attempts to authorize the county board of supervisors to
17 delegate statutory responsibilities. *See supra* II(C). At both AGO-173 and -189 the Draft EPM
18 would allow the board of supervisors to disregard their statutory duties by delegating them to the
19 county recorder or other officer in charge of elections. Accordingly, the AG struck portions of
20 AGO-173 and -189.

21 **P. Out of Precinct Voting (AGO-189, -196 to -197, -208, -221, -235, & -236)**

22 Despite the U.S. Supreme Court upholding Arizona’s precinct-voting system in *Brnovich*
23 *v. Democratic National Committee*, the Secretary attempted to include procedures in the Draft
24 2021 EPM, allowing voters to cast a ballot outside of their assigned precinct. The Secretary
25 claimed in her transmission letter that “no one has pointed to any statutory provision actually
26 requiring the out-of-precinct policy” and further claimed that “the Supreme Court’s recent

1 decision in *Brnovich v. DNC* made clear that the policy is required by the Manual alone.” AGO-
2 002. The Secretary’s claim is not supported by the Court’s opinion; rather, the Court pointed to
3 A.R.S. § 16-584(E) as the relevant statute that *prohibits* ballots cast in the wrong precinct to be
4 counted, with the EPM further delineating those procedures.⁹ Regardless, A.R.S. § 16-584(E)
5 requires the voter to swear or attest “the elector resides in the precinct, is eligible to vote in the
6 election and has not previously voted in the election” and the ballot affidavit must “be verified
7 for proper registration of the elector by the county recorder[.]” A.R.S. § 16-584(E). If the
8 registration shows that the voter resides in that precinct, is eligible to vote, and has not previously
9 voted in the election, the ballot affidavit is verified, and the ballot “shall be counted[.]” *Id.*
10 However, “[i]f registration is not verified the ballot shall remain unopened[.]” *Id.* The statute is
11 clear. If the county recorder is unable to verify that the voter lives in the precinct where the ballot
12 was cast, the provisional ballot envelope cannot be opened, and the vote cannot be counted.

13 In trying to rewrite the law to suit *her* policy preferences over the Legislature’s,¹⁰ the
14 Secretary included provisions in the Draft 2021 EPM informing voters that ballots cast out of
15 precinct will nonetheless be counted for certain races and provides procedures to allow for
16 duplicating out-of-precinct ballots for certain races. *See* AGO-189, -196 to -197, -208, -221, -
17 235, and -236. Tellingly, the Secretary does not include instructions for the county recorder to
18 actually verify a ballot was cast out of precinct; the Draft 2021 EPM still requires the county
19 recorder to “[c]onfirm the voter voted in the correct polling place or voting location or cast the

21 ⁹ “If a voter finds that his or her name does not appear on the register at what the voter believes is
22 the right precinct, the voter ordinarily may cast a provisional ballot.” Ariz. Rev. Stat. Ann. § 16–
23 584 (Cum. Supp. 2020). That ballot is later counted if the voter’s address is determined to be
24 within the precinct. *See ibid.* But if it turns out that the voter cast a ballot at the wrong precinct,
25 that ballot is not counted. *See* § 16–584(E); App. 37–41 (election procedures manual); Ariz. Rev.
26 Stat. Ann. § 16–452(C) (misdemeanor to violate rules in election procedures manual).” *Brnovich*
v. Democratic National Committee, 141 S. Ct. 2321, 2334 (2021).

¹⁰ The Secretary is attempting to relitigate the issue with the same failing arguments she made to
the U.S. Supreme Court. *See Brief of Respondent Arizona Secretary of State Katie Hobbs*, 2021
WL 260081 (Jan. 13, 2021) at 6.

1 ballot for the correct precinct” and that the “County Recorder shall deliver only provisional ballot
2 envelopes and/or affidavits of qualified voters who meet the above requirements... for counting.”
3 AGO-242 to -243. It is unclear why the Draft 2021 EPM instructs voters their vote *may* count,
4 and instructs ballot duplication boards on how to duplicate out of precinct ballots, but fails to
5 provide instructions to the county recorder on how to statutorily verify an out of precinct ballot.
6 Without the recorder’s verification, the provisional ballot will never be counted.

7 Because these portions of the Draft 2021 EPM completely undermine the law, the AG
8 struck the offending sections on AGO-189, -196 to -197, -208, and -221, and edited the language
9 to return it to the approved language from the 2019 EPM. *Supra* at FN 7 (2019 EPM) at pp 159,
10 165, 176, and 188. The AG also struck portions of AGO-235 and -236.

11 **Q. List Of Candidate Withdrawals For PPE (AGO-205)**

12 In the Draft 2021 EPM’s instructions regarding setting up a voting location, the Secretary
13 included another instruction that is inconsistent with the law. Without any relevant statutory
14 reference, the Secretary changes the way ballots are tabulated after a candidate withdraws from
15 a Presidential Preference Election. Although A.R.S. § 16-343(F) specifies that votes for
16 candidates that withdrew due “death or incapacity of the candidate” will be tabulated, there is no
17 law that says that votes for candidates who withdrew for other reasons will be tabulated.
18 *Compare* A.R.S. § 16-343 (F) *to* (G). Because the Legislature specifically delineated those
19 instances when a Presidential Preference Election vote is to be tabulated even after withdrawal,
20 the Secretary cannot add other instances without running afoul of the statute. Thus, the AG struck
21 portions of AGO-205.

22 **R. 75’ Polling Location Limit (AGO-212)**

23 Arizona law states that “a person shall not be allowed to remain inside the seventy-five
24 foot limit while the polls are open, except for the purpose of voting, and except the election
25 officials, one representative at any one time of each political party... and no electioneering may
26

1 occur within the seventy-five foot limit.” A.R.S. § 15-515(A). There is no exception for “U.S.
2 Department of Justice or other authorized federal government observers.” AGO-212. Although
3 there have been instances when federal observers, including the Department of Justice, have been
4 judicially authorized to be within the seventy-five foot limit during active elections, there is no
5 blanket authority for federal employees to be within the seventy-five foot limit. Again, the
6 Legislature expressly delineated those individuals permitted within the protected zone. The
7 Secretary cannot add to the list through the EPM. The AG, therefore, struck portions of AGO-
8 212.

9 **S. Intimidating Conduct In Polling Places (AGO-213 & 225)**

10 At the April 29 show-cause hearing, the Secretary, through counsel, repeatedly took the
11 position that the EPM regulates the activities of county officials, and not ordinary citizens. In
12 stark contrast to that position, the Draft 2021 EPM in fact attempts to criminalize the conduct of
13 voters. In the section “Preventing Voter Intimidation” the Secretary describes what she frames
14 as “potentially intimidating conduct[.]” AGO-213. She criminalizes vague, arbitrary, nebulous
15 activities (some of which are potentially protected speech) such as “raising one’s voice[.]” using
16 “offensive language to a voter or poll worker[.]” “following voters or poll workers[.]” and
17 “confronting, questioning, photographing, or videotaping voters or poll workers[.]” Some of the
18 conduct proscribed by the Draft 2021 EPM could be misconstrued by election workers to
19 encompass constitutionally and statutorily protected activities, such as electioneering. *See i.e.*
20 A.R.S. § 16-411(H). While the AG believes election officials should take steps to avoid actual
21 voter intimidation, the Secretary lacks the statutory authority to vaguely criminalize voter
22 conduct through the EPM. Instead, the Legislature has seen fit to provide penal provisions within
23 Title 16 that clearly articulate prohibited conduct. *See* A.R.S. § 16-1001 *et seq.* Thus, the AG
24 struck portions of AGO-213 to -214.

1 **T. Updating Voter Registration Records (AGO-243)**

2 In addition to the authority granted the Secretary under A.R.S. § 16-452, she also has
3 authority to promulgate rules to allow qualified electors to update their voter registration
4 information at voting locations. A.R.S. §§ 16-246(G), -411(B)(5)(b), and -542(A), (E), (I). The
5 Secretary also has the authority to promulgate rules regarding conditional provisional ballots.
6 A.R.S. § 16-579(A)(2). However, as previously discussed, *supra* at I(A), the Secretary has no
7 authority over how county recorders conduct their statutory obligations as to voter registration.
8 In the Draft 2021 EPM, the Secretary not only attempts to regulate the provisional ballot form in
9 excess of the statutory requirements, but also mandates that by “the August 2022 Primary
10 Election, a paper provisional ballot envelope or affidavit form *shall* substantially comply with
11 A.R.S. § 16-152 *and* be used to register a voter for the first time for future elections[.]” AGO-
12 243 (emphasis added); *compare* A.R.S. § 16-584(E)(the provisional envelope “shall contain the
13 precinct name or number, a sworn or attested statement of the elector that the elector resides in
14 the precinct, is eligible to vote in the election and has not previously voted in the election, the
15 signature of the elector and the voter registration number of the elector”) *to* A.R.S. § 16-152(A)
16 (containing twenty-three items, including date of birth, occupation, father’s name or mother’s
17 maiden name). Although the Secretary, through counsel, asserted at the April 29 show-cause
18 hearing that the Draft 2021 EPM is clear as to what counties should consider as guidance
19 (designated with terms such as “should”) versus what is required (designated with terms such as
20 “shall”), here she attempts to make a mandatory obligation out of a provision that , at best, can
21 be issued as guidance, thereby potentially ensnaring even those the Court referred to as
22 “sophisticated defendants[.]” *See* Reporter’s Transcript of Proceedings, April 29, 2022, at pp 44
23 lines 7-21. Accordingly, the AG struck portions of AGO-243.

24 **III. Conclusion.**

25 As previously established, the AG did not attempt to use the EPM process to impose his
26 policy preferences on the Secretary. The AG did not attempt to add to, or even re-write, EPM

1 provisions. Instead, the AG, consistent with recent Arizona Supreme Court guidance, struck
2 those provisions inconsistent with the lawful scope of the EPM statute or inconsistent with the
3 text or purpose of Arizona election law. The AG spent a significant amount of time reviewing
4 and commenting on the EPM. The detailed explanations contained within this supplemental brief
5 demonstrate that reality. Based on those explanations, and the arguments contained in the AG’s
6 prior filings, the AG respectfully requests that the Court order the Secretary to promulgate the
7 2021 EPM consistent with the redlined draft the AG provided to the Secretary on December 9,
8 2021 (AGO-005).

9
10 RESPECTFULLY SUBMITTED this 6th day of May, 2022.

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

13 By /s/ Michael S. Catlett
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*

1 A copy has been electronically served via AZTurbo
2 Court, an electronic filing service provider
3 approved by the Administrative Office of the
4 Courts, and email this 6th day of May, 2022, on:

4 Roopali H. Desai
5 D. Andrew Gaona
6 Kristen Yost
7 Coppersmith Brockelman PLC
8 2800 North Central Avenue, Suite 1900
9 Phoenix, AZ 85004
10 Email: rdesai@cblawyers.com
11 Email: agaona@cblawyers.com
12 Email: kyost@cblawyers.com
13 *Attorneys for Plaintiff Arizona Secretary
14 of State Katie Hobbs*

11 Sambo (Bo) Dul
12 Christine Bass
13 States United Democracy Center
14 8205 South Priest Drive, #10312
15 Tempe, AZ 85284
16 Email: bo@statesuniteddemocracy.org
17 Email: christinebass@statesuniteddemocracy.org
18 *Attorneys for Defendant Arizona Secretary
19 of State Katie Hobbs*

18 Brian M. Bergin
19 Bergin, Frakes, Smalley & Oberholtzer
20 4343 E. Camelback Rd, Ste 210
21 Phoenix, AZ 85018
22 Email: bbergin@bfsolaw.com
23 *Attorney for Plaintiffs Demitra Manjoros
24 and Yavapai Republican Committee*

23 Anni Foster
24 Jake Agron
25 Office of Governor Douglas A. Ducey
26 1700 West Washington Street
Phoenix, Arizona 85007
Email: afoster@az.gov

1 Email: jagron@az.gov
2 *Attorneys for Arizona Governor*
3 *Douglas A. Ducey*

4 By: /s/ Michael S. Catlett
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26