ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of the Arizona Republican Party and Arizona voter and taxpayer. Petitioners v. KATIE HOBBS, in her official capacity as Arizona Secretary of State; and STATE OF ARIZONA, a body politic. Respondents	No. CV-22-0048-SA

PETITIONERS' REPLY TO STATE OF ARIZONA'S RESPONSE TO APPLICATION AND REPLY TO BRIEF AMICUS CURIAE OF ARIZONA ATTORNEY GENERAL MARK BRNOVICH

Alexander Kolodin (030826)
Veronica Lucero (030292)
Roger Strassburg (016314)
Arno Naeckel (026158)
Davillier Law Group, LLC
4105 N. 20th St., Ste. 110
Phoenix, AZ 85016
T: (602) 730-2985 F: (602) 801-2539
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
rstrassburg@davillierlawgroup.com
anaeckel@davillierlawgroup.com
phxadmin@davillierlawgroup.com (file copies)
Attorneys for Petitioners

Petitioners reply herein to the combined Response of the State of Arizona ("State") and to the Brief Amicus Curiae of Arizona Attorney General Mark Brnovich ("AG"):

I. If the 2019 EPM Is Invalid, then it Is Even More Essential for this Court to Accept Jurisdiction.

Petitioners and the State agree that the Secretary has a non-discretionary legal duty to propound an EPM that conforms to the Arizona Constitution and Arizona Revised Statutes. Petitioners argue that the Secretary can rectify certain deficiencies in the EPM by either submitting (1) a revised EPM or (2) an addendum to the EPM to the AG and Governor for review and approval. The State argues that only the former option is acceptable because the Secretary must comply with her non-discretionary legal duty to propound a new EPM for this election cycle as because of certain other legal deficiencies in the EPM. Accordingly, the State argues that this Court should mandate that the Secretary propound a new and completely "lawful" EPM.

Anticipating this argument, Petitioners suggested an addendum to the EPM because the Governor, Attorney General, and Secretary have previously agreed this is a lawful means of changing the EPM after the statutory deadline to propound the EPM has passed. [Pet. at 15–16.] However, Petitioners made it clear that they were perfectly pleased to see either a new EPM—or an addendum to the old EPM—that

conforms to the Arizona Constitution and the Arizona Revised Statutes. Thus, from Petitioners' point of view, the State's preferred means of granting relief, by requiring the issuance of an entirely new EPM that conforms to the constitution and Arizona Revised Statutes, is satisfactory.

However, for the Secretary to comply with a legal mandate to propound a lawful EPM, it is essential that this Court resolve the issues Petitioners have raised and say what the law is with respect to drop-boxes, signature verification, and the overall constitutionality of mail-in voting—all subjects addressed by the EPM. For example, if the constitution prohibits the use of drop-boxes or the Arizona Revised Statutes do not authorize them, a mandate to propound a lawful EPM would include a mandate that the Secretary present an EPM to the AG and Governor for review and approval that prohibits the use of drop-boxes (or, alternatively, excludes provisions related to drop-boxes entirely).

II. Petitioners Agree that Robust Uniform Signature Verification Guidance Must Be Included in the EPM.

Section 16-550(A) requires local election recorders to verify ballot signatures by "compar[ing] the signatures thereon with the signature of the elector on the elector's registration record." A.R.S. § 16-550(A). Pursuant to § 16-452(A), the Secretary has the duty to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting,

counting, tabulating and storing ballots." A.R.S. § 16-452(A). *See also McKenna v. Soto*, 250 Ariz. 469 ¶ 20 (2021) (noting that "[t]he purpose of the [] EPM is to ensure election practices are consistent and efficient throughout Arizona."). The State and AG agree with Petitioners that the EPM must therefore include robust signature verification procedures that, as part of the EPM, would have the force of law. *McKenna*, 250 Ariz. 469 at ¶¶ 20–21.

The State and AG note that signature verification is vulnerable to non- or mal-feasance. [State/AG Resp. at 14–18.] They also make a compelling case that some practices included in the Secretary's current signature verification procedures are inconsistent with Arizona election law and that these should not be included in the EPM. [*Id*. at 18–20.] For example, there is no authority under Arizona law that allows "voters (or others) to skirt the signature verification process by utilizing electronically-scanned and cut-and-paste signatures[.]" [*Id*. at 19–20.]

The thrust of Petitioners' argument is simply that signature verification procedures must be included in the EPM and may not be propounded outside of the context of the EPM—which the Secretary has done with her 2020 Guide. However, Petitioners would obviously prefer that the Secretary be mandated to submit more robust signature verification procedures to the AG for review and approval. Accordingly, if this Court finds that the Secretary's procedures are

unlawful, it should by all means compel her to revise them to conform to the law before submitting them to the AG for review and approval.

It is important to note that even if this Court merely orders the Secretary to submit her 2020 Guide to the AG and Governor for their review and approval, as Petitioners request [Pet. at 44], the AG will still retain his right and duty to insist that the guide conforms to the other applicable laws he has identified before signing off on it. However, it is an unfortunate fact that ARS § 16-452 does not say what happens if the Secretary, AG, and Governor fail to agree on what should be included in the EPM. With the mid-term elections looming, all parties seem to agree that this matter requires a speedy and final resolution. Thus, clarifying *now* what would constitute lawful signature verification procedures will save much trouble and confusion down the road.

All this is assuming that mail-in voting is constitutional, which it is not.

III. Drop-boxes Are Not Authorized, but if Authorized, they Must Be Properly Staffed.

Petitioners maintain that the Secretary may not authorize the establishment of drop-boxes, as drop-boxes are neither authorized by the Arizona Constitution nor by law. [*See* Pet. at Parts II & III and Pet's Reply.] This is a threshold question that the Court must resolve before addressing the argument, presented by the State and AG, that ballot drop-boxes may be allowed if staffed and supervised. [State/AG Resp. at Part III.]

Should the Court determine that drop-boxes are authorized by the Arizona Constitution *and* the Arizona Revised Statutes, then Petitioners are in accord with the State and AG's position that drop-boxes must be properly staffed and monitored by election officials at all times. *See* A.R.S. § 16-1005(E).

IV. The Court Should Exercise Jurisdiction to Decide the Critical Issues Petitioners Raise.

The State acknowledges that the Petition "raises important questions about the constitutionality of the early-voting system in Arizona" but argues that the Court lacks jurisdiction over the State to issue an extraordinary writ against it. [State/AG Br. Resp. at Part IV.] The State's argument that relief may not be directed against it disregards this Court's authority to the grant the declaratory relief sought by Petitioners:

> Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

Ariz. Sch. Bds. Ass'n v. State, 501 P.3d 731 ¶16 (2022) (quoting A.R.S. § 12-1832). *See also* A.R.S. § 12-1831 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."); A.R.S. § 12-1831 ("No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for."). Further, the power "to settle and to afford

relief from uncertainty and insecurity with respect to rights, status and other legal relations" is "to be liberally construed and administered." A.R.S. § 12-1842.

Petitioners have clearly sought declaratory relief, on both constitutional and legal grounds, regarding early voting, mail-in voting, drop-boxes, the requirement that votes not be tabulated prior to election day, and that voting may only occur "at the polls." [Pet. at 40–43.] However, there is no single officer or group of officers of the State who can answer whether these provisions are unconstitutional or unlawful.

The State highlights this point in asserting that Petitioners' "claim is not properly asserted against the Secretary because she does not administer early voting in Arizona. Only the county recorders administer early voting." [State/AG Br. Resp. at 22. *See also* Sec'y Resp. at 14 ("Yet the early voting statutes are mainly implemented by county officials . . . and the Secretary does not 'enforce' those statutes.").] The implication is that Petitioners would have to join to this action the recorders of every county in the State (as well as every municipal election official).[1] That would create an administrative headache for no purpose.

Fortunately, the State is wrong for two reasons. *First*, the Secretary is given direct responsibility under the Arizona Constitution for ensuring that official

[1] *See, e.g.*, EPM at 73 ("A city, town, school district, or special taxing district may conduct its own ballot-by-mail election after obtaining approval of their governing board. A.R.S. § 16-409(A); A.R.S. § 16-558(A).").

ballots are only provided at the polls:

> When any initiative or referendum petition or any measure referred to the people by the legislature shall be filed, in accordance with this section, with the **secretary of state, *he shall cause*** to be printed on the official ballot at the next regular general election the title and number of said measure, together with the words "yes" and "no" in such manner that the electors may express at the polls their approval or disapproval of the measure.

Ariz. Const. art. 4, §. 1 (emphasis supplied). In other words, she is directly tasked with acting on behalf of the state to see that the mandates of this constitutional provision are carried out.

Second, consistent with this mandate, the Secretary is given direct statutory authority to administer both voting and early voting in Arizona. She is required by law to "prescribe rules" regarding the "procedures for early voting" that all inferior election officers must follow. A.R.S. § 16-452(A). A county or municipal election official who violates the rules set forth in the EPM is guilty of a class 2 misdemeanor. A.R.S. § 16-452(C). It is hard to imagine a more significant degree of control over the conduct of Arizona's subsidiary election officials. For them, her word is law.

As the AG acknowledges, these procedures are required to comport with both the Arizona Constitution and the Arizona Revised Statutes. [State/AG Resp. at 7 ("Because candidate nominating provisions cannot be adopted pursuant to § 16-452, they should not again have been included in the EPM[.]") & 11

(Secretary required to "promulgate a lawful manual" for AG and Governor's review and approval).] *See also Leach v. Hobbs*, 250 Ariz. 572, 576 (2021). Thus, if early voting is unconstitutional, in whole or in part, then there is a simple solution that fits within the context of the relief the State itself argues is appropriate—for this Court to mandate that the Secretary propound an EPM that forbids the use of these very unconstitutional procedures (or excludes procedures for early voting entirely). And even if the Secretary lacked this degree of control over county and municipal election officials (she does not), granting this relief still places them on sufficient notice that the challenged provisions are unlawful. Given such notice, it would be presumed that they would conduct themselves accordingly, thus obviating the need for writs to issue against each and every election official in the state. *See* Ruling Re: Declaratory Judgment *Arizona School Boards Association Inc., et al. v. State of Arizona, et al*., CV2021-012741 at *15, *aff'd Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 741–42 (2022).[2]

[2] The State also tries to circumvent *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119 (2013), by arguing that, there, the Attorney General appeared on behalf of both the State and a state body. However, the AG would appear on behalf of the Secretary, a state officer, as well as the State itself, in the normal course of affairs. *See, e.g.*, A.R.S. §§ 41-193(A)(1), 41-192(A, D-F). Respondents' choice of counsel hardly has any bearing on the jurisdictional question.

RESPECTFULLY SUBMITTED this 17th day of March 2022:

Davillier Law Group, LLC

By /s/ Alexander Kolodin
Alexander Kolodin
Veronica Lucero
Roger Strassburg
Arno Naeckel

Attorneys for Petitioners