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9 **ARIZONA SUPERIOR COURT**  
10 **MARICOPA COUNTY**

11 ARIZONA REPUBLICAN PARTY, ) No. CV2020-014553  
12 )  
Plaintiff, )  
13 )  
v. ) **ARIZONA SECRETARY OF STATE**  
14 ) **KATIE HOBBS'S MOTION TO DISMISS**  
ADRIAN FONTES, as Maricopa County )  
15 Recorder; and the MARICOPA COUNTY )  
BOARD OF SUPERVISORS, by and through ) (Assigned to The Hon. John Hannah)  
16 CLINT HICKMAN, JACK SELLERS, STEVE )  
CHUCRI, BILL GATES, AND STEVE )  
17 GALLARDO, ) (Oral Argument set for November 18, 2020  
at 3:15 p.m.)  
18 )  
Defendants. )  
19 )

20 Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., Katie Hobbs, in her official capacity as  
21 Arizona Secretary of State ("Secretary"), moves to dismiss Plaintiff's Verified Complaint.

22 **I. Introduction**

23 The timing of this lawsuit says it all. Despite knowing about the hand count audit  
24 procedure for nearly a decade, taking no issue with the existing procedure in two other elections  
25 in 2020, and participating in the 2020 General Election hand count audit just last week, Plaintiff  
26 Arizona Republican Party ("Plaintiff") now claims that this procedure violates long-standing

1 Arizona law. As a threshold issue, Plaintiff lacks standing. But even if Plaintiff is found to have  
2 standing, Plaintiff could have—and should have—brought its claim challenging the legality of  
3 the hand count procedure years ago, or at the very least, before the county completed its hand  
4 count audit in this election.

5 And even if Plaintiff’s Complaint were timely, it fails to state a claim upon which relief  
6 can be granted. Indeed, Plaintiff’s claim rests on its erroneous interpretation of Arizona law. And  
7 beyond that, Plaintiff’s Complaint fails to acknowledge that the County’s hand count audit was  
8 conducted in full compliance with the Elections Procedures Manual (“EPM”), which has the  
9 force and effect of law. Because Plaintiff does not challenge the EPM, Plaintiff’s mandamus  
10 request, if granted, would lead to the absurd result of requiring the County to violate the law.

11 Plaintiff’s Complaint is procedurally and substantively flawed. Moreover, it is clear that  
12 Plaintiff’s true intent is to delay and undermine the final certification of the General Election  
13 results. The Court should not countenance Plaintiff’s delay and blatant attempts to disrupt the  
14 election. The Secretary respectfully requests that the Court dismiss Plaintiff’s Complaint with  
15 prejudice.

16 **II. Argument**

17 **A. Plaintiff’s Claim Fails as a Matter of Law.**

18 To begin, Plaintiff’s sole claim fails as a matter of law. *Swenson v. Cty. of Pinal*, 243  
19 Ariz. 122, 125 ¶ 5 (App. 2017) (dismissal under Rule 12(b)(6) is appropriate if, even accepting  
20 the factual allegations as true, “as a matter of law . . . plaintiffs would not be entitled to relief[.]”).  
21 Plaintiff’s entire complaint hinges on an argument that A.R.S. § 16-602(B) **prohibits** counties  
22 from conducting a hand count audit of “voting centers” instead of “precincts.” That legal  
23 interpretation is wrong, and the Court can and should decide this issue without an evidentiary  
24 hearing.

25 In 2011, the Legislature amended A.R.S. § 16-411 to authorize “the use of voting centers  
26 in place of or in addition to specifically designated polling places.” Recognizing that this could

1 impact how certain counties conduct the hand count audit, it also amended A.R.S. § 16-602(B)  
2 to require that the “hand count shall be conducted as prescribed by this section **and in**  
3 **accordance with hand count procedures established by the secretary of state in the official**  
4 **instructions and procedures manual adopted pursuant to § 16-452.**” (Emphasis added). The  
5 Legislature couldn’t have been clearer: it allowed counties to use voting centers instead of  
6 precincts, and it authorized the Secretary to adopt procedures in the EPM to address A.R.S. §  
7 16-602’s silence on hand count procedures for counties that use voting centers.

8         The Secretary and her predecessors did just that. In 2012 and 2014, Secretary Bennett  
9 drafted hand count batch selection procedures in the EPM that allowed “counties utilizing vote  
10 centers” to consider “a vote center . . . to be a precinct/polling location during the selection  
11 process.” [See 2012 EPM and 2014 EPM, Excerpts attached as Exhibits A and B, respectively]<sup>1</sup>  
12 In 2019, the Secretary adopted the current version of the EPM, which likewise allows “counties  
13 that utilize vote centers” to consider “each vote center . . . to be a precinct/polling location and  
14 the officer in charge of elections must conduct a hand count of regular ballots from at least 2%  
15 of the vote centers, or 2 vote centers, whichever is greater.” [2019 EPM, Excerpt attached as  
16 Exhibit C] The Secretary adopted the 2019 EPM, with approval from the Attorney General and  
17 Governor, and it thus has the force and effect of law. *Arizona Pub. Integrity All. v. Fontes*, \_\_  
18 Ariz. \_\_, 2020 WL 6495694, at \*3 (Nov. 5, 2020) (“Once adopted, the EPM has the force of  
19 law[.]”) (citing A.R.S. § 16-452(C)).<sup>2</sup>

20         In sum, Plaintiff is simply wrong when it argues that A.R.S. § 16-602(B) requires all  
21 counties to conduct a hand count audit using **only** precincts. To the contrary, the statute is silent  
22 on the procedures for counties that use voting centers and, critically, it expressly authorizes the

23 \_\_\_\_\_  
24 <sup>1</sup> Governor Brewer and Attorney General Horne approved both the 2012 and 2014 EPM, and  
Secretary Bennett adopted them.

25 <sup>2</sup> The Attorney General agrees with the Secretary’s interpretation of A.R.S. § 16-602. [See  
26 November 12, 2020 Letter from J. Kanefield to K. Fann and R. Bowers, attached as Exhibit D]

1 Secretary to fill that gap. The EPM thus adheres to Arizona statutes, Maricopa County properly  
2 complied with the EPM, and Plaintiff’s claim fails as a matter of law.

3 **B. Plaintiff lacks standing.**

4 Although Plaintiff’s claim fails as a matter of law, the Court may dispose of Plaintiff’s  
5 Complaint without reaching the merits. Indeed, Plaintiff fails to allege a particularized injury  
6 and thus lacks standing. “[A]s a matter of sound judicial policy,” Arizona courts “require[]  
7 persons seeking redress in the courts first to establish standing.” *Bennett v. Napolitano*, 206 Ariz.  
8 520, 524 ¶ 16 (2003). While Arizona courts “are not constitutionally constrained to decline  
9 jurisdiction based on lack of standing,” they will not consider the merits of a complaint that fails  
10 to allege a “particularized injury,” absent “exceptional circumstances.” *Id.* at 527 ¶ 31. No  
11 exceptional circumstances exist here.

12 Plaintiff doesn’t even try to allege that the hand count audit procedure somehow injured  
13 Plaintiff. Instead, Plaintiff merely raises a “generalized grievance” that is insufficient to establish  
14 standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992).<sup>3</sup>

15 **C. Plaintiff’s Claim Is Barred by Laches.**

16 Even if Plaintiff has standing and could state a claim, it is barred by laches. The equitable  
17 doctrine of laches “seeks to prevent dilatory conduct and will bar a claim if a party’s  
18 unreasonable delay prejudices the opposing party or the administration of justice,” *Lubin v.*  
19 *Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006), and Plaintiff checks off all the boxes. Plaintiff waited  
20 **years** to challenge this longstanding procedure, its delay is unreasonable, and that delay causes  
21 significant prejudice.

22 **1. Plaintiff unreasonably delayed in challenging the relevant laws.**

23 In deciding whether a plaintiff’s delay is unreasonable, a court should consider “the  
24 justification for the delay, the extent of the plaintiff’s advance knowledge of the basis for the

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26 <sup>3</sup> Arizona courts rely on federal standing jurisprudence as “instructive.” *Bennett*, 206 Ariz. at  
525 ¶ 22.

1 challenge, and whether the plaintiff exercised diligence[.]” *Arizona Libertarian Party v. Reagan*,  
2 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). Plaintiff has known for nearly a  
3 decade that Arizona’s hand count audit procedures allow sampling from voting centers, yet  
4 Plaintiff failed to challenge these procedures every step of the way.

5 First, as detailed above, the Legislature authorized voting centers when it amended A.R.S.  
6 § 16-411 in **2011**. In the same bill, it remained silent on the hand count procedure for counties  
7 that use voting centers, and instead authorized the Secretary to adopt hand count procedures in  
8 the EPM. A.R.S. § 16-602(B). Plaintiff did not challenge that grant of authority in 2011 or in the  
9 subsequent nine years.

10 Second, when Secretary Bennett adopted the **2012 and 2014** EPM allowing counties to  
11 sample from “vote centers” for the hand count audit, Plaintiff did not challenge the procedure.

12 Third, when the Secretary adopted the current version of the EPM in **December 2019** that  
13 authorizes counties to select a hand count sampling from voting centers, Plaintiff again did not  
14 challenge this procedure.

15 Fourth, when Arizona held a Presidential Preference Election in **March 2020 and a**  
16 **Primary Election in August 2020**, Maricopa County conducted hand count audits using only  
17 voting centers, as authorized by the EPM. Plaintiff did not challenge the hand count procedure  
18 before, during, or after either of those elections.

19 Finally, as the Maricopa County Defendants explained in their motion to dismiss [at 8-9],  
20 Plaintiff did not challenge the hand count procedure for the 2020 General Election until after  
21 Maricopa County had already completed – and Plaintiff participated in – the hand count audit.  
22 If Plaintiff wanted to challenge a nearly decade-old hand count procedure in this election, the  
23 time to raise such a challenge was before the hand count was completed. *Cf. Sherman v. City of*  
24 *Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002) (“[C]ourts should review alleged violations  
25 of election procedure prior to the actual election.”); *Tilson v. Mofford*, 153 Ariz. 468, 471, 737

1 P.2d 1367, 1370 (1987) (“[P]rocedural violations in the elective process itself must be reviewed  
2 by the court prior to the actual election[.]”).

3 **2. Plaintiff’s unreasonable delay causes prejudice.**

4 By waiting to challenge the hand count procedure until after all votes have been counted  
5 and the hand count audit is already complete, Plaintiff’s claim causes significant prejudice.  
6 Plaintiff’s requested relief is nearly impossible, if not entirely impossible, because Maricopa  
7 County only used voting centers – not precincts – for the 2020 General Election. Even if it were  
8 possible to somehow go back and identify and sort voted ballots by precinct, that would be an  
9 extremely long, tedious, and costly process.

10 Moreover, any delay caused by requiring a new hand count audit would interfere with  
11 Maricopa County’s ability to complete the canvass by the statutory deadline, which would have  
12 cascading harmful effects. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998) (“In election  
13 matters, time is of the essence” because disputes “must be initiated and resolved” without  
14 interfering with important election deadlines).

15 Under A.R.S. § 16-642(A), the Maricopa County Board of Supervisors must approve its  
16 canvass on or before **Monday, November 23, 2020**. See *Hunt v. Campbell*, 19 Ariz. 254, 279  
17 (1917) (describing a board of supervisors’ duty to canvass an election). The Board’s timely  
18 completion of the canvass is critical, as the Secretary must, “[o]n the fourth Monday following  
19 a general election . . . canvass all offices for which the nominees filed nominating petitions and  
20 papers with the secretary of state.” A.R.S. § 16-648(A). This year, that deadline is November  
21 30, 2020, and the Secretary has already secured an appointment with the Governor, the Attorney  
22 General, and the Chief Justice to complete the canvass on that date. The overlay of a presidential  
23 election also means the United States Constitution (Article II, § 1 and the Twelfth Amendment)  
24 and the Electoral Count Act, 3 U.S.C. § 15, impose additional deadlines and requirements on the  
25 Secretary. In short, Plaintiffs’ delay in filing suit prejudices the Secretary, the County, and  
26 Arizona voters who deserve finality. *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (finding

1 claims barred by laches and considering fairness to the parties, the court, “election officials, and  
2 the voters of Arizona”).

3 Beyond that, “[t]he real prejudice caused by delay in election cases is to the quality of  
4 decision making in matters of great public importance,” and “[t]he effects of such delay extend  
5 far beyond the interests of the parties. Waiting until the last minute to file an election challenge  
6 ‘places the court in a position of having to steamroll through the delicate legal issues in order to  
7 meet the [applicable] deadline[s].’” *Id.* (citation omitted). Late filings, such as Plaintiff’s,  
8 “deprive judges of the ability to fairly and reasonably process and consider the issues . . . and  
9 rush appellate review, leaving little time for reflection and wise decision making.” *Id.* (citation  
10 omitted).

11 In sum, Plaintiff’s nine-year delay in challenging the hand count procedure prejudices the  
12 Court, Maricopa County election officials, the Secretary, and above all else, Arizona voters.  
13 Laches thus precludes Plaintiff’s claim.

14 **D. Plaintiff’s Complaint Suffers From Other Significant Procedural Defects.**

15 Plaintiff’s Complaint also fails to request necessary relief. For one, Plaintiff’s request for  
16 mandamus relief against the County Defendants essentially asks the Court to ignore the EPM.  
17 The Complaint recognizes [¶ 13] that the EPM authorizes Maricopa County’s hand count  
18 procedure, yet Plaintiff failed to request injunctive or declaratory relief invalidating the relevant  
19 provisions in the EPM. By not challenging the legality of this provision of the EPM, Plaintiff  
20 seeks an impossible remedy in the form of special action relief requiring the County to violate a  
21 binding provision of Arizona law. But of course, there is no non-discretionary duty to violate the  
22 law, and Plaintiff’s request for mandamus must fail for this additional and foundational reason.  
23 *See Ariz. R. P. Spec. Act. 3(a)* (special action relief is appropriate when an officer “has failed to  
24 . . . to perform a duty required by law as to which he has no discretion”); *Arizona Bd. of Regents*  
25 *v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm’r*, 160 Ariz. 150, 155 (App.  
26 1989) (“A complaint for special action is the proper suit to file when a party is raising the

1 question of whether a defendant is failing to perform a duty required by law”). Even if Plaintiff  
2 requested this relief, however, it would fail for the reasons detailed above.

3 Plaintiff also seeks to delay the official canvass while Maricopa County re-does the hand  
4 count audit, yet it failed to request injunctive relief postponing the canvass.<sup>4</sup> But even if Plaintiff  
5 had requested this injunctive relief, such a request would fail. Contrary to Plaintiff’s blatant  
6 misrepresentation of the law in open court today, A.R.S. § 16-642 **does not** permit an extension  
7 of the statutory canvass deadline under these circumstances. The plain terms of A.R.S. § 16-  
8 642(C) set forth only a single, narrow exception to a timely canvass, permitting an extension  
9 where not all of the voting locations have returned results. Nowhere does A.R.S. § 16-642  
10 mention **any** other reason to extend the canvass deadline. This “calls for application of the canon  
11 of statutory interpretation *expressio unius est exclusio alterius* (‘[T]he expression of one thing is  
12 the exclusion of another.’).” *Jennings v. Woods*, 194 Ariz. 314, 330 (1999). Because the Arizona  
13 legislature provided only one circumstance where the county canvass may be postponed, no such  
14 other circumstances may be read into the statute. For the same reason, if the legislature had  
15 intended to allow for the canvass to be delayed by court order, it would’ve said so—as it did  
16 elsewhere in Title 16. *See, e.g.*, A.R.S. § 16-650 (providing that the Secretary of State “shall,  
17 *unless enjoined from doing so by an order of court*, deliver” a certificate of election to each  
18 person elected (emphasis added)); A.R.S. § 16-624 (irregular ballots may only be examined after  
19 the election “upon an order of court”).

20 The Arizona Supreme Court’s seminal decision in *Hunt v. Campbell* reinforces this  
21 conclusion. As *Hunt* explained, the sole scenario in which the county canvass may be postponed  
22 is when not all of the returns have been received; in that case, the canvass is automatically

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23 \_\_\_\_\_  
24 <sup>4</sup> Plaintiff’s counsel claimed at the November 16 hearing that this was the first he learned of the  
25 Maricopa County Board of Supervisors’ plan to complete the canvass this week, but the canvass  
26 deadline is not new. It is set by statute, so Plaintiff had notice that the county must complete the  
canvass by no later than November 23, and it could have done so as early as November 9. *See*  
A.R.S. § 16-642.



1 postponed until either all of the returns have come in or the canvass has been postponed six days.  
2 *See* 19 Ariz. 254, 278–79 (1917). But if the returns from all voting locations *have* been received  
3 and the Board of Supervisors nonetheless fails to canvass by the deadline, then “mandamus  
4 would issue to compel it to do so.” *Id.* at 279. Here, there is no claim that any voting location  
5 has yet to return results. Accordingly, the plain terms of A.R.S. § 16-642 require the canvass to  
6 be completed by November 23, 2020. Plaintiff has no right of action to delay the canvass.

7 In short, Plaintiff’s Complaint is moot because Maricopa County will complete the  
8 canvass in a matter of days. Plaintiff has not sought injunctive relief nor could it as a matter of  
9 law. Moreover, Plaintiff cannot overcome its heavy burden of establishing every other element  
10 necessary to obtain injunctive relief. *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). If  
11 Plaintiff files an amended complaint seeking an injunction, the Secretary will respond by  
12 tomorrow, November 17, as directed by the Court during today’s show cause hearing.

13 **E. Plaintiff’s Requested Relief Would Violate Equal Protection.**

14 Finally, Plaintiff’s requested relief would result in differential treatment of ballots in  
15 violation of Equal Protection principles under the Arizona and United States Constitutions. U.S.  
16 Const. Ariz. Const. art. II, § 13; U.S. Const. amend. XIV, § 1. While there may be various reasons  
17 to have different election procedures among Arizona counties in some cases, there is no rational  
18 reason to grant Plaintiff’s requested relief only in Maricopa County. Multiple Arizona counties  
19 used a voting center model for the 2020 General Election, including Cochise, La Paz, Maricopa,  
20 Santa Cruz, Yavapai, and Yuma Counties, and many others used a hybrid model. In all of those  
21 counties, hand count audits were conducted using the same procedure that Maricopa County  
22 used, which is required by the EPM. Requiring a precinct-based hand count for only one of the  
23 multiple counties that use a voting center model would result in an “arbitrary and disparate”  
24 treatment of ballots. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

1 **III. Conclusion**

2 This case is about delay—not the adjudication of good faith claims. Plaintiff’s grossly  
3 deficient and untimely Complaint cannot stand. The Secretary requests that the Court dismiss  
4 Plaintiff’s Complaint with prejudice. The Secretary also requests an award of her attorneys’ fees  
5 and costs under A.R.S. §§ 12-341, 12-349, 12-2030, and any other applicable law.

6 RESPECTFULLY SUBMITTED this 16th day of November, 2020.

7 **COPPERSMITH BROCKELMAN PLC**

8 By /s/ Roopali H. Desai

9 Roopali H. Desai  
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12 ORIGINAL efiled and served via email  
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/s/ Verna Colwell