Exhibit A

ARIZONA SUPREME COURT

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

STATE OF ARIZONA'S RESPONSE TO APPLICATION FOR ISSUANCE OF WRIT UNDER EXERCISE OF ORIGINAL JURISDICTION

AND

BRIEF AMICUS CURIAE OF ARIZONA ATTORNEY GENERAL MARK BRNOVICH

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

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

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

Pursuant to the Court's Order Directing Service, and Fixing Time For Response and Reply ("Order"), the State of Arizona ("State") hereby responds to Petitioners' Application for Issuance of Writ Under Exercise of Original Jurisdiction ("Application"). Pursuant to A.R.S. § 12-1841 and the Court's Order, Arizona Attorney General Mark Brnovich ("AG") also hereby responds to the Application.

INTRODUCTION

The Court should accept jurisdiction to decide important issues of pure law relating to the Election Procedures Manual ("EPM") and the proper interpretation of A.R.S. § 16-452.

Fifty years ago, the Legislature created the EPM "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. After the EPM was not promulgated for two election cycles, the Legislature in 2019 amended the EPM statute to require the Secretary of State ("Secretary") to provide a draft EPM to the AG and Governor by October 1 of every odd-numbered year. *See id.* § 16-452(B). The Legislature, thereby, clearly expressed its intent that a new version of the EPM take effect every two years.

Since that amendment, this Court has twice provided new guidance on the proper scope of the EPM. First, because § 16-452 does not mention candidate

nominating petitions, the Court held that the 2019 EPM's procedures relating to that topic were not promulgated under § 16-452 and do not have the force of law. *See McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). The Court subsequently made clear that "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach v. Hobbs*, 250 Ariz. 572, __ ¶21 (2021).

Despite this clear guidance, on October 1, 2021, the Secretary provided a draft EPM to the AG and Governor chock full of provisions beyond the scope of her authority in § 16-452 or inconsistent with the purpose of Arizona election laws. For example, the Secretary included procedures relating to candidate nominating petitions that this Court had just held in *McKenna* are beyond the scope of the EPM. Following an exchange of correspondence with the AG, the Secretary wrote Arizona's county recorders to report that no 2021 EPM would be forthcoming for the 2022 election cycle and that they should instead rely on the "now not fully up-to-date" 2019 EPM. Contrary to that instruction, because § 16-452 makes clear that a new EPM is required every two years and the AG did not approve the 2019 EPM for use during the 2022 election cycle, there currently is no valid EPM in place.

The Court, therefore, cannot decide the important legal issues Petitioners raise, or grant the relief they request, without deciding two predicate legal issues of statewide importance. Specifically, the Court cannot decide what topics should and

should not be included in the 2019 EPM without first deciding whether the 2019 EPM remains valid under A.R.S. § 16-452. It is the State and the AG's position that the 2019 EPM is no longer valid. The Court also cannot grant the relief Petitioners request—ordering the Secretary to include or exclude certain subjects in the EPM—without first ordering her, as statutorily mandated in § 16-452(B), to provide a valid draft EPM to the AG and Governor for analysis and approval. Thus, the Court should accept jurisdiction and resolve those two predicate issues, and should do so now prior to the start of the 2022 election cycle. The Court should hold that the 2019 EPM is no longer valid and that the Secretary is required to provide a valid draft EPM to the AG and Governor by a date certain in the near future, at which time Petitioners' concerns could be addressed in the 2022 EPM.

Finally, while Petitioners raise important issues about the constitutionality of the early-voting system in Arizona, the Court does not have original jurisdiction over the State. Thus, the Court should deny jurisdiction over that issue without addressing the merits of the claim.

LEGAL ARGUMENT

Petitioners seek various writs related to three primary issues: (1) whether the Secretary should be required to promulgate her existing signature guidance through the EPM; (2) whether the Secretary is authorized to create ballot drop boxes through the EPM; and (3) whether the State's no-excuse early voting laws are inconsistent

with the Arizona Constitution. The first two questions are statutory in nature and the third is constitutional. As to the third issue, the Application appears to seek relief only against the State. The State and AG, therefore, respond to the first two statutory issues, but only the State responds to the constitutional issues.

I. The Court Should Accept Jurisdiction And Order The Secretary To Provide The AG And Governor With A Valid Draft EPM Because The 2019 EPM Is No Longer Valid.

A. The Court Should First Decide Whether The 2019 EPM Is Legally Effective And Order The Secretary To Comply With § 16-452.

Petitioners raise several issues of statewide importance related to the EPM. As explained further below, however, the Secretary failed to provide the AG and Governor, by October 1, 2021, with a draft EPM consistent with § 16-452 and this Court's holdings in *Leach* and *McKenna*. Consequently, before the Court could reach the important issues Petitioners raise, or grant the relief they request, the Court must resolve predicate legal issues regarding the continuing validity (or lack thereof) of the 2019 EPM and whether the Secretary must comply with her mandatory duty under § 16-452 to provide a valid draft EPM to the AG and Governor.

Neither of the important issues Petitioners raise can be answered without first determining whether the 2019 EPM remains valid. If the Court orders the Secretary to include her signature verification guidance in the 2019 EPM (more on this below), as Petitioners request, and yet the 2019 EPM is not legally binding, then Petitioners requested relief will be of no value. Similarly, if the 2019 EPM is not legally

binding, then the Secretary's allowance of ballot drop boxes therein is now irrelevant. If Arizona law does not permit ballot drop boxes, as Petitioners argue, then county recorders will not be permitted to utilize them during the 2022 elections.

Thus, the Court cannot reach Petitioners' legal issues without first deciding whether the 2019 EPM remains legally valid. The Court should accept jurisdiction to decide that pure legal issue, which is a matter of statewide importance. The parties to this action, and scores of election officials throughout the State, require clarity on whether the 2019 EPM remains valid for purposes of the 2022 election cycle, which will begin in earnest in a matter of months.

The Court also cannot grant the relief requested to modify the EPM without first requiring the Secretary to comply with § 16-452. The Court should, therefore, order the Secretary to comply with her mandatory statutory duty to provide the AG and Governor with a valid draft EPM by a date certain to allow sufficient time for review and approval before the 2022 election cycle begins.

B. There Currently Is No Valid EPM.

1. The Secretary Failed To Provide A Valid Draft EPM In 2021.

Arizona law provides that the Secretary, every two years, "shall 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). The Secretary discharges that statutory duty through the EPM.

The Secretary does not enjoy unlimited discretion in determining what provisions to include in the EPM. Rather, this Court has recently (and correctly) made clear that "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach v. Hobbs*, 250 Ariz. 572, __ ¶21 (2021); *see also McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021) ("Because the statute that authorizes the EPM does not authorize rulemaking pertaining to candidate nomination petitions, those portions of the EPM relied upon . . . to invalidate the signatures without a complete date were not adopted 'pursuant to' § 16-452.").

Moreover, the Secretary is subject to oversight by other state officials—both the AG and the Governor must approve the draft EPM before it enjoys the force of law. A.R.S. § 16-452(B). To ensure that the EPM is timely promulgated, Arizona law requires the Secretary to provide a draft EPM to the AG and Governor by October 1 of each odd-numbered year. *Id.*

The AG is not statutorily authorized to rubber stamp the EPM without regard to what provisions the Secretary includes. Instead, "the authority of the [AG] must be found in statute." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, __ ¶8 (2020). And no Arizona statute, including § 16-452, allows the AG to approve

an EPM provision exceeding the scope of its statutory authorization or contravening an election statute's purpose. Put differently, the AG has no statutory authority to approve policies not adopted "pursuant to § 16-452" and which are mere guidance. These limitations—scope and approval—on the Secretary's authority are particularly vital in light of the fact that "[a] person who violates any rule adopted pursuant to [§ 16-452] is guilty of a class 2 misdemeanor." A.R.S. § 16-452(C).

At the end of 2021—after the Court's guidance in *Leach* and *McKenna*—the Secretary provided a draft EPM to the AG and Governor. Unfortunately, many of the draft provisions either exceeded the scope of the Secretary's authority or were inconsistent with the purpose of one or more election statutes. The following are just some of the more egregious examples and are not meant to be exhaustive.

The Secretary included seventeen pages of rules and procedures relating to candidate nominating procedures. *See* APP. Vol. II at 131-48. The Secretary included those provisions despite this Court's clear conclusion in *McKenna* that "the statute that authorizes the EPM does not authorize rulemaking pertaining to candidate nomination petitions" and that such provisions are "not adopted 'pursuant to' § 16-452." 250 Ariz. at 473 ¶20. Because candidate nominating provisions cannot be adopted pursuant to § 16-452, they should not again have been included in the EPM and the AG could not approve them pursuant to § 16-452.

The Secretary also included over forty-five pages of rules and procedures relating to voter registration. *See* APP. Vol. II at 12-56. Voter registration is not one of the topics upon which the Secretary is empowered to promulgate rules under § 16-452, which mentions instead "early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." The Legislature granted statutory authority for voter registration solely to county recorders. *See, e.g.*, A.R.S. §§ 16-131, 16-163(A). Because voter registration provisions cannot be adopted pursuant to § 16-452, the Secretary should not have again included them and the AG could not approve them pursuant to § 16-452.

One final example. For years, Arizona has, at least in part, followed a precinct system for in-person voting. Those who vote in person in a county using the precinct system must vote in their assigned precinct. A.R.S. § 16-122. The Democratic National Committee ("DNC") challenged Arizona's out-of-precinct rule on the grounds that it violated § 2 of the Voting Rights Act. The AG defended the law and the Court rejected DNC's challenge, explaining that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting.'" *Brnovich v. DNC*, 141 S. Ct. 2321, 2344 (2021). The Secretary's draft 2021 EPM, however, inserted provisions allowing voters who appear at the wrong precinct to nonetheless cast a provisional ballot for certain races, which is in direct conflict with A.R.S. §§ 16-122 and -584 (not to mention *Brnovich*). *See* APP. Vol.

II at 231 (indicating that "ballots cast in the wrong precinct must also be manually duplicated in order to be tabulated"); *see also id*. at 232 ("for out-of-precinct ballots, only the voter's selections for races and ballot measures for which the voter is eligible to vote shall be duplicated onto the correct ballot style").[1]

Again, these are just a few examples (of many) of invalid provisions included in the Secretary's draft EPM. Faced with a draft containing a multitude of invalid provisions, the AG could not approve the EPM. Instead, the AG redlined those provisions he concluded were beyond the Secretary's statutory authority or inconsistent with an election statute and indicated that he would approve as modified. *See generally* App. Vol. II. The Secretary refused to remove all of the offending provisions.[2] After exchanging correspondence about the draft, the Secretary simply gave up, writing county recorders that no 2021 EPM would be forthcoming, but reassuring them that "it was our hard work during 2019 that gave us an EPM that remains relevant, though now not fully up-to-date." *See* APP. Vol. I at 7-23; APP. Vol. I at 25.

2. The 2019 EPM Was Not Approved For The 2022 Elections And Is No Longer Valid.

[1] Again, these three examples represent just a few of the problematic provisions. On December 9, 2022, the AG sent the Secretary a redline EPM showing the provisions that were inconsistent with Leach and McKenna. *See* APP. Vol. II; *see also* APP. Vol. I at 10 (cover letter transmitting the redlined EPM).

[2] The Secretary offered only to remove certain of the offending provisions. *See* APP. Vol. I at 12.

Petitioners correctly recognize that there is no 2021 EPM, instead asking the Court to order the Secretary to add or remove certain provisions from the 2019 EPM. But the 2019 EPM is no longer legally binding or valid. Thus, while Petitioners raise important issues about the 2019 EPM, ordering the Secretary to include or exclude provisions from the 2019 EPM about signature verification or ballot drop boxes will not change the status quo—that county election officials are not currently bound to follow any EPM (obviously, they can voluntarily follow EPM provisions so long as they do not violate state statutes in the process).

In 1979, the Legislature first charged the secretary of state with promulgating an election procedures manual. Back then, A.R.S. § 16-452(B) provided the following: "Such rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election. Prior to its issuance, the manual shall be approved by the governor and the attorney general." For the next forty years, various secretaries of state dutifully discharged their duty to promulgate a manual. Things went off the tracks beginning in 2016 and, for reasons not relevant here, no manual was promulgated during the 2016 and 2018 election cycles. The Legislature stepped in during 2019, enacting new statutory language referenced above *requiring* (1) the EPM "to be issued not later than December 31 of each odd-numbered year" and (2) the Secretary to "submit the

manual to the governor and the attorney general not later than October 1 of the year before each general election." A.R.S. § 16-452(B).

There is nothing in the statutory language supporting that an old EPM remains legally binding or valid once the deadline for promulgation of a new EPM passes. Construing the statute to imply such a result would render the Legislature's 2019 revisions superfluous and fail to take into consideration this Court's intervening precedent in *Leach* and *McKenna*, which now provide clear direction on what can and cannot be included in the EPM. In fact, such a construction would be inconsistent with the purpose of the Legislature's revision to § 16-452, which was intended to avoid a situation like in 2016 and 2018 where no new manual was published. Any motivation to promulgate a lawful manual decreases significantly if a secretary can simply instruct county election officials to follow an old version she prefers more. That reality was borne out here when the Secretary failed to provide the AG and Governor with a valid draft and instead signaled to county recorders that they should continue to follow the 2019 EPM. APP. Vol. I at 25. EPMs also become stale fairly quickly—the Secretary acknowledged that the 2019 EPM is no longer "fully up-to-date"—and, therefore, should not be relied upon for more than one election cycle. *See id.*

To be clear, the AG has not approved the 2019 EPM for use during the 2022 election cycle and the Secretary has failed to comply with her statutory directive to

present the AG and Governor with a lawful EPM for review and approval. Consequently, there will be no EPM for the 2022 elections as required by law unless and until the Secretary complies with her obligations under A.R.S. § 16-452. The Court should order her to do so.

The lack of a legally-binding, valid EPM could have a significantly deleterious impact on the 2022 elections. After all, the stated goal of the manual required under § 16-452 is "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" for voting in, and tabulating the results of, elections. That goal was thwarted when the Secretary failed to comply with § 16-452 by drafting an EPM that disregarded this Court's guidance on the lawfully permissible contents of the EPM.

Based on the foregoing, the AG respectfully requests that the Court accept jurisdiction to determine whether the 2019 EPM remains valid. The Court should hold that that the 2019 EPM was not approved for the 2022 election cycle and is no longer valid. The Court should also order the Secretary to comply with § 16-452 by promptly providing a valid draft EPM to the AG and Governor by a date certain.

II. The AG Agrees That Signature Verification Is An Issue Of Statewide Importance, But Does Not Believe That The Secretary's Guidance Should Be Fully Included In The EPM For Several Reasons.

A. Arizona's Early Voting System Requires Robust Signature Verification.

Arizona provides a number of options for voters to cast ballots, and has taken multiple steps to make voting less burdensome. Arizona, for example, allows voters to register online, allows voters to be included on a list to automatically receive a ballot for every election, and provides multiple options for returning or submitting a ballot.

Arizona has permitted some form of absentee balloting since 1918, beginning with World War I soldiers. Since the 1992 election cycle, Arizona has allowed no-excuse access to mail-in balloting. *See* 1991 Ariz. Sess. Laws, ch. 51, § 1. With absentee voting, voters may elect to receive a ballot and return envelope (return postage pre-paid) by mail. To cast the ballot, the voter simply makes her selections on the ballot, seals the envelope, and signs the outside of the return envelope, which doubles as a ballot affidavit. A.R.S. §§ 16-547, 16-548. The affiant declares, under penalty of perjury, that he or she "voted the enclosed ballot." A.R.S. § 16-547(A). Arizona's voters may vote by mail during the last four weeks of an election. A.R.S. §§ 16-541(A), 16-542(C)–(D). Both the ballot and the signed affidavit must be delivered to the office of the county recorder no later than 7:00 p.m. on election day. A.R.S. § 16-548(A).

A ballot is not complete, and cannot be counted, unless and until it includes a signature on the ballot affidavit. Once received, county election officials compare the signature on the affidavit with the signature in the voter's registration record.

A.R.S. § 16-550(A). If county election officials determine that the signature matches that on file, the ballot is counted. If, on the other hand, county election officials determine that the signature on the ballot affidavit does not match that on file, then the ballot cannot be counted unless the voter verifies the signature. *Id.*

Requiring a match between the signature on the ballot affidavit and the signature on file with the State is the primary, if not only, and certainly most important election integrity measure when it comes to absentee ballots. The Ninth Circuit acknowledged, in response to a constitutional challenge to the deadline for submitting signed ballot affidavits, that "Arizona requires early voters to return their ballots along with a signed ballot affidavit in order to guard against voter fraud." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020). County election officials, therefore, must be extremely diligent in ensuring that early-ballot signatures match those on file with the State. Regardless of the sheer quantity of early ballots received, the administrative burdens imposed by verifying each one, or for other reasons that could be construed as nefarious or partisan, county election officials and their staffs cannot violate their statutory duty to match *every* signature.

B. Signature Verification Is Vulnerable To Non- or Mal-feasance.

Voting by mail is widespread in Arizona: 79% of Arizona voters cast mail-in ballots in 2018 and that number reportedly increased to 89% for the 2020 General Election. With over 3.4 million ballots cast in the General Election, Arizona

elections officials were required to match signatures on over 3 million ballots during a five to six-week period in 2020. Unfortunately, this large number of early mail-in ballots combined with the administrative burden of confirming every one of the signatures submitted in a very short period of time, when not administered diligently, could result in election officials approving ballots that should not otherwise be approved without further verification.

Statistics for Maricopa County, for example, over the last three election cycles reflect that the number of ballots rejected because of missing and mismatched signatures is trending down. *See* APP. Vol. I at 27. During the 2016 General Election, when Helen Purcell was county recorder, Maricopa County received 1,249,932 mail-in ballots. *Id.* Of that amount, Maricopa County rejected 2,209 ballots because of missing signatures and 1,451 ballots because of mismatched signatures. *Id.*

Just two years later, during the 2018 General Election, after Adrian Fontes became county recorder, Maricopa County received 1,184,791 mail-in ballots, just 65,141 less than in 2016. *Id.* Yet the number of ballots rejected in 2018 because of missing signatures (only 1,856) and mismatched signatures (only 307) declined significantly—the number of missing signature ballots decreased by 353 and the mismatched signature ballots decreased by 1,144 (a 79% decrease). *Id.* By

comparison, Pima County received 302,770 ballots (882,081 less than Maricopa) and rejected 488 (135 more than Maricopa) because of mismatched signatures. *Id.*

During the 2020 General Election, Maricopa County saw a significant increase in the number of mail-in ballots, receiving 1,908,067 mail-in ballots (an increase of 723,276 mail-in ballots). *Id.* Yet the number of ballots rejected because of missing signatures continued its dramatic decrease (to only 1,455 ballots) and the number of ballots rejected because of mismatched signatures increased only slightly (to 587 ballots).[3] *Id.* To be sure, Maricopa County has explained that the number of ballots rejected for mismatched signatures during the 2020 General Election was impacted by the Legislature's creation of a 5-day post-election cure period for mismatched signatures. But the existence of that cure period in 2020 does not explain the dramatic decrease—on an absolute or percentage basis—of ballots with missing signatures from 2016 to 2020[4] or the dramatic decrease in ballots with mismatched signatures from 2016 to 2018. One possible explanation for these trends, and the AG acknowledges there could be others, is that Maricopa County became less diligent with signature review beginning in 2018.[5]

---

[3] Pima County by contrast rejected nearly the same number of ballots based on mismatched signatures (572) despite receiving 1,479,386 less ballots. APP. Vol. I at 27.

[4] Ballots with missing signatures were required to be cured prior to close of polls on election day.

[5] The AG has asked Maricopa County to provide information about its signature verification policies and procedures. *See* APP. Vol. I at 3-5.

Certain data stemming from litigation following the 2020 General Election is also instructive. In November 2020, certain individuals filed an election challenge under A.R.S. § 16-672. In connection with that challenge, the trial court ordered that the parties' counsel and retained forensic experts could review 100 randomly selected ballot affidavits and conduct a signature comparison of ballots where a signature match had occurred. *Ward v. Jackson*, No. CV2020-015285, 2020 WL 13032880, *3 (Maricopa Cnty. Super. Ct. Dec. 4, 2020). Two forensic document examiners testified during an evidentiary hearing, one for the plaintiffs and one for the defendants. The plaintiffs' expert testified that of the 100 ballots reviewed, 6 signatures were "'inconclusive,' meaning she could not testify that the signature on the envelope/affidavit matched the signature on file." *Id.* at *4. The forensic expert for Defendants, who sought to defeat the election challenge, "testified that 11 of the 100 envelopes were inconclusive, mostly because there were insufficient specimens to which to compare them."[6] *Id.* Neither of the forensic experts found any sign of forgery. *Id.*

Although the trial court rejected the election challenge and this Court affirmed[7], that does not render the forensic experts' findings irrelevant for purposes

[6] There was no indication in the trial court's ruling rejecting the election challenge whether there was overlap between the 6 affidavits that Plaintiffs' expert found inconclusive and the 11 affidavits that Defendants' expert found inconclusive.
[7] *Ward v. Jackson*, No. CV-20-0343, 2020 WL 8617817, *3 (Ariz. Dec. 8, 2020).

of analyzing whether current election procedures can be improved. And the fact that two forensic experts could differ so widely on whether particular signatures matches were inconclusive (one thought 6 signatures were inconclusive, the other 11) and that defendants' own expert concluded, less than one month after the General Election, that 11% of signatures sampled were inconclusive, suggests, as Petitioners argue, that improvement is needed.

C. Portions Of The Secretary's "Signature Verification Guide" Are Inconsistent With Arizona Election Law.

Additional ballot integrity measures for mail-in ballots could come in at least two forms—(1) enhanced signature verification procedures or methods or (2) additional ballot integrity measures for mail-in ballots. Petitioners request that the Court order the Secretary to include, in the 2019 EPM, signature verification procedures the Secretary has entitled, "Signature Verification Guide" (the "Guide"). APP. Vol. I at 29-48. Again, the AG has not, and will not, approve the 2019 EPM for use in future elections. While Petitioners may be correct that additional signature verification guidance should be included in a future EPM, the AG would not approve wholesale inclusion of the Guide in the EPM.

The Secretary's Guide is flawed in several respects. By way of example, it describes both broad characteristics of signatures (e.g., type, speed, spacing, size, slant, etc.) and local characteristics of signatures (e.g., internal spacing, letter size, curves, pen lifts, etc.). *Id.* at 31-32. The Guide suggests that signature review can

end based only on a comparison of broad characteristics without any consideration of local characteristics, or vice versa. *Id.* The Guide emphasizes that "[o]nly a **combination** of characteristic differences between signatures should trigger a flag for a second check[.]" *Id.* at 31. Even when there are multiple characteristic differences between a ballot affidavit signature and a signature on file, the Guide instructs that a signature can be accepted if the reviewer "can reasonably explain the differences." *Id.* This is much too amorphous to ensure the "maximum degree of correctness, impartiality, uniformity and efficiency" in election administration. A.R.S. § 16-452(A).

Most concerning, however, is a section of the Guide instructing county election officials to accept "electronic signatures that appear to be cut and paste" so long as the cut-and-paste signature matches based on the amorphous review process described above. APP. Vol. I at 42. The Guide explains that "[i]t is now possible for voters to cut and paste a handwritten signature that has been scanned electronically onto a ballot affidavit that they then return electronically." *Id.* The Guide states that "these signatures should be compared to the voter's signature found in the voter registration database as you would any other signature." *Id.* Allowing voters (or others) to skirt the signature verification process by utilizing electronically-scanned and cut-and-paste signatures could result in election fraud or unreliable results. At the very least, there is no authority under Arizona law for

accepting such signatures and doing so is inconsistent with the entire purpose of the signature requirement in A.R.S. § 16-550(A). Thus, the AG would not approve of such a procedure being included in any EPM. *See Leach*, 250 Ariz. at __ ¶21.

The State and AG do not, however, object to additional signature verification guidance being included in the EPM, provided that such guidance complies with the Court's statements in *Leach* about the scope of the EPM. The only effective way Petitioners requested relief can be granted, however, is by ordering the Secretary to provide the AG and Governor with a valid draft EPM, such that they can then analyze and approve any new signature guidance for the 2022 election cycle.

III. There Is No Valid EPM Allowing Ballot Drop Boxes And, In Any Event, Ballot Drop Boxes Must Be Properly Staffed.

Petitioners request a writ requiring the Secretary to remove certain provisions relating to ballot drop boxes from the EPM. Petitioners contend that Arizona law does not otherwise permit the use of ballot drop boxes. As explained, the Secretary failed to provide the AG and Governor with a valid draft EPM in 2021 and the AG has not approved the 2019 EPM for use during the 2022 election cycle. Thus, it is the State and the AG's position that the 2019 EPM is no longer valid, and election officials cannot rely upon any provisions therein to implement ballot drop boxes.

If ballot drop boxes are permitted, Arizona law requires that they be properly staffed. Specifically, A.R.S. § 16-1005(E) provides that "[a] person or entity that . . . is found to be serving as a ballot drop off site, *other than those established and*

staffed by election officials, is guilty of a class 5 felony." (emphasis added). Thus, under Arizona law, any ballot drop-off site must be established and staffed by election officials. To give the phrase "staffed" meaning separate from "established," election officials must do more than simply set up a ballot drop box and leave it for the duration of the early-voting period. Instead, ballot drop boxes must be monitored by an election official's staff. Such staffing must be sufficient "to secure the purity of elections" and in such a manner that "secrecy in voting shall be preserved." *See* Ariz. Const. art. VII §§ 1, 12. The Arizona Constitution and § 16-1005(E) require that ballot drop boxes, if permitted, be monitored at all times.

These issues demonstrate why the Court should accept jurisdiction to determine the validity of the 2019 EPM and to require the Secretary to provide a valid draft EPM to the AG and Governor. Such relief is necessary to provide election officials with clarity about allowable procedures, including with respect to ballot drop boxes, for the 2022 election cycle. And the AG, in connection with the EPM approval process could ensure that any EPM provisions relating to ballot drop boxes comply with the scope of § 16-452 and Arizona election law under the Court's new guidance in *Leach*.

IV. The Court Lacks Original Jurisdiction Over the State.

As the State understands the Application, Petitioners claim that the early-voting system in Arizona is inconsistent with certain provisions of the Arizona

Constitution is asserted only against the State. Such a claim is not properly asserted against the Secretary because she does not administer early voting in Arizona. Only the county recorders administer early voting. *See* A.R.S. §§ 16-541 to -550. As explained below, however, the Court lacks original jurisdiction over the State. While the Application raises important questions about the constitutionality of the early-voting system in Arizona, because the Court lacks original jurisdiction over the only party named in that claim, the State does not address the merits of Petitioners' constitutional claim.

A. The Court Has Limited Jurisdiction Over Original Special Actions.

This Court's subject matter jurisdiction is limited to that provided in the Arizona Constitution or by law. *See* A.R.S. § 12-102(A) ("The supreme court shall discharge the duties imposed and exercise the jurisdiction conferred by the constitution and by law."); *see also* Ariz. Const. art. VI, § 5 (setting forth this Court's jurisdiction). No provision of the Arizona Constitution or Arizona law grants the Court original jurisdiction over the State.

At common law, courts could issue various writs compelling state officials to take, or refrain from taking, action. Arizona's founders recognized the utility of these common law writs and granted Arizona courts the power to issue them. *See* Ariz. Const. art. VI, § 5(1) ("The supreme court shall have . . . [o]riginal jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other extraordinary

writs to state officers."); *id.* art. VI, § 18 ("The superior court or any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of a person held in actual custody within the county."). The Arizona Legislature later codified several of the writs. *See*, *e.g.*, A.R.S. § 12-2021 (writ of mandamus); A.R.S. § 12-2001 (writ of certiorari); A.R.S. § 12-2041 (writ of quo warranto).

But the technical and procedural aspects of the writs resulted in confusion, and so, in 1970, this Court streamlined the procedure for writs of mandamus, certiorari, and prohibition through creation of the special action rules. *See State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990) ("In 1970, this court adopted the Arizona Rules of Procedure for Special Actions to effect a procedural reorganization of the extraordinary writs of certiorari, mandamus, and prohibition."); Ariz. R. P. Spec. Act. 1 cmt. (a) ("The Rule is necessitated by the existing confusion as to the proper lines between these various writs, and by lack of a simple procedure which can be followed by all members of the bar and by the judiciary."). Thus, "[r]elief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule[.]" Ariz. R. P. Spec. Act. 1(a).

The creation of this new procedural mechanism, however, did not alter the nature or availability of the underlying writs or this Court's subject matter

jurisdiction. The Rules of Procedure for Special Actions make clear that "nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition." *Id.* This Court has further confirmed that the streamlined special action procedure did not expand this Court's original jurisdiction over the writs beyond that granted in Article VI, § 5(1) of the Arizona Constitution. *See Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 350 ¶11 (2012) ("Those procedural rules combine the old common law writs into a single form of action, but do not expand the constitutional scope of this Court's original jurisdiction.").

Thus, the Court's jurisdiction over Petitioners' action against the State hinges on whether that claim falls within any of the grants of jurisdiction in Article VI, § 5, including the narrow grant of original jurisdiction in § 5(1). Petitioners' action does not fall within any such grant.

B. The Arizona Constitution Does Not Grant The Court Original Jurisdiction Over The State.

Petitioners ask the Court to exercise original jurisdiction as to the State. The Arizona Constitution grants this Court original jurisdiction in only two situations. One involves claims and disputes among counties and is clearly inapplicable here. *See* Ariz. Const. art. VI, § 5(2). Thus, if the other provision does not apply, there is no jurisdiction over the State in this case.

The other original jurisdiction provision also does not apply. Article VI, § 5(1) grants the Court "[o]riginal jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other extraordinary writs to state officers." That provision thus grants the Court original jurisdiction to issue certain of the common law writs. But there is a very important limitation to that grant: this Court has only been granted original jurisdiction to issue such writs "*to state officers*," and not the State itself. *See Rios v. Symington*, 172 Ariz. 3, 5 (1992) ("This court has original jurisdiction over the issuance of extraordinary writs against state officers."); *see also Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶13 (2011) ("[*N*]*oscitur a sociis* . . . dictates that a statutory term is interpreted in context of the accompanying words.").

The State is not a "state officer." The former is a sovereign legal entity, formed with the consent of the people, and which is immune from suit without consent from its elected branches. *See* Ariz. Const. art. II, § 2; *Clouse v. State*, 199 Ariz. 196, 198 ¶8 (2001) ("The doctrine of sovereign immunity precludes bringing suit against the government without its consent."); *see also Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.") (quoting The Federalist No. 81 (Alexander Hamilton)); *cf. Garcia v. State*, 159 Ariz. 487, 488 (Ct. App. 1988) (the State is not a "person" under 42 U.S.C. § 1983). The latter is an actual person who

can be compelled by law to take action, or refrain from doing so, through one of the common law writs; requiring a "state officer" to take action has long been understood to be qualitatively different than requiring the State to do so. *Ingram v. Shumway*, 164 Ariz. 514, 516 (1990) ("[O]ur jurisdiction to hear this case is well founded in the constitutional provisions giving this court original jurisdiction to issue common law writs *to state officers*[.]" (emphasis added)); *see also Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006) (explaining that a writ of habeas corpus "being in the nature of an injunction against a state official, does not commence or constitute a suit against the State"); *Ex parte Young*, 209 U.S. 123, 167–68 (1908) (an action for issuance of an injunction against a state official acting without authority is not an action against the state). There would be no need for the extraordinary writs if parties could simply name the State directly.

This is why it has long been accepted that the proper use of the common law writ of mandamus—part of what Petitioners seek here—is to compel a *state officer* to act. *See, e.g.*, *Transp. Infrastructure Moving Arizona's Econ. v. Brewer*, 219 Ariz. 207, 213 ¶32 (2008) ("We have described mandamus as available only 'to require public officers to perform their official duties when they refuse to act.'") (quoting *Sears v. Hull*, 192 Ariz. 65, 68 ¶11 (1998)); *Bd. of Educ. of Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344 (1973) ("Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an

act which the law specifically imposes as a duty."); *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 ¶9 (Ct. App. 2007) ("Mandamus is a remedy used to compel a public officer to perform a duty required by law."). Neither Arizona law nor the Rules of Procedure for Special Actions expand the scope of mandamus beyond public officers. *See* A.R.S. § 12-2021 (mentioning relief against "any person, inferior tribunal, corporation or board"); Ariz. R. P. Spec. Act. 3(a) (special action seeking relief in the nature of mandamus asks "[w]hether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion"); Ariz. R. P. Spec. Act. 1(a) (special action rules do not expand the scope of the traditional writs).

Similarly, the writ of certiorari—the other part of what Petitioners seek—was only available to review the actions of inferior tribunals, boards, or officers exercising judicial or quasi-judicial functions. *See Miller v. Super. Ct.*, 88 Ariz. 349, 351 (1960) ("It is clear that there are two conditions precedent to the granting of a writ of certiorari: First, an inferior tribunal must exceed its jurisdiction; Second, there must be no appeal from the judgment or order entered."). Certiorari relief is only available "when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy." A.R.S. § 12-2001; Ariz. R. P. Spec. Act. 3(b) (special action seeking relief in the nature of certiorari or prohibition

asks "[w]hether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority"). There is no indication in the statute authorizing certiorari relief that such relief is available against the State. *See* A.R.S. § 12-2001.[8]

Indeed, writs of mandamus sought through special action have been brought directly in this Court almost exclusively against state officers or bodies seeking performance of a duty. *See, e.g*, *Indep. Redistricting Comm'n*, 229 Ariz. at 350 ¶10 (original special action by the Independent Redistricting Commission and one of its members against Governor Brewer, the Arizona Senate, and Senate President Pearce); *Brewer v. Burns*, 222 Ariz. 234, 236 ¶5 (2009) (original special action by Governor Brewer against the Arizona Legislature and some of its individual members); *Ingram*, 164 Ariz. at 516 (original special action by a registered voter against former Governor Mecham). There is no practice of bringing original special actions directly against the State, let alone of the Court exercising jurisdiction over such actions.[9]

---

[8] For the same reason, Petitioners' request for relief against the State under Rule of Special Action 3(c) fails. *See* Ariz. R. P. Spec. Act. 3 cmt. (b) (explaining that "This subsection and the following subsection (c) inherit the tradition of the writs of certiorari and prohibition.").

[9] The only such action the State could locate was *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119 (2013). In that case, however, the State appeared on behalf of a state body, the Commission on Appellate Court Appointments, and this Court went out of its way to point out that the State had

This all explains why the Rules of Procedure for Special Actions do not contemplate that the State should be named as a party in this, or any, special action. Rule 2 provides that "[t]he complaint shall join as a defendant the body, officer, or person against whom relief is sought." Ariz. R. P. Spec. Act. 2(a)(1). The State is a not a "body, tribunal, or officer" against which mandamus or certiorari relief can be granted.

In sum, the Court's original jurisdiction to issue writs to state officers does not include the State. The Court should, therefore, decline to exercise jurisdiction over the State.

CONCLUSION

The State and AG respectfully request that the Court accept jurisdiction to decide the pure legal issue—predicate to the important statutory issues Petitioners raise—whether the 2019 EPM remains valid for the 2022 elections. The Court should order the Secretary to comply with her mandatory statutory duty under § 16-452 to provide a valid draft EPM to the AG and Governor by a date certain in the near future.

---

conceded that "that this Court could grant mandamus relief by directing the Commission to comply with a ruling on the merits[.]" *Id.* at 121 ¶7. Here, the State is not representing an inferior state body and, therefore, the Court cannot grant mandamus relief by directing the State to take action.

As to Petitioners' constitutional claim, the State is not subject to the Court's original jurisdiction. The Court should, therefore, deny original jurisdiction or special action relief as to the State without addressing the merits of Petitioners' important constitutional claim.

RESPECTFULLY SUBMITTED this 11th day of March, 2022.

MARK BRNOVICH
Arizona Attorney General

Joseph A. Kanefield
Chief Deputy & Chief of Staff

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