

1 Christina Estes-Werther (State Bar #025075)
Aaron D. Arnson (State Bar #031322)
2 Trish Stuhan (State Bar #027218)
3 **PIERCE COLEMAN PLLC**
7730 East Greenway Road, Suite. 105
4 Scottsdale, Arizona 85260
Tel. (602) 772-5506
5 Fax (877) 772-1025
6 Christina@PierceColeman.com
7 Aaron@PierceColeman.com
8 Trish@PierceColeman.com
Attorneys for Defendant Lisa Marra

9
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF COCHISE

12 ARIZONA ALLIANCE OF RETIRED
13 AMERICANS, INC. and STEPHANI
14 STEPHENSON,

15 Plaintiffs,

16 v.

17 TOM CROSBY, ANN ENGLISH, and
18 PEGGY JUDD, in their official
capacities as the Cochise County
19 Board of Supervisors; DAVID
20 STEVENS, in his official capacity as
the Cochise County Recorder; and
21 LISA MARRA, in her official capacity
as the Cochise County Elections
22 Director,

23 Defendants.
24

Case No. S0200CV202200518

**DEFENDANT LISA MARRA'S
RESPONSE TO PETITION FOR WRIT
OF MANDAMUS, OR IN THE
ALTERNATIVE, MOTION
PRELIMINARY INJUNCTION**

**(Assigned to The Honorable Casey
McGinley)**

25 Defendant, Lisa Marra, Director of the Cochise County Elections Department
26 ("Marra") must not be compelled to violate state law by 1) participating in a hand count of
27 all early ballots (the "Full Early Ballot Audit") or 2) relinquishing custody of the ballots to
28

1 an unauthorized individual. Both would be required due to the decision of the Cochise
2 County Board of Supervisors (the “Board”) to proceed with the Full Early Ballot Audit.
3 The Board’s actions are in violation of A.R.S. § 16-602 and the Elections Procedure
4 Manual (“EPM”) and place Marra, “a person charged with a duty under any law relating
5 to elections,” in jeopardy of violating A.R.S. § 16-1010 (a class 6 felony) if she knowingly
6 acts in violation of Arizona election law. Further, the Full Early Ballot Audit cannot be
7 completed without significant additional resources – personnel, space, security – none of
8 which cannot be provided less than a week before the general election to meet the
9 County’s statutory canvass deadline.

10 **I. MANDAMUS RELIEF IS APPROPRIATE.**

11 Defendant Marra is the Elections Director for Cochise County tasked with the
12 responsibility of preparing, administering and conducting the general election on
13 November 8, 2022. Defendant Marra files this response to highlight the important legal –
14 and practical – concerns for the Court in considering Plaintiffs’ Verified Special Action
15 Complaint and Petition for Writ of Mandamus, or in the Alternative Motion for
16 Preliminary Injunction. To be clear, Marra has no desire to be mired in any political
17 struggle. Her sole goal is to comply with Arizona law in performing her duties this
18 election cycle. As to preliminary matters, Marra does not dispute jurisdiction, venue,
19 standing, and most importantly, the availability of a writ of mandamus.

20 Under A.R.S. § 12-2021, a writ of mandamus may be issued “to compel, when
21 there is not a plain, adequate and speedy remedy at law, performance of an act which the
22 law specially imposes as a duty resulting from an office, trust or station” The Rules
23 of Procedure for Special Actions, Rule 3, limit the questions raised in this Special Action.
24 Here, the questions before the Court are narrow:

- 25 (a) Whether the defendant has failed to exercise discretion which he has a duty
26 to exercise; or to perform a duty required by law as to which he has no
27 discretion; or

1 (b) Whether the defendant has proceeded or is threatening to proceed without
2 or in excess of jurisdiction or legal authority.

3 Special Actions, Rules of Proc., Rule 3.

4 Arizona law prescribes non-discretionary duties for how to conduct hand counts.
5 The Board’s actions threaten to proceed in excess of this legal authority. This response is
6 accordingly filed to affirm the importance of judicial determination of these issues prior to
7 the November 8, 2022 general election.

8 **II. ARIZONA’S HAND COUNT STATUTE DOES NOT AUTHORIZE**
9 **DEFENDANT MARRA TO CONDUCT A FULL EARLY BALLOT AUDIT.**

10 As Elections Director, Defendant Marra is the “county officer in charge of the
11 election” who is authorized to proceed with the hand count pursuant to A.R.S. § 16-
12 602(B), (F). The statute stipulates that the hand count must proceed as prescribed by
13 A.R.S. § 16-602 and the EPM¹ adopted pursuant to A.R.S. § 16-452, which has the force
14 and effect of law. *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16, 475 P.3d
15 303, 308 (2020) (“Once adopted, the EPM has the force of law; any violation of an EPM
16 rule is punishable as a class two misdemeanor.”). Marra has prepared for the authorized
17 hand count of ballots cast at voting centers pursuant to A.R.S. § 16-602(B) (“Precinct
18 Hand Count”) and the early ballots as prescribed by A.R.S. § 16-602(F).

19 For the early ballots, the political party chairman or designee randomly selects one
20 or more batches of early ballots that have been tabulated (at least one batch of up to 400
21 early ballots from each central counting machine and at least one accessible voting
22 machine if those machines independently tabulate votes), and from those batches, the
23 political party chairman or designee randomly selects one percent of the total number of
24 early ballots cast or five thousand early ballots, whichever is less, for the same races as
25 the Precinct Hand Count as set out in A.R.S. § 16-602(B)(2). A.R.S. § 16-602(F); EPM at
26 215, 228. The statute authorizes a second manual audit of the races “[i]f the manual audit

27 ¹ ARIZ. SEC’Y OF STATE, 2019 ELECTIONS PROCEDURES MANUAL (2019),
28 https://azsos.gov/sites/default/files/2019_elections_procedures_manual_approved.pdf.

1 of the early ballot results in a difference in any race that is equal to or greater than the
2 designated margin when compared to the electronically tabulated results for those same
3 early ballots” *Id.* The designated margin is established by the Vote Count
4 Verification Committee, a statutorily authorized committee that determines the
5 acceptable range. A.R.S. §16-602(K); EPM at 227.

6 If the first hand count audit does not produce this difference in the designated
7 margin, the hand count is over. There is no further authorization for Defendant Marra to
8 proceed with further audits of early ballots. If the second manual audit of the same races
9 is triggered by the terms outlined in statute and results in a difference in the designated
10 margins of that race when compared to the electronically tabulated results for those same
11 early ballots, then, *and only then*, is the manual audit expanded. A.R.S. § 16-602(F).

12 The statute further limits the expanded audit “only for that race to a number of
13 additional early ballots equal to one percent of the total early ballots cast or an additional
14 five thousand ballots, whichever is less, to be randomly selected from the batch or
15 batches of early ballots set aside for the audit.” *Id.* The manual counts are repeated for
16 that race until a manual count satisfies the designated margin. *Id.* There is no
17 authorization to expand to all early ballots and in fact, the statute is clear: once the
18 manual count (whether initial, expanded or subsequent counts of the same race) is less
19 than the designated margin as compared to the electronic tabulation of those early ballots,
20 the hand counts is over – “no further manual audit of the early ballots shall be
21 conducted.” *Id.*

22 The EPM outlines specific mathematical calculations based on the statutory
23 formulas for determining the number and size of the batches and the final calculations of
24 the totals for each race selected to be hand counted. EPM at 228-232. It is an extensive
25 procedure. The Board disregards these EPM requirements by seeking Defendant Marra’s
26 participation in the Full Early Ballot Audit. There is no authorization in the statute or the
27 EPM that allows Defendant Marra to proceed with a Full Early Ballot Audit, nor does

1 any statute or provision of the EPM prescribe procedures for how to conduct a Full Early
2 Ballot Audit, if such an audit existed.

3 **III. CONDUCTING A FULL EARLY BALLOT AUDIT VIOLATES THE**
4 **SEPARATION OF POWERS BETWEEN THE LEGISLATIVE AND**
5 **EXECUTIVE BRANCH.**

6 Fundamental principles of separation of powers are that the legislature is charged
7 with *law creation*, whereas the executive branch is charged with *law enforcement*. See
8 *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928); *Crawford v. Hunt*, 17
9 P.2d 802, 805 (1932). The separation of powers doctrine limits the legislative branch's
10 ability to delegate its power of law creation to the executive, as well as the methods by
11 which the power may be delegated. *Roberts v. State*, 253 Ariz. 259, 512 P.3d 1007, 1016
12 (2022). Delegations are only permitted where plainly authorized for agency action. *Id.*

13 The State Legislature has not plainly authorized any county officials – whether the
14 Cochise County election director or county recorder – to change or supplant the policies
15 prescribed in the EPM regarding hand counts. See, e.g., *Arizona Pub. Integrity All. v.*
16 *Fontes*, 250 Ariz. 58, 63, 475 P.3d 303 (2020) (holding that Maricopa County Recorder
17 acted unlawfully by promulgating new instruction for mail-in ballots outside of procedure
18 authorized in statute and EPM). Here, if the County Recorder oversaw the hand count
19 sought by the County Board of Supervisors, he would, in effect, be required to fill in the
20 gaps where there are no governing laws, rules, or procedures. This is nothing short of
21 *secondary lawmaking* by an executive which is not only contrary to statute but is
22 prohibited by the separation of powers doctrine. Ariz. Const. Art. III.

23 Moreover, to the extent the County intends to bypass the Defendant Marra as
24 elections director, their actions improperly delegate her critical role to an unauthorized
25 entity in violation of state law. This infringes on Marra's ability to oversee the election
26 and ensure ballot security.
27
28

1 **IV. DEFENDANT MARRA IS PROHIBITED FROM RELINQUISHING**
2 **CUSTODY OF BALLOTS WITHOUT A COURT ORDER.**

3 The statutory provisions for the early ballot hand count are clear: the early ballots
4 selected for the hand count must “be securely sequestered.” A.R.S. § 16-602(F), EPM at
5 215, 229-230, 232.

6 A.R.S. § 16-602(H) is more explicit: “the county officer in charge of elections
7 shall retain the custody of the ballots for purposes of performing any required hand
8 counts and the officer shall provide for security for those ballots.” Further, A.R.S. § 16-
9 624(A) requires Marra, as the officer in charge of elections, after the adoption of the
10 canvass, to deposit the ballots to the county treasurer where the ballots remain in a secure
11 facility. The ballots are unopened and unaltered for twenty-four months (for elections
12 with a federal office on the ballot) until destroyed “without opening or examining the
13 contents” and can only be removed by court order to deliver into the court’s custody if a
14 recount is ordered. A.R.S § 16-624(A), (D); EPM at 248.

15 There is no authority – in the hand count statute or EPM – that authorizes
16 Defendant Marra to relinquish custody of the early ballots to any individual. If the Board
17 is allowed to proceed, early ballots will be placed in the possession of an unauthorized
18 person without designated procedures since none exist for a 100% hand count of early
19 ballots for the November 8, 2022 general election. Breaking the chain of custody to
20 relinquish these early ballots poses substantial risk of harm which cannot be undone.

21 **V. THE COUNTY’S CANVASS DEADLINE CANNOT BE MET IF THE**
22 **BOARD PROCEEDS WITH A FULL EARLY BALLOT AUDIT.**

23 Similar to most election processes, preparing for a hand count is a time-intensive
24 undertaking that involves planning weeks in advance. Even if Defendant Marra did not
25 believe the Full Early Ballot Audit was violating the law, she is simply *unable* to
26 responsibly prepare and execute the Board’s directive and meet the County’s canvass
27 deadline, which is scheduled for November 18, 2022. A.R.S. § 16-642(A) (requires
28 canvass of the election between six days to twenty days after the election). Postponements

1 of the canvass are only allowed if precinct results are missing, not due to a Full Early
2 Ballot Audit. A.R.S. § 16-642(C), EPM at 240.

3 Ultimately, a hand count is a labor-intensive process that requires those involved to
4 be trained by County staff. Hand counts require Marra to contact the county chairpersons
5 of each recognized political party at least fourteen days prior to the election to designate
6 members participating in the hand count and the party chairpersons must designate
7 members at least seven days before the election. EPM at 213. These deadlines have
8 passed.

9 A.R.S. §16-602(I) specifies that hand counts must begin within twenty-four hours
10 after the closing of the polls. Given the time-intensive nature of an authorized hand count
11 which often takes one to two days to complete for the authorized hand count process, there
12 is insufficient personnel to manage the process, space, and security issues that would need
13 to be addressed to begin a hand count on November 9, 2022 and complete the hand count
14 before the County's scheduled canvass on November 18, 2022. As the only designated
15 official who administers the hand count process, Marra cannot proceed with the Full Early
16 Ballot Audit in the time remaining before the election.

17 **VI. THE FULL EARLY BALLOT AUDIT JEOPARDIZES POST-ELECTION**
18 **PROCESSES.**

19 Elections are time-sensitive and if disrupted, cause a chain reaction to other
20 processes. A delay in the County's canvass will disrupt the State's canvass requirement
21 (A.R.S. § 16-648(A)), automatic recounts (A.R.S. § 16-661), and impact candidates
22 seeking election for federal, state and local offices who cannot be seated until the election
23 process has concluded.

24 In addition to being against the plain language of the statute, the decision to require
25 a Full Early Ballot Audit poses innumerable practical difficulties, throwing confusion and
26 chaos into the general election. Defendant Marra, as the County Election Director, does
27 not take the extraordinary remedy of mandamus lightly, recognizing the important roles

1 the Cochise County Board of Supervisors and Recorder serve. However, in this instance,
2 where state law is clear and the last-minute threats to the electoral process real, mandamus
3 is appropriate. Defendant Marra supports Plaintiffs' request for mandamus relief to the
4 extent it seeks an order compelling Cochise County officials to forgo the Full Early Ballot
5 Audit proposed at this late hour and, instead, comply with their non-discretionary duties
6 under A.R.S. § 16-602 and the EPM.

7 **VII. CONCLUSION.**

8 Defendant Marra must not be compelled to engage in the Full Early Ballot Audit
9 because 1) the audit flies in the face of the plain language of state law and 2) jeopardizes
10 the integrity of the ballots for the November 8, 2022 general election. Further, Defendant
11 Marra faces a class 6 felony if forced to administer the Full Early Ballot Audit or
12 relinquish control of the ballots to an unauthorized official at the Board's direction and a
13 class 2 misdemeanor for violating the EPM. A.R.S. §§ 16-452(C), 16-1010. Defendant
14 Marra respectfully requests the Court grant the request for mandamus, or in the
15 alternative, issue an injunction to halt the Full Early Ballot Audit.

16 DATED this 3rd day of November, 2022.

17 **PIERCE COLEMAN PLLC**

18 By: /s/ Christina Estes-Werther

19 Christina Estes-Werther

20 Aaron D. Arnson

21 Trish Stuhan

22 7730 East Greenway Road, Suite 105

23 Scottsdale, Arizona 85260

24 *Attorneys for Defendant Marra*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2022, I electronically transmitted this document to the Clerk’s Office using the AZTurbo System for filing, and on this same day, served a copy via electronic mail upon the following:

HERRERA ARELLANO LLP

- Roy Herrera
roy@ha-firm.com
- Daniel A. Arellano
daniel@ha-firm.com
- Jillian L. Andrews
jillian@ha-firm.com
- Austin T. Marshall
austin@ha-firm.com

ELIAS LAW GROUP LLP

- Aria C. Branch
abranh@elias.law
- Lalitha D. Madduri
lmadduri@elias.law
- Christina Ford
cford@elias.law
- Mollie DiBrell
mdibrell@elias.law
- Daniel Cohen
dcohen@elias.law
- Attorneys for Plaintiffs*

Timothy LaSota
tim@timlasota.com

Bryan Blehm
THE VALLEY LAW GROUP
bryan@thevalleylawgroup.com

(Appearance to be noticed)
Attorneys for Defendants Tom Crosby,
Ann English, and Peggy Judd

David Stevens
dstevens@cochise.az.gov

By: /s/ Mary Walker

RETRIEVED FROM DEMOCRACYDOCKET.COM