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August 14, 2023

The Honorable Adrian Fontes
Arizona Secretary of State
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Re: Public Comments on Draft 2023 Elections Procedures Manual

Secretary Fontes:

On behalf of Arizona Senate President Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma, enclosed please find comments concerning various provisions of the draft 2023 Elections Procedures Manual published by your office.

Please do not hesitate to contact us should you have any questions.

Respectfully,

/s/ Kory Langhofer
Kory Langhofer

/s/ Thomas Basile
Thomas Basile

Arizona State Legislature
1700 West Washington
Phoenix, Arizona 85007

August 14, 2023

The Honorable Adrian Fontes
Arizona Secretary of State
1700 West Washington Street, Seventh Floor
Phoenix, Arizona 85007

Re: Public Comments on the Draft 2023 Elections Procedures Manual

Dear Secretary Fontes:

We write in response to the draft 2023 Elections Procedures Manual ("EPM") that your office has published for public comment. Preliminarily, we believe that your truncated 14-day comment period fails to afford Arizonans a meaningful opportunity to digest and debate such a consequential and voluminous compendium of regulatory dictates. This timetable is far more compressed than the public comment period allotted for the 2019 iteration of the EPM, and significantly shorter than the 30-day comment period that attends a typical agency rulemaking. *See generally* A.R.S. § 41-1023(B). We are concerned that this highly abbreviated window for public input may bespeak an indifference to Arizona voters' views and perspectives on the legal infrastructure of our constitutional republic.

In any case, we have catalogued below various provisions of the draft EPM that we believe either (1) conflict with or misstate a controlling statute or (2) exceed the parameters of any rulemaking authorization provided by Arizona law. As you know, the Arizona Supreme Court has on multiple occasions admonished that the Secretary may not, under the EPM's auspices, act as a roving arbiter of all facets of the electoral process, *see McKenna v. Soto*, 250 Ariz. 469, 473, ¶ 20 (2021), or arrogate the exclusively judicial power of interpreting controlling laws, *see Leibsohn v. Hobbs*, 254 Ariz. 1, ¶ 22 (2022) ("[A]n EPM regulation that contradicts statutory requirements does not have the force of law. Further, it is this Court's role, not the Secretary's, to interpret [a statute's] meaning." (citation omitted)).

With these principles in mind, we respectfully urge you to review the following comments and revise the relevant EPM provisions accordingly.

I. Chapter 1: Voter Registration

Nothing in Arizona law authorizes the Secretary to regulate voter registration processes or procedures in the EPM. We accordingly believe that all or substantially all of Chapter 1 is *ultra vires* and invalid. *See Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021) ("[A]n EPM regulation that exceeds the scope of its statutory authorization . . . does not have the force of law.").

A. Section II(A): Citizenship Requirement

Contrary to the EPM's suggestion that the County Recorder or his/her designee may merely "visually inspect[]" and "not make a copy of" an applicant's documentary proof of citizenship (*see* pp. 5, 11), A.R.S. § 16-166(F)(3) and (J) clearly contemplate that the Recorder must retain a copy of such documentation for a period of at least two years.

B. Section VII(C): Voter Registration Deadline

The notion that the Secretary may unilaterally extend the voter registration deadline if "the closure of state or federal offices would cause a method of registration to be unavailable within the 30-day period preceding the next election" egregiously mischaracterizes both Arizona law and the National Voter Registration Act ("NVRA"). The relevant provisions of the NVRA state that, if an applicant submits a "valid" registration form "not later than the lesser of 30 days, or the period provided by State law,[1] before the date of the election," he or she must be permitted to vote in that election. 52 U.S.C. § 20507(a)(1)(A)-(D). By its plain terms, the NVRA accedes to Arizona law; it does not require a state to adjust its own statutory registration deadline. Indeed, the district court opinion that the draft EPM cites in support of its curious construction of the NVRA—*i.e.*, *Arizona Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *13 (D. Ariz. Nov. 3, 2016)—has since been largely repudiated by the Ninth Circuit. *See Isabel v. Reagan*, 987 F.3d 1220, 1230 (9th Cir. 2021) (rejecting argument that, if the state deadline falls on a weekend or holiday, "the NVRA imposes an affirmative duty on states to ensure that persons who register to vote later than the deadline are registered to vote in the upcoming election").

II. Chapter 2: Early Voting

A. Section I(A): One-Time Requests to Receive a Ballot-by-Mail

The draft EPM's summary statement that "[a]ny election in Arizona . . . must provide for early voting, which includes no-excuse ballot-by-mail" (p. 47) elides important qualifications. While Arizona law broadly permits voting by mail, *see* A.R.S. §§ 16-542(C), 16-544, that method of early voting is unavailable to Federal Form registrants who have failed to furnish adequate documentary proof of United States citizenship or documentary proof of Arizona residency. *See id.* § 16-121.01(E). A more precise formulation would provide that "Any election in Arizona . . .must provide for early voting, which, subject to certain limitations, includes no-excuse ballot-by-mail."

Separately, while the draft EPM correctly notes that voters who qualify under the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310, *et seq.* ("UOCAVA") may permissibly submit early ballot requests more than 93 days prior to an election (p. 48), it neglects

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[1] Arizona law requires applicants to submit a valid registration no later than 29 days prior to an election if they wish to cast a ballot in that election. *See* A.R.S. § 16-120(A). While the statute permits an automatic adjustment of this deadline if it falls on a weekend or holiday, *see id.* § 16-120(B), it plainly does not authorize extensions upon the Secretary's say-so.

to state that the same option is available to a voter whose information is protected pursuant to A.R.S. § 16-153. *See* A.R.S. § 16-542(B).

B. Section I(B): Requests to Be Placed on the Active Early Voting List

Footnote 19 (p. 53) of the draft EPM unlawfully purports to delay the implementation of 2021 Ariz. Laws ch. 359, § 6 ("S.B. 1485"), in contravention of the statute's plain terms. As the draft EPM acknowledges, the enactment provides that, if a voter enrolled on the active early voting list ("AEVL") does not cast any early ballot during two consecutive election cycles, the County Recorder must send a notice to the voter asking him or her to confirm continued participation in the AEVL. If the voter does not respond within 90 days, the voter will be removed from the AEVL. *See* A.R.S. § 16-544(L)-(M).

S.B. 1485 became effective on September 29, 2021. A straightforward application of the statutory text ordains that the County Recorder must, no later than January 15, 2025, send the mandated notice to all AEVL voters who did not cast an early ballot in (1) any election in the 2022 election cycle and (2) any election in the 2024 election cycle.

The draft EPM's position that the notice can be premised only upon the voter's lack of participation in the 2024 and 2026 election cycles defies the statutory text and confounds common sense. Assume that an AEVL voter chooses not to cast an early ballot in any election in the 2022 cycle (to include the statewide primary election held on August 2, 2022 and the statewide general election held on November 8, 2022) or any election in the 2024 cycle. The notice sent by the County Recorder in January 2026 necessarily is predicated on the voter's actions (or lack thereof) taken ***after*** S.B. 1485's effective date.[2] Indeed, the draft EPM's spurious conception of retroactivity would, for all practical purposes, suspend S.B. 1485 until January 1, 2023—more than a year after the statute's actual effective date.

C. Section I(C): Creation and Preparation of Early Ballots

Earlier this year, the Legislature approved, and the Governor signed, Senate Bill 1273, which requires that the instructions provided to voters casting early ballots must explicitly advise of Arizona's prohibition on illegal ballot harvesting. *See* A.R.S. § 16-513(E) (as amended by 2023 Ariz. Laws ch. 119, § 1). The draft EPM hence must incorporate this provision in its formulation of ballot instructions (pp. 58-59).

D. Section I(D): Mailing Ballots-by-Mail

We believe this provision of the draft EPM is afflicted with three errors of varying magnitude.

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[2] The draft EPM's professed concern with retroactive application is further discredited by the fact that merely refraining from returning an early ballot during two election cycles does not, by itself, have any effect whatsoever on an AEVL voter's ability to participate in the electoral process. Rather, the only consequence of the voter's inactivity is the issuance of a notice, which the voter may, in his or her discretion, either answer (and thereby maintain AEVL enrollment) or ignore.

First, it correctly states that a UOCAVA voter may select his or her preferred secured method of receiving a ballot (p. 59), but it fails to designate a default transmittal mechanism "[i]f no means of communication is designated" by the voter, as A.R.S. § 16-543(A) requires.

Second, the allowance of "replacement ballots by mail" (p. 61) lacks any discernible textual nexus to the statutory provisions it cites. A.R.S. § 16-542(E) does not authorize the issuance of multiple replacement ballots, and A.R.S. § 16-558.02 is codified in Article 8.1 of Title 16, which applies only to special district mail ballot elections.

Third, and perhaps most significantly, you appropriate to the Secretary a novel authority to extend the early voting period for UOVACA voters in the event of an "emergency" (p. 62). To be sure, the Legislature has allowed the Secretary to devise "procedures" that facilitate the issuance and return of UOCAVA ballots if unforeseen exigencies affect the voting process. The mandate that all ballots must be received by the County Recorder no later than 7:00 p.m. on Election Day, however, is a categorical and foundational pillar of Arizona election law. *See* A.R.S. §§ 16-547(D), 16-551(C), 16-565(A). Whether, when and under what conditions any variance from this absolute temporal benchmark may be permitted is solely a matter of legislative judgment. Even assuming *arguendo* that this prerogative could be assigned to the Secretary, any such delegation would have to be imparted in express and unequivocal terms. A limited ministerial authority to set UOCAVA voting "procedures" does not empower the Secretary to unilaterally change explicit statutory deadlines.

E. Section I(I): Ballot Drop-Off Locations and Drop-Boxes

The draft EPM maintains and entrenches the 2019 iteration's allowance of ballot "drop boxes." This innovation, however, is untethered from Arizona's election code. The Legislature has constructed specific and discrete channels for early voting—to wit, the submission of early ballots via the United States Postal Service, A.R.S. §§ 16-542(A), 16-547(D), at in-person early voting locations (or, if eligible, through special election boards), *id.* §§ 16-542(H), 16-549, or by direct delivery to a "polling place" or "the office of" the County Recorder or other elections official, *id.* §§ 16-547(D), 16-548(A). There is no statutory warrant for the EPM's creation of new, extra-textual modes and locations for transmitting and collecting ballots. While drop boxes may serve legitimate convenience interests, the amassing of voted ballots in public places inevitably entails security risks and can conduce illicit ballot harvesting. Whether and how to calibrate these competing considerations is a quintessential policy judgment that is reserved to the Legislature.

The draft EPM ventures even farther beyond the governing statutes by purporting to authorize each County Recorder to "establish and implement additional local procedures for ballot drop-off locations," to include "restrict[ing] activities that interfere with the ability of voters and/or staff to access the ballot drop-off location free from obstruction or harassment" (p. 65). Preliminarily, whatever rulemaking authority A.R.S. § 16-452(A) confers is lodged jointly in the Secretary, Attorney General, and Governor alone. Indeed, the EPM's express purpose is to establish "uniformity" in election procedures across the entire state. A.R.S. § 16-452(A). The notion that the EPM can spawn open-ended sub-delegations to county officials is not only unmoored from statutory text but also constitutionally unworkable. Valid provisions of the EPM carry the force

of criminal law. *See* A.R.S. § 16-452(C). The EPM cannot preemptively place this significant imprimatur on hypothetical third-party directives that do not yet exist.

Arizona law already comprehensively prohibits interference with the voting process or improper tampering with ballots or other election equipment. *See, e.g.*, A.R.S. §§ 16-1003, 16-1004(A)-(B), 16-1013, 16-1016. Local law enforcement and prosecutors can and should enforce these critical safeguards. But the County Recorders cannot—through an amorphous and attenuated chain of purported statutory delegations—effectively legislate new or additional regulations for a mode of ballot submission that itself is not recognized by any Arizona law.

F. Section VI(A): Processing and Tabulating Early Ballots - County Recorder Responsibilities

The draft EPM correctly states that early ballots cast in-person or through a special election board "must be signature-verified by the County Recorder" (p. 72). It proceeds, however, to explicitly undermine this statutory directive by opining that "early ballots cast in person should not be invalidated based solely on an allegedly inconsistent signature absent other evidence that the signatures were not made by the same person." In adding a voter identification requirement as a supplementary safeguard during in-person early voting, however, the Legislature deliberately left the signature verification criterion intact. As the draft EPM itself acknowledges, ***all*** early ballots must undergo signature validation. *See* A.R.S. § 16-550(A). The EPM cannot by fiat effectively repeal or abridge this independent statutory mandate.

G. Section VI(B): Early Ballot Board Responsibilities

The EPM's acknowledgment that each early ballot board must "consist[] of an inspector and two judges (the two judges must be from different political party preferences)" (p. 73) is correct, but the provision also should make clear that there must be "an equal number of inspectors . . . who are members of the two largest political parties," A.R.S. § 16-531(A).

III. <u>Chapter 8: Pre-Election Procedures</u>

A. Section I(D): Consolidation of Polling Places Based on Lack of Candidates

The draft EPM provides that, if a Board of Supervisors consolidates polling places, it must ensure that "[a]ll affected voters receive information on early voting, which includes information on how to make a one-time early ballot request" (p. 123). The controlling statute, however, mandates that voters must be provided with the actual "***application*** used to request an early voting ballot," A.R.S. § 16-411(C)(3) [emphasis added]—not merely information about how to obtain such an application.

B. Section I(G): Polling Place/Vote Center Emergency Designation

The draft EPM states that a County Recorder "may" designate polling places or vote centers on an emergency basis if certain circumstances exist (p. 125). This discretionary formulation, however,

is at odds with the applicable statute, which specifies that the County Recorder "shall" make such designations if the requisite conditions are in place, *see* A.R.S. § 16-411(I).

C. Section II(A): Election Board Duties

The draft EPM's announcement that "[t]he officer in charge of elections may allocate . . . duties among different [election] board members as deemed appropriate" (p. 127) is invalid and *ultra vires* to the extent it purportedly authorizes the reassignment of duties that governing statutes vest specifically in a designated election board member. *See, e.g.*, A.R.S. §§ 16-534, 16-535.

Additionally, footnote 38 opines that "[i]f it is impossible to sufficiently staff the [election] boards with members of differing political parties, the officer in charge of elections shall, at minimum, exercise best efforts to utilize board members with no party affiliation or from differing unrecognized parties" (p. 127). We agree in principle that, if it truly is "impossible" to attain partisan balance on an election board, the responsible officials should employ all feasible methods to mitigate the asymmetry. But this narrow proviso cannot subsume or dilute the statutory commitment to full equal representation on election boards. *See* A.R.S. § 16-531(A). For this reason, the EPM should clarify that its "impossibility" exception would apply only if (1) the county chair of a political party committee refused or failed to identify a sufficient number of party members to staff election boards and (2) despite using their best efforts, county officials were unable to recruit the necessary number of volunteers from the underrepresented political party.[3]

D. Section III(A): Designation of Political Party and Other Observers – Appointment Process

The draft EPM recognizes political parties' statutory right to appoint observers at polling locations but adds that "[t]he County Recorder or officer in charge of elections may require reasonable deadlines for advance notice of appointments" (p. 133). The underlying statute, however, provides that a county party chairman may appoint observers simply by issuing an appointment that is "addressed to the election board." A.R.S. § 16-590(A). While we agree that political party committees should work cooperatively with county officials to ensure an efficient credentialing process, the draft EPM provision is inconsistent with controlling law to the extent its vague "reasonableness" criterion authorizes county officials to decree arbitrary and inconsistent appointment deadlines—particularly if such deadlines fall many weeks in advance of the election, before political party committees can feasibly recruit a full roster of observers. *See* A.R.S. § 16-452(A) (EPM must provide for "uniformity" in election procedures).

IV. Chapter 9: Conduct of Elections/Election Day Operations

A. Section III: Preserving Order and Security at the Voting Location

In an extraordinary expropriation of the legislative power, the draft EPM purports to criminalize wide swaths of speech and conduct that you speculate might be "considered intimidating," to

[3] This comment likewise extends to the draft EPM's provisions regarding the staffing of the Central Counting Place Boards (p. 194) and Electronic Adjudication Boards (p. 201).

include using "offensive language" (whatever that means) at a polling location, "[f]ollowing" individuals at a polling location (which, it bears emphasis, is a public place) or disseminating even truthful information about "voter fraud," if done in a manner that is, to your sensibilities, "harassing or intimidating."

Three significant interrelated flaws afflict this troubling provision of the draft EPM.

First, the definitional ambit of criminal voter intimidation or electoral interference begins and ends with the plain text of the controlling statutes. Recognizing the danger that fraudulent or coercive tactics pose to the franchise, the Legislature long ago codified clear and robust protections for voters. *See* A.R.S. § 16-1013. Whether any given act or statement is illegal, however, necessarily is a highly fact-sensitive and context-dependent judgment that must be made by local law enforcement and prosecutorial authorities, and (if pursued) reviewed by the courts. A.R.S. § 16-452 does not—and never could—empower the Secretary to effectively ban specific categories of speech or behavior that the Legislature has never prohibited.

Second, even assuming *arguendo* that the EPM could augment criminal statutes, the draft provision is facially overbroad. *See generally State v. Kaiser*, 204 Ariz. 514, 519, ¶ 17 (App. 2003) ("An overbroad [law] is one designed to burden or punish activities which are not constitutionally protected, but ... includes within its scope activities which are protected by the First Amendment." (citation omitted)). While the draft provision may encompass some conduct that A.R.S. § 16-1013 does in fact prohibit, it sweeps far beyond the statutory scope. Consider, for example, the purported proscription of "offensive language to a voter or poll worker." Putting aside the (constitutionally significant) vagueness that inheres in the notion of "offensiveness," not all speech that might wound a listener's feelings—for example, criticism of poll workers' job performance or disparagement of a fellow voter's perceived political leanings—is even remotely threatening or intimidating. *See In re Nickolas S.*, 226 Ariz. 182, 188, ¶ 26 (2011) ("The addressee's personal disagreement with or anger over words said to him does not, by itself, mean that the words can be punished . . . First Amendment protections should not dissolve merely because words are spoken to a particularly sensitive or combative addressee."). While we hope and expect that all Arizonans will exhibit decorum and civility during the voting process, the executive branch cannot dictate to them a code of etiquette.

Third, the provision's elastic terms are exacerbated by their ambiguous ostensible legal import. Perhaps recognizing its extra-statutory character, the provision intersperses among its instructions qualifiers (*e.g.*, "should," "guidelines") that customarily connote non-binding advisories. But every adopted provision of the EPM necessarily assumes the status of a criminal law. *See* A.R.S. § 16-452(C). The draft's confused (and confusing) admixture of advisory terms and criminal enforcement mechanisms leaves citizens without fair notice not only of what speech or expression is purportedly prohibited, but also whether supposed infractions are punishable at all. *See generally F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

We accordingly urge you to excise from this provision all content that does not bear a direct and immediate textual nexus to the plain terms of A.R.S. § 16-1013 or other applicable statutes.

B. Section VII: Challenges to a Voter [*sic*] Eligibility to Vote

Although Arizona law undisputedly permits "[a]ny qualified elector of the county" to challenge a putative voter's eligibility, *see* A.R.S. § 16-591, the draft EPM commands that "[t]o prevent harassment and intimidation of the challenged voter, the person making the challenge may not speak to the challenged voter" (p. 187). It requires no great facility with the First Amendment, however, to recognize the obvious truism that the government cannot forbid a citizen from addressing another citizen simply because the government is worried about what the speaker might say. To be clear, any person who actually threatens or coerces a voter can and should be held to account. *See* A.R.S. § 16-1013. But the executive branch cannot prescribe polling location speech codes or dictate who may talk to whom in a public place.

V. Chapter 11: Hand Count Audit

The draft EPM decrees that "[a] county lacks the discretion to conduct a hand count of all ballots cast at precincts or early voting centers located in that county. Likewise, a county lacks the discretion to hand count all early ballots cast in that county" (p. 213, n.56). The draft EPM's sole source of ostensible authority for this proposition, however, is a non-binding Attorney General opinion of dubious validity. Arizona law authorizes the Attorney General to provide an opinion only upon the request of certain elected officials. *See* A.R.S. § 41-193(A)(8); *see also State v. Deddens*, 112 Ariz. 425, 428 (1975) (such opinions "are not a legal determination of what the law is at any certain time"). Opinion I22-004 (R22-010), by contrast, was issued *sua sponte* and for the sole purpose of repudiating an opinion that the office had properly published just a few months earlier. Nothing in Arizona law permits the Attorney General either to issue unsolicited advisory opinions or to haphazardly nullify prior opinions out of ideological spite. *See generally State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130, ¶ 8 (2020) ("[T]he Attorney General has no inherent or common law authority . . . [T]he authority of the Attorney General must be found in statute.").

In addition, it appears the Arizona Court of Appeals may disagree with both the Attorney General and the draft EPM on this point. *See Court to Hear Arguments on Cochise Hand-Count Appeal*, E. ARIZ. COURIER, Jul. 16, 2023, *available at* https://www.eacourier.com/news/state/court-to-hear-arguments-on-cochise-hand-count-appeal/article_11b116f0-2459-11ee-a1e6-3bed20d039e4.html ("At least one appellate court judge appears ready to let Cochise County do a full hand count of its early ballots.").[4] It is, at the very least, inappropriate for the draft EPM to purport to preemptively adjudicate a live legal dispute pending before the courts. This footnote accordingly should be removed.

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[4] The courts have already rebuffed previous attempts by the Attorney General to gratituously interfere in Cochise County's election administration operations. *See Judge Sides Against Mayes on Cochise County Election Administrator*, ARIZ. DAILY STAR, Apr. 18, 2023, *available at* https://tucson.com/news/government-and-politics/judge-sides-against-mayes-on-cochise-county-election-administrator/article_4d5bcfac-de44-11ed-b68e-ab70812f8c75.html.

Thank you for your consideration of the foregoing comments. We appreciate the work your office has done to prepare this initial draft, and hope that you will take the steps necessary to ensure that the version submitted to the Governor and Attorney General is properly confined to matters within the plain scope of applicable statutory delegations and aligns in all respects with controlling law.

Respectfully,

Ben Toma
Speaker of the Arizona House of Representatives

Warren Petersen
President of the Arizona Senate