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8 **SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF MARICOPA**

10 **ARIZONA PUBLIC INTEGRITY**
11 **ALLIANCE, INC., TYLER**
12 **MONTAGUE,**

13 **Plaintiffs,**

14 **vs.**

15 **ADRIAN FONTES, ET AL.,**

16 **Defendants.**

Case No.: LC2020-000252

**MOTION FOR LEAVE TO FILE
AMICUS BRIEF AND
MEMORANDUM IN SUPPORT**

**(THE HONORABLE JAMES D.
SMITH)**

17 Pursuant to Ariz. R. Civ. P. 7.1 and this Court's inherent authority to
18 regulate its own proceedings, *amicus curiae* the Public Interest Legal Foundation
19 hereby respectfully moves for leave to file the attached brief as *amicus curiae* in
20 support of the Plaintiffs. All parties gave their consent to its filing. This motion is
21 supported by the following memorandum of points and authorities.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTEREST OF *AMICUS CURIAE***

24 The *amicus curiae* has a significant and long-standing interest in this matter
25 of national concern. The Public Interest Legal Foundation is a 501(c)(3)
26 organization whose mission includes working to protect the fundamental right of
27

28 MOTION FOR LEAVE TO FILE AMICUS BRIEF AND MEMORANDUM IN SUPPORT (THE HONORABLE
JAMES D. SMITH) - 1

1 citizens to vote. The Public Interest Legal Foundation (“the Foundation”) has sought
2 to advance the public’s interest in fair elections free from unconstitutional burdens
3 and discrimination. At the state level, this is best done by ensuring that state laws
4 enacted by each state’s legislative branch are constitutional. As the Constitution
5 gives state Legislatures the power to regulate state elections, the separation of
6 powers is foundational to elections that are fair and free.
7

8
9 Attorneys for *amicus curiae* have extensive experience in election law. Their
10 interest in ensuring that state election laws comply with federal election standards
11 and are followed is at the core of their mission of preserving election integrity across
12 the country.

13
14 In light of the urgent need for resolution of the issue presented, *amicus curiae*
15 believe their experience will aid this Court in consideration of this case.

16
17 No party to the litigation or any other organization contributed to the
18 preparation of the brief, and the Foundation received no financial support for its
19 filing.

20 **II. THE ATTACHED BRIEF WILL ASSIST THE COURT IN**
21 **CONSIDERATION OF THIS CASE**

22 This Court has the inherent authority to regulate its own proceedings and
23 broad discretion to determine whether or not to allow an appearance by an *amicus*
24 *curiae*. A.R.S. 17B, Special Actions, Rules of Proc., Rule 2. The Foundation believes
25 it can provide the Court with information, perspective and argument that no
26 current party may raise based. Specifically, the Foundation’s brief provides analysis
27

1 of Arizona's statutory scheme governing ballot instructions, and the Constitutional
2 requirement that state election laws be equally applied throughout the state.

3
4 The Foundation believes its brief will assist the Court in quickly and
5 correctly determining that Defendants' cross-out instruction violates Arizona's
6 election law.

7
8 **CONCLUSION**

9 For the foregoing reasons, the Foundation's motion for leave to file the
10 attached brief as *amicus curiae* should be granted.

11 Respectfully submitted this 2nd Day of September, 2020.

12
13
14 /s/ Sue Becker

15 PUBLIC INTEREST LEGAL FOUNDATION

16 **CERTIFICATE OF SERVICE**

17 ORIGINAL FILED this 2nd Day of September, 2020, with:
18 Clerk of the Maricopa County Superior Court

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17 **Case No.: LC2020-000252**

18 **AMICUS CURIAE BRIEF IN**
19 **SUPPORT OF PLAINTIFFS**

20 **INTRODUCTION**

21 The issue before the Court is whether the cross-out instruction that
22 Defendants added to the Early Voting Ballot Instructions and mailed to voters in
23 the presidential preference primary election is contrary to the plain mandates of
24 Arizona election law. Defendants have stated that the same cross-out instruction
25 will be given to early voters when ballots are mailed to them for the upcoming
26 November general election. Because the cross-out instruction is an unapproved
27 deviation from the State's statutory election procedures, it violates Arizona election
28 law. If followed, the instruction also increases the number of "overvote" spoiled
ballots that must be separated, interpreted and hand-counted. For these reasons,

1 the Court should grant the injunctive relief requested by Plaintiffs and enjoin
2 Defendants from issuing the violative cross-out instruction.

3
4 **ARGUMENT**

5 **I. The Cross-Out Instruction is Not in the State's Election Procedures**
6 **Manual and Deviating from the Manual is a Violation of State Law.**

7 Arizona law expressly states that the Secretary of State is to "prescribe rules
8 to achieve and maintain the maximum degree of correctness, impartiality,
9 uniformity and efficiency on the procedures for early voting, and voting" as well as
10 for "collecting, counting" and "tabulating" ballots. A.R.S. 16-452 (A). The plain
11 language of this statutory requirement ensures that all ballots are treated
12 uniformly throughout the state. The statutory requirement codifies impartiality
13 and uniformity in the counting of ballots.

14
15 The 2019 State Elections Procedure Manual in effect for the 2020 elections
16 requires that specific directives be included in the ballot instructions that are given
17 to early voters whose ballots are mailed to them. Under "Required Instructions to
18 Voters," the Manual states the following:

19
20 A County Recorder must supply printed instructions that:

- 21
22 1. Direct voters to sign the voter affidavit, mark the ballot, and return
23 the voted ballot in the enclosed return envelope;
24 2. Include a website address where the following information will be
25 posted: (1) official locations where early ballots may be deposited; and
26 (2) official write-in candidates and withdrawn candidates for all
27 jurisdictions on the ballot, A.R.S. § 16-343(G); and (2);
28 3. Inform voters that no votes will be counted for a particular
office if they overvote (vote for more candidates than
permitted) and therefore the voter should contact the County
Recorder to request a new ballot in the event of an overvote;

- 1 4. Recommend that voters mail a ballot-by-mail at least six calendar days
2 before the election to best ensure the ballot will be timely received by
3 7:00pm on Election Day;
- 4 5. Informs voters regarding the appropriate marking devices to be used
5 when marking the ballot; and
- 6 6. Include the following language:

7 In order to be valid and counted, the ballot and affidavit must be
8 delivered to the County Recorder or other officer in charge of
9 elections or may be deposited at any polling place in the county
10 no later than 7:00pm on Election Day; and

11 **WARNING** – It is a felony to offer or receive any compensation
12 for a ballot.

13 A.R.S. § 16-457(C). The County Recorder may substitute “voter center”
14 for “polling place” if the county uses vote centers. If applicable, the
15 County Recorder may add additional ballot drop-off locations to the
16 statutorily-prescribed language. All ballot drop-off locations and drop-
17 boxes shall be approved by the Board of Supervisors (or designee). A
18 County Recorder in a covered jurisdiction, as designated by the Census
19 Bureau in the current Federal Register publication, must provide these
20 instructions in English and in any additional written language(s)
21 required under the federal Voting Rights Act. See Chapter 8, Section
22 VI.

23 See Arizona Secretary of State 2019 Elections Procedures Manual, p. 56,
24 (emphasis added), attached as **Exhibit A**.

25 The Manual directs County Recorders to inform voters that “no vote will be
26 counted” if they “overvote” and that voters should “request a new ballot in the event
27 of an overvote.” An overvote occurs when there is more than one mark on the ballot
28 for one office. This is also called a “spoiled” ballot. When a ballot has more than one
mark for one office, the tabulating equipment sees both marks and invalidates the
ballot, which means it is rejected by the tabulating machine and must be set aside,
manually interpreted and counted later. See A.R.S. 16-621. The Manual states that

1 the voting equipment must note a ballot as "spoiled or voided" when "the voter
2 changes the ballot or corrects an error." See Exhibit B, p. 80 of the Manual.

3
4 Defendants' *ad hoc* cross-out instruction erroneously instructs early voters to
5 "correct" a ballot by adding a second mark. This constitutes an overvote. This
6 contradicts the explicit procedure that the Manual requires, which is to request a
7 new ballot. It also creates an impermissible difference between how early voter
8 overvote/spoiled ballots are counted and how in-person overvote/spoiled ballots are
9 counted. The early voter's ballot is automatically rejected by the tabulating
10 machine, whereas the in-person voter gets a new ballot that is successfully accepted
11 and instantly counted by the tabulating machine. Indeed, the State has numerous
12 procedures in place for in-person voters who want to correct their ballot, and all of
13 them include using a new ballot. See Exhibit C, pages 79, A222 of the Manual
14 discussing new replacement ballots, attached. Notably, even in a special all-mail
15 election, where everyone is automatically mailed a ballot, the procedure to correct a
16 ballot is still to request a replacement ballot, not to cross out an incorrect mark. See
17 Exhibit D, p. 74 of the Manual.
18
19
20

21 The Manual does not contemplate a voter taking an action as instructed by
22 the Defendant, namely, to "cross-out" his or her mark and place a second mark on
23 the ballot. The *ad hoc* instructions have the effect of instructing early voters to spoil
24 their ballots. The instructions also happen to violate Arizona law, which requires
25 uniformity and impartiality in its election procedures. See A.R. S. 16-652(A).
26
27 Further, Defendants do not have the authority to change or ignore state election
28

1 procedures that have been prescribed by the Secretary of State and approved by
2 both the Arizona Governor and the Arizona Attorney General. A.R.S. 16-452(B).

3 The promulgated rules are mandatory, not discretionary, as evidenced by the
4 attachment of criminal liability to a violation of any election rule contained in the
5 State's Election Manual:
6

7 C. A person who violates any rule adopted pursuant to this section is guilty of
8 a class 2 misdemeanor.

9 A.R.S. 16-452(C).

10 Because Defendants' cross-out instruction contradicts the mandatory ballot
11 instructions approved by the State, it is erroneous and the Court should invalidate
12 it.
13

14 **III. Defendants' Arguments Attempting to Justify the Cross-Out**
15 **Instruction Lack Merit.**

16 Even if the Court determines that Arizona law permits the Defendants to
17 issue the cross-out instruction to just early voters, which it does not, such a practice
18 would infuse chaos into the election and potentially disenfranchise voters.
19

20 First, the legislation passed does not change the approved statewide
21 procedures, nor does it allow any county to give the cross-out instruction. The
22 legislation simply establishes additional processes to safeguard the manual
23 interpretation of overvoted, spoiled, or damaged ballots. It is intended to assist in
24 the adjudication of overvoted ballots, a percentage of which are present in every
25 election. The passage does not permit an *increase* in overvoted ballots, which could
26 likely result if the cross-out instruction is given.
27

1 Second, the County's position that it will save money if it doesn't have to mail
2 out replacement ballots does not outweigh the public's interest in having their
3 ballots successfully accepted by the voting tabulating machine
4

5 Last, having two different sets of instructions on how to correct a ballot
6 creates voter confusion. Early voters are being told that crossing out a mistake is
7 acceptable, while in-person poll location instructions say the opposite. In addition,
8 the Maricopa County's own website tells voters that if they make a mistake on their
9 ballot, *they should request a new ballot*:
10

11 15. If I ruined my mailed ballot, how do I get another one?

12 A: If you make a mistake in marking your ballot, do not try to correct
13 it. Call us at 602-506-1511. ... If you do not have enough time to wait
14 for a new ballot in the mail, visit any Ballot Center location across the
County to vote in-person.

15 FAQ from Maricopa County Elections Website, available at
16 <https://recorder.maricopa.gov/site/faq.aspx>.

17 CONCLUSION

18 For the foregoing reasons, the Court should grant the Plaintiffs injunctive
19 relief by enjoining the Defendants from issuing the illegal cross-out instruction on
20 all mail-in ballots, and awarding whatever additional relief it deems necessary.
21

22 Respectfully submitted this 2nd Day of September, 2020.

23
24 /s/ Sue Becker

25 PUBLIC INTEREST LEGAL FOUNDATION

26 CERTIFICATE OF SERVICE

27 ORIGINAL FILED this 2nd Day of September, 2020, with:
28 Clerk of the Maricopa County Superior Court
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS - 6

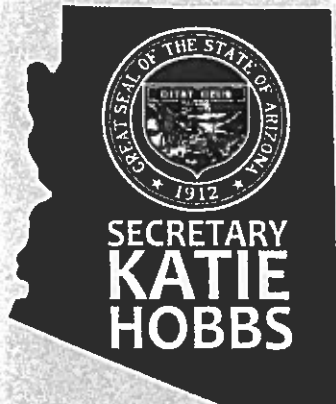
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EXHIBIT A



STATE OF ARIZONA

2019 ELECTIONS PROCEDURES MANUAL

December 2019

www.azsos.gov



1700 W. Washington St. Phoenix, AZ 85007



1-877-THE-VOTE (843-8683)



3. Required Instructions to Voters

A County Recorder must supply printed instructions that:

1. Direct voters to sign the voter affidavit, mark the ballot, and return the voted ballot in the enclosed return envelope;
2. Include a website address where the following information will be posted: (1) official locations where early ballots may be deposited; and (2) official write-in candidates and withdrawn candidates for all jurisdictions on the ballot, A.R.S. § 16-343(G); and (2);
3. Inform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote;
4. Recommend that voters mail a ballot-by-mail at least six calendar days before the election to best ensure the ballot will be timely received by 7:00 p.m. on Election Day;
5. Informs voters regarding the appropriate marking devices to be used when marking the ballot; and
6. Include the following language:
 - In order to be valid and counted, the ballot and affidavit must be delivered to the County Recorder or other officer in charge of elections or may be deposited at any polling place in the county no later than 7:00 p.m. on Election Day; and
 - **WARNING** - It is a felony to offer or receive any compensation for a ballot.

A.R.S. § 16-547(C). The County Recorder may substitute “vote center” for “polling place” if the county uses vote centers. If applicable, the County Recorder may add additional ballot drop-off locations to the statutorily-prescribed language. All ballot drop-off locations and drop-boxes shall be approved by the Board of Supervisors (or designee).

A County Recorder in a covered jurisdiction, as designated by the Census Bureau in the current Federal Register publication, must provide these instructions in English and any additional written language(s) required under the federal Voting Rights Act. *See Chapter 8, Section VI.*

D. Mailing Ballots-by-Mail

1. Methods of Transmitting Ballots-by-Mail

A ballot-by-mail must be mailed to voters by first-class, non-forwardable mail. The ballot-by-mail must be accompanied by an early ballot affidavit, instructions to voters, and a postage-prepaid return envelope.

UOCAVA ballots may be transmitted by mail, fax, email, or other secure method of online transmittal, in accordance with the delivery method selected by the voter on the FPCA. UOCAVA mailing requirements apply to all elections, not just federal elections. A.R.S. § 16-543(A).

EXHIBIT B

ARIZONA SECRETARY OF STATE
2019 ELECTIONS PROCEDURES MANUAL

- c. Prevent the voter from voting for the same person more than once for the same office;
 - d. Have the capability to be sealed and prevent further voting after the close of the polls and/or after the last voter has voted;
 - e. DRE voting machines must produce a paper ballot or voter verifiable paper audit trail (VVPAT) for audit purposes, including the ability to change the ballot or correct any error and noting a spoiled or voided ballot when the voter changes the ballot or corrects an error; and
 - f. Provide the voter with an opportunity (in a private, secret, and independent manner) to correct any error before the ballot is cast and counted or cast a replacement ballot if the previous ballot is spoiled or unable to be changed or corrected;
4. Accessible voting equipment must be capable of:
- a. Allowing the voter to cast and verify (both visually and with audio or synthesized speech) the voter's selections, including a synthesized (or actual) speech recording and braille keyboard or other input method that is ADA compliant;
 - b. Displaying the on-screen ballot in a format substantially similar to that of paper ballots (*see Chapter 4, Section II(E)(1) and Chapter 8, Section V(A)*);
 - c. Displaying, providing audio or synthesized speech (and if applicable, printing) the ballot in English and in any minority language required under federal or state law;²⁰ and
 - d. Otherwise providing voters with visual impairments equivalent access to the voting experience compared to that provided for voters without visual impairments.
5. The voting system may not be subject to a recent decertification proceeding or otherwise have been utilized in violation of federal or state law.²¹

A.R.S. § 16-442(B); A.R.S. § 16-442.01(A)-(B); A.R.S. § 16-446(A)-(B); A.R.S. § 16-502(H); 52 U.S.C. § 20971(a)-(b); 52 U.S.C. § 21081(a).

ii. Demonstration and Functionality Test

A demonstration and functionality test consists of:

1. Explaining the testing process (of both primary and general election test ballots) during the public meeting;
2. Casting ballots on all electronic voting equipment in accordance with the test script prepared for the meeting;

²⁰ See Chapter 8, Section VI. If the applicable minority language is not a written language, the accessible voting machine must be capable of providing audio or synthesized reading of the ballot to the voter.

²¹ For example, under A.R.S. § 16-1004(B), it is a class 5 felony to knowingly modify the software, hardware, or source code for voting equipment without receiving certification from the Election Equipment Certification Committee.

The Election Equipment Certification Committee must issue a written recommendation to the Secretary of State based on the majority vote from the public meeting.

i. Legal Standards for Certification

A voting system must comply with all federal and state laws, including the following:

1. The voting system must be tested and certified under federal law:
 - a. The voting system must be reviewed and/or tested by an accredited VSTL;
 - b. The voting system must be certified by the EAC; and
 - c. The voting system must otherwise comply with the then-applicable federal Voluntary Voting System Guidelines (VVSG) in effect;
2. The voting system must have the following functional capability and/or characteristics required under federal and state law:
 - a. The voting system must be suitably designed and be of durable construction;
 - b. The voting system must provide for secure, efficient, and accurate voting;
 - c. The voting system must record votes correctly and accurately, including aggregation of the voter's choices made on a single device;
 - d. The voting system must provide a durable paper document that visually indicates the voter's selections and can be (1) used to verify the voter's choices; (2) spoiled by the voter if they fail to reflect the voter's choices, in which case the voter would be permitted to cast a new ballot; and (3) used in recounts and manual audits;
 - e. The voting system must function for all types of elections;
 - f. The voting system must be capable of rotating candidate names within a race and accurately tabulating the results;
 - g. The voting system must aggregate the votes in the EMS in a way that prevents votes from being changed or deleted after voting has concluded; and
 - h. The voting system must contain security features that prevent unauthorized access or hacking;
3. Ballot marking devices and direct-recording electronic (DRE) voting machines must:
 - a. Permit the voter to verify (in a private, secret, and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;
 - b. Allow the voter to vote for the candidate or ballot measure of choice, allow the voter to vote for or against as many candidates or ballot measures for which they are entitled to vote, and inform the voter if the number of vote choices exceeds the permitted amount or prevent the voter from selecting more than the permitted number of vote choices;

INSTRUCTIONS TO VOTERS AND ELECTION OFFICERS

1. The polls are open from 6:00 a.m. until 7:00 p.m.
2. Please give your full name and place of residence and identification documents to the election officer. The election officer will determine which type of ballot you will use to cast your vote.
3. Once you have received your ballot, go to the next available voting booth to cast your vote. Mark your ballot opposite the name of each candidate for whom you want to vote.
4. If you want to vote for a person who is an official write-in candidate, write that person's name on the lines provided and mark the ballot in the appropriate place next to the name you have written.
5. Ask for assistance if you need assistance marking your ballot or wish to utilize the accessible voting equipment. If you request assistance marking your paper ballot, two election officers from opposing political parties will accompany you to the voting booth. They will:
 - tell you the names of all candidates for each office on the ballot,
 - tell you the political parties by which the candidates were nominated for each office,
 - ask the name of the candidates for whom you want to cast your vote, and
 - mark your ballot correctly.

Neither of the election officers who assist you with your vote is allowed to influence your vote by recommending, explaining, or suggesting any candidate or political party for any office or issue.

6. If you accidentally spoil your ballot, present it to the election judge. Make sure to conceal any votes you have made on the ballot. Either you or the judge will need to mark the ballot as spoiled, and the judge will give you another ballot on which to cast your vote. You are allowed to spoil no more than three ballots.

If you believe that a violation of the Help America Vote Act of 2002 has occurred, you may contact:

Secretary of State's Division of Election Services
1700 West Washington Street 7th Floor
Phoenix, AZ 85007
1-877-THE VOTE
www.azsos.gov

EXHIBIT D

III. PREPARING AND MAILING BALLOTS

A County Recorder or other officer in charge of elections may use a unified ballot format that combines all candidates and issues on the same ballot in a ballot-by-mail election. A.R.S. § 16-204(G).

Ballots utilized in a ballot-by-mail election must be prepared and transmitted in accordance with the requirements applicable to early ballots (*see Chapter 2, Sections I(C) and I(D)*), except:

- The County Recorder must mail ballots to all eligible voters not more than 27 and not fewer than 15 days before the election. A.R.S. § 16-558.01.
- Return envelopes in ballot-by-mail elections for Title 48 special district elections need not be postage pre-paid. The district governing board must determine whether the cost of return postage will be borne by the local jurisdiction or the voter. A.R.S. § 16-558.01.

If a jurisdiction conducts its own election without using the services of the County Recorder, the duties listed above for the County Recorder shall be performed by the officer in charge of elections for the jurisdiction.

IV. METHODS TO RETURN OR REPLACE BALLOTS

A completed ballot-by-mail must be delivered to the appropriate officer in charge of elections or an official ballot drop-off location no later than 7:00 p.m. on Election Day. A.R.S. § 16-411(D); 16-558(B); 16-551(C).

A city, town, school district, or special taxing district that conducts a ballot-by-mail election on its own behalf, and a county that conducts a ballot-by-mail election on behalf of a jurisdiction, may establish voting locations/ballot replacement sites on Election Day as well as ballot drop-off sites for voters to deposit voted ballots until 7:00 p.m. on Election Day. A.R.S. § 16-411(D); *see also Chapter 8, Section I(B)*.

A County Recorder or other officer in charge of elections must establish at least one central location in each district to issue replacement ballots in cases where the voter's mailed ballot was lost, spoiled, destroyed, or not received. These ballot replacement sites shall be open until 7:00pm on Election Day. A.R.S. § 16-558.02(A); A.R.S. § 16-409(A). The County Recorder or other officer in charge of elections may establish as many additional ballot replacement sites as deemed necessary. If there is no appropriate location for a ballot replacement site in the district (for example, if the district contains only residential buildings), the County Recorder or officer in charge of elections should establish a ballot replacement site as close to the district as practicable.

In order for the replacement ballot to be counted, the voter must sign a sworn statement that the original ballot was lost, spoiled, destroyed, or not received. A.R.S. § 16-409(A); A.R.S. § 16-558.02(A). This language may be incorporated into the early ballot affidavit prescribed by A.R.S.