IN THE SUPREME COURT
FOR THE STATE OF ARIZONA

DAVID YETMAN, SANDRA SPANGLER, ARLENE LEAF, DAVID MORGAN, DAVID HENRY CROTEAU, SHAUN McCLUSKY, and TED DOWNING, QUALIFIED VOTERS IN CONGRESSIONAL DISTRICT 2 ON THEIR OWN BEHALF AND ON BEHALF OF ALL ARIZONA VOTERS,
Petitioners,
vs.

KEN BENNETT, ARIZONA SECRETARY OF STATE,
Respondent.

SUPREME COURT NO.

SPECIAL ACTION PETITION FOR WRIT OF MANDAMUS

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Jurisdictional Statement

This petition is a Special Action against Ken Bennett, the Arizona Secretary of State in his official capacity. Pursuant to Article 6 Sec. 5 (1) of the Constitution of Arizona this court has original jurisdiction of writs of prohibition, mandamus and other extraordinary writs to State officers.

The plaintiffs are individual electors in Congressional District Two in both Pima and Cochise counties who have sued on their own behalf and on behalf of all other electors. Plaintiffs do not have available any other remedy at law and certainly none equally plain, speedy or adequate. Rule 1, Rules of Procedure for Special Actions. Plaintiffs assert that the accurate counting of votes is the sine qua non of our democracy and that the intent of the legislature is to provide a separate check on the computerized counting of votes so as to preserve the purity of our elections and to ensure that Article 7, section 7 of the Arizona Constitution is strictly complied with. Section 7 provides: "In all elections held by the people in the state, the person, or persons, receiving the highest number of legal votes shall be declared elected."

Plaintiffs allege that Ken Bennett is proceeding or is threatening to proceed without or in excess of jurisdiction or legal authority and that the plaintiffs do not have an equally plain, speedy or adequate remedy at law.

The secretary of state does not have the discretion not to follow specific legislative directions such as A.R.S. § 16-664C.

This petition concerns the statutory recount of the Congressional District Two election where the canvass of returns from Pima and Cochise Counties resulted in a 161 vote margin between candidates Ron Barber and Martha McSally thereby triggering a recount pursuant to A.R.S. § 16-661. Plaintiffs are qualified electors who voted at the November 4, 2014 General Election in that District. In addition to Article 6, Sec. 5, (1) of the Constitution of Arizona, Rule 7(b) of the Rules of Procedure For Special Action permits the filing of a special action in this court under appropriate circumstances.

Plaintiffs expect that the Secretary of State will today, December 1, 2014, pursuant to A.R.S. § 16-662, certify the facts requiring the recount to the Superior Court in Maricopa County. A.R.S. § 16-663 requires the Maricopa County Superior Court to forthwith enter an order requiring a recount of the votes cast for such office.

Plaintiffs allege that the Secretary of State intends to then exceed his legal authority and to violate A.R.S. § 16-664. It is of statewide interest that the recount proceed according to law and that the process not be repeated because the Secretary of State intends to ignore the statutory requirements of a recount.

The two counties directly involved are in one court of appeals and the Secretary of State in another. A uniform interpretation of our recount statutes is of state wide importance. Finally, a recount that confirms the accuracy of the vote count as required by statute to protect the purity of electronically counted elections is fundamental to our democratic system.

Statement of Issues

1. A.R.S. § 16-664 requires the court ordered recount of votes to be recounted on an automatic tabulating system to be furnished and programmed under the supervision of the secretary of state. That statute further requires the programs to be used in the recount to differ from the programs used in the initial tabulation of votes.

Plaintiffs allege that the defendant secretary of state intends to use the same program for the recount while the statute requires a different program. The defendant secretary of state does not have the discretion to not follow that statutory mandate. The failure to follow the statutory dictate defeats the goal and law on recounts.

2. The secretary of state has available to him a different program that would timely recount the votes as required by statute but refuses to use that program. Plaintiffs request that he be ordered to use a program that can accomplish

the statutory requirements.

3. A.R.S. § 16-663 requires a random hand count of five percent of the precincts. Plaintiffs allege that the defendant secretary of state does not intend to require Pima County and Cochise County to follow the mandatory procedures.

Statement of Facts

A series of statutes set out the requirements which the legislature has determined must be followed for a recount of votes. Arizona does not permit recounts except pursuant to A.R.S. § 16-661A which states that: "A recount of the vote is required when the canvass of returns in a primary or general election shows that the margin between the two candidates receiving the greatest number of votes for a particular office...is less than ....(1) one-tenth of one percent of the number of votes cast for both such candidates..."

A.R.S. § 16-662 requires the secretary of state, when a recount is mandatory for a congressional district, to certify the facts requiring the recount to the Superior Court in Maricopa County.

A.R.S. § 16-663A requires the Superior Court to which the facts requiring a recount are certified to forthwith make and enter an order requiring a recount of the votes cast for, in this instance, the office of Congressional Representative in District 2.

The ballots cast at the November 4, 2014 election were cast and tabulated on electronic voting equipment. A.R.S. § 16-663B requires that the court ordered recount must be pursuant to 16-664 whenever the ballots were cast and tabulated on electronic voting equipment.

A.R.S. § 16-664 provides that in the event of a court ordered recount of votes that were cast and tabulated on electronic voting equipment the secretary of state must order the ballots recounted on an automatic tabulating system to be furnished and programmed under the supervision of the secretary of state.

A.R.S. § 16-664A permits the secretary of state to designate the Pima County Board of Supervisors and the Cochise County Board of Supervisors to perform the recount duties assigned by the secretary of state.

A.R.S. § 16-664C requires that the programs to be used in the recount of votes "shall differ from the programs prescribed by § 16-445 and used in the initial tabulation of the votes."

Both Pima and Cochise counties filed with the secretary of state at least ten days prior to the November 4, 2014 election a copy of each computer program used in the tabulation of the votes cast as required by A.R.S. §16-445.

A.R.S. § 16-444 defines computer program as including all programs and documentation adequate to process the ballots at an equivalent counting center.

Processing ballots requires both the Election Management System (EMS) software and the election specific documentation given to the EMS so that the EMS can properly interpret ballots as they are run through the scanner. Pima County uses a proprietary system known as GEMS provided by Premier Election Solutions, Inc. Cochise County uses a proprietary system provided by Election Systems and Software (ES&S) company known as "Unity". The "documentation" consists of a data file containing the contests, vote rules, (used to determine an improper number of marks), the candidates, party affiliation and the coordinates of the vote oval associated with each candidate or "yes/no" choice.

The State of Arizona Election Procedures Manual, revised in 2014, page 226, provides that the programs used in a recount "shall not be the programs submitted to the Secretary of State and used in the initial tabulation of the votes."

Nonetheless, despite the clear requirements of A.R.S. § 16-664C and its own Elections Procedures Manual plaintiffs allege that the defendant secretary of state intends to use or permit the use by Pima and Cochise Counties of the same programs in the recount that were used in the initial tabulation of votes.

On November 24, 2014 the Pima County Election Integrity Commission, through a unanimous vote, sent a memorandum to their appointing authority, the Pima County Board of Supervisors, advising them that a recount of congressional

district two votes using Pima County's existing system violated state law. That memorandum is Exhibit A in the Appendix to this petition.

In a responsive memorandum dated November 25, 2014, Appendix Exhibit B, Pima County Administrator C.H. Huckelberry informed the Pima County Board of Supervisors that the Arizona Secretary of State Office assured Pima County that they did not need to use a different computer program as required by A.R.S. § 16-664C and that they should use the same computer program filed with the Secretary of State pursuant to A.R.S. § 16-445.

The Appendix contains documentation relating to a system from the Clear Ballot Group that is available to the secretary of state that would comply with the statutory requirements and can be timely implemented. Plaintiffs have no interest in this system except that it is available and can be used for both the systems used in Pima and Cochise Counties. The memorandum from the Pima County Election Integrity Commission recommended it to the Pima County Board of Supervisors as "Clear Ballot has demonstrated the capability of handling the style of ballots used in Pima County."

Argument

I. The Secretary of State's plan for the recounting of ballots is contrary to law.

"Proceedings for a recount of votes cast at an election are strictly statutory. They are of no effect unless authorized, began and conducted provided by the statute." Barrera v. Superior Court, Etc. 117 Ariz. 528, 529, 573 P.2d 928, 929 (App. 2 1977).

The Huckelberry memorandum (Appendix Exhibit B) explicitly explains Pima County's plan which he asserts has the approval of the secretary of state.

> We have shared the EIC memorandum (Appendix Exhibit A) with the Arizona State Election Director Christina Estes-Werther and Deputy Election Director Kris Kingsmore. They have assured us the use of a different "program" for the recount means only that the tabulation program will be reset to count just the CD2 race and that the program as changed will be subject to a new round of logic and accuracy testing by both the Secretary of State and the County.

Plaintiffs assert that merely resetting the tabulation program does not comply with the law. Appendix Exhibit C is a declaration of computer professor Duncan Buell who explains why Mr. Huckelberry and the secretary of state is wrong.

> 7. It is my opinion that Mr. Huckelberry's proposal simply to reconfigure the existing software to count only the votes in that particular race cannot possibly be construed to be the use of a different "program" as specified in A.R.S. 16-664(C) of A.R.S. 16-444 as cited by Mr. Ryan's memo or as required by the Election Procedures Manual cited in the same memo.
>
> 8. What Mr. Huckelberry proposes is what a computer scientist and information technology professional would almost certainly refer to as changing the "configuration" for the program to be run. The underlying code used for tabulation will not be

different from the original code used. Only the "table" used to configure what the code will do will be changed. As a professional computer scientist who has been writing programs for 45 years, I declare that this cannot be argued to be the use of a different program.

9. I will reason by analogy in hopes of being understood by a non-technical audience. I would argue that what is proposed in Mr. Huckelberry's memo is not much different from "reprogramming" a cable TV remote control unit to have a different list of "favorite" stations. That change is just reconfiguring the shortened list of favorites for the convenience of the viewer; it has essentially nothing to do with the software that actually delivers signals to the screen. If the signals themselves are being delivered incorrectly, then changing which of the incorrect signals is on the short list of favorites will not change incorrect signals to correct ones as delivered to the screen.

Appendix Exhibit D contains the declaration of Michael Duniho, retired master computer scientist at the NSA, who explained the Secretary of State's plan violates 16-664C in similar terms to Professor Buell.

> A.R.S. 16-664C says that "the programs to be used in the recount of votes pursuant to this section shall differ from the programs prescribed by section 16-445 and used in the initial tabulation of the votes. In software, a program is a list of instruction in a programming language that tells a computer to perform a certain task. Generally, this set of instruction is compiled into machine code that is loaded into the computer and that does not change during program execution. In vote tabulating software, the program reads parameters from the database to direct it to interpret particular spots on a scanned ballot as votes for a particular candidate. This set of parameters

> may be considered as part of the program or may be considered simply as data used by the program, but in either view, the parameters for a recount of a particular race must in any given software system be identical to the parameters that controlled the original tabulation. Therefore, with regard to a particular race, removing parameters relating to other races does not change the program with respect to the particular race being counted again. The program is identical to the original program.

Arizona correctly requires that something significant be different between the Election Day voting system and the voting system used for a recount. To utilize exactly the same voting system, both the scanners (be they precinct scanners or central scanners) and computer programs, one could only expect that the recount will yield the same results as the Election Day tally. That is not the purpose of a recount. Any errors in scanning the Election Day ballots as well as any errors in the computer programming of the scanners will remain invisible with nothing changed between Election Day and the recount. The Arizona legislature correctly prescribed that the computer programming must be different between Election Day and the recount such that programming errors can be surfaced.

A.R.S. 16-444, 445 and 446 define what "computer programs" are, and it is the Election Management System (EMS) software and machine firmware, not just the election specific programming. The EMS software is the software provided by the voting systems manufacturer and certified by the State. It is installed on a

County server and remains there in a static (code is unchanged) state throughout the election cycle. EMS software is used to import geographic, candidate, and proposition information, then to use that information to lay out the ballots, proof those ballots via human interaction, program the voting machines, then intake and report results from those voting machines. There is election specific programming and information given to the EMS early in the election cycle.

A.R.S. 16-444(4) defines the term “computer program”:

> “Computer program” includes all programs and documentation adequate to process the ballots at an equivalent counting center.”

Processing ballots requires both the Election Management System (EMS) software (GEMS, Unity) and the election specific documentation given to the EMS so that the EMS can properly interpret ballots as they are run through the scanner.

A.R.S. 16-445 requires the filing of computer election programs with the Secretary of State. In compliance with that statute the counties have sent in a copy of the Election Management System software and the election specific documentation (typically in a database format) for each election cycle since both are needed to process the ballots for that election (see 16-444 item 4). The revision and 48 hour filing cycle refers to the election specific documentation, as the EMS software will not typically be changed during an election cycle (although that can

happen), but the election specific documentation is more likely to change (a candidate is removed from the ballot or there is a mis-spelling on the ballot-either of which would necessitate a change to the election specific documentation). The Secretary of State escrows or requires to be escrowed the EMS software, since that is what the State tests and certifies and further requires that the voting system manufacturer inform the Secretary annually of the whereabouts of that escrowed copy.

A.R.S. 16-664 mandates different programs than those on file with the Secretary of State pursuant to 16-445. This section of statute thus precludes simply re-scanning the ballots through that same EMS and election specific data files. Simply configuring the reporting to make visible only the contest in question does not make for a different program. A program is lines of code- and no code is changed by changing the reporting to make visible only the contest in question. In fact, changing the reporting in this manner is only a configuration change (checking or unchecking boxes within the EMS reporting configuration).

The Huckelberry Memorandum (Appendix Exhibit B) noted that a statewide recount of a ballot proposition in 2010 and a congressional district primary in 2012 had been conducted by the Secretary of State in the manner that they propose for this election. The methodology used was not challenged, however. That historical

practice does not trump the requirement of the statutes.

II. A program is available for use now that complies with A.R.S. 16-664.

The historical practice of the office of the Secretary of State needs to be put in historical perspective. There may not have been an available a different program in the past to perform the check on the system required by our legislature. That is no longer true.

The Pima County Election Integrity Commission memorandum (appendix A) made two recommendations. Option 1 was for a full hand count which is not provided by Arizona law. Option 2 was for a system that had been studied and considered by the commission.

> Option 2. Engaging the services of Clear Ballot Group, a company that uses ballot imaging and automated image analysis to tabulate elections and conduct audits. Clear Ballot has demonstrated the capability of handling the style of ballots used in Pima County.

Clear Ballot is a proprietary company that has developed a product that can comply with Arizona law. Plaintiffs do not know if there are other programs that would comply. If such programs exist then the Secretary of State would have the legal authority to exercise his discretion as to which program to use. Plaintiffs assert that since the relevant statutes are mandatory for the Secretary of State it is appropriate for plaintiffs to argue that he must use a system that does comply with

the statutory requirements and if he doesn't have another such system he should use the Clear Ballot program.

Appendix Exhibit E is a copy of "an unsolicited proposal by the Clear Ballot Group, Inc. To provide recount services in accordance with state law to help resolve the recount of the 2nd Congressional District election in a uniform, timely, accurate, effective and fully transparent manner."

As previously noted, Pima County and Cochise County use different Election Management Systems. The Clear Ballot system can count the ballots for both counties. Michael Duniho (Appendix Exhibit D) commented in his expert declaration on their system. He said:

> Generally, commercial vote tabulation systems are built with their own unique ballot formats such that a competing commercial vote tabulation system could not read its competitor's ballots. This seems to have been done intentionally by the vendor companies as a competitive feature. The Clear Ballot software was designed as an election auditing tool and so is intended to read multiple ballot designs. It scans a ballot and builds its interpretation parameter set from the ballot image. It qualifies under A.R.S. 16-664C as a different program and can be used to comply with the Arizona statute concerning recounts.

The Huckleberry memorandum (Appendix Exhibit B) purports to state a legal argument of the secretary of state that he is prohibited from using the Clear Ballot system. Plaintiffs will, therefore, address that point in this petition.

> As to the use of the Clear Ballot Group, this company is not certified in Arizona as required by State statute and the Secretary of State's Election Procedures Manual; and the Secretary of State's office has confirmed it would not consider using an uncertified system during the recount. Thus, neither of these options appears viable.

There is, however, no such requirement in any statute. The Secretary of State is apparently misreading A.R.S. § 16-442 B which relates to compliance with the Help America Vote Act of 2002 and relates to the use of "machines or devices used at any election." The election was held on November 4, 2014 and the machines and devices used were certified for use in Arizona.

Appendix Exhibit F contains the rules published by the Arizona Secretary of State for Arizona Voting System Certification, revised April 1, 2010. Those rules relate to the voting process. There are no similar requirements for the programs to be used in the mandatory recount pursuant to A.R.S. § 16-664, and nothing in Title 16 to prohibit the use of Clear Ballot's system for recount.

The Clear Ballot system is certified for use in the State of Florida. Appendix Exhibit G contains a copy of the Florida Department of State's approval of the Clear Ballot Group's Clear Audit 1.0.6 system and the Florida Division of Election Voting System Qualification Test Report for the Clear Ballot Group's Clear Audit System.

Plaintiffs are registered individually as Republican, Democrat, Green,

Libertarian and no party. They have no stake in any company nor in any election outcome that would override their desire for a recount as provided by the law that would ensure the accurate reporting of a genuine recount. They have provided the Clear Ballot Group material because it demonstrates that there is at least one program that complies with the intent of the legislature.

The Secretary of State has discretion in how he complies with A.R.S. § 16-664. He does not have the discretion to ignore the mandatory requirements, however.

Mandamus against a public officer is to be issued to compel the performance of an act which the law enjoins as a duty arising out of the office. Graham v. Moore, 56 Ariz. 106, 105 P.2d 962 (1940); Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949).

III. A.R.S. § 16-663B requires a hand count confirmation of the electronic machine recount that has been conducted pursuant to §16-664.

It reads as follows:

> B. When the court orders a recount of votes which were cast and tabulated on electronic voting equipment, such recount shall be pursuant to § 16-664. On completion of the recount, and for legislative, statewide and federal candidate races only, the county chairmen of the political parties entitled to continued representation on the ballot or the chairmen's designee shall select at random without the use of a computer five percent of the precincts for the recounted race for a hand count, and if the

> results of that hand count when compared to the electronic tabulation of that same race are less than the designated margins calculated pursuant to § 16-602, the recount is complete and the electronic tabulation is the official result. If the hand count results in a difference that is equal to or greater than the designated margin for that race, the procedure established in §16-602, subsections C, D, E and F applies.

A.R.S. § 16-663 requires hand count confirmation of the machine recount of "five percent of the precincts." Those precincts are to be selected at random by political party representatives "without the use of a computer."

In Pima County the percentage of "early ballots" cast are approximately 70% of the total ballots and they are not segregated by precinct. For a hand count verification pursuant to §16-663B they would need to be segregated for any precinct hand count. On information and belief Pima County does not intend to segregate those ballots by precinct.

Michael Duniho's declaration (Appendix D) notes that the Clear Audit system would be a valuable tool for that required process. The precincts must be selected at random without the use of a computer, but sorting the ballots by precinct could be done electronically by Clear Audit and the hand count could be done using graphical images of ballots on the Clear Audit computer screen.

Conclusion:

_____The Arizona statutory requirement for a separate and distinct computer

program to be used in the recount from the program to be used for the initial count is an important check on the most important aspect of our democracy. Namely, the confirmation that the votes have been accurately counted. Computer programs are sets of instructions that can be maliciously altered and the machine will count as instructed. Furthermore the best intended programs can have "bugs" in their software. As Professor Buell noted in nearly all situations in which correct results are necessary a genuine separate program for the recount would seem to be a minimal requirement.

The Arizona legislature has created such a double check system and indeed has gone beyond that requirement to also require a hand count as a check on both machine counts.

Plaintiffs request that a stay order be entered, that a prompt hearing be scheduled and that this court order the Secretary of State to require that the recount be conducted with a separate program as requested by plaintiffs and required by our legislature.

Request for Attorney Fees and Costs

Plaintiffs request their costs and attorney fees pursuant to A.R.S. § 12-2021 et seq. and pursuant to the private attorney general doctrine. Arnold v. Arizona Dept. Of Health Services, 160 Ariz 593, 775 P.2d 521 (Ariz. 1981).

RESPECTFULLY SUBMITTED this 1ST day of December, 2014.

RISNER & GRAHAM

/s/ William J. Risner

____

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Attorney for Appellant

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