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MARY ELLEN DUNLAP  
CLERK OF SUPERIOR COURT

BY \_\_\_\_\_  
DEPUTY

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7 SUPERIOR COURT OF THE STATE OF ARIZONA  
8 COUNTY OF COCHISE

10 WILLIAM J. ODLE, a qualified elector  
11 and taxpayer of Cochise County and  
12 Arizona Congressional District 2,

13 Plaintiff,

14 v.

14 JUANITA MURRAY, Cochise County  
15 Election Director; CHRISTINE  
16 RHODES, Cochise County Recorder,

17 Defendants.

No. **CV201200744**

**MOTION FOR TEMPORARY  
RESTRAINING ORDER (WITH  
NOTICE) AND MOTION FOR  
ORDER SETTING HEARING ON  
PRELIMINARY INJUNCTION**

18 Pursuant to Rule 65(d), Ariz. R. Civ. P., Plaintiff William J. Odle ("Plaintiff")  
19 hereby moves this Court for the issuance of:

20 1. A Temporary Restraining Order ("TRO") immediately prohibiting  
21 defendants Juanita Murray ("Elections Director") and Christine Rhodes ("Recorder"),  
22 their officers, managers, agents, servants, affiliates, employees, and attorneys, and those  
23 persons in active concert or participation with them from tabulating or otherwise counting  
24 in any manner the 130 disputed unsealed provisional ballots from Hopi, Ramsay and  
25 Castro Park, or comingling the disputed unsealed provisional ballots, without obtaining  
26 prior written consent from Plaintiffs.

27 2. An Order to Set Hearing on Preliminary Injunction providing defendants  
28 Juanita Murray and Christine Roads with notice of the date and time of the hearing on

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1 Plaintiff's Application for a Preliminary Injunction as to why a preliminary injunction  
2 should not be issued in the same force and effect as this Temporary Restraining Order.

3 This Motion is supported by the following Memorandum, the Verified Complaint,  
4 and the Declarations of Sean Philbin and Todd Johnson, which are attached hereto.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. FACTUAL BACKGROUND.**

7 This action relates to 130 general election ballots in Cochise County which were  
8 cast as provisional ballots. A "provisional ballot" is one that has been voted on at a  
9 polling location but held over in a special envelope until the County Recorder can verify  
10 the voter's eligibility to vote in that polling location.<sup>1</sup> The 130 disputed ballots consist of  
11 96 from the Castro Park Precinct, 30 from the Ramsey Precinct, and 4 from the Hopi  
12 Precinct in Cochise County.

13 Pursuant to Arizona's legal procedures for maintaining ballot security, these ballots  
14 have been spoiled because they were not sealed, as required, when they were transported  
15 from the Castro Park, Ramsey, and Hopi Precinct polling locations to the Cochise County  
16 Elections Department and Recorder's Office. One disputed provisional ballot has gone  
17 missing from the Recorder's Office in the last 48 hours as well, despite being embargoed.

18 In addition, the poll workers did not affix the provisional ballot tracking forms to  
19 the outside of the provisional ballot envelope. Instead, the forms were placed inside of the  
20 unsealed envelopes.<sup>2</sup> Moreover, according to the Elections Director, when the ballots  
21 were received in her office, an individual or individuals reached inside the unsealed  
22 envelopes, pulled out the provisional ballot tracking forms, and affixed them to the  
23 outside of the envelopes. This apparently took place without any elections official  
24 alerting the political party observers, who are entitled to monitor the elections process as

25  
26 <sup>1</sup> The most common reasons for voting a provisional ballot is that the voter has already received  
27 an early ballot in the mail but has requested a ballot at a polling location, or that the voter has  
28 moved within the county without updating his or her voter registration information. See A.R.S.  
§§ 16-579(B), 16-584.

<sup>2</sup> See Ariz. Secretary of State Election Procedures Manual 139.

1 an additional safeguard for ballot security.<sup>3</sup>

2 Plaintiff is a qualified elector and taxpayer of Cochise County and of Arizona's  
3 Congressional District 2 who cast his vote for candidates that include Martha McSally for  
4 Congress. For the reasons explained below, Plaintiff will suffer irreparable harm should  
5 the Elections Director tabulate the disputed ballots. Among other things, Plaintiff's vote  
6 in the contest for Congressional District 2, and other offices on the general election ballot,  
7 will be diluted and negated by illegal ballots to such an extent that his chosen candidates  
8 may not be elected. This injures Plaintiff's fundamental right to vote and compromises  
9 the integrity of the election process.

## 10 II. LEGAL ARGUMENT.

11 A plaintiff is entitled to a TRO on a showing of either (1) a combination of  
12 probable success on the merits and the possibility of irreparable harm, or (2) the existence  
13 of serious questions going to the merits and "the balance of hardships tipped sharply" in  
14 the moving party's favor. *See Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.  
15 1990). Plaintiff satisfies either standard for issuance of the requested TRO.

### 16 A. Plaintiff is Likely to Prevail on the Merits.

17 "Confidence in the integrity of our electoral processes is essential to the  
18 functioning of our participatory democracy." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006).  
19 "The right of qualified electors to vote in a state election is recognized as a fundamental  
20 right under the equal protection clause of the Fourteenth Amendment." *Pierce v.*  
21 *Allegheny County Board of Elections*, 324 F. Supp. 2d 684, 694-95 (W.D. Pa. 2003).  
22 When elections officials fail to follow the legal process for handling ballots or have  
23 inconsistent policies for ballot security, an equal protection violation occurs. *Id.* at 705  
24 (holding that plaintiffs satisfied the likelihood of success on the merits element for a TRO  
25 where the "the Board of Elections' three policies for accepting hand-delivered absentee  
26 ballots were, at the very least, different from the policies in Philadelphia County"); *see*

27  
28 <sup>3</sup> *See, e.g.*, A.R.S. §§ 16-552(C) (authorizing political party early ballot challengers); 16-621(A)  
(authorizing political party observers at tabulation center).

1 also *Roe v. State of Alabama*, 43 F.3d 574, 581 (11th Cir. 1995) (affirming preliminary  
2 injunction against counting absentee ballots where voters failed to sign affidavits on  
3 envelopes, holding that counting such ballots would constitute vote dilution and  
4 disenfranchise those who signed the affidavits).

5 Likewise, the Arizona Supreme Court has held that deviations from ballot handling  
6 procedures shall render the ballots invalid. *Miller v. Picacho Elem. School Dist. No. 33*,  
7 179 Ariz. 178, 178, 877 P.2d 277, 277 (1994) (“In this case we hold that absentee ballots  
8 procured in violation of our absentee ballot law are invalid, and if the ballots affect the  
9 outcome, the election must be set aside.”). Insofar as a plaintiff requests provisional  
10 remedies to address this impropriety, the appropriate judicial response is to enter an  
11 injunction or other order requiring that the ballots be set aside pending resolution of the  
12 legal challenge. *Id.* at 707 (“This court will enter an order requiring that these 937  
13 absentee ballots be set aside by the Board of Elections in a secure place. As of this time,  
14 those ballots are challenged.”).

15 Here, Plaintiff states a classic equal protection claim because the Cochise County  
16 Elections Department has dispensed with requirements for provisional ballot processing in  
17 3 of the 49 polling place locations in Cochise County. These requirements must apply  
18 County-wide and did apply in the 46 other precincts. Plaintiff satisfies the requirements  
19 to state a claim under § 1983 because the defendants are state actors, acting under color of  
20 state law, to deprive Plaintiff of his constitutional rights resulting in damage. *See*  
21 *Mulleneaux v. State*, 190 Ariz. 525, 539, 950 P.2d 1156, 1160 (App. 1997) (“To state a  
22 claim against an individual, plaintiff must allege that the person deprived him of a federal  
23 or constitutional right and acted under color of state law in doing so.”). In addition,  
24 Plaintiff states a violation of Arizona law that justifies relief as a special action and under  
25 the declaratory judgment, injunction and mandamus statutes.

26 The Arizona Elections Procedure Manual (“Manual”), published by the Arizona  
27 Secretary of State, provides the procedural requirements for elections and, specifically, the  
28 treatment of provisional ballots. Under A.R.S. § 16-513, the Manual has the force of law

1 because elections "shall" be conducted in accordance with the Manual:

2 The board of supervisors shall prepare instructions for the guidance of  
3 voters and election officers at the election, according to which the election  
4 shall be conducted and which shall govern the voters and election officers  
as provided in the secretary of state's procedures manual.

5 A.R.S. § 16-513; *see also* A.R.S. § 16-452(A) (elections procedures manual shall set forth  
6 rules for ballot "maximum degree of correctness, impartiality, uniformity, and efficiency"  
7 and "procedures for early voting and voting, and of producing, distributing, collecting,  
8 counting, tabulating, and sorting ballots") & (C) (making failure to comply with a rule  
9 promulgated in the Manual a class 2 misdemeanor).

10 The Manual outlines the procedure for provisional ballots at the polls. (Manual at  
11 138.) Specifically, it provides the procedures for the treatment of provisional ballots:

12 The election official gives the provisional ballot envelope and ballot to the  
13 voter and directs the voter to a designated voting booth.

14 After voting, the voter returns the ballot to the election official at the ballot  
15 box along with the provisional ballot envelope.

16 The voter places the voted ballot in the provisional ballot envelope and may  
17 seal the envelope.

18 *The election official ensures the voted ballot is sealed in the provisional  
19 ballot envelope.*

20 The election official makes sure that all of the information on the  
21 provisional ballot envelope has been filled out including signatures of board  
22 workers.

23 The voter is given a provisional voter receipt with information on how to  
24 verify the status of the voter's provisional ballot.

25 *The voter or election official deposits the sealed provisional ballot envelope  
26 in the ballot box.*

27 (Manual at 139-40 (emphasis added)).

28 The Manual emphasizes the importance of ballot security. The Manual provides

1 that “[r]eceiving sites may be set up to receive ballots from outlying precincts.  
2 Procedures for security of these ballots at all times, from receipt to delivery, must be  
3 implemented.” (Manual at 150.) After the provisional ballots are cast, the Manual  
4 provides that “[p]rovisional ballots shall be accepted or rejected for counting using the  
5 procedure outlined for early ballot processing in this manual.” (Manual at 169.) *Only* the  
6 Elections Department staff may “open the provisional ballot envelopes.” (Manual at 170);  
7 *see also* Manual at 114 (“The ballots shall be stored in sealed packages”).

8 The disputed ballots in this case did not follow this procedure. Each provisional  
9 ballot envelope, in effect, is a quasi-ballot box with a seal. The seal guarantees that the  
10 ballot has not been tampered with since leaving the voter’s possession. When provisional  
11 ballot envelopes lack the requisite seal, however, the chain of custody for those ballots is  
12 broken not to mention the integrity of the vote. Because of the risk of compromised  
13 ballots, they simply cannot not be counted.

14 **B. Plaintiff Will Suffer Irreparable Harm Unless Defendant Is Enjoined.**

15 Absent emergency relief from this Court, Plaintiff will suffer actual and imminent  
16 harm, which cannot be adequately compensated at law. The Manual requires sealing  
17 provisional ballots at the polling site in order to avoid tampering with the ballots and  
18 spoliation. The lack of an unbroken seal makes it possible for someone to change out the  
19 ballots in the envelopes, mark additional candidates in a single race to cause “over-votes,”  
20 mark an unvoted race, or remove ballots altogether.

21 The Elections Director has indicated that she may begin tabulating the disputed  
22 ballots as early as this afternoon, November 13, 2012. *See* Declaration of T. Johnson,  
23 attached hereto. If these ballots are tabulated and then mixed into the general population  
24 of ballots, there will be no way to recover them and “claw back” these votes should it later  
25 be determined that they are illegal. Even if the ballots are ordered to be counted but  
26 segregated from the general population, there is still a high risk that they are lost, altered,  
27 stolen, or destroyed. Should something like this occur, would be no record to subtract the  
28 votes from the final vote total. For these reasons, courts have recognized that not

1 counting ballots or invalidating them is the appropriate remedy. *E.g., Pierce*, 324 F. Supp.  
2 2d at 707; *Miller*, 179 Ariz. at 180, 877 P.2d at 279. Additionally, the tabulation of these  
3 ballots would violate Plaintiff's equal protection rights, as the county has departed from  
4 the requirements under the Manual for 3 polling places, resulting in inconsistent standards  
5 among the polling places in Cochise County.

6 **C. The Balance of Hardships Tips Sharply in Plaintiff's Favor.**

7 The hardship to Plaintiff if a temporary restraining order is not granted will vastly  
8 exceed any hardship felt by the Elections Director if she is enjoined. The fact is, at this  
9 time, there is not substantial hardship to the Elections Director. The status quo will be  
10 maintained. The Election Director will be able to tabulate the ballots if the Court rules  
11 against Plaintiff on the merits. On the other hand, should tabulation of the disputed  
12 ballots proceed and Plaintiff prevails on the merits, for the reasons mentioned above, it  
13 may be impossible to recreate the vote totals.

14 **III. CONCLUSION.**

15 For the foregoing reasons, Plaintiff respectfully requests that this Court issue a  
16 temporary restraining order and set a preliminary injunction hearing on an expedited  
17 basis.

18 DATED this 13th day of November, 2012.

19 SNELL & WILMER L.L.P.

20  
21 By \_\_\_\_\_

22 Eric H. Spencer  
23 Michael Liburdi  
24 One Arizona Center  
25 Phoenix, Arizona 85004-2202  
26 Attorneys for Plaintiff  
27  
28

**DECLARATION OF TODD JOHNSON**

I, Todd Johnson, declare as follows:

1. I am a political party observer and since November 9, 2012, I have been observing ballot tabulation at the Cochise County Elections Department.

2. On or about November 9, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Cochise County Recorder's Office had received nearly 120 provisional ballots that had not been properly sealed from the Castro Park precinct.

3. I later learned that the Cochise County Elections Department removed the provisional ballot receipt from the inside of each unsealed ballot envelope and appended the receipt to the outside of each envelope. The Elections Department had transferred the unsealed ballots (along with all other provisional ballots that had been properly sealed) to the Cochise County Recorder's Office.

4. On or about November 10, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Recorder's Office had received 5 provisional ballots that had not been sealed from the Hopi precinct.

5. On or about November 11, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Recorder's Office had received 32 provisional ballots that had not been sealed from the Ramsey precinct.

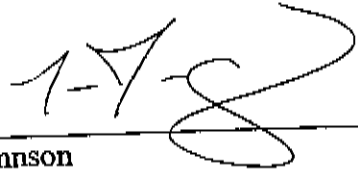
6. The Cochise County Elections Department received approximately 130 unsealed provisional ballot envelopes (with ballots) back from the Recorder's Office on November 12, 2012.

7. The Cochise County Elections Director said that she intends to feed the ballots from the unsealed provisional ballots through the elections tabulating equipment as soon as the undisputed provisional ballots are tabulated, per the County Attorneys' Office's authority.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Dated: November 13, 2012.

A handwritten signature in black ink, appearing to read 'T. Johnson', written over a horizontal line.

Todd Johnson

**DECLARATION OF SEAN PHILBIN**

I, Sean Philbin, declare as follows:

1. I am a political party observer and since November 9, 2012, I have been observing provisional ballot processing at the Cochise County Recorder's Office ("Recorder").

2. On or about November 9, 2012, a fellow party observer informed me that there were approximately 120 provisional ballots in the Recorder's possession that appeared to be unsealed.

3. Upon personal review of the ballots in question, I made the determination that all of the ballots under review appeared to be unsealed.

4. After concluding that the ballots in question appeared unsealed and after inquiring with the Recorder about the condition of the ballots at the time of their arrival, I was informed by the Recorder that the ballots had arrived there in that condition (i.e., unsealed).

5. At this time, I requested that the Recorder immediately cease processing the ballots in question and I further requested that the ballots in question be isolated from any outstanding, unprocessed ballots and locked in a secure location until a determination could be reached regarding their validity.

6. The Recorder complied with my requests and stored the ballots in question in a locked room within the building.

7. The Recorder also informed me at this time that the unsealed provisional ballots in question were from Castro Park Precinct.

8. On or about November 10, 2012, I personally observed that the Recorder had five more additional provisional ballots that appeared unsealed.

9. Upon concluding that the five additional ballots appeared unsealed, I followed the same procedure as I had set with the previous ballots in question and requested that the Recorder immediately cease processing the ballots and store them in a secure room until a conclusion could be reached regarding their validity. The Recorder complied with my requests.

10. The Recorder informed me at that time that the five ballots in question were from

### Hopi Precinct.

11. On or about November 11, 2012, I was informed by the Recorder that several more ballots appeared to be unsealed.

12. Upon personal review of the ballots in question, I made the determination that thirty-two of the ballots under review appeared to be unsealed.

13. Upon concluding that the thirty-two additional ballots appeared unsealed, I followed the same procedure as I had set with the previous ballots in question and requested that the Recorder immediately cease processing the ballots and store them in a secure room until a conclusion could be reached regarding their validity. The Recorder complied with my requests.

14. The Recorder informed me at this time that the thirty-two ballots in question were from Ramsey Precinct.

15. All of the unsealed ballots in question, including approximately 120 from Castro Park Precinct, five from Hopi Precinct and thirty-two from Ramsey Precinct, totaled approximately 157 provisional ballots to which I raised a dispute regarding their validity with the Recorder. On or about November 9, 2012, I was informed by a fellow party observer who was stationed at the Cochise County Election Department that the Cochise County Elections Department removed the provisional ballot receipt from inside of each unsealed ballot envelope in question from Castro Park Precinct and appended the receipt to the outside of each envelope. The fellow party observer informed me that the Elections Department subsequently transferred the unsealed ballots (along with all other provisional ballots that had been properly sealed) to the Recorder.

16. At my request, the Recorder kept all the disputed ballots segregated and stored in a secure location until November 12, 2012, when the Recorder informed me that, once the undisputed provisional ballots had been processed, she intended to process the unsealed provisional ballots by the end of the night.

17. Over protest by political party observers, including me, I witnessed the Recorder process all the unsealed provisional ballots in question on November 11, 2012.

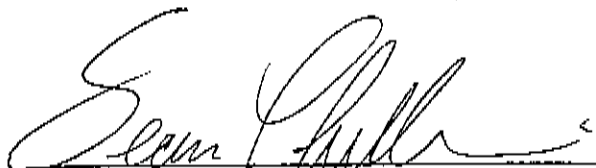
18. The Recorder disqualified approximately 27 provisional ballots, leaving approximately 130 unsealed provisional ballots.

19. The Recorder, in the presence of political party observers, had segregated the five Hopi provisional ballots and stored them in a secure, locked room in the building on November 10, 2012. An inventory accompanying the undisputed Hopi Precinct ballots noted that five unsealed ballots were under dispute and had been segregated and locked away in a secure location. However, when the Recorder processed the Hopi precinct ballots on November 11, only four unsealed envelopes were present. The Recorder could not account for the missing unsealed ballot from Hopi precinct.

20. On November 12, 2012, I personally observed the disputed provisional ballots being transferred back to the Cochise County Elections Department. The disputed ballots were again segregated and stored in a secure location at the Elections Department away from all undisputed ballots.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 13, 2012.



Sean Philbin

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10 Attorneys for Plaintiff

11 SUPERIOR COURT OF THE STATE OF ARIZONA  
12 COUNTY OF COCHISE

13 WILLIAM J. ODLE, a qualified elector  
14 and taxpayer of Cochise County and  
15 Arizona Congressional District 2,

16 Plaintiff,

17 v.

18 JUANITA MURRAY, Cochise County  
19 Election Director, CHRISTINE  
20 RHODES, Cochise County Recorder,

21 Defendants.

No. **CV 201200744**

**VERIFIED SPECIAL ACTION  
COMPLAINT FOR INJUNCTIVE,  
MANDAMUS AND DECLARATORY  
RELIEF**

22 For their Special Action Complaint for Declaratory, Mandamus, and Injunctive  
23 Relief (the "Complaint"), Plaintiffs allege as follows:

**THE PARTIES**

24 1. Plaintiff William Odle ("Plaintiff") is a qualified elector and taxpayer of  
25 Cochise County and voted for Martha McSally in Arizona Congressional District 2 in the  
26 November 6, 2012 general election. Plaintiff has standing to bring this action because, if  
27 the Court does not act to prevent vote dilution, there will be no mechanism by which  
28 invalid provisional ballots could be challenged for violations of Arizona law.

2. Defendant Juanita Murray ("the Elections Director") is the Cochise County  
Election Director and acted under color of law.

3. Defendant Christine Rhodes (the "Recorder") is the Cochise County

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1 Recorder and acted under color of law.

## 2 JURISDICTION AND VENUE

3 4. This Court has jurisdiction and venue pursuant to Article 6 § 14 of the  
4 Arizona Constitution and A.R.S. §§ 12-123; 12-1801, *et seq.*; 12-1831, *et seq.*; and 12-  
5 2021, *et seq.* and Rule 1 of the Rules of Special Action.

6 5. A justiciable controversy exists because, without Court intervention, the  
7 Elections Director stands to violate the rights of Plaintiff under the U.S. Constitution, the  
8 Arizona Constitution and Arizona statutes and will suffer immediate injury and loss of  
9 rights.

## 10 GENERAL ALLEGATIONS

11 6. This action arises out of the Elections Director's anticipated processing and  
12 counting of 130 challenged provisional ballots by the Cochise County Elections  
13 Department.

14 7. Upon information and belief, the Elections Director received the Cochise  
15 County provisional ballots on or shortly after election day.

16 8. Upon processing the ballots for transmittal to the Recorder for verification,  
17 the Elections Director became aware that nearly 157 provisional ballots in her possession  
18 had not been sealed by poll workers in accordance with Arizona law, thereby rendering  
19 the ballots void as a matter of law. The unsealed provisional ballots in question were  
20 from the Hopi, Ramsey and Castro Park precincts.

21 9. The Elections Director removed the provisional ballot receipt from each  
22 unsealed ballot envelope and appended the receipt to the outside of each envelope. The  
23 Elections Director subsequently transferred the unsealed ballots (along with all other  
24 provisional ballots that had been properly sealed) to the Recorder.

25 10. The Recorder became aware of the unsealed ballots in her possession and  
26 temporarily segregated those ballots pending further advice.

27 11. Over protest by political party observers, the Recorder processed the  
28

1 unsealed provisional ballots on November 11, 2012 and disqualified 27 provisional  
2 ballots, leaving 130 unsealed provisional ballots (the "Disputed Ballots").

3 12. On November 12, 2012, the Disputed Ballots were transferred back to the  
4 Cochise County Elections Department for counting. However, the Recorder could not  
5 locate one of the Disputed Ballots and it remains missing and unaccounted for.

6 13. Upon information and belief, the Elections Director intends to feed the  
7 Disputed Ballots through the elections tabulating equipment in the next few hours.  
8 Plaintiff will be irreparably harmed should this occur, because there is no mechanism to  
9 trace or claw back those particular votes once the ballots are fed through the elections  
10 tabulating equipment.

11 14. Should the Elections Director tabulate the Disputed Ballots, Plaintiff's vote  
12 in the contest for Congressional District 2, and other offices on the general election ballot,  
13 will be diluted and negated by the Disputed Ballots to such an extent that his chosen  
14 candidate, Martha McSally, may not be declared the winner, and because the integrity of  
15 the election will be compromised.

16 15. If the Elections Director is permitted to process the Disputed Ballots,  
17 irreparable harm will result to Plaintiff, and all voters in Cochise County.

18 16. By failing to reject the Disputed Ballots as illegal, the Elections Director  
19 has:

20 A. Failed to perform duties required by law as to which she has no  
21 discretion; and

22 B. Proceeded and is threatening to proceed without or in excess of her  
23 jurisdiction or legal authority.

24 **COUNT I**  
25 **(42 U.S.C. § 1983: INJUNCTIVE RELIEF FOR VIOLATIONS**  
26 **OF FEDERAL EQUAL PROTECTION RIGHTS)**

27 17. All prior allegations are incorporated by reference.

28 18. A.R.S. § 16-452(A) provides the Arizona Secretary of State shall  
promulgate an Elections Procedures Manual that shall have the force and effect of law

1 with respect to “the procedures for early voting and voting, and of producing, distributing,  
2 collecting, counting, tabulating, and storing ballots.” *See also* A.R.S. § 16-513 (requiring  
3 all elections to be conducted in accordance with the Elections Procedures Manual).

4 19. The Election Procedures Manual (2012 Edition) mandates that a poll worker  
5 must “ensure[] the voted [provisional] ballot is sealed in the provisional ballot envelope”  
6 and may only deposit a “sealed provisional ballot envelope in the ballot box.” (Emphasis  
7 added.)

8 20. Provisional ballots must be sealed in a provisional ballot envelope in order  
9 to prevent potential electoral misconduct, such as altering ballots without a voter’s  
10 knowledge or consent.

11 21. All polling places in Cochise County except for Castro Park, Ramsey, and  
12 Hopi followed the Manual’s requirement that provisional ballots be sealed.

13 22. Upon information and belief, Pima County (the other county comprising  
14 Congressional District 2) is counting only provisional ballots that have been sealed in  
15 provisional ballot envelopes, all in accordance with Arizona law.

16 23. Without Court intervention, the Elections Director intends to count the  
17 Disputed Ballots, in contravention of Arizona law and the standards applied in Pima  
18 County, thereby depriving the Plaintiff of equal protection of law.

19 24. If the Elections Director proceeds as intended, she will proximately cause  
20 and continue to cause a violation of Plaintiff’s right to equal protection under the  
21 Fourteenth Amendment to U.S. Constitution.

22 25. The Elections Director at all times acts and continues to act as a state actor  
23 and under color of state law.

24 26. Plaintiff requests that this Court determine and declare his rights and  
25 interests with respect to the Disputed Ballots and consequential vote dilution should they  
26 be counted.

27 27. Plaintiff therefore has a claim, and is entitled to injunctive relief against the  
28 Elections Director pursuant to 42 U.S.C. § 1983, for deprivation of federal rights under



1 color of state law.

2 28. Plaintiff requests attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

3 **COUNT II**

4 **(A.R.S. §§ 12-1801 – 1846 & 18-2021-2030: DECLARATORY AND INJUNCTION)**

5 29. All prior allegations are incorporated by reference.

6 30. Under Arizona law, a poll worker must "ensure[] the voted [provisional]  
7 ballot is sealed in the provisional ballot envelope" and may only deposit a "sealed  
8 provisional ballot envelope in the ballot box." (Emphasis added.) Any provisional ballot  
9 that does not meet these requirements, therefore, is not eligible to be cast in an Arizona  
10 election.

11 31. Without Court intervention, the Director intends to count the Disputed  
12 Ballots in contravention of Arizona law and in violation of Plaintiff's rights.

13 32. Plaintiff requests that this Court determine and declare his rights and  
14 interests with respect to the Disputed Ballots and consequential vote dilution should they  
15 be counted. There is an actual and justiciable controversy regarding Plaintiff's rights and  
16 interests, and such judgment or decree will terminate such uncertainty and controversy.

17 33. There is an actual and justiciable controversy that can be resolved by this  
18 Court entering a declaratory judgment.

19 34. Plaintiff therefore has a claim, and is entitled to declaratory and injunctive  
20 relief, against the Director pursuant to A.R.S. §§ 12-1801 – 1846.

21 35. Plaintiff requests attorneys' fees and costs pursuant to A.R.S. § 12-348 and  
22 the private attorney general doctrine established in *Arnold v. Ariz. Dep't of Health Serv's.*,  
23 160 Ariz. 593, 775 P.2d 521 (1989) because the rights sought to be vindicated here (i)  
24 benefit a large number of people, (ii) require private enforcement, and (iii) are of societal  
25 importance.

26 **COUNT III**

27 **(A.R.S. §§ 12-2021-2030: MANDAMUS AND SPECIAL ACTION RELIEF)**

28 36. All prior allegations are incorporated by reference.

1 37. Pursuant to the Arizona Secretary of State's Election Procedure Manual,  
2 provisional ballots must be sealed in an envelope for transportation to the county recorder  
3 for verification and only the Elections Department may open provisional ballot envelopes.

4 38. The Elections Director is responsible for ensuring that provisional ballots  
5 are transmitted to the county recorder in the sealed envelopes.

6 39. These procedures are mandatory.

7 40. The Elections Director has failed to comply with this mandatory legal  
8 requirement.

9 41. Plaintiff has no plain, adequate and speedy remedy at law to compel  
10 Defendant Elections Director to comply with this requirement. Therefore, Plaintiff  
11 requests this Court issue a Writ of Mandamus pursuant to A.R.S. § 12-2021 and Rule 1 of  
12 the Rules of Procedure for Special Actions to require Defendant reject all of the disputed  
13 ballots.

14 42. Plaintiff requests attorneys' fees and costs pursuant to A.R.S. § 12-2030.

#### 15 PRAYER FOR RELIEF

16 WHEREFORE, the Plaintiff demands relief in the following forms:

17 1. A declaration pursuant to A.R.S. §§ 12-1831 - 1846 that the Disputed  
18 Ballots are void for failure to comply with Arizona law requiring that all provisional  
19 ballots must be sealed at the polling place;

20 2. A temporary, preliminary, and permanent injunction pursuant to A.R.S. §§  
21 12-1801 - 1830 and Ariz. R. Civ. P. 65 precluding the Elections Director from counting  
22 the Disputed Ballots, running the Disputed Ballots through any election tabulating  
23 equipment, duplicating the Disputed Ballots, or otherwise mixing the Disputed Ballots  
24 with valid provisional ballots from Cochise County;

25 3. A mandamus order pursuant to A.R.S. §§ 12-2021 - 2030 and Rule 1 of the  
26 Rules of Procedure for Special Actions that the Disputed Ballots shall remain segregated  
27 from the remaining provisional ballots in the Elections Director's possession, and shall be  
28 returned to the Recorder to be stored and/or preserved in the like manner as provisional

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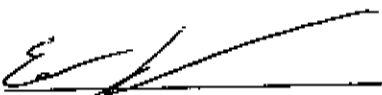
ballots that were previously disqualified by the Recorder;

4. An award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988, A.R.S. §§ 12-348 and 12-2030, the private attorney general doctrine and other applicable law.

5. Such other relief as the Court deems necessary and appropriate.

DATED this 13th day of November, 2012.

SNELL & WILMER L.L.P.

By 

Eric H. Spencer  
Michael Liburdi  
One Arizona Center  
Phoenix, Arizona 85004-2202  
Attorneys for Plaintiff

Snell & Wilmer

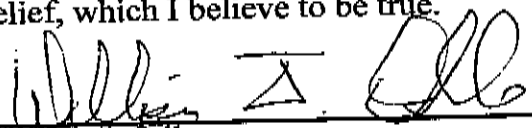
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**VERIFICATION**

I, William J. Odle, being first duly sworn upon his oath, deposes and says:

I have read the foregoing Verified Special Action Complaint and know the contents thereof. The allegations of the Verified Special Action Complaint are true, except the matters stated therein on information and belief, which I believe to be true.

  
 \_\_\_\_\_  
 William J. Odle

Dated 13 Nov 2012

**Snell & Wilmer**

LLP

LAW OFFICES  
 One Arizona Center, 400 E. Van Buren  
 Phoenix, Arizona 85004-2202  
 (602) 382-5000

**DECLARATION OF TODD JOHNSON**

I, Todd Johnson, declare as follows:

1. I am a political party observer and since November 9, 2012, I have been observing ballot tabulation at the Cochise County Elections Department.

2. On or about November 9, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Cochise County Recorder's Office had received nearly 120 provisional ballots that had not been properly sealed from the Castro Park precinct.

3. I later learned that the Cochise County Elections Department removed the provisional ballot receipt from the inside of each unsealed ballot envelope and appended the receipt to the outside of each envelope. The Elections Department had transferred the unsealed ballots (along with all other provisional ballots that had been properly sealed) to the Cochise County Recorder's Office.

4. On or about November 10, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Recorder's Office had received 5 provisional ballots that had not been sealed from the Hopi precinct.

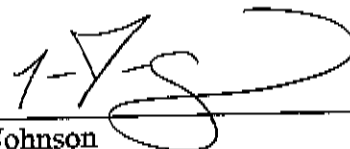
5. On or about November 11, 2012, fellow party observers at the Cochise County Recorder's Office notified me that the Recorder's Office had received 32 provisional ballots that had not been sealed from the Ramsey precinct.

6. The Cochise County Elections Department received approximately 130 unsealed provisional ballot envelopes (with ballots) back from the Recorder's Office on November 12, 2012.

7. The Cochise County Elections Director said that she intends to feed the ballots from the unsealed provisional ballots through the elections tabulating equipment as soon as the undisputed provisional ballots are tabulated, per the County Attorneys' Office's authority.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 13, 2012.

  
\_\_\_\_\_  
Todd Johnson

**DECLARATION OF SEAN PHILBIN**

I, Sean Philbin, declare as follows:

1. I am a political party observer and since November 9, 2012, I have been observing provisional ballot processing at the Cochise County Recorder's Office ("Recorder").

2. On or about November 9, 2012, a fellow party observer informed me that there were approximately 120 provisional ballots in the Recorder's possession that appeared to be unsealed.

3. Upon personal review of the ballots in question, I made the determination that all of the ballots under review appeared to be unsealed.

4. After concluding that the ballots in question appeared unsealed and after inquiring with the Recorder about the condition of the ballots at the time of their arrival, I was informed by the Recorder that the ballots had arrived there in that condition (i.e., unsealed).

5. At this time, I requested that the Recorder immediately cease processing the ballots in question and I further requested that the ballots in question be isolated from any outstanding, unprocessed ballots and locked in a secure location until a determination could be reached regarding their validity.

6. The Recorder complied with my requests and stored the ballots in question in a locked room within the building.

7. The Recorder also informed me at this time that the unsealed provisional ballots in question were from Castro Park Precinct.

8. On or about November 10, 2012, I personally observed that the Recorder had five more additional provisional ballots that appeared unsealed.

9. Upon concluding that the five additional ballots appeared unsealed, I followed the same procedure as I had set with the previous ballots in question and requested that the Recorder immediately cease processing the ballots and store them in a secure room until a conclusion could be reached regarding their validity. The Recorder complied with my requests.

10. The Recorder informed me at that time that the five ballots in question were from

Hopi Precinct.

11. On or about November 11, 2012, I was informed by the Recorder that several more ballots appeared to be unsealed.

12. Upon personal review of the ballots in question, I made the determination that thirty-two of the ballots under review appeared to be unsealed.

13. Upon concluding that the thirty-two additional ballots appeared unsealed, I followed the same procedure as I had set with the previous ballots in question and requested that the Recorder immediately cease processing the ballots and store them in a secure room until a conclusion could be reached regarding their validity. The Recorder complied with my requests.

14. The Recorder informed me at this time that the thirty-two ballots in question were from Ramsey Precinct.

15. All of the unsealed ballots in question, including approximately 120 from Castro Park Precinct, five from Hopi Precinct and thirty-two from Ramsey Precinct, totaled approximately 157 provisional ballots to which I raised a dispute regarding their validity with the Recorder. On or about November 9, 2012, I was informed by a fellow party observer who was stationed at the Cochise County Election Department that the Cochise County Elections Department removed the provisional ballot receipt from inside of each unsealed ballot envelope in question from Castro Park Precinct and appended the receipt to the outside of each envelope. The fellow party observer informed me that the Elections Department subsequently transferred the unsealed ballots (along with all other provisional ballots that had been properly sealed) to the Recorder.

16. At my request, the Recorder kept all the disputed ballots segregated and stored in a secure location until November 12, 2012, when the Recorder informed me that, once the undisputed provisional ballots had been processed, she intended to process the unsealed provisional ballots by the end of the night.

17. Over protest by political party observers, including me, I witnessed the Recorder process all the unsealed provisional ballots in question on November 11, 2012.



18. The Recorder disqualified approximately 27 provisional ballots, leaving approximately 130 unsealed provisional ballots.

19. The Recorder, in the presence of political party observers, had segregated the five Hopi provisional ballots and stored them in a secure, locked room in the building on November 10, 2012. An inventory accompanying the undisputed Hopi Precinct ballots noted that five unsealed ballots were under dispute and had been segregated and locked away in a secure location. However, when the Recorder processed the Hopi precinct ballots on November 11, only four unsealed envelopes were present. The Recorder could not account for the missing unsealed ballot from Hopi precinct.

20. On November 12, 2012, I personally observed the disputed provisional ballots being transferred back to the Cochise County Elections Department. The disputed ballots were again segregated and stored in a secure location at the Elections Department away from all undisputed ballots.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 13, 2012.

  
Sean Philbin