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November 24, 2023

*Via Email and Regular Mail*

Hon. Adrian Fontes  
Arizona Secretary of State  
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CC (via Email): Hon. Kris Mayes  
Arizona Attorney General  
[Kris.Mayes@azag.gov](mailto:Kris.Mayes@azag.gov)

***Re: City of Tucson Proposition 413; Potential Recount***

Dear Secretary Fontes,

We have an interesting election issue here in Tucson.

On November 21, 2023, the Pima County Board of Supervisors and the City of Tucson Mayor and Council each approved the canvass of the November 7, 2023 election, which included the canvass of the results in the City of Tucson special election called for voter consideration of Proposition 413 (hereafter, "P413"). P413 is a ballot measure that proposed an amendment to the Tucson Charter to adjust the salaries of the City of Tucson mayor and each councilmember. As a municipal charter amendment, P413 was called and administered as a special election, held concurrently with the November 7, 2023 general election. Pima County administered this special election on the City's behalf pursuant to an intergovernmental agreement (IGA).

P413 was narrowly approved by the City's voters, with the vote totals coming in as:

YES 47,165

NO 46,876

The canvass confirms that the margin of votes cast for P413 versus against P413 (289 votes) as compared to the total number of votes cast (94,041) is less than 1/2 of 1%.

As you might imagine, this narrow margin prompted me to review the election recount provisions codified in A.R.S. §§16-661 through -667, including the recent amendments approved by the Arizona Legislature, so that I could guide the City Clerk and the Mayor

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and Council through the canvass of the election and any actions that might be required thereafter, including whether the canvassed result compels the City to initiate the proceedings for a court-ordered “automatic” recount under those statutes. As explained in more detail below, I determined that the recount requirements of A.R.S. §§16-661 through -667 do **NOT** apply to P413. I explained my opinion to the Mayor and Council at their public meeting on November 21, 2023 (in advance of their action to approve the canvass).<sup>1</sup>

In connection with its approval of the canvass, the Tucson Mayor and Council (by motion) confirmed and certified that the vote margin relating to Prop 413 is by the number established in the canvass (289 votes), which is less than one-half of one percent of the number of votes cast for that measure; and directed and authorized me as the City Attorney (together with the City Clerk) to notify you and Arizona Attorney General Mayes of the P413 result and canvass. The motion as approved<sup>2</sup> also authorized me to file a legal action requesting the Arizona court(s) to order EITHER that:

- (1) a recount be conducted based on the canvass of P413; or
- (2) the recount provisions of AZ statute do not apply.

Based on this direction, I’m providing this letter to explain my position regarding the P413 recount issue, and to ask that you confer with Attorney General Mayes to determine your position on whether the recount provisions of A.R.S. §§16-661 through -667 (hereafter, the “Recount Statutes”) authorize or require a recount of P413, which was presented to Tucson’s voters in a special election as a proposed charter amendment. As explained in more detail below, my position is this:

- the Recount Statutes plainly apply to city elections to city **office** (i.e., the election of candidates to a city office such as mayor, councilmember) based upon the 2004 and 2022 amendments to the Recount Statutes;
- the Recount Statutes plainly apply to **statewide** initiatives, **statewide** referred measures, and amendments to the Arizona Constitution;
- however, the Recount Statutes do **NOT** apply to or govern municipal elections that propose amendments to a city charter, or other municipal elections involving an “initiated or referred measure.” Instead, in the context of municipal elections, the Recount Statutes exclusively apply to elections that are elections to a municipal office;
- accordingly, the Recount Statutes neither require nor authorize a recount of P413.

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<sup>1</sup> My presentation to the Mayor and Council is attached as Attachment A.

<sup>2</sup> The motion is set out on page 9 of Attachment A.

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## **Factual Background**

On June 6, 2023, the City of Tucson Mayor and Council adopted Ordinance 12011, calling a Special Election on November 7, 2023, to submit to the city's voters a proposed Charter amendment recommended by the Citizens' Commission on Public Service and Compensation. This proposed Charter amendment ultimately became Proposition 413 (P413), which as approved by the electorate now amends the Tucson Charter to adjust the salaries of the City's elected officials (the Mayor and each council member) effective December 4, 2023.<sup>3</sup>

As noted above, on November 21, 2023 both Pima County (which administered the Special Election pursuant to an IGA with the City of Tucson) and the City of Tucson (through its Mayor and Council) approved the canvass of P413, certifying that the vote totals resulted in its approval by a margin of 289 votes. Based on the direction provided by the Mayor and Council, I'm writing to you now to explain my position on the issue of whether P413 is subject to a recount under the Recount Statutes; and to ask you to consider and share your opinion on this issue.

## **Legal Arguments and Conclusion**

In my position as the City Attorney for the City of Tucson, I have the responsibility to provide legal advice to the various City officials relating to their performance of the duties and responsibilities of their office. In this capacity, I examined the issue of whether the Recount Statutes require or authorize a recount of the election results for P413 so that I could provide appropriate legal advice to the City Clerk and to the Mayor and Council. I have determined that the Recount Statutes do **NOT** require or authorize a recount of P413. Here is my analysis:

- I. Recounts of a canvassed vote can only occur when expressly authorized by state statute.

Arizona law is very clear that the proceedings for a recount of votes cast at an election are strictly and purely statutory. Recounts are only legal if they are plainly authorized by adopted Arizona statute. In fact, the burden is on the person or persons seeking a judicially-ordered recount to point out a statutory law vesting that authority in the court; and without express statutory authority, courts cannot order a recount. *Barrera v. Superior Court, In And For Graham County*, 117 Ariz. 528 (Ariz.App. 1977). It is also plainly true that the governing body of an Arizona city – such as the Tucson Mayor and

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<sup>3</sup> The publicity pamphlet for the November 7, 2023 elections is available here: <https://www.tucsonaz.gov/files/sharedassets/public/v/1/clerks/documents/elections/choice-is-yours-final-ge-11-7-23.pdf>



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Council - cannot order a recount at its discretion or whim. A recount can only happen in the limited circumstances provided by state statute; and only when ordered by a court. *Id.*; and A.R.S. §16-663.

II. Arizona's Recount Statutes do NOT require or authorize a recount for a city election that does not involve the election of a candidate to city office.

The Arizona statutes that govern and control the issue of what types of Arizona elections are subject to “automatic” recount are A.R.S. §§16-661 through -667, the “Recount Statutes.” A careful analysis of the Recount Statutes shows that they simply do **NOT** apply to non-candidate city elections, including P413. Here’s why:

*A. The Recount Statutes are expressly clear that they only apply to City Elections for the election of candidates to city office – and not elections for non-candidate city propositions/ballot measures like P413.*

Within the Recount Statutes, every reference to a city election that is subject to an automatic recount is exclusive to elections to a city office, and not to a referred measure or city ballot proposition. *See* A.R.S. §16-662; §16-665(B)(3); and §16-666 (each saying “. . . in the case of an office to be filled by the electors of a city. . .”). In fact, the inclusion of *any* city elections within the scope of the Recount Statutes did not occur until 2004, when the Legislature amended those statutes via Senate Bill 1244 to add, for the first time, the provisions applying automatic recounts to elections to a city or town office. As noted in the Senate Fact Sheet for SB 1244, those amendments were adopted because in 2003, Maricopa County election officials had determined that the prior version of the statutes did not apply to municipal elections for a municipal office. In response, the Legislature amended A.R.S. §§16-662, -665 and -666 to add municipal elections – but the Legislature added *only* elections to city or town office, and not municipal ballot propositions (whether initiated or referred).

Of course, P413 was not an election for city office, but was instead a ballot proposition referred to the City’s electors as an amendment to the Tucson Charter. My opinion is that P413 does not fall within the scope of the 2004 amendments to the Recount Statutes, and is not subject to those provisions, which are exclusive to elections to municipal office.

*B. To the extent they relate to “referred measures,” the provisions of the Recount Statutes clearly only apply to statewide referred measures.*

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A.R.S. §16-661(A) provides as follows:

16-661. Automatic recount; requirements

A. 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, or between the number of votes cast for and against *initiated or referred measures or proposals to amend the Constitution of Arizona*, is less than or equal to one-half of one percent of the number of votes cast for both such candidates or on such measures or proposals. [emphasis added]

Other sections of the Recount Statutes also include provisions that apply to “referred measures” or to a “referendum measure.” See, A.R.S. §§16-662, -665(B)(1) and -666. This language (*i.e.* the language including initiated or referred measures or proposals to amend the Arizona Constitution) was included in the first enactment of the Arizona recount statutes in 1925, and has remained in those statutes ever since. See, *1928 Revised Code § 1271; 1939 Code § 55-909; 1956 A.R.S. § 16-1001 (up to 1979); and A.R.S. §§ 16-661 et seq. (1979 to present)*. However, it is clear that the “referred measures” subject to the Recount Statutes are exclusively referred measures in state elections, and not city or town referred measures or other non-candidate ballot propositions.

First of all, by its own express terms, A.R.S. §16-661(A) only applies to “referred measures” that are “in a primary or general election.” Initiated or referred measures to be voted on statewide are placed on the ballot by the Secretary of State at state general elections. Ariz. Const. Art. 4, Part 1, § 1, subd. 10 and Art. 7, § 11; *Estes v. State*, 48 Ariz. 21, 22-24 (1936). Referred measures in municipal elections are often placed in special elections that are neither primary nor general elections. P413 is in fact an example of this: P413 was placed on the ballot as a special election, held concurrently with the separate general election. As a municipal special election, P413 falls outside the scope of A.R.S. §16-661(A).<sup>4</sup>

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<sup>4</sup> I readily acknowledge that special elections are conducted in the same manner as general elections – our own Tucson Charter expressly provides as much: “All special elections herein provided for shall be conducted in the same manner and under the same provisions as are provided for the holding of general elections, including the qualifications of electors and the nomination of candidates.” *Tucson Charter, Ch. XVI, Sec 18*. However, as you will see in the discussion of the McCall case later in this letter, this does not have the effect of making the City of Tucson’s municipal special elections subject to the election recount statutory provisions that apply only to primary and general elections.

Additionally, A.R.S. §16-661(A) includes “referred measures” within the clause describing “initiated or referred measures or proposals to amend the Constitution of Arizona.” Context is important here. The statute is plainly only attempting to capture state elections, given that “proposals to amend the Constitution of Arizona” are necessarily placed in state elections. In fact, on this point, we don’t have to speculate about the Legislature’s intent – which is always a dangerous exercise. Fortunately, the Arizona Supreme Court addressed and resolved this very issue more than 100 years ago (and just a few years prior to the Legislature’s first enactment of the recount statutes in 1925). In 1919, the Arizona Supreme Court decided an election contest case involving the removal of a county seat in *McCall v. City of Tombstone*, 21 Ariz. 161 (1919). In *McCall*, the court examined statutory language that established the right to bring an election contest in connection with a general election “to a state office or \* \* \* constitutional amendment *or other question submitted to vote of the people.*” [*emphasis added*].<sup>5</sup> The election at issue in *McCall* was a county special election called by Cochise County regarding the removal of the county seat from Tombstone. The parties contesting this election argued that: (1) because the statute allowed contests to “other questions submitted to a vote of the people” (i.e., ballot propositions), they had the right to contest it, even though it was a county election and not a state election; and (2) because the law governing special elections provided that “every special election shall be conducted in the same manner as general elections, and all laws of a general nature governing elections of county officers shall govern such elections as far as applicable,” that Cochise County’s special election was subject to the election contest provisions that applied in statewide general elections.

The Supreme Court had no difficulty in recognizing that the language of the election contest statute as quoted could only be read to apply exclusively to state elections, and not to a county special election. The Court also rejected the argument that the requirement that special elections be conducted in the same manner as general elections somehow extended the scope of the election contest statute so that it might apply to the Cochise County special election. “The fact that, under the general election law, provision is made for contesting the election of state and county offices, constitutional amendments and other state-wide propositions, and the election to county and municipal offices, will not imply a grant of jurisdiction to the courts to hear and determine contested county seat

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<sup>5</sup> This quote is as it appeared in the *McCall* decision. The actual language of the election contest statute as it existed at the time provided as follows:

Any elector of the state may contest the election of any person who is declared elected to a state office, or the declared result upon a constitutional amendment or other question submitted to vote of the people upon the following grounds: . . .” Ariz. Civ. Code (1913) tit. 12, ¶ 3060.

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elections, simply because the act providing for county seat removals refers to the general election law for the manner of conducting such elections.” *Id.*, at 164-165.

Finally, the Supreme Court found that while the election contest statute provided a right to contest elections for county or city office, together with elections for state office, constitutional amendments and other state ballot measures, *the statute was silent on elections for city or county referred measures or other ballot propositions*. Accordingly, the Court determined that the statute did not allow for contests of those measures. “Paragraphs 3065 and 3066 of said chapter 14, relating to the contests of county and city offices, are silent as to any proposition or question that might be submitted to a popular vote. There is nothing, therefore, within the terms or provisions of our contest statutes that would make them applicable to a county seat election, because that law is limited to state elections and elections of county and city officers.” *Id.*, at 164.

Just six (6) years after the *McCall* decision, the Legislature enacted the first recount statutes (now, A.R.S. §§16-661 through -667) and used language very similar to the language of the election contest statute that was at issue in that case. Just as the court recognized in *McCall*, the language in what is now A.R.S. §16-661(A) that makes its provisions applicable to “initiated or referred measures or proposals to amend the Constitution of Arizona” in a “primary or general election” can only be read to apply to state elections; and to exclude municipal special elections called for referred measures or ballot propositions that do not involve an election to a municipal office. In other words, A.R.S. §16-661(A) doesn’t apply to P413.

In fact, when you examine the Recount Statutes in their entirety, you’ll see that trying to apply these statutes to require or authorize an automatic recount in municipal elections for referred measures would lead to an absurd result. The statutes of course not only establish when a recount is required, but also establish the procedures and acts required – and what officers have the duty to perform those acts - to carry out the recount and proclaim the final result of the subject election. For elections to municipal office (the provisions added in 2004), these provisions are exceedingly clear and sensible: if the canvass shows that a recount is triggered, the city or town council certifies that fact and files that certification in the superior court in the county in which the canvass was conducted (so, for Tucson, Pima County Superior Court). *A.R.S. §16-662*. That court then orders the recount, which is conducted as provided in A.R.S. §§16-663 and -664. Upon completion of the recount, the court announces the result and enters an order that is delivered to the city or town clerk; who in turn delivers the certified election result to the successful candidate. *A.R.S. §16-665(B)(3)*. The city or town is responsible for the costs of the recount and associated actions. *A.R.S. §16-666*.

Let’s contrast that to the procedures and actions that would result if the Recount Statutes were applied to P413 or any other municipal proposition. First, the Arizona Secretary of State would be required to certify the facts of the City of Tucson special election. *A.R.S.*



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§16-662. Then, the Secretary of State would be required to file that certification in Maricopa County Superior Court – regardless of the fact that the election and canvass occurred in Pima County. *Id.* Then, after the recount, the Maricopa County judge would issue an order to the Governor of Arizona, directing the Governor to issue a proclamation reciting the final vote tally and declaring the election result. *A.R.S. §16-665(B)(1)*. And for what it’s worth, the costs of the recount would be a charge against the state, rather than a cost borne by the city or county in which the election was held. *A.R.S. §16-666*. These procedures make plenty of sense for a referred measure in a state election; but they make absolutely no sense in connection with a city or town election. And there is a reason for that: the Recount Statutes do not apply to a municipal election unless it is an election between candidates for a municipal office; and they do not apply to P413.

My final argument flows from the Arizona election contest statutes, A.R.S. §§ 16-671 through -678. These statutes are the successor provisions of the election contest statute at issue in the *McCall* case. A.R.S. § 16-672 is the statutory sibling of A.R.S. § 16-661: where §16-661 establishes the scope of election recounts, §16-672 establishes the scope of election contests. And A.R.S. § 16-672(A) uses very similar language: “Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, *or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona*, or other question or proposal submitted to vote of the people, upon any of the following grounds:” [emphasis added]. More than 100 years ago, the Arizona Supreme Court was able to determine that this language necessarily only covered initiated or referred measures in a state election and did not apply to ballot propositions that were not in a state election. So what did the Arizona Legislature do? It amended the election contest statutes, and enacted what is now A.R.S. §16-674, relating to contests of county, city and town elections. In this statute, the Legislature expressly included city and town elections for office, **and** city or town ballot questions, proposals, measures or propositions “in the same manner as contests of election to a state office or question, proposal, measure or proposition submitted to the vote of the electors of the state.” As a result, municipal elections on propositions such as P413 are subject to an election contest, because the Legislature has expressly authorized those contests. However, in the case of recounts conducted under the Recount Statutes, the Legislature chose not to include municipal ballot proposals, measures or propositions. For that reason, my opinion is that P413 is not subject to the recount provisions of Arizona law.

My hope is that you and the Attorney General will agree with my analysis. If so, an opinion would be helpful. But regardless of your position, I would like to discuss this matter with you, Attorney General Mayes and/or your designees so that I can determine the next steps, if any, that the City of Tucson should take relating to these matters. I certainly don’t want to move forward with a court filing until you have the opportunity

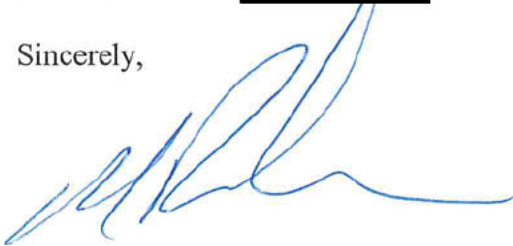


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to review this issue – especially since the Recount Statutes, if they apply, establish duties that fall to you as the Secretary of State to carry out.<sup>6</sup>

If you need or desire any further information from me, don't hesitate to reach out by phone (my cell is [REDACTED] or email ([mike.rankin@tucsonaz.gov](mailto:mike.rankin@tucsonaz.gov))).

Sincerely,



Mike Rankin  
City Attorney

MR/dg

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<sup>6</sup> I'm well aware of the provisions of A.R.S. §16-403, which provides that in city or town elections, the duties devolving on the secretary of state in other elections shall "devolve on the mayor or similar governing officer, board or commission, and the duties prescribed in this chapter devolving on the clerk of the board of supervisors shall devolve on the city or town clerk." However, I don't think this statute applies to the issues here, given that the Recount Statutes themselves serve to distinguish between the roles and responsibilities of the Secretary of State and any local officials, including the mayor and the city clerk.