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16 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

17 **IN AND FOR THE COUNTY OF YAVAPAI**

18 ARIZONA FREE ENTERPRISE CLUB,)
19 an Arizona nonprofit corporation, and)
20 MARY KAY RUWETTE, individually,)

No. S1300CV2023-00872

21 Plaintiffs,)

22 v.)

23 ADRIAN FONTES, in his official capacity)
24 as the Secretary of State of Arizona,)

25 Defendant,)

26 ---and---)

27 ARIZONA ALLIANCE FOR RETIRED)
28 AMERICANS and VOTO LATINO,)

Intervenors/Defendants.)

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
INTERVENORS' COMBINED MOTION
TO DISMISS AND MOTION FOR
SUMMARY JUDGMENT**

(assigned to the Honorable John Napper)

Pursuant to the Court's October 27, 2023 Order, Plaintiffs Arizona Free Enterprise Club and Mary Kay Ruwette ("Plaintiffs") respond to Defendant's Motion for Summary Judgment and Intervenors' Combined Motion to Dismiss for Lack of Standing and Motion for Summary Judgment. The Court should deny both motions.

1 Plaintiffs' claim and request for relief are similar to the claims asserted and relief granted
2 by the Arizona Supreme Court in *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58 (2020),
3 where the High Court recognized a beneficial interest in compelling compliance with Arizona
4 Law and issued an injunction prohibiting Defendant's noncompliance. Defendant and
5 Intervenors instead implore this Court to ignore the Legislature's wishes and proper authority,
6 sanctioning a grant of unfettered discretion of the Secretary of State to ignore Arizona law under
7 the cover of A.R.S. § 16-452. Defendant and Intervenors further propose an expansive
8 interpretation of A.R.S. § 16-548 that would gut Arizona's statutory restrictions on ballot
9 handling and directly contradict multiple other state election laws.

10 Defendant and Intervenors are wrong on precedent and wrong on statute. This Court
11 should deny their motions and grant Plaintiffs' Application for Preliminary and Permanent
12 Injunctive Relief.

13 ARGUMENT

14 When considering a motion for summary judgment, courts "view the evidence and
15 reasonable inferences in the light most favorable to the party opposing the motion, and the
16 inferences must be construed in favor of that party." *Thompson v. Better-Bilt Aluminum Prod.*
17 *Co., Inc.*, 171 Ariz. 550, 558 (1992). Summary judgment is not appropriate unless "no genuine
18 issues of material fact exist and the moving party is entitled to judgment as a matter of law."
19 *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr.*
20 *Fund*, 201 Ariz. 474, 482 (2002).

21 Here, Defendant and Intervenors have failed to show they are entitled to judgment as a
22 matter of law because they ignore key precedent on beneficial standing and cannot identify a
23 sound statutory basis for their favored drop box regulations.

24 **I. Plaintiffs have properly asserted a mandamus action and have standing as** 25 **beneficially interested parties under binding Arizona Supreme Court precedent.**

26 Under Arizona law, a "writ of mandamus may be issued . . . to any person . . . on the
27 verified complaint of the party beneficially interested, to compel . . . performance of an act which
28 the law specially imposes as a duty resulting from an office." A.R.S. § 12-2021.

1 The Supreme Court of Arizona applied this law to find standing based on beneficial
2 interest in *Arizona Pub. Integrity All. v. Fontes*, where Arizona citizens and voters filed a
3 mandamus action seeking to halt a county recorder from issuing a voter instruction that did not
4 comply with his non-discretionary duties under the 2019 Election Procedures Manual (“2019
5 EPM”). *Id.* at 61. In *Fontes*, the Arizona Supreme Court reversed a ruling of the Superior Court
6 that had denied plaintiff citizens’ and voters’ beneficial interest in compelling a public official to
7 perform an act imposed by law. *Id.* at 61-62.

8 Citing A.R.S. § 12-2021, the Court stated that “we apply a more relaxed standard for
9 standing in mandamus actions.” *Id.* at 62. The Court recognized that A.R.S. § 12-2021 “reflects
10 the Legislature's desire to broadly afford standing to members of the public to bring lawsuits to
11 compel officials to perform their public duties,” and so must be “applied liberally to promote the
12 ends of justice.” *Id.* (internal citations omitted). The Court held that “[p]laintiffs, as Arizona
13 citizens and voters, seek to compel the Recorder to perform his non-discretionary duty to provide
14 ballot instructions that comply with Arizona law. Thus, we conclude that they have shown a
15 sufficient beneficial interest to establish standing.” *Id.*

16 This case is no different. Plaintiff Mary Kay Ruwette is an Arizona Citizen and Voter,
17 and—just like the Arizona Public Integrity Alliance, in *Fontes*—Plaintiff Arizona Free
18 Enterprise Club advances the interests of Arizona Citizens and Voters interested in election
19 integrity, among other issues. *Verif. Compl.* at 4. Plaintiffs request special action relief providing
20 that Defendant has “failed to carry out a nondiscretionary duty to implement the EPM in a
21 manner consistent with A.R.S. § 16-548(A), § 16-547(D) & (E), and § 16-1005.”¹ *Id.* at 16-17.

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24 ¹ Defendant suggests that Plaintiffs should seek mandamus against the Attorney General, because
25 the EPM has already been implemented, and violations of it would be prosecuted by the Attorney
26 General. *Def. Mot.* at 4. However, the oversight of elections at the state level, including through
27 the EPM, is a duty of the Secretary of State, not the Attorney General. The relief sought here
28 against the Secretary of State and his EPM will remedy the legal violations alleged. “A mandamus
proceeding is properly directed against the officer . . . whose duty it is to perform the act sought to
be enforced.” *Anthony A. Bianco, Inc. v. Hess*, 86 Ariz. 14, 22, 339 P.2d 1038, 1043 (1959).
Moreover, the 2023 EPM is not yet finalized and an injunction may, for instance, compel
Defendant to issue an EPM that complies with Arizona law.

1 This Court should “conclude that [plaintiffs] have shown a sufficient beneficial interest to
2 establish standing” just as the Supreme Court did in a very similar situation just three years ago.
3 *Fontes* at 62. There is no daylight between the plaintiffs in *Fontes* and the Plaintiffs here.

4 **A. Defendant’s and Intervenors’ arguments that this is not a mandamus action**
5 **requires completely ignoring *Fontes* and granting unfettered discretion to**
6 **Defendant.**

7 Controlling Supreme Court precedent notwithstanding, Defendant and Intervenors ask the
8 Court to ignore these close parallels and completely disregard the Arizona Supreme Court’s
9 decision in *Fontes*.

10 First, Defendant and Intervenors allege that *Fontes* does not control here because
11 mandamus cannot “restrain a public official from doing an act.” Def. Mot. at 4 (citing *Smoker v.*
12 *Bolin*, 85 Ariz. 171, 173 (1958)); Intervenors Mot. at 6. Never mind that the Arizona Supreme
13 Court in *Fontes* did exactly that in the mandamus action there: “We reverse the trial court and
14 grant relief. The County is enjoined from including the New Instruction with mail-in ballots for
15 the November 3, 2020 General Election.” *Fontes* at 65. In fact, the Supreme Court issued a
16 prohibitory injunction *halting noncompliance* with Arizona law, as opposed to a mandatory
17 injunction *requiring compliance*—exactly what plaintiffs requested there (*id.* at 61), and very
18 similar to what Plaintiffs request here. *See also Int’l Union, United Mine Workers of Am. v.*
19 *Bagwell*, 512 U.S. 821, 835 (1994) (“[I]njunctive provisions containing essentially the same
20 command can be phrased either in mandatory or prohibitory terms.”); 11A Fed. Prac. & Proc.
21 Civ. § 2948.2 (3d ed.) (observing that “with a little ingenuity practically any mandatory
22 injunction may be phrased in prohibitory form”).

23 Second, Defendant also alleges that mandamus relief is not available here because
24 mandamus “cannot be used to require a public official to exercise discretion in a particular way,”
25 and Defendant’s “only non-discretionary duty here is to issue the EPM.” Def. Mot. at 5 (citing
26 A.R.S. § 16-452(A)). Intervenors likewise cite A.R.S. § 16-452(A) and assert that Plaintiffs “ask
27 the Court to dictate *how* the Secretary should exercise his discretionary authority to ‘prescribe
28 rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and

1 efficiency on the procedures for early voting and voting, and of . . . collecting . . . and storing
2 ballots.” Intervenor Mot. at 7.

3 As an initial matter, this argument would require the Court to determine the merits of this
4 action—whether Defendant does or does not have the authority to authorize drop boxes—prior to
5 determining the predicate issue of standing. *See State v. Trachtman*, 190 Ariz. 331, 333 (Ct. App.
6 1997) (“Before we may consider [a claim] we must first determine whether he has standing to
7 raise his claim.”); *Burks v. City of Maricopa*, No. 2 CA-CV 2017-0177, 2018 WL 3455691, at *2
8 (Ariz. Ct. App. July 16, 2018) (“[S]tanding is a threshold question that must be resolved before
9 the merits of a case can be addressed”); Intervenor Mot. at 2 (“Standing is a threshold issue that
10 must be resolved before reaching the merits.”).

11 Moreover, Defendant and Intervenor argue that any action related to election
12 regulations, aside from issuing an EPM, is discretionary. Def. Mot. at 5. This position is
13 absurd—it would allow Defendant the “discretion” whether or not to comply with Arizona law—
14 and would insulate Defendant’s actions from scrutiny via mandamus. Defendant lost this
15 argument previously before the Supreme Court in *Fontes*. The simple fact is that Arizona courts
16 have consistently held that Defendant cannot regulate elections however he pleases. Defendant
17 has no “discretion” to disobey election statutes. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 46 (2022)
18 (“[A]n EPM regulation that contradicts statutory requirements does not have the force of law.”).

19 **B. *Sears v. Hull* does not apply to these facts.**

20 Defendant would have this Court look past the obvious parallels to *Fontes*, because,
21 according to him, “the only thing this case shares with [*Fontes*] is the identity of the Defendant.”
22 Def. Mot. at 4. As shown above, that notion is simply false. Defendant instead urges that
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1 standing is improper under *Sears v. Hull*, 192 Ariz. 65 (1998). Def. Mot. at 3. Intervenor
2 likewise argue that standing does not exist under *Sears*. Intervenor Mot. at 2.²

3 However, *Sears* is readily distinguished from the present case. In *Sears*, Arizona citizens
4 sued the Governor and requested the court to enjoin him from entering a gaming compact with
5 an Indian Tribe. *Id.* at 68. However, Arizona law had already been interpreted by the Supreme
6 Court of Arizona as “requir[ing] the Governor *to* enter a [gaming] compact” with the Tribe. *Id.* at
7 69. The *Sears* plaintiff therefore requested relief that did not involve “the performance of a non-
8 discretionary act” since the Governor’s “execution of the [gaming] compact cannot be regarded
9 as a failure to perform a duty specifically imposed by law.” *Id.* Thus, the *Sears* plaintiffs wanted
10 to *stop* the Governor from performing his legal obligations. As a result, the Court held that since
11 the *Sears* action was “not in the nature of mandamus” and so standing based on beneficial
12 interest did not apply. *Id.* Instead, to have standing, plaintiffs there would have to show the
13 customary requirement of a “distinct and palpable injury.” *Id.*

14 Unlike the *Sears* plaintiffs, the present case falls squarely in a mandamus action because
15 the requested relief merely requires the Secretary to perform his non-discretionary duty:
16 complying with Arizona election laws. Verif. Compl. at 16-17. Plaintiffs here assert that
17 Defendant has “exceeded [his] lawful authority” under Arizona Law (*id.*), unlike the *Sears*
18 plaintiffs, who asserted that the Governor should not be permitted to do what Arizona law
19 explicitly required. For *Sears* to be analogous, Defendant would have to argue that he is *required*
20 to authorize unstaffed drop boxes. Even Defendant cannot go this far, arguing only that, “The
21 Drop Box Rules carry out the Secretary’s statutory discretion.” Def. Mot. at 5.

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25 ² To support their argument that Plaintiffs lack standing, Intervenor Mot. at 3. But
26 standing in federal courts is required by the “cases or controversies” clause of Article III of the
27 federal Constitution. In contrast, Arizona’s Constitution does not limit standing to “cases or
28 controversies.” As a result, “standing [under Arizona’s Constitution] is not jurisdictional, but
instead is a prudential doctrine.” *Dobson v. State ex rel., Comm’n on App. Ct. Appointments*, 233
Ariz. 119, 122 (2013).

1 And in fact, the Supreme Court of Arizona in *Fontes* has already recognized that *Sears*
2 does not control where plaintiffs allege that an official fails to perform his non-discretionary duty
3 to comply with Arizona election laws. There, immediately after citing *Sears*, the Court stated
4 “[h]owever, we apply a more relaxed standard for standing in mandamus actions” and concluded
5 that plaintiffs had standing for a mandamus action “compel[ling] the [Defendant] to perform his
6 non-discretionary duty to . . . comply with Arizona law.” *Fontes*, 250 Ariz. at 62.

7 Because this case is a proper mandamus action seeking to compel Defendant to perform a
8 non-discretionary duty to comply with Arizona law, there is no need for plaintiffs here to show
9 the “distinct and palpable injury” discussed in *Sears*. *Id.* Intervenor’s arguments that Plaintiffs
10 “do not allege injury sufficient for standing [and] cannot establish any injury” (Intervenor Mot.
11 at 3) is irrelevant as a result. Plaintiffs easily qualify for standing due to their beneficial interest
12 in Defendant complying with the law, just as the plaintiffs did in *Fontes*. The Supreme Court of
13 Arizona has already considered arguments nearly identical to Defendant’s and remained
14 unpersuaded. So too should this Court.

15 **C. Plaintiffs are also entitled to declaratory judgment.**

16 Defendant, standing alone, asserts that declaratory judgment is not available here because
17 “Plaintiffs’ Complaint presents no facts that establish a justiciable controversy.” Def. Mot. at 6.

18 To support his claim, Defendant cites *Town of Wickenburg v. State*, 115 Ariz. 465 (App.
19 1977). There, the court required a justiciable controversy for a declaratory judgment action to
20 continue, and defined a justiciable controversy as one “where adverse claims are asserted upon
21 present existing facts, which have ripened for judicial determination.” *Id.* at 468. This is exactly
22 what Plaintiffs have done. Plaintiffs assert adverse claims that Defendant’s regulations violate
23 Arizona law and harm their beneficial interest in “the proper and uniform enforcement . . . of
24 statutory requirements for completed early ballots.” Verif. Compl. at 16. Plaintiffs also provide
25 present existing facts, including the existence of unstaffed drop boxes in Arizona (Verif. Compl.
26 at 11-12), the existence of an in-force EPM and a draft EPM issued by Defendant and purporting
27 to authorize unstaffed drop boxes (*id.* at 8), and the existence of multiple statutes that conflict
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1 with EPM provisions (*id.* at 2, 5). *Wickenburg* outlines the test for a justiciable controversy, and
2 Plaintiffs' complaint satisfies it.

3 Defendant also argues, in a footnote, that A.R.S. § 12-1841(A) requires adding as parties
4 "all persons . . . who have or claim any interest which would be affected by the declaration."
5 Def. Mot. at 6. Not so. First, Defendant's argument proves too much. Defendant only proposes
6 that "all county and local election officials in Arizona" would have an interest in this case, but by
7 the same reaching logic, so too would every voter in Arizona.³ Second, the Arizona Supreme
8 Court has determined that A.R.S § 12-1841(A) requires an analysis of the type of claim asserted.
9 If declaratory judgment is sought regarding a contract, for example, the case may culminate "in
10 the fixing of a lien upon the property of each individual . . . without notice to him" and so those
11 affected are necessary parties *Anthony A. Bianco, Inc. v. Hess*, 86 Ariz. 14, 22 (1959). This
12 situation is distinct from cases challenging statutes where intervenors have entered on the
13 defendant's side, because an issue with wide-reaching impact "can be settled as well by
14 [defendants and intervenors] as if all those similarly situated had intervened . . . Therefore, we
15 hold that those persons or organizations which did not intervene are not necessary parties to this
16 action." *Id.* Similarly, in this case challenging a statewide regulation, it is not necessary to join
17 every citizen and official who may in some way be affected by a declaratory judgment. *Cf.* 26
18 C.J.S. Declaratory Judgments § 139 ("To require the participation of all parties having any
19 interest that could potentially be affected by the invalidation of a statute, however, may be
20 impractical under a declaratory judgments act. Applying such a statutory provision in an
21 excessively literal manner . . . could sweep in hundreds of parties and render the litigation
22 unmanageable.")

23 Plaintiffs are persons "whose rights, status or other legal relations are affected by a
24 statute." A.R.S. § 12-1832. They therefore "may have determined any question of
25 construction . . . arising under [that] statute . . . and obtain a declaration of rights, status or other
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28 ³ If Defendant were correct, every Arizona voter would be a required party to any action seeking
declaratory judgment regarding an election statute.

1 legal relations thereunder.” *Id.* Plaintiffs also have presented a justiciable controversy. Defendant
2 is wrong on the law, and the Court should dismiss his motion for summary judgment of
3 Plaintiffs’ declaratory judgment claim.

4 **II. Arizona law does not grant Defendant unfettered discretion to regulate elections.**

5 Defendant and Intervenors assert that Defendant is expressly authorized to issue the
6 unstaffed drop box regulations under A.R.S. § 16-452(A). Def. Mot. at 7, Intervenors Mot. at 8.
7 This is false: the statute is utterly silent on these drop boxes.

8 Defendant’s and Intervenors’ theory, therefore, is that A.R.S. § 16-452(A) grants him the
9 discretionary power to authorize unstaffed drop boxes under the umbrella of “collecting” and
10 “storing” ballots. A.R.S. § 16-452. But if Defendant and Intervenors are correct, A.R.S. § 16-452
11 would grant Defendant sweeping power well beyond unstaffed drop boxes and allow him
12 plenary power to reshape Arizona’s voting process in whatever way he likes. Under his theory,
13 Defendant would even retain “discretion” to ignore Arizona law, since Defendant claims that his
14 “*only* non-discretionary duty here is to issue an EPM.” Def. Mot. at 5 (emphasis added). This is
15 not the law. Instead, A.R.S. § 16-452(A) can and should be plainly read as a grant of regulatory
16 power to implement the specific requirements of Arizona law as set forth by the Legislature.

17 Indeed, even if it were a faithful reading of the statute, Defendant’s and Intervenors’
18 interpretation of A.R.S. § 16-452 could not stand in view of Arizona’s non-delegation and
19 constitutional avoidance doctrines. “The non-delegation doctrine prevents the legislature from
20 granting unlimited discretion to an officer.” *Biggs v. Betlach*, 243 Ariz. 256, 263 (2017). Arizona
21 legislature is required to delegate power “prescribed in terms sufficiently definite to serve as a
22 guide in exercising that power.” *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949).
23 When a statute delegates a power “with no prescribed restraints nor criterion nor guide to its
24 action,” that statute “offends the Constitution.” *State v. Marana Plantations, Inc.*, 75 Ariz. 111,
25 114 (1953). This is because “[u]nder the [Arizona] Constitution the legislative authority of the
26 state is vested in the legislature.” *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 113, 252 P.2d
27 87, 89 (1953). “[I]f possible this court construes statutes to avoid rendering them
28 unconstitutional.” *Hayes v. Cont’l Ins. Co.*, 178 Ariz. 264, 272 (1994).

1 Here, the power to regulate elections is one “specifically reserved to state legislatures.”
2 *Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023). And Defendant here, just like he was in *Fontes*,
3 “is limited to those powers expressly or impliedly delegated to him by the state constitution or
4 statutes.” *Fontes*, 250 Ariz. at 62. But by claiming to usurp that power without restraint,
5 Defendant’s and Intervenors’ broad construction of A.R.S. § 16-452 runs headlong into a
6 constitutional conflict. They argue that the power to regulate collecting and storing ballots
7 permits him to authorize unstaffed drop boxes. But they do not, and cannot, articulate any
8 restraints on that theory. Without such restraints, Defendant, under the umbrella of regulating
9 ballot collection, could require county recorders to hire and dispatch door-to-door ballot
10 harvesters, for instance. There is simply no prescribed restraints or criterion to guide Defendant
11 in exercising the power he construes A.R.S. § 16-452 as granting him. The Defendant’s and
12 Intervenors’ interpretation of A.R.S. § 452 therefore “offends the Constitution” and cannot be
13 accepted by this Court because “[w]here alternate constructions are available, [courts] should
14 choose that which avoids constitutional difficulty.” *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990).

15 Defendant and Intervenors should have been disabused of its construction by multiple
16 recent Arizona Supreme Court cases consistently holding that his power to regulate elections is
17 limited by Arizona law. *See Leach v. Hobbs*, 250 Ariz. 572, 576 (2021) (“an EPM regulation that
18 exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does
19 not have the force of law”); *Leibsohn v. Hobbs*, 254 Ariz. 1, 46 (2022) (“[A]n EPM regulation
20 that contradicts statutory requirements does not have the force of law.”); *see also Arizona All. for*
21 *Retired Americans, Inc. v. Crosby*, 537 P.3d 818, 823–24 (Ariz. Ct. App. 2023) (finding that an
22 EPM provision relating to counting was void because it “directly conflicts with the express and
23 mandatory procedures of A.R.S. § 16-602(F) [and] exceeds the scope of its statutory
24 authorization.”).

25 But rather than accepting this limitation, Defendant attempts to distinguish *Leach* by
26 arguing that the “[r]ules regarding petition circulators at issue in *Leach* [are] not specifically
27 identified in A.R.S. § 16-452.” Def. Mot. at 7. Intervenors alternatively argue that *Leach* is
28 distinguishable because the EPM provision at issue granted a loophole to evade statutory

1 requirements, while unstaffed drop boxes allegedly do not undermine the purpose of A.R.S.
2 § 16-452. Intervenor's Mot. at 9. The distinctions are unavailing.

3 While § 16-452 does not authorize regulations regarding the petition circulators in *Leach*,
4 A.R.S. § 19-118 does: "The secretary of state shall establish in the instructions and procedures
5 manual issued pursuant to § 16-452 a procedure for registering circulators." And in *Leach*, the
6 Court struck down an EPM the Secretary of State issued pursuant to A.R.S. § 19-118 because "it
7 exceeded the scope of its statutory authorization" by including a procedure for de-registering
8 where the authorizing statute did not provide one. *Leach*, 250 Ariz. at 576. Thus, in *Leach*, the
9 regulations at issue were *actually* "expressly authorized by statute" as Defendant wrongly claims
10 his unstaffed drop box regulations are in the present case. Def. Mot. at 7. *Leach* is directly on
11 point here, and shows that even when express authorization exists, Defendant does not have
12 unfettered discretion to issue regulations that go beyond statutory authorization.

13 Moreover, Defendant's understanding of his expansive authority under § 16-452 appears
14 to be a novel theory. As noted in the complaint, the 2019 EPM contains 273 pages of regulations
15 and over a thousand citations to enabling statutes. Verif. Compl. at 12. If Defendant truly
16 regarded § 16-452 prior to this case as an expansive grant of authority to regulate elections, he
17 would likely cite it frequently to support any gap filling measures not sourced in statute. But that
18 is not the case. Instead, § 16-452 is found just once in the entire 2019 EPM, to support
19 Defendant's ability to regulate the *petition circulators at issue in Leach!* 2019 EPM at 252. The
20 2023 EPM draft relies on § 16-452 only five times: once for its petition circulators regulations
21 (2023 EPM at 105), once in a citation of another law requiring regulations in the regarding
22 campaign finance forms (*id.* at 253), two times for EPM deadlines (*id.* at unnumbered pages
23 following page 253), and finally to support the requirement that a County Recorder shall issue
24 correct ballots to early voters who received incorrect ballots (*id.* at 72).

25 Defendant argues that "precise statutory authority for every procedure in the EPM flies in
26 the face of the purpose of the EPM—to fill the gaps left by the election statutes." But creating
27 and regulating unstaffed drop boxes is not "filling the gaps" in election statutes—it is new
28 construction from the ground up. And, Defendant's proposed understanding of § 16-452 would

1 render almost all Arizona election law as mere surplusage, on the idea that the Arizona
2 Legislature has wholly delegated its legislative power to Defendant on every aspect of
3 “procedures for early voting and voting, and of producing, distributing, collecting, counting,
4 tabulating and storing ballots.” The Court should adopt a plain reasonable reading of A.R.S.
5 § 16-452(A) as providing a grant of regulatory power to the Secretary of State to implement the
6 specific requirements of Arizona election statutes, placing Defendant’s regulatory powers
7 squarely within the confines of those statutes, giving proper effect to the Legislature’s intent in
8 enacting those statutes, and recognizing the role of the EPM in faithfully providing guidance to
9 implement those election statutes—*this* is how Defendant is charged under law to “achieve and
10 maintain the maximum degree of correctness, impartiality, uniformity and efficiency.” A.R.S.
11 § 16-452(A).

12 A.R.S. § 16-452(A), by its plain text, does not authorize unstaffed drop boxes. Defendant
13 and Intervenors propose an expansive interpretation of this statute that collides with Arizona’s
14 constitution and disregards large swaths of Arizona law. Defendant and Intervenors are not
15 entitled to summary judgment.

16 **III. The EPM drop box regulations do not have the force of law because they directly**
17 **contradict Arizona’s statutory requirements.**

18 “An EPM regulation that contradicts statutory requirements does not have the force of
19 law.” *Leibsohn v. Hobbs*, 254 Ariz. 1, 46, 517 P.3d 45, 51 (2022). Here, the EPM unstaffed drop
20 box regulations contradict Arizona law that requires ballots to be delivered, mailed, or deposited
21 to certain locations, none of which include an unstaffed drop box.

22 **A. The EPM explicitly contradicts Arizona law in order to support the drop box**
23 **regulations.**

24 Under Arizona law, ballots must be “delivered or mailed to the county recorder or other
25 officer in charge of elections of the political subdivision in which the elector is registered or
26 deposited by the voter or the voter's agent at any polling place in the county.” A.R.S.
27 § 16-548(A). Additionally, the same statute requires that “[i]n order to be counted and valid, the
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1 ballot must be received by the county recorder or other officer in charge of elections or deposited
2 at any polling place in the county no later than 7:00 p.m. on election day.” *Id.*

3 A.R.S. § 16-547(D) reinforces and sheds light on the requirements of A.R.S. § 16-548(A)
4 by requiring all “county recorder or other officer in charge of elections” (hereinafter, “election
5 officials”) to supply a printed instruction stating:

6
7 In order to be valid and counted, the ballot and affidavit must be
8 ***delivered to the office of the county recorder*** or other officer in
9 charge of elections ***or may be deposited at any polling place*** in the
10 county ***not later than 7:00 p.m. on election day***. The ballot will
11 not be counted without the voter's signature on the envelope.

12 (WARNING--It is a felony to offer or receive any compensation
13 for a ballot.) (emphasis added)

14 Additionally, early voters must be provided “an envelope bearing on the front the name,
15 official title and post office address of the recorder or other officer in charge of elections.”

16 A.R.S. § 16-547(A).

17 A plain reading of A.R.S. § 16-547(A), (D) and 548(A) indicates that the Legislature
18 intended two locations for voting an early ballot: to the county recorder’s office—whether
19 delivered in person or via postal mail—or at a polling place—whether deposited by the voter or
20 the voter’s agent. There is no allowance for placing ballots in unstaffed drop boxes. In fact,
21 Arizona statute requires that elections officials expressly tell voters that their ballots must be
22 either delivered to an election official’s office or deposited at a polling place by 7:00 p.m. on
23 election day. To this end, the Legislature required that the ballot envelope include the name and
24 address of that election official’s office, and other laws provide for notice of polling places. A
25 voter who places a ballot in an unstaffed drop box violates the Legislature’s voting requirements,
26 which it laid out in plain language in A.R.S. § 16-547(D). The Legislature did not intend to
27 permit voting by unstaffed drop box.

28 In fact, Defendant concedes this point *sub silentio* with his treatment of A.R.S.
§ 16-547(D) in the EPM. Despite the express command of the Legislature to include a very

1 specific instruction to all early voters, the 2019 EPM commands that a different instruction be
2 provided to early voters:

3
4 In order to be valid and counted, the ballot and affidavit must be
5 delivered to the County Recorder or other officer in charge of
6 elections or may be deposited at any polling place in the county no
7 later than 7:00 p.m. on Election Day; and

8
9 WARNING - It is a felony to offer or receive any compensation
10 for a ballot

11 2019 EPM at 56. In the first sentence, Defendant has conspicuously omitted the word “office,” in
12 direct contravention of § 16-547(D). Through the 2019 EPM, Defendant thus *requires* election
13 officials to mislead voters about their obligations under penalty of a class 2 misdemeanor. A.R.S.
14 § 16-452(C), and at least in part introducing ambiguity about the effectiveness of early ballots
15 placed in unstaffed drop boxes.⁴

16 The draft 2023 EPM submitted by Defendant continues the omission of “office,” and then
17 adds language that even more flagrantly violates § 16-547(D):

18
19 In order to be valid and counted, the ballot and affidavit must be
20 delivered to the County Recorder or other officer in charge of
21 elections or may be deposited at any polling place **or ballot drop-**
22 **off location in the county** no later than 7:00 p.m. on Election Day.
23 The ballot will not be counted without the voter’s signature on the
24 envelope.

25
26 (WARNING - It is a felony to offer or receive any compensation
27 for a ballot.) (emphasis added)

28 2023 EPM at 57. This draft EPM section proves Plaintiffs’ point: unstaffed drop boxes are a
distinct and new way of early voting, foreign to Arizona’s election statutes. Defendant’s own
draft EPM submission concedes as much by adding language not found in statute, to expressly
cover this new and foreign way of voting. This submission by Defendant further concedes that

⁴ This instructional language of A.R.S. 16-547(D) stating “must be delivered to the office of the county recorder or other officer in charge of elections” remains unchanged since it was introduced in 1997. 1997 Ariz. Legis. Serv. 2nd Sp. Sess. Ch. 5 (S.B. 1003) (WEST)

1 Defendant himself regards early voters placing their ballots in unstaffed drop boxes to be a
2 distinct method of voting, in addition to and apart from the allowed (1) in-person or postal mail
3 delivery to an election official or (2) deposit at a polling place by a voter or a voter’s agent.
4 While Defendant’s rewriting of the instruction *specifically required by the Arizona Legislature* is
5 consistent with his position in this case—that the Secretary of State’s “only non-discretionary
6 duty here is to issue the EPM,” (Def. Mot. at 5)—his instruction is illegal and shows why
7 unstaffed drop boxes are not allowed under Arizona statute.

8 **B. Defendant and Intervenors fail to offer a permissible construction of A.R.S.**
9 **§ 16-547(D) and 548(A) consistent with the drop box regulations.**

10 Despite Defendant’s recognition through the 2023 EPM that a ballot drop-off location is
11 neither delivery to an election official nor deposit at a polling place, Defendant and Intervenors
12 argue for definitions of “deliver” in A.R.S. § 16-548 which, in their view, permits drop boxes.
13 According to Defendant, “deliver” as used in A.R.S. § 16-548 means “to take and hand over to
14 or leave for another.” Def. Mot. at 10. Intervenors agree, and add two more options: “to ‘hand
15 over, surrender,’ or ‘to send (something aimed or guided) to an intended target or destination.’”
16 Intervenors Mot. at 11.

17 Plaintiffs disagree that these definitions function in context. Instead, the Oxford English
18 Dictionary provides a definition of “deliver” that corresponds to the context in which it is used in
19 in A.R.S. § 547, 548, and elsewhere in Arizona election law: “to take (something) to a specified
20 recipient or address.” La Sota Decl. Ex. A (definition II.11.a).

21 Plaintiffs’ definition aligns with the plain text of A.R.S. § 16-548(A) and avoids
22 ambiguity. For example, A.R.S. § 16-548(A) states a ballot may be “deposited” at any polling
23 place in the county. According to the Oxford English Dictionary, “deposit” means “to place in
24 some repository, to commit to the charge of any one, for safe keeping.” La Sota Decl. Ex. B
25 (definition 3.a). This definition precisely captures what a voter does with an early ballot at a
26 polling place. Defendant’s and Intervenors’ definitions describe similar actions. Therefore,
27 Defendant would have “deposit” and “deliver” mean identical actions of “taking and handing
28 over to or leaving for another.” But this would result in the Legislature having used two different

1 words to mean the same thing, and “[w]here the legislature has specifically used a term in certain
2 places within a statute and excluded it in another place, courts will not read that term into the
3 section from which it was excluded.” *Ariz. Bd. of Regents v. State ex rel. Ariz. Pub. Safety Ret.*
4 *Fund Manager Adm’r*, 160 Ariz. 150, 157 (App. 1989). In contrast, there is significant difference
5 between “deliver” in Plaintiffs’ definition and “deposit.” Adopting Plaintiffs’ definition of
6 “deliver” respects the Legislature’s use of different words to mean different things.

7 Further still, A.R.S. § 16-548(A) states that “[i]n order to be counted and valid, the ballot
8 must be received by the county recorder or other officer in charge of elections or deposited at
9 any polling place in the county no later than 7:00 p.m. on election day.” Relatedly, A.R.S.
10 § 16-551(C) requires that “the office of the county recorder or other officer in charge of elections
11 shall remain open until 7:00 p.m. on election day for the purpose of receiving early ballots.”
12 Plaintiffs’ definition of “deliver,” which includes a specified address, explains why the office
13 must remain open until 7:00 p.m.: delivery, and thus receipt, occurs when a ballot is taken to a
14 specified recipient or address. In contrast, Defendant’s and Intervenors’ definition permits
15 delivery, and thus receipt at a variety of locations, and so it would be nonsensical to require one
16 specific location to remain open specifically “for the purpose of receiving early ballots.”⁵

17 Plaintiffs’ definition of “deliver” better harmonizes the meaning of A.R.S. § 16-547(D)
18 and 548(A), as well. Defendant asserts that inclusion of the word “office” in A.R.S. § 16-547(D)
19 renders that statute ambiguous. Def. Mot. at 10. But that is only because Defendant has opted for
20 a definition to support his preferred policies over the plain language of the statute. No such
21 ambiguity exists using Plaintiffs’ definition, because when “deliver” conveys a notion of “a

23
24 ⁵ Defendant suggests that the first step in statutory analysis should be “searching for the
25 overarching purpose of the statutes.” Def. Mot. at 9. Plaintiffs disagree that a resort to purpose is
26 necessary when no ambiguity is present, as here. *St. v. Com. Credit Co.*, 35 Ariz. 479, 485 (1929)
27 (“[I]f the language is ambiguous, then court should consider the purpose of the statute”).
28 Nonetheless, Defendant’s foray into the purpose of election laws, which begins with broad
generalities about the purity of elections (Def. Mot. at 9) and ends with concluding that a
permissive early voting regime supports a conclusion that voters can return their ballots however
they want (*id.* at 10), ends up missing the purpose obvious from a plain reading of A.R.S. § 16-
547, 548, and 511: the Legislature restricts methods of ballot return.

1 specified recipient or address,” specifying that the address is a particular office is consistent and
2 clear. The Court should adopt Plaintiffs’ definition and reject Defendant’s and Intervenors’,
3 because “[w]hen construing two statutes, this Court will read them in such a way as to harmonize
4 and give effect to all of the provisions involved.” *Pima County ex rel. City of Tucson v. Maya*
5 *Constr. Co.*, 158 Ariz. 151, 155 (1988).

6 Finally, in the unique circumstance of when a special district mail ballot election is held,
7 Arizona law authorizes the board of county supervisors to forego establishing polling places and,
8 as a substitute, to “designate one or more sites for voters to deposit marked ballots until 7:00
9 p.m. on the day of the election.” A.R.S. § 16-411. Notably, when authorizing drop boxes in this
10 very limited scenario, Arizona law uses the word “deposit” to describe the voter’s action, just
11 like A.R.S. § 16-548(A) and § 16-547(D) use that word to describe the voter’s action when
12 leaving a ballot at a precinct. Similarly, A.R.S. § 16-579.02(A)(1) also uses the word “deposit”
13 to describe the action of leaving a ballot at an official drop box at a polling place.⁶ In other
14 words, the word “deposit” describes actions at a drop box, and the Legislature’s decision to use
15 the word “deliver” in A.R.S. § 16-548(A) and 547(D) clearly means something other than using
16 a drop box.

17 **C. Defendant’s and Intervenors’ construction of “deliver” results in absurd**
18 **outcomes.**

19 Even if Defendant’s and Intervenors’ construction included drop boxes, such a
20 construction would violate the canon against absurdity. They offer no limitations on the
21 boundaries of where, when, or how a voter could “take and hand over” a ballot, or “leave [a
22 ballot] for another.” As Intervenors view it, “nothing in the statutory scheme prescribes or
23

24
25 ⁶ Intervenors confusingly misinterpret what A.R.S. § 579.02 illustrates. Intervenors Mot. at 12-13.
26 The drop boxes described there are exactly the kind of submission method contemplated when
27 A.R.S. § 16-548 states that a ballot can be “deposited by the voter or the voter’s agent at any polling
28 place in the county.” A.R.S. § 16-579.02 and § 16-441 clearly show that the Legislature knows
how to authorize and regulate drop boxes when it wants to, and the only times it has done so are
at polling places and for special district mail ballot elections. It has not done so for unstaffed drop
boxes.

1 proscribes the means by which voted ballots must be ‘delivered . . . to the county recorder.’”
2 Intervenors Mot. at 10.

3 If Defendant and Intervenors were correct, a voter could permissibly leave a ballot for an
4 election official anywhere. If all it takes to satisfy A.R.S. § 16-548(A) is leaving a ballot for an
5 election official somewhere by 7:00 p.m. on election day, a voter would be well within his rights
6 to leave his ballot in an election official’s bag at a gym, or hand it to the official while passing at
7 a grocery store. A voter could also choose to leave his ballot on the official’s home doorstep, or
8 under the official’s windshield wiper. A voter could even leave a ballot at an official’s vacation
9 home in Hawaii at 7:00 p.m. on election day and expect the official to tabulate the vote without
10 concern. Each of these are absurd results of Defendant’s and Intervenors’ construction, and “an
11 interpretation is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed
12 to have been within the intention of persons with ordinary intelligence and discretion.” *State v.*
13 *Estrada* 201 Ariz. 247, 251 (cleaned up). The Court should reject their construction of A.R.S.
14 § 16-548 and § 16-547.

15 In sum, Defendant and Intervenors can find no honest statutory support for their unstaffed
16 drop box scheme. Defendant has manipulated statutory language to the contrary and compelled
17 election officials to further that scheme. The only way Defendant and Intervenors can find that
18 support is by adopting a contorted definition that fits nowhere else in Arizona law, and violates
19 multiple canons of construction.

20 On the other hand, Plaintiffs’ definition of “deliver” avoids conflicts, fits in context, and
21 supports a plain understanding of the law. “If the provision has only one reasonable
22 interpretation, we apply it.” *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244, 468
23 P.3d 1200, 1205 (2020)

24 Arizona law does not authorize unstaffed drop boxes. Defendant’s unstaffed drop box
25 regulations conflict with election statutes, do not have the force of law, and should be enjoined.

26 **IV. This Court should promptly enjoin Defendant’s unstaffed drop box regulations.**

27 Plaintiffs’ motion for preliminary and permanent injunctive relief remains pending, and
28 Defendant and Intervenors have failed to show that Plaintiffs are not entitled to relief.

1 Defendant's and Intervenors' present motions do nothing to undercut the reasons
2 Plaintiffs already presented for granting relief. Plaintiffs have shown a strong likelihood of
3 success on the merits that Defendant has no statutory authorization to issue unstaffed drop box
4 regulations, and has in fact issued regulations that conflict with Arizona election statutes.
5 Because "Plaintiffs have shown that [Defendant] has acted unlawfully and exceeded his
6 constitutional and statutory authority, they need not satisfy the standard for injunctive relief."
7 *Fontes*, 250 Ariz. at 64.

8 Even so, Plaintiffs have shown harm to their beneficial interest in "the proper and
9 uniform enforcement . . . of statutory requirements for completed early ballots." Verif. Compl. at
10 16. Under *Fontes*, harm to a beneficial interest in compelling an official to perform a legal duty
11 "establishe[s] the requisite injury" necessary for injunctive relief. *Fontes* at 64. And Plaintiffs
12 here, just like plaintiffs in *Fontes*, have shown that "because [Defendant's] action does not
13 comply with Arizona law, public policy and the public interest are served by enjoining his
14 unlawful action." *Id.* at 64.

15 Perhaps recognizing that *Fontes* controls here, Defendant and Intervenors are left
16 debating where the balance of hardships lie. Defendant claims that Plaintiffs have exhibited and
17 "unreasonable delay in bringing the lawsuit." Def. Mot. 13. Defendant fails to recognize that
18 Plaintiffs filed this suit within just three weeks of Defendant finalizing the draft 2023 EPM and
19 transmitting it to the Governor.⁷ Defendant has as much time as possible to accommodate any
20 changes due to an injunction, given that A.R.S. § 16-452(B) requires submission of the EPM
21 "not later than October 1 of the year before each general election." Defendant's only authority,
22 *League of Women Voters ("LWV") v. Reagan*, No. CV-18-02620, 2018 WL 4467891 (D. Ariz.
23 Sept. 18, 2018), involved Plaintiffs who knew of violations for at least nine months prior to filing
24 an emergency motion for preliminary injunction less than three months before a general election.
25 *League of Women Voters* is unpersuasive here, where Plaintiffs promptly filed upon the EPM
26 draft being complete, and five months prior to the March 2024 Presidential Preference Election.

27
28 ⁷ https://apps.azsos.gov/election/files/epm/cover_letter_epm_submission_20230930a.pdf

1 Intervenors also assert that their members will face harms if they lose access to unstaffed
2 drop boxes. But none of these anecdotes explain why these members would be disenfranchised
3 by removing unstaffed drop boxes, while leaving polling places, recorders’ offices, and hundreds
4 of thousands of United States Postal Service collection points (including many secure collection
5 boxes) available to them.

6 One affiant, Mr. Frey, merely states his preference and desire for convenience leads him
7 to leave his ballot at an unstaffed ballot box at a grocery store, outside of state control, rather
8 than the federally regulated and protected USPS. Intervenors SOF Ex. H at 2. Another, Ms.
9 Horwin prefers unstaffed drop boxes “because they are significantly more accessible than
10 voting . . . by mail” and because she “did not have time to go to the post office.” Intervenors SOF
11 Ex. G at 3. Ms. Lorencita Marshall notes that she prefers to use an unstaffed drop box located
12 five hours round trip from her house, rather than a post office requiring a two hour trip.
13 Intervenors SOF Ex. K at 2. Mr. Lomahquahu attests to the lack of mail services in the Hopi
14 reservation. Intervenors SOF Ex. L at 3.

15 None of the affiants, however, discuss the availability of drive-up and twenty-four-hour
16 mail collection boxes which, unlike unstaffed drop boxes, *are* explicitly authorized by Arizona
17 law. Nor do they discuss why the difficulty of *returning* a ballot in the mail differs from any
18 difficulties in *receiving* that same ballot in the mail, which must occur for every single early
19 voter in Arizona. And the only affiant who contrasted the effort to reach a post office with the
20 effort to reach an unstaffed drop box conceded that using the post office is easier for her.

21 Nor do Defendant or Intervenors present evidence showing that removing unstaffed drop
22 boxes would result in overall lower vote participation. One county with no unstaffed drop
23 boxes—Mohave County—recorded greater voter participation in the 2022 general election than
24 at least one other county⁸ that does use unstaffed drop boxes, Pinal County.⁹ Mohave County

26 ⁸ https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf [retrieved
27 Dec. 1, 2023]

28 ⁹ <https://www.pinal.gov/1503/Drop-Box-Locations> [retrieved Dec. 1, 2023,
<https://archive.ph/KbdjP>]

1 also had nearly the same voter turnout rate in 2022 (56.33%) as Graham County (56.48%),¹⁰
2 even though Graham County used five unstaffed drop boxes in 2022.¹¹ Further, Mohave County
3 has a much larger voting population than Graham County (146,919 eligible voters versus
4 19,487),¹² and is also nearly three times larger geographically than Graham County (13,311
5 square miles versus 4,622).¹³ Additionally, because Mohave County relied on the USPS to
6 handle ballots rather than unstaffed drop boxes, the county avoided the risk of ballot retrievers
7 being left alone and vulnerable with hundreds of ballots during the long drives and pit stops
8 required to reach distant populated areas. Kentch Decl. at ¶ 8. And another county with no
9 unstaffed drop boxes—Cochise County—is in the top three counties for the state for voter
10 turnout. Stevens Decl. at ¶ 9. In fact, the county with the worst turnout rate—Yuma County at
11 44.54%¹⁴—has used drop boxes for more than a decade according to Intervenor’s Statement of
12 Facts. Intervenor SOF at 4.

13 In short, it is far from certain that the balance of hardships weighs against granting an
14 injunction. Given that Plaintiffs have shown a substantial likelihood of success on the merits and
15 an injury to their beneficial interest, and in view of the fact that injunctions halting unlawful
16 actions by election officials *per se* serve public policy, this Court should grant the preliminary
17 and permanent injunction Plaintiffs have requested.

18 CONCLUSION

19 Plaintiffs have standing in this suit due to their beneficial interest. Defendant and
20 Intervenor have failed to show that Defendant possesses the authority under Arizona statute to
21

22 _____
23 ¹⁰ https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf
[retrieved Dec. 1, 2023]

24 ¹¹ <https://www.graham.az.gov/314/How-To-Return-Your-Early-Ballot> [retrieved Dec. 1, 2023,
25 <https://archive.ph/U8bdi>]

26 ¹² https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf
[retrieved Dec. 1, 2023]

27 ¹³ https://www2.census.gov/geo/docs/maps-data/data/gazetteer/counties_list_04.txt [retrieved
28 Dec. 1, 2023]

¹⁴ https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf
[retrieved Dec. 1, 2023]

1 create and regulate unstaffed drop boxes. The Court should thus deny Defendant's and
2 Intervenor's motions for summary judgment and grant Plaintiffs a permanent injunction against
3 Defendant's unstaffed drop boxes scheme.

4
5 **RESPECTFULLY SUBMITTED** December 1, 2023.

6
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24 I hereby certify that on December 1, 2023, I caused the foregoing document to was filed
25 with the Yavapai County Superior Court Clerk via the Turbo Court E-file system.

26 I hereby certify that on December 1, 2023, I caused the following parties or persons to be
27 served via email:

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