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**Pro Hac Vice Application Pending*
***Pro Hac Vice Application Forthcoming*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WARREN PETERSEN, in his official capacity as President of the Arizona Senate; BEN TOMA, in his official capacity as Speaker of the Arizona House of Representatives, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	No. CV2024-001942 **[PROPOSED] RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** (Assigned to the Hon. Scott Blaney)

INTRODUCTION

The Elections Procedures Manual ("EPM") is the result of a thoughtful, collaborative process involving the Secretary of State (the "Secretary"), the Governor, the Attorney General, and local election officials, and is critical to ensuring that Arizona's elections are administered fairly and consistently. Plaintiffs' lawsuit threatens to inject uncertainty and chaos into the 2024 elections by invalidating key provisions of the EPM, even going so far as to request an order from this Court that would permit county officials to disregard their duty to timely canvass election results. As discussed below and in the motion to dismiss filed concurrently by Proposed Intervenor-Defendants Arizona Alliance for Retired Americans and Voto Latino, Plaintiffs lack standing to assert their claims, which are without merit in any event. Even apart from the legal shortcomings of Plaintiffs' suit, the equities militate strongly against relief that would undermine the administration of Arizona's elections and even disenfranchise lawful voters. Plaintiffs' motion for a preliminary injunction should be denied.

ARGUMENT

Plaintiffs ask this Court to issue expedited relief invalidating key EPM provisions that ensure the fair and orderly administration of Arizona's elections, but their arguments fail as a matter of both law and equity. Because they lack standing to assert their claims—which, in any event, are meritless and risk mass confusion and even disenfranchisement in the upcoming elections—their request for a preliminary injunction should be denied.

I. Plaintiffs lack standing.

Plaintiffs' attempt to improperly micromanage the administration of Arizona's elections not only fails as a matter of law, but also underscores why they lack standing to assert their claims in the first place.

The Arizona Constitution's "express mandate . . . that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately . . . . underlies [the] requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue." *Bennett v.*

Napolitano, 206 Ariz. 520, 525 ¶ 19 (2003). Accordingly, Plaintiffs must show a "cognizable injury" to assert their claims against the Secretary. *Id.* at 524 ¶ 17; *see also, e.g.*, *Sears v. Hull*, 192 Ariz. 65, 69–70 ¶¶ 16–17 (1998) (denying standing to citizens seeking relief against Governor where they failed to plead and prove palpable injury personal to themselves).

Plaintiffs premise their standing on a purported injury to the Legislature as a whole, alleging that "[t]he Legislature has institutional interests in defending the proper scope of authority delegated to other branches of government, including the Secretary." Verified Special Action Compl. for Declaratory & Injunctive Relief ("Compl.") ¶ 8.[1] They also note that, "[a]s leaders of the Arizona Legislature, the Speaker and President have authority to take legal action to prevent institutional injuries to the Legislature." *Id.* ¶ 10. But while legislative authorization to initiate suit might be *necessary* for legislative standing—and even then, the adequacy of the broad, unspecific authorization on which Plaintiffs rely is not clear—it is not alone *sufficient*: Plaintiffs must still "allege[] a direct institutional injury." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487 ¶¶ 16, 18 (2006). This they have failed to do.

In their complaint, Plaintiffs articulate various injuries that *can* confer legislative standing, but none is actually present here. *See Tennessee ex rel. Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 511–12 (6th Cir. 2019) ("Merely alleging an institutional injury is not enough."). Unlike in *Coleman v. Miller*, 307 U.S. 433 (1939), there are no allegations about "'maintaining the effectiveness' of a vote," as there might be if, for example, the Governor improperly vetoed a legislative enactment, Compl. ¶ 8 (quoting *Biggs v. Cooper*, 236 Ariz. 415, 418 ¶ 11 (2014)). Plaintiffs cite the U.S. Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, but the Legislature had standing there because the challenged initiative would have

[1] Plaintiffs do not appear to assert individual standing, nor could they: The Arizona Supreme Court has "rejected the argument that the President and the Speaker have standing to bring suit as individuals on behalf of the entire legislative body." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487 ¶ 16 n.5 (2006) (citing *Bennett*, 206 Ariz. at 526–27 ¶ 28).

"'completely nullif[ied]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." 576 U.S. 787, 804 (2015) (quoting *Raines v. Byrd*, 521 U.S. 811, 823–24 (1997)). Here, by contrast, the Secretary has not sought to strip the Legislature of its authority to enact election rules; quite the contrary, he issued the EPM pursuant to the very authority that *the Legislature itself* prescribed through statute. Nor is this an instance where the Legislature's "specific powers are disrupted" or their constitutionally assigned role is intruded upon. *Priorities USA v. Nessel*, 978 F.3d 976, 982 (6th Cir. 2020); *see also Tenn. Gen. Assembly*, 931 F.3d at 511–12. Not only does the Legislature remain free to enact voting- and election-related laws, it has done so since the EPM was adopted. *See* H.B. 2785, 56th Leg., 2d Reg. Sess. (Ariz. 2024).

The U.S. Supreme Court has noted the distinction between "the level of vote nullification at issue in *Coleman*"—which is to say, the sort of concrete institutional injury that confers legislative standing—and "the abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826. Plaintiffs' asserted injury falls within the latter category: a disagreement with how the law should be interpreted, not any actual harm to the Legislature's institutional interests or constitutional prerogatives. Indeed, all Plaintiffs have claimed is "[a]n allegation of generalized harm that is shared alike by all or a large class of citizens generally"—namely, that election laws are not being interpreted to their liking—which "is not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16.[2]

Nor do any of the other authorities Plaintiffs cite give them standing in this case. (Indeed, given the short shrift Plaintiffs give them, their citations most likely reflect a "kitchen-sink" attempt to save their suit, not serious arguments for standing.) For example, Plaintiffs cite Arizona's declaratory-judgment statute as a basis for standing, *see* Compl.

[2] For this reason, the legislative authorization on which Plaintiffs rely cannot be properly invoked in this case. Plaintiffs are allowed only to assert claims "arising out of [an] injury to the [Legislature's] powers or duties." *Senate Rules: Fifty-Sixth Legislature* 6, Ariz. Senate, https://www.azsenate.gov/alispdfs/SenateRules2023-2024.pdf (last visited Mar. 4, 2024); *Rules of the Arizona House of Representatives: 56th Legislature* 3, Ariz. H.R., https://www.azhouse.gov/alispdfs/AdoptedRulesofthe56thLegislature.pdf (last visited Mar. 4, 2024). Here, no such legislative injury has actually been alleged.

¶ 8, but never explain how the Legislature's "rights, status or other legal relations are affected" by an EPM adopted consistent with the statutory process, A.R.S. § 12-1832. Nor is the discussion of standing for mandamus actions in *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62 ¶¶ 10–11 (2020), helpful in this special action, which seeks to "prohibit[] the Secretary from enforcing or implementing" the challenged provisions of the EPM, Compl. 21, not compel him to perform a legally imposed duty, *see Sears*, 192 Ariz. at 69 ¶ 11 (mandamus does not lie "to restrain a public official from doing an act" or where "the action of a public officer is discretionary" (cleaned up)). And *Cochise County v. Kirschner* concerned an exercise of administrative discretion beyond what was provided by statute, *see* 171 Ariz. 258, 261–62 (App. 1992), whereas here the Secretary is specifically charged with "prescrib[ing election] rules," A.R.S. § 16-452(A).

Ultimately, this is a case where Plaintiffs are attempting to "coerce[]" the judiciary "into resolving political disputes between the executive and legislative branches"—precisely a situation in which Arizona courts have applied a more rigorous standing inquiry. *Bennett*, 206 Ariz. at 525 ¶ 20 ("Concern over standing is particularly acute when, as here, legislators challenge actions undertaken by the executive branch."). Plaintiffs clearly disagree with the Secretary's interpretation of the state's election laws, and they are free to use the legislative process to respond—but they should not and cannot ask this Court to step in as a referee. Because Plaintiffs lack standing to pursue their claims, they cannot possibly be entitled to preliminary injunctive relief. The motion must be denied on these grounds alone.

II. Plaintiffs are unlikely to succeed on the merits of their claims.

This lawsuit attempts to obscure a critical legal reality: It is squarely within the Secretary's authority to prescribe rules related to voter registration and elections. The challenged EPM provisions are consistent with Arizona's statutes and were properly adopted. They therefore have the force of law, and Plaintiffs' claims necessarily fail.

A. The Secretary is required to proscribe rules interpreting and implementing Arizona election law to ensure uniformity across counties.

Arizona law mandates that the Secretary "*shall* prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A) (emphasis added); *see also Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 15 (noting that "[t]he Legislature has expressly delegated to the Secretary the authority to promulgate" voting-related rules). Consistent with this delegation, the Secretary may prescribe rules interpreting and implementing statutory commands. *See Griffith Energy, LLC v. Ariz. Dep't of Revenue*, 210 Ariz. 132, 137 ¶ 23 (App. 2005) ("Although the legislature cannot delegate the authority to enact laws to a government agency, it can allow the agency 'to fill in the details of legislation already enacted.'" (quoting *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971))). And, "[o]nce adopted, the EPM has the force of law." *Ariz. Pub. Integrity All.*, 250 at 63 ¶ 16. Only in the rare instance where the EPM "contradicts" state law does it lose that distinction. *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022). This is not that rare case.

B. The EPM's guidance ensuring uniformity in citizenship-verification procedures does not conflict with statutory requirements.

Plaintiffs are unlikely to succeed on their claim in Count II that the EPM unlawfully conflicts with A.R.S. § 16-165(I), *see* Pls.' Mot. for Prelim. Inj. ("Mot.") 6–8; Compl. ¶¶ 37–40, 61–69, not least of all because that statutory provision is no longer enforceable as a matter of law. On February 29, 2024, a federal court held that A.R.S. § 16-165(I) is preempted because it violates the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(A), and the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507(b)(1), *see Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *57 (D. Ariz. Feb. 29, 2024). Plaintiffs' sole argument for enjoining the EPM's citizenship-investigation rule is their claim that it "[u]nlawfully [a]bridges" county recorders' responsibility under A.R.S. § 16-165(I) to search for voters in the Systematic Alien Verification for Entitlements

system whom they have a "reason to believe" are not U.S. citizens. Mot. 6. But, as the federal court's order makes clear, county recorders are prohibited from doing so because it would violate federal law. *See Mi Familia Vota*, 2024 WL 862406, at *57.

Moreover, Plaintiffs would be unlikely to succeed on Count II even if A.R.S. § 16-165(I) remained enforceable. That statute instructs county recorders to verify the citizenship of registered voters whom they have "reason to believe" are not U.S. citizens, but is silent as to what constitutes a "reason to believe" that a voter is not a citizen. A.R.S. § 16-165(I). Plaintiffs implicitly concede as much by acknowledging that not *all* third-party allegations should qualify as a "reason to believe," offering their own view that a "purely conjectural 'tip'" would not be enough, but law enforcement records or other "reliable documentation" might. Mot. 7. But Plaintiffs bear the burden of showing that the EPM "contradicts" Arizona statute. *Leibsohn*, 254 Ariz. at 7 ¶ 22. They fall far short of that showing here. Indeed, the EPM does not even clearly contradict *Plaintiffs'* reading of the law: It, too, requires that a "reason to believe" be grounded in reliable documentation such as jury-commissioner reports or the state database. Compl. Ex. 1, at 43.

In any event, the fact that the statute leaves a gap in defining what qualifies as "reason to believe" only underscores that it is appropriate for the Secretary to include guidance on that issue in the EPM to help ensure that county recorders will apply the law uniformly—exactly the Secretary's edict under Arizona law. *See Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *6 (D. Ariz. Nov. 3, 2016) (imposing on Secretary legal obligations to promulgate rules in EPM ensuring uniformity in voter registrations (citing A.R.S. § 16-452(A))); A.R.S § 16-142(A)(1) (requiring Secretary to oversee Arizona's NVRA compliance); A.R.S § 16-168(J) (requiring Secretary to ensure voter-registration list maintenance complies with NVRA). Plaintiffs' claim that county recorders should themselves determine what constitutes a credible "reason to believe" is not a textual argument about *how* to interpret this standard, but a practical argument about *who* should interpret it. But the EPM's guidance is within the Secretary's statutory authority, and it does not "directly conflict[]" with statute. *Ariz. All. for Retired*

Ams., Inc. v. Crosby, 537 P.3d 818, 823 (Ariz. Ct. App. 2023). Far from "abridg[ing] or modify[ing] clear statutory terms," Mot. 7, the Secretary's guidance on this point is *statutorily required*.

C. The EPM properly mandates the beginning of the AEVL maintenance program.

Plaintiffs are unlikely to succeed on their claim in Count III that active early voting list ("AEVL") maintenance must commence on January 15, 2025—and thus that the EPM unlawfully mandates that the process begin on January 15, 2027, *see* Mot. 8–11; Compl. ¶¶ 41–44, 70–83—for a simple reason: Plaintiffs' argument is based on a plain misreading of the operative statute.

A.R.S. § 16-544(L) provides that, "[o]n or before January 15 of each odd-numbered year, the county recorder or other officer in charge of elections shall send a notice to each voter who is on the [AEVL] and who did not vote an early ballot in all elections *for two consecutive election cycles*." (Emphasis added). The statute defines an "election cycle" as "the two-year period beginning on January 1 in the year after a statewide general election." *Id.* § 16-544(S). Putting these two provisions together, AEVL removal notices can only be sent to voters who did not cast early ballots in all elections *for two consecutive two-year periods beginning on January 1 in the year after a general election*. As Plaintiffs note, S.B. 1485, which amended A.R.S. § 16-544 to add the AEVL removal process, took effect on September 29, 2021. Mot. 8. While it might be true that "S.B. 1485 [] was operative throughout all statewide elections held during the 2022 election cycle," *id.* at 11, it is also indisputably true that it was *not* in effect for the entire two-year period beginning on January 1, 2021. Accordingly, the first full "election cycle" as contemplated by A.R.S. § 16-544(L) began on January 1, 2023, and the second election cycle will commence on January 1, 2025—meaning that, as the EPM correctly reflects, AEVL notices can be sent out *at the earliest* following the conclusion of the 2025–2026 election cycle, in January 2027.

Plaintiffs' focus on retroactivity, *see* Mot. 9–10, is a red herring. Regardless of the EPM's purported basis for beginning the AEVL maintenance process on January 15, 2027,

that is its proper commencement date under the plain terms of A.R.S. § 16-544. Plaintiffs might wish to remove voters earlier, but "[f]idelity to the statutory text," *id.* at 8, *requires* the process as mandated by the EPM.[3]

D. The EPM's guidance on circulator registration applications is consistent with statutory requirements.

Plaintiffs are unlikely to succeed on Count IV's challenge to the EPM's treatment of circulator registration applications. *See* Mot. 11–13; Compl. ¶¶ 45–47, 84–90. Arizona law requires that circulator registration applicants provide their "full name, residence address, telephone number and email address" and sign an affidavit declaring that "all of the information provided is correct to the best of [their] knowledge." A.R.S. § 19-118(B). While it requires disqualification of signatures collected by circulators who *fail* to register, it is silent as to the consequences of mistakes or typos in a circulator registration application. *See id.* § 19-118(A). Plaintiffs acknowledge this, noting the statute does not resolve, for example, whether "an accidental transposition of digits in a telephone number invalidate[s] a registration[.]" Mot. 13. The EPM resolves this and other open questions by stating that signatures will not be disqualified "if the circulator makes a mistake or inconsistency in listing [the required] information (e.g., a phone number or email address that is entered incorrectly; a residential address that doesn't match the residential address listed on that circulator's petition sheets; etc.)." Compl. Ex. 1, at 119 n.58.

Again, the EPM has the force of law unless it *directly conflicts* with a clear statutory requirement. And, again, Plaintiffs are unable to point to any statutory provision with which the EPM conflicts. Nor could they. By Plaintiffs' own admission, the statutory scheme for circulator registration applications is silent on this point. Though circulators "must strictly comply with . . . statutory requirements" governing registration applications, A.R.S. § 19-

[3] Plaintiffs' reasoning would also lead to absurd results. If the two-year-election-cycle clock could start any time prior to S.B. 1485's enactment, then in theory voters who failed to cast early ballots during *any* earlier four-year period—2019–2022, 2017–2020, and so on—could now receive AEVL removal notices. In that case, January 15, 2025, would have no special significance; notices would have been required on January 15, 2023, as well.

102.01, strict compliance calls for fidelity to the statute, *see Norman v. State Farm Mut. Auto. Ins. Co*., 201 Ariz. 196, 201 ¶ 16 (App. 2001), and to find in Plaintiffs' favor the Court would have to read into the statute language that simply is not there. "[S]trict construction does not mean strained construction," *Com. Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (quoting *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983)). Even strict compliance with the statutory scheme requires only that circulators affirm the accuracy of their applications to the best of their knowledge. It does *not* mean that signatures gathered by circulators who make mistakes on their applications must be disqualified.

Plaintiffs' reliance on *Leibsohn v. Hobbs* is misplaced. The *Leibsohn* plaintiff challenged EPM guidance that directed circulators to register through an online portal that allowed applicants to upload only one notarized affidavit to their account. 254 Ariz. at 8 ¶¶ 26–28. The Court found a direct conflict between that guidance and a statute requiring circulators to submit a separate affidavit for each initiative petition they wished to circulate, such that the EPM procedure "made it impossible" for circulators who worked on more than one petition to strictly comply with the statute. *Id.* at 9 ¶ 32. Here, by contrast, there is no conflict between statutory requirements and the EPM's guidance. As a result, it does not exceed the Secretary's authority. *See Ariz. All. for Retired Ams.*, 537 P.3d at 823.[4]

E. The EPM's guidance on boards of supervisors' and the Secretary's duty to canvass is consistent with statutory requirements.

Plaintiffs are also unlikely to succeed on their claim in Count V that "the EPM unlawfully constricts the county boards of supervisors' canvassing authority." Mot. 13; *see also* Compl. ¶¶ 48–54, 91–107. Indeed, the EPM is consistent with Arizona law and will ensure the timely certification of election results.

[4] Plaintiffs also argue that courts, not the Secretary, must determine the consequences of typos or mistakes in circulator registration applications. Mot. 13. But the Legislature expressly delegated this interpretive authority to the Secretary. *See* A.R.S. § 19-118(A) (Secretary shall establish in EPM "procedure for registering circulators, including circulator registration applications").

At the outset, it is indisputable that the Secretary is authorized to regulate the canvassing of election results, since he is required to prescribe rules for "counting" and "tabulating" ballots. A.R.S. § 16-452(A). Canvassing is an essential component of the ballot-counting-and-tabulation process because the "official canvass" is the "official record" of the vote *count*, as *tabulated* by tabulation equipment. A.R.S. § 16-646 (official canvass must record the "number of ballots cast" and "number of votes" received by each candidate); *see also id*. § 16-444(A) ("[v]ote tabulating equipment" is used to "count votes . . . and tabulate the results"). The official canvass is the official, tabulated count; without it, ballots are not officially counted or tabulated. The Secretary is also statutorily required to regulate "the procedures for . . . voting," *id.* § 16-452(A), which necessarily includes the finalization of election results through a canvass.

Plaintiffs are correct that the canvassing process "is denoted entirely by statute," Mot. 14, and the EPM's guidance is entirely consistent with that statutory scheme. This includes EPM guidance stating that boards of supervisors have "a non-discretionary duty to canvass the returns as provided by the County Recorder or other officer in charge of elections" and may not "change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order." Compl. Ex. 1, at 248.

Arizona law requires that the boards of supervisors must complete the canvass of election returns by a specified deadline. *See* A.R.S. § 16-642(A). To complete the canvass, boards must prepare an "official canvass," recording "the number of ballots cast," "the number of votes . . . received by each candidate," and the "the number of votes . . . for and against" each proposed amendment or other measure on the ballot. *Id.* § 16-646(A). The statutory provisions specify that "[t]he result printed by the vote tabulating equipment, . . . when certified by the board of supervisors or other officer in charge, *shall* constitute the official canvass of each precinct or election district." *Id.* § 16-622(A) (emphasis added). These duties are mandatory, not discretionary, as reflected by the plain statutory text: A board "*shall*" canvass the county's election results and "*shall*" prepare an "official canvass," which "*shall*" reflect the results printed by tabulation equipment. *Id.* §§ 16-622(A), 16-

642(A), 16-646(A) (emphases added); *see also Ins. Co. of N. Am. v. Superior Ct.*, 166 Ariz. 82, 85 (1990) ("The use of the word 'shall' indicates a mandatory intent by the legislature."). By stating that the boards "shall" perform certain tasks, this statutory scheme "lists duties, not powers." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 132 ¶ 19 (2020) (rejecting argument that statutes conferred discretion). In light of these mandatory statutory directives, Plaintiffs' argument that the Secretary cannot command any action of boards of supervisors misses the mark. *See* Mot. 15. The Legislature, not the Secretary, has already established the boards' nondiscretionary duty to canvass election returns without rejecting the results, changing the vote totals, or delaying certification.[5]

Plaintiffs' claim that Arizona law does not "forbid[] boards of supervisors from independently evaluating the election returns," Mot. 14, incorrectly presumes that boards have unlimited authority absent statutory prohibitions. This is backwards: Arizona courts have consistently stressed that boards have *only* those powers "expressly conferred by statute" and "may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (first quoting *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363 (1967); and then quoting *Mohave County v. Mohave-Kingman Ests., Inc.*, 120 Ariz. 417, 420 (1978)); *see also Ariz. All. for Retired Ams.*, 537 P.3d at 824 (rejecting Cochise County's attempt to implement hand-count audit procedures because "counties must follow [prescribed] method unless and until the legislature determines otherwise"). Plaintiffs' further claim that "the EPM unlawfully constricts the county boards of supervisors' canvassing authority," Mot. 13, is wholly without merit—they do not and cannot point to any statutory authority permitting boards to perform any canvassing-related actions not reflected in the EPM, and the EPM cannot "constrict[]" boards from performing activities that they are otherwise foreclosed from undertaking. In short, the EPM accurately states that the boards have "no authority to

[5] The boards' lack of discretion does not constitute a "rubber stamp" of election returns. Mot. 15. Arizona law mandates a thorough and diligent process to ensure that the tabulated results are accurate before they are presented to the boards for certification. *See* A.R.S. § 16-602 (describing detailed procedures for limited hand-count audit).

change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order," Compl. Ex. 1, at 248, since there is no statutory authority for boards to independently evaluate election returns or otherwise perform these proscribed post-election activities.[6]

Plaintiffs' contrary argument hinges entirely on the meaning of the word "determining" in A.R.S. § 16-643, which states that "[t]he canvass of the election returns shall be made in public by opening the returns, other than the ballots, and determining the vote of the county." Plaintiffs are simply wrong to suggest that this language "empowers the Board" to change vote totals or reject election results. Compl. ¶¶ 100–01. Arizona law requires that "[w]ords and phrases shall be construed according to the common and approved use of the language," A.R.S. § 1-213(A), and, "[a]bsent statutory definitions, courts generally give words their ordinary meaning, and may look to dictionary definitions," *DBT Yuma, LLC v. Yuma Cnty. Airport Auth.*, 238 Ariz. 394, 396 ¶ 9 (2015) (citation omitted). Here, neither the Arizona statutes' general definitions, *see* A.R.S. § 1-215, nor the provisions of Title 16 specifically define the word "determine," so dictionary definitions provide the word's acceptable ordinary meaning: "to fix conclusively or authoritatively." *Determine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/determine (last visited Mar. 4, 2024). To "fix," in turn, means "to make firm, stable, or stationary" or "to give a permanent or final form to." *Fix*, Merriam-Webster, https://www.merriam-webster.com/dictionary/fix (last visited Mar. 4, 2024). Consistent with these definitions, during the canvass of election returns, vote totals are "conclusively" and "authoritatively" put in "final form." Nothing empowers boards to *change* vote totals, *reject* election results, or *delay* certification.

[6] To the extent there are concerns about the legitimacy of vote totals transmitted by county recorders or other elections officials, *see* Mot. 15, they must be resolved by courts, not by boards acting ultra vires, *see, e.g.*, *Reyes v. Cuming*, 191 Ariz. 91, 93 (App. 1997); *Lake v. Hobbs*, No. CV 2022-095403, 2022 WL 19406609, at *3 (Maricopa Cnty. Super. Ct. Dec. 19, 2022). And while Plaintiffs insist that any errors by boards may be challenged in court, Mot. 15 (citing A.R.S. § 16-672), the ability to challenge unlawful conduct in court does not give boards the right to engage in such conduct.

Finally, Plaintiffs' concern that the EPM's guidance could allow the Secretary to disenfranchise counties has no basis in law. *See* Mot. 16. The EPM does not allow the Secretary to discount the canvasses of any county that timely transmits its canvass. Compl. Ex. 1, at 252. Therefore, counties can ensure that the votes of their residents are counted by timely completing and transmitting their canvasses—as required by law. In the event a county fails to complete its canvass in the time prescribed by statute, the courts can be called upon to ensure that this nondiscretionary duty is completed. *See, e.g.*, Minute Entry, *Ariz. All. for Retired Ams., Inc. v. Crosby*, No. CV-2022-00552 (Cochise Cnty. Super. Ct. Dec. 1, 2022) (ordering board of supervisors to meet and canvass its election results that day).[7]

F. The EPM applies juror-questionnaire cancellations consistent with the requirements of federal law.

Plaintiffs are also unlikely to succeed on Count I's challenge to the EPM's guidance on juror-questionnaire cancellations. *See* Mot. 4–6; Compl. ¶¶ 34–36, 55–60. Simply put, the EPM provisions regarding juror-questionnaire responses do not exceed the Secretary's authority because the procedure outlined in A.R.S. § 16-165(A)(9) is otherwise inconsistent with the requirements of the NVRA, 52 U.S.C. §§ 20501–20511.

The NVRA provides that a state may not remove someone from the list of eligible voters based on a change of residence "unless the registrant . . . confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered" or "has failed to respond to a notice" *and* "not voted or appeared to vote . . . in" two consecutive federal election cycles. *Id.* § 20507(d)(1). Arizona law, however, allows for voter cancellations based on changes of residence if (1) a county recorder receives a summary report from the jury commissioner or jury manager indicating

[7] That the EPM provision concerning the Secretary's duty to canvass was inserted after the public-comment period does not make it invalid, as Plaintiffs suggest. *See* Mot. 16. The purpose of the notice-and-comment period—which is *not* statutorily required—is to solicit feedback about how the draft EPM should be edited, so it is not surprising that additions, deletions, or amendments might occur after this period. At any rate, the 2023 EPM, including this canvassing provision, was approved by the Governor and Attorney General and therefore has the force of law. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16.

that the voter stated on a jury questionnaire that she is not a resident of the county where she is registered, and (2) the voter fails to return a subsequent mail notice to the county recorder within 35 days. A.R.S. § 16-165(A)(9). This law violates the NVRA because cancelling a registration after only 35 days does not satisfy the NVRA's requirement that cancellation for failure to return a notice occur only after a voter's failure to vote in two consecutive election cycles. *See* 52 U.S.C. § 20507(d)(1)(B). (To illustrate, if an Arizona voter has voted in at least one of the previous two federal election cycles but fails to return the notice within 35 days, A.R.S. § 16-165(A)(9) would require cancellation of that voter's registration, while the NVRA would forbid it.) It further "violates the NVRA by allowing [Arizona] to remove voters from its rolls automatically, without any direct contact with the voter." *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 721 (7th Cir. 2021). A "summary report from the jury commissioner or jury manager," A.R.S. § 16-165(A)(9)(b), is not "direct contact with the voter," and thus cannot be considered confirmation in writing from the voter, *League of Women Voters of Ind.*, 5 F.4th at 721 (finding written communication from another state that voter moved is not "direct contact with the voter" as required by NVRA). Finally, because A.R.S. § 16-165(A)(9) allows systemic cancellation of voter registrations within 90 days of federal elections and "contain[s] no provision limiting systematic roll review and registration cancellation to at least 90 days prior to a federal election," it further violates the NVRA—specifically, 52 U.S.C. § 20507(c)(2)(A). *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *9 (Sept. 14, 2023).

Because Congress enacted the NVRA pursuant to its power to regulate elections under the Elections Clause of the U.S Constitution, the NVRA "necessarily supersedes" any conflicting state law—including this one. *Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (quoting *Ex parte Siebold*, 100 U.S. 371, 384 (1879)), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). Drawing on this constitutional authority, Congress may "conscript state agencies" to ensure compliance with the NVRA. *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1413–15 (9th Cir. 1995). Here, Congress has

specifically conscripted the Secretary to oversee Arizona's compliance with the NVRA. *See* 52 U.S.C. § 20509 (requiring states to designate chief election official responsible for managing NVRA compliance). And Arizona statute *requires* the Secretary to ensure that all voter-registration cancellations conform with the NVRA's requirements. A.R.S. § 16-168(J).[8] Plaintiffs' argument that only courts may determine whether the NVRA preempts Arizona's voter-cancellation rules, *see* Mot. 5–6, ignores the Secretary's legal duty to enforce the NVRA over conflicting provisions of state law—a duty that the Legislature has affirmatively imposed on the Secretary.

By mandating that voters who indicate a change of residency on a juror questionnaire and fail to respond to a notice within 35 days are merely put into inactive status, the EPM ensures that this rule complies with the NVRA. In turn, an order forcing the Secretary to instruct county recorders to immediately cancel the registrations of voters who fail to return notices within 35 days would require the Secretary to violate both the express terms of the NVRA *and* Arizona law requiring him to ensure NVRA compliance. Plaintiffs are accordingly unlikely to succeed on this claim.

III. Neither the equities nor public policy supports injunctive relief.

By their own acknowledgment, Plaintiffs' satisfaction of the remaining preliminary-injunction factors rises and falls with the merits: Because the Secretary exceeded the bounds of his legal authority, Plaintiffs argue, they have been irreparably injured and "public policy and the public interest are served by" an injunction. Mot. 16–17 (quoting *Ariz. Pub. Integrity All.*, 250 Ariz. at 64 ¶ 27). As discussed above, however, no legal violations have occurred. Therefore, Plaintiffs have not been injured, and they are not entitled to preliminary injunctive relief.

Other equitable considerations also militate against a preliminary injunction. As the Arizona Supreme Court has explained, "[e]lection laws play an important role in protecting

[8] For this reason, Plaintiffs' reliance on *Roberts v. State*, 253 Ariz. 259 (2022), *see* Mot. 5–6, is misplaced. There, the Supreme Court concluded that a statute did *not* incorporate a certain federal law, and thus the Legislature did not authorize a state agency to adopt that law, whereas here Arizona law specifically directs the Secretary to comply with the NVRA.

the integrity of the electoral process," and "public officials should, by their words and actions, seek to preserve and protect those laws." *Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶ 4. By contrast, "when public officials, in the middle of an election, change the law"—or, in this case, *seek* a court order that would require the Secretary to change the law—"based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process." *Id.* Plaintiffs should not be allowed to ignore the law, which in some cases they themselves enacted, and inject uncertainty into the electoral process—especially where they retain the legislative power to enact whichever election laws they and their caucuses see fit.

Moreover, courts must "consider fairness not only to those who challenge [election rules], but also to . . . the election officials[] and the voters of Arizona." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000). Plaintiffs' requested relief would not only confuse both election officials and voters, but also potentially lead to the disenfranchisement of lawful voters. Such a result would not only cause irreparable harm, *see, e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) (per curiam) ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm."), it would also undermine the strong public interest in "permitting as many qualified voters to vote as possible," *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012).

CONCLUSION

For these reasons, Proposed Intervenor-Defendants Arizona Alliance for Retired Americans and Voto Latino respectfully request that the Court deny Plaintiffs' motion for preliminary injunction.

RESPECTFULLY SUBMITTED this 4th day of March, 2024.

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