

D. Andrew Gaona (028414)  
Austin C. Yost (034602)  
**COPPERSMITH BROCKELMAN PLC**  
2800 North Central Avenue, Suite 1900  
Phoenix, Arizona 85004  
T: (602) 381-5486  
agaona@cblawyers.com  
ayost@cblawyers.com

Lalitha D. Madduri\*  
Dan Cohen\*  
Julie Zuckerbrod\*  
**ELIAS LAW GROUP LLP**  
250 Massachusetts Ave NW, Suite 400  
Washington, D.C. 20001  
T: (202) 968-4330  
lmadduri@elias.law  
dcohen@elias.law  
jzuckerbrod@elias.law

*Attorneys for Intervenor-Defendant  
Arizona Alliance for Retired Americans*

*\*Admitted pro hac vice*

**ARIZONA SUPERIOR COURT**  
**MARICOPA COUNTY**

RON GOULD, in his individual capacity,  
Plaintiff,

v.

KRIS MAYES, in her official capacity as the  
Attorney General of the State of Arizona,  
Defendant,

and

ARIZONA ALLIANCE FOR RETIRED  
AMERICANS,

Intervenor-Defendant.

No. CV2024-000815

**INTERVENOR-DEFENDANT  
ARIZONA ALLIANCE FOR  
RETIRED AMERICANS' MOTION  
TO DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

(Assigned to the Hon. Frank Moskowitz)

**Oral Argument Requested**

Under Rule of Civil Procedure 12(b)(1), (6), Intervenor-Defendant the Arizona Alliance for Retired Americans (the "Alliance") moves to dismiss Plaintiff's claims.

## INTRODUCTION

Arizona law is clear: electronic tabulating equipment must be used to count ballots unless it is impracticable. A.R.S. § 16-621; 2023 Elections Procedures Manual (“EPM”) at 200 (citing statutes).<sup>1</sup> Plaintiff seeks extraordinary relief: a judicial permission slip allowing counties to abandon the state’s longstanding and detailed ballot counting procedures and tally all votes for the 2024 elections by hand, without even attempting to use available, certified, rigorously tested, and highly accurate electronic tabulating equipment.

Plaintiff’s effort is the latest in a recent series of attempts by a small but vocal few who cite vague and unsupported concerns about threats to election integrity to baselessly cast doubt on the accuracy of proven voting equipment. Each time, experienced election officials, county attorneys, and courts have confirmed that Arizona law forbids expansive hand counts and election officials must follow that law when tabulating ballots. Plaintiff now asks this Court to bless his personal desire to violate Arizona law and give Mohave County judicial permission to conduct a full hand count of all ballots. This request is all the more extraordinary because Mohave County has no plans to do so. In fact, the County Board of Supervisors (the “Mohave Board”)—of which Plaintiff is only one of five members—wisely voted *against* repeated proposals to conduct a full hand count, heeding warnings from their county attorney and the Attorney General that doing so would violate Arizona law, and from the Mohave County Elections Director, who advised that—as a practical matter—doing an accurate hand count would be all but impossible.

Plaintiff’s brazen request must be rejected for at least four reasons. *First*, Plaintiff has suffered no injury and identifies no legal right that has been affected. *Second*, Plaintiff’s speculations about hypothetical future events do not create a justiciable controversy. For both of these reasons, this Court lacks jurisdiction and the complaint must be dismissed at the outset. *Third*, Plaintiff is wrong on the law: Arizona law requires electronic tabulation

---

<sup>1</sup> The EPM is available at [https://apps.azsos.gov/election/files/epm/2023/EPM\\_20231231\\_Final\\_Edits\\_to\\_Cal\\_1\\_11\\_2024.pdf](https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf) (Dec. 2023).

1 of ballots except in narrow circumstances, which Plaintiff explicitly emphasizes do not exist  
2 here. *Fourth*, neither Plaintiff nor the Mohave Board has discretionary authority to invent  
3 their own extra-statutory hand count procedures.

4 This case presents the paradigmatic example of a request for an advisory opinion. It  
5 also threatens to inject chaos into ballot counting procedures, undermine voter confidence,  
6 seriously jeopardize the timely certification of election results, and violate Arizonans'  
7 fundamental right to vote, all mere months before a presidential election. The Court should  
8 dismiss Plaintiff's complaint with prejudice and without leave to amend.

### 9 **BACKGROUND**

10 Arizona law requires electronic tabulation of ballots. *See* A.R.S. § 16-621(A); EPM  
11 at 200. The tabulating equipment used to count ballots undergoes thorough testing by  
12 independent, neutral experts, *see* A.R.S. §§ 16-442(A)–(B), as well as four independent  
13 audits: two logic and accuracy tests before the election, *see* A.R.S. §§ 16-449(A)–(B), a  
14 limited hand count audit of electronically tabulated ballots, *see* A.R.S. §§ 16-602(B), (F),  
15 and post-election logic and accuracy testing, *see* EPM at 243–44.

16 Arizona counties routinely report highly accurate results from electronic tabulating  
17 equipment, and recent post-election audits have found no significant errors in any Arizona  
18 county.<sup>2</sup> For the 2022 election, Mohave County Elections Director Allen Tempert reported  
19 zero discrepancies in Mohave County between the statutory hand count audit and the  
20 tabulated results.<sup>3</sup>

21 Nevertheless, isolated skeptics have recently attempted to solve non-existent  
22 problems with electronic tabulation equipment by expanding the use of hand counts. Courts  
23 have uniformly rejected these misguided efforts. For example, in 2022, Representative and

---

24 <sup>2</sup> *See Summary of Hand Count Results – 2022 Gen. Election*, ARIZ. SEC'Y OF STATE,  
25 <https://azsos.gov/node/218> (last visited July 11, 2024). The Court may take judicial notice  
26 of the Secretary of State's website. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 65 ¶ 28  
n.2 (2020).

27 <sup>3</sup> *See Mohave Cnty. Hand Count / Early Ballot Audit Rep.*, MOHAVE CNTY. ELECTIONS  
28 DEP'T, <https://apps.azsos.gov/election/2022/ghc/2022generalhandcountreport-mohave.pdf>  
(Nov. 15, 2022).

1 candidate Mark Finchem and candidate Kari Lake sued to ban the use of voting machines  
2 and electronic ballot tabulation equipment in Maricopa and Pima Counties, seeking to force  
3 county election officials to hand count all ballots during the 2022 elections. *See Lake v.*  
4 *Hobbs*, 623 F. Supp. 3d 1015 (D. Ariz. 2022), *aff'd sub nom. Lake v. Fontes*, 83 F.4th 1199  
5 (9th Cir. 2023). A federal judge dismissed their suit and denied a preliminary injunction  
6 finding that the plaintiffs had “articulated only conjectural allegations of potential injuries”  
7 involving the use of electronic tabulating equipment. *Id.* at 1032. The court further found  
8 that conducting a full hand count would not be in the public interest, citing a lack of any  
9 evidence that a hand count would be more accurate, the impossibility of conducting a hand  
10 count without enormous resources, and the expectation that “the results of the election  
11 would be delayed.” *Id.* at 1019 n.1.

12 Then, in October 2022, the Cochise County Board of Supervisors (the “Cochise  
13 Board”) voted to conduct a full hand count audit, in contravention of lawful audit  
14 procedures under A.R.S. § 16-602. Intervenor-Defendant, the Alliance, successfully sued  
15 to prevent the Cochise Board from doing so. *See Ruling, Ariz. All. for Retired Ams., Inc. v.*  
16 *Crosby*, No. CV2022-00518 (Cochise Cnty. Sup. Ct. Nov. 7, 2022) (“*Arizona Alliance I*”)  
17 (granting the Alliance’s request to enjoin the Cochise Board from conducting a full hand  
18 count audit), *aff'd* 537 P.3d 818 (Ariz. App. 2023). The court held: “The decision as to how  
19 to conduct and tabulate elections is appropriately in the domain of the State Legislature,  
20 supplemented by the delegated rule making authority of the Secretary of State. The  
21 Legislature has spoken clearly, and elected officials are required to follow its direction.” *Id.*  
22 at 11. The court of appeals affirmed, and held that “the legislature provided for a detailed  
23 method to verify the results from electronically tabulated voting machines,” which did not  
24 allow a full hand count in the first instance, and “counties must follow that method unless  
25 and until the legislature determines otherwise.” *Ariz. All. for Retired Ams., Inc. v. Crosby*,  
26 537 P.3d 818, 824 ¶ 19 (App. 2023) (“*Arizona Alliance II*”).

27 In 2023, a member of the public requested that the Mohave Board consider  
28 conducting a full hand count of all ballots for the 2024 general election. After receiving

1 advice on the legal consequences and practical risks of a full hand count, the Board voted  
2 twice against transgressing Arizona law, once on August 1, 2023, and again on November  
3 20, 2023. At the August 1 meeting, Mohave County Elections Director Tempert explained  
4 to the Board the significant expense, delay, and risk of inaccuracies that would result if it  
5 moved forward with such a plan. Director Tempert told the Board that a full hand count for  
6 the 2024 election would require hiring over 300 new workers and would cost about \$1.1  
7 million.<sup>4</sup> He also advised that he ran a test hand count of 850 ballots, a process that took  
8 three days and had 46 errors.<sup>5</sup> At this error rate, a hand count of the 105,000 ballots cast in  
9 Mohave County in the 2020 general election would have resulted in nearly 6,000 errors and,  
10 as Director Tempert emphasized, would have been “an awful lot of work . . . in a short  
11 amount of time,”<sup>6</sup> and “would just be astronomical to try to put together.”<sup>7</sup> Mohave County  
12 Deputy Attorney Ryan Esplin advised the Board to follow Arizona law and the EPM by  
13 using electronic tabulating equipment to count ballots rather than conduct a hand count.<sup>8</sup>  
14 When Plaintiff stated his belief that the EPM was only a “negotiated document”<sup>9</sup> and that  
15 he did not “know that the manual not allowing a hand count is really something that [the  
16 Board] need[ed] to fall back on,”<sup>10</sup> Deputy County Attorney Esplin responded that “it is a  
17 criminal offense to fail to follow the Elections Procedures Manual” unless it conflicts with  
18 a statute.<sup>11</sup> He also predicted that the 2023 EPM would provide “more clarity . . . as to  
19 whether the counties can do hand counts or not.”<sup>12</sup> Ultimately, the Board voted 3–2 against  
20

---

21 <sup>4</sup> FAC ¶¶ 9–11; Mohave Cnty. Ariz. – Local Government, *Board of Supervisors Special*  
22 *Meeting - 08/01/2023*, YOUTUBE (Aug. 1, 2023), at 26:08–27:00,  
23 <https://www.youtube.com/watch?v=B26KaFJLMKw> (hereinafter “August 1 Video  
Recording”).

24 <sup>5</sup> *Id.* at 13:04–51.

25 <sup>6</sup> *Id.* at 11:29–41.

26 <sup>7</sup> *Id.* at 21:11–18.

27 <sup>8</sup> *Id.* at 40:27–55.

28 <sup>9</sup> *Id.* at 44:35–40.

<sup>10</sup> *Id.* at 46:27–34.

<sup>11</sup> *Id.* at 45:10–40.

<sup>12</sup> *Id.* at 43:51–44:07.

1 a full hand count for the 2024 election.<sup>13</sup>

2 The Board met again on November 20 to discuss the possibility of conducting a full  
3 hand count. Before that meeting, Attorney General Kris Mayes sent the Board a letter in  
4 which the Attorney General echoed Deputy County Attorney Esplin's advice that directing  
5 a full hand count would violate Arizona law and recommended the Board vote against it.  
6 During the meeting, Deputy County Attorney Esplin repeated:

7 If you look at it, the statutes and . . . the laws, there's hardly anything there  
8 that suggests that you can hand count it. *And if it's not there, you're not*  
9 *authorized to do it.* That's why our advice to you is take the safe route and  
10 use the machines because we know those are legal. We know the law. The  
11 law says very clear, this is what we do[.]<sup>14</sup>

12 The Board again voted 3–2 against a full hand count.<sup>15</sup> Plaintiff Supervisor Gould  
13 was one of the two members of the Board in the minority.

14 Plaintiff now seeks a declaratory judgment from this Court to authorize what even  
15 the Mohave Board has twice voted to reject: a full hand count in the first instance, in  
16 violation of Arizona law.

### 17 LEGAL STANDARD

18 Dismissal under Arizona Rule of Civil Procedure 12(b)(1) is proper when the court  
19 lacks subject matter jurisdiction. *See State v. Maldonado*, 223 Ariz. 309, 311 ¶ 14 (2010)  
20 (“[A] court that lacks subject matter jurisdiction cannot adjudicate the action.”). Subject  
21 matter jurisdiction refers to a court’s “power to hear and determine a particular type of  
22 case.” *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz Cnty.*, 233 Ariz. 460, 462 ¶ 9  
23 (App. 2013) (internal quotation marks omitted). “When the court’s subject matter  
24 jurisdiction is challenged under Rule 12(b)(1), the court may take evidence and resolve  
25 factual disputes essential to its disposition of the motion.” *Gatecliff v. Great Republic Life*

26 <sup>13</sup> FAC ¶ 11; August 1 Video Recording at 1:58:10–30.

27 <sup>14</sup> Mohave Cnty. Ariz. – Local Government, *Board of Supervisors Meeting - 11/20/2023*  
28 (Nov. 20, 2023), at 4:14:10–31, <https://www.youtube.com/watch?v=BvpSrZl68ZE>  
(emphasis added).

<sup>15</sup> *Id.* at 4:46:07–22.

1 *Ins. Co.*, 154 Ariz. 502, 506 (App. 1987).

2 Dismissal under Rule 12(b)(6) is appropriate where the complaint fails to state a  
3 claim for relief because “as a matter of law . . . the plaintiff would not be entitled to relief  
4 under any interpretation of the facts.” *Cleckner v. Ariz. Dep’t of Health Servs.*, 246 Ariz.  
5 40, 42 ¶ 6 (App. 2019) (internal quotation marks omitted). “[M]ere conclusory statements  
6 are insufficient to state a claim upon which relief can be granted.” *Cullen v. Auto-Owners*  
7 *Ins.*, 218 Ariz. 417, 419 ¶ 7 (2008).

## 8 **ARGUMENT**

### 9 **I. Plaintiff’s claims are not justiciable.**

10 Arizona employs “a rigorous standing requirement.” *Fernandez v. Takata Seat Belts,*  
11 *Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). Standing is a threshold question that must be resolved  
12 before reaching the merits. *See Sears v. Hull*, 192 Ariz. 65, 68 ¶ 9 (1998) (“Because we  
13 agree that the plaintiffs lack standing, we do not address the merits of their claims.”). “[T]he  
14 standing doctrine . . . ensures that courts refrain from issuing advisory opinions, that cases  
15 be ripe for decision and not moot, and that issues be fully developed between true  
16 adversaries.” *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005).

17 These principles apply with even greater force in declaratory judgment actions  
18 because courts lack “jurisdiction to render a judgment” unless the complaint “set[s] forth  
19 sufficient facts to establish that there is a justiciable controversy.” *Planned Parenthood Ctr.*  
20 *of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972); *see also Klein v. Ronstadt*, 149  
21 Ariz. 123, 124 (App. 1986) (similar); *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App.  
22 1980) (refusing to interpret Declaratory Judgments Act “to create standing where standing  
23 did not otherwise exist”). Declaratory relief must “be based on an existing state of facts, not  
24 those which may or may not arise in the future.” *Lake Havasu Resort, Inc. v. Com. Loan*  
25 *Ins.*, 139 Ariz. 369, 377 (App. 1983). To bring a claim for declaratory relief, a plaintiff must  
26 therefore show that its “rights, status or other legal relations” are “affected by a statute,”  
27 *Arizona Sch. Boards Assn., Inc. v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (quoting A.R.S. §  
28 12-1832), and “that there [is] an actual controversy ripe for adjudication,” *Bd. of Sup’rs of*

1 *Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380 (1978). Because Plaintiff has failed to  
2 establish either of these elements, his claims must be dismissed.

3 **A. Plaintiff lacks standing because he fails to allege any current or future**  
4 **injury.**

5 Plaintiff's theory of standing suffers from both factual and legal deficiencies and  
6 should be rejected. To have standing to bring an action, "a plaintiff must allege a distinct  
7 and palpable injury." *Sears*, 192 Ariz. at 68 ¶ 16. Plaintiff alleges no past, present, or future  
8 injury. This alone dooms his claim for declaratory relief.

9 Plaintiff broadly asserts that this case is about his individual liberty, FAC ¶ 6, but  
10 fails to allege that any of his individual "rights, status or other legal relations are affected  
11 by [any] statute," as is required for declaratory relief. *See* A.R.S. § 12-1832. Plaintiff  
12 brought this lawsuit in his *individual* capacity, not as a County Supervisor, and not on behalf  
13 of the Mohave Board (which wisely declined to vote for a full hand count and did not  
14 authorize Plaintiff to bring this suit on its behalf). Plaintiff does not—and cannot—allege  
15 that he personally has a right to initiate a hand count and he has no authority to unilaterally  
16 assert the rights of the Board. For this reason alone, the Court should dismiss this case.

17 More fundamentally, Plaintiff cites no statute that either injures him nor authorizes  
18 the Mohave Board to order a full hand count, *see* FAC ¶¶ 14–15, 39–41. And, as discussed  
19 in Section II(B), *infra*, the legislative powers of counties and their officers are limited to  
20 only those prescribed by statute. Plaintiff's complaint cites a series of election statutes that  
21 describe the ballot counting procedures for Arizona elections, but none support his cause.  
22 FAC ¶¶ 33, 39–41, 52; *id.* ¶¶ A–G (citing, *e.g.*, A.R.S. § 16-443 (authorizing use of  
23 electronic vote tabulating equipment); § 16-445 (requiring election officials to file the  
24 computer program software used on electronic tabulating equipment with secretary of  
25 state); § 16-449 (requiring election officials to test electronic tabulating equipment and  
26 programs); § 16-451 (describing the means of financing electronic tabulating equipment);  
27 § 16-468 (providing requirements for ballots used in an optical scanning system); § 16-602  
28 (providing requirements for tallying ballots and auditing results); § 16-621 (providing



1 requirements for counting ballots at counting centers); § 16-622 (defining the official  
2 canvass and unofficial results)). Quite to the contrary, *many* of these statutes pertain to  
3 counting ballots electronically. And while Plaintiff alleges only that these “election statutes  
4 [] appear not to *bar* his intended support” for a hand count, FAC ¶ 6 (emphasis added), as  
5 explained *infra* Section II(A), other provisions of Arizona law *require* electronic tabulation.  
6 Because no interpretation of the election statutes Plaintiff cites could affect his rights, status,  
7 or legal relation, he establishes *no* injury, much less a cognizable one. Plaintiff’s complaint  
8 amounts to nothing more than “a mere difference of opinion between public officers,”  
9 which “cannot form the basis for declaratory judgment.” *Riley v. Cochise Cnty.*, 10 Ariz.  
10 App. 55, 60 (1969).

11 Nor are Plaintiff’s rights affected by the Attorney General’s November 19, 2023,  
12 letter, which Plaintiff claims was a “threat” of his imminent criminal prosecution. *See* FAC  
13 ¶¶ 1–2, 5, 17–21, 31, 38. When considering the genuineness of a claimed threat of  
14 prosecution, courts consider whether the plaintiff has “articulated a ‘concrete plan’ to  
15 violate the law in question,” and “the history of past prosecution or enforcement under the  
16 challenged statute.” *Thomas v. Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1139 (9th  
17 Cir. 2000). Plaintiff’s allegations fall far short of meeting these requirements. While  
18 Plaintiff insists that he alone will continue to seek a hand count, *see* FAC ¶¶ 31, 49, there  
19 can only be a “concrete plan” to violate the law if the Board as a whole votes to do so  
20 because elections are the responsibility of county boards of supervisors, not any individual.  
21 *See* A.R.S. § 11-251(3). The Attorney General’s memorandum confirms this: it advises “*the*  
22 *Board . . . not [to] direct the Elections Department to act illegally*” and only if “it does, [the  
23 Attorney General’s office] will promptly sue and obtain a court order.” FAC, Ex. A at 3  
24 (emphasis added). Plaintiff admits as much, recognizing that his disagreement with Arizona  
25 law could affect his rights only if “a future vote results in an *overall* ‘yes’ with respect to  
26  
27  
28

1 hand-counting all ballots,” FAC ¶¶ 37, 50 (emphasis added), but he makes no allegations  
2 that such an outcome is likely.

3 Plaintiff’s own experience confirms that he is not at risk of prosecution for his past  
4 individual attempts to ignore Arizona law. Plaintiff has *already twice* voted for a hand count  
5 and faced no criminal repercussions, *see* FAC ¶¶ 35, 49, and the Attorney General has never  
6 initiated charges against Plaintiff, *see, e.g.*, FAC ¶¶ 30, 37, 50, or any other county  
7 supervisor who voted for a hand count when the Board as whole rejected such action.  
8 Plaintiff’s fear of criminal prosecution is thus not based on a genuine threat and cannot form  
9 the basis of his declaratory judgment action.

10 At bottom, Plaintiff seeks an improper advisory opinion blessing his desire to violate  
11 Arizona law. But “[n]o proceeding lies under the declaratory judgments acts to obtain a  
12 judgment which is merely advisory or which merely answers a moot or abstract question.”  
13 *Moore v. Bolin*, 70 Ariz. 354, 356 (1950); *Iman v. S. Pac. Co.*, 7 Ariz. App. 16, 21 (1968)  
14 (“[T]he Declaratory Judgments Act was not intended to constitute the court a ‘fountain of  
15 legal advice.’”). The factual scenario that Plaintiff claims gives rise to his injury does not  
16 exist now, has never existed, and may never exist. *See Velasco v. Mallory*, 5 Ariz. App.  
17 406, 410–11 (1967) (An advisory opinion is “anticipative of troubles which do not exist;  
18 may never exist; and the precise form of which, should they ever arise, [courts] cannot  
19 predict.”). The Court accordingly has no rightful authority to pass on the question presented  
20 and should decline Plaintiff’s invitation to violate these sacrosanct judicial principles.

21 All of the remaining relief Plaintiff seeks is similarly abstract and improper. Plaintiff  
22 asks the Court to opine on the court of appeals’ opinion in *Arizona Alliance II*, 537 P.3d  
23 818, FAC ¶ D, but he alleges no facts requiring further analysis of that ruling. Plaintiff also  
24 requests a declaration that he cannot be prosecuted for his votes to hand count ballots based  
25 on his claim that he is entitled to legislative immunity protection, *id.* ¶¶ E, F, but his own  
26 experience demonstrates that any such prosecution is far from imminent. And, although he  
27 brings this case in his individual capacity, Plaintiff seeks a declaration regarding the duties  
28 of the Mohave Board and *all* boards of supervisors in Arizona. *Id.* ¶¶ B, C.

1 Because each of Plaintiff's requests seek the Court's counsel on abstract questions  
2 that do not directly and concretely affect his legal rights, he effectively asks the Court to  
3 serve as his personal "fountain of legal advice." *Iman*, 7 Ariz. App. at 21. The Court should  
4 decline to do so.

5 **B. Plaintiff's claims are not ripe.**

6 For the same reasons that Plaintiff lacks standing, his claims are not ripe for judicial  
7 review. "It is well settled that a proceeding for a declaratory judgment must be based upon  
8 an actual controversy" and Arizona courts "will not decide as to future or contingent rights."  
9 *Moore*, 70 Ariz. at 356–57. Plaintiff's claims are unmoored from any present, existing  
10 controversy and are thus unripe for this Court's consideration.

11 Plaintiff's claims depend on a series of hypothetical future events, none of which are  
12 likely to come to pass. Only *if* the Board were to hold a future vote on whether to conduct  
13 a full hand count in violation of Arizona law, and only *if* a majority of that hypothetical  
14 Board voted for a full hand count—something the Mohave Board has never done—could  
15 an actual controversy potentially exist. Plaintiff's claims are "wholly contingent upon the  
16 occurrence of unforeseeable events" and are therefore "too 'imaginary' and 'speculative' to  
17 support jurisdiction." *Thomas*, 220 F.3d at 1139, 1141 (quoting *Babbitt v. United Farm*  
18 *Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

19 **C. Because Plaintiff's claims have never been ripe, they do not meet the**  
20 **"capable of repetition yet evading review" exception to mootness.**

21 The Court should reject Plaintiff's conclusory assertion that his claims are justiciable  
22 because they are likely to recur. Although Arizona courts will sometimes consider a  
23 question that has "become moot" where the issue is one "capable of repetition yet evading  
24 review," *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 460 ¶ 12 (App. 2001), this  
25 exception only applies in election cases "where an election's occurrence initially rendered  
26 the issues moot, but the same issues were likely to recur in a future election," *Arizona*  
27 *Alliance II*, 537 P.3d at 821 ¶ 5. But Plaintiff's action for declaratory relief was never  
28 justiciable. Unlike in *Arizona Alliance* where the Cochise Board voted to conduct a full

1 hand count audit in the 2022 election, the Mohave Board has *never* voted to conduct a full  
2 hand count in *any* election. FAC ¶¶ 11, 28–29. Nor is there any indication that it will.  
3 Plaintiff merely asserts that he alone will continue voting for a hand count, but he does not  
4 allege any facts demonstrating that a majority of his colleagues will vote to violate the law  
5 with him in the future. Because Plaintiff’s claims are not ripe and were never ripe, the  
6 exception does not apply.<sup>16</sup>

7 **II. Plaintiff fails to state a claim in Count I because Arizona law requires the**  
8 **use of electronic tabulating equipment except in rare circumstances, which**  
9 **is not alleged here.**

10 In Count One, Plaintiff seeks declaratory relief that under Arizona law, the “use of  
11 vote tabulating machines in the first instance, rather than hand counting ballots, is . . .  
12 optional” and that county boards “have the legal authority” to decide whether to hand count  
13 ballots “even in situations where use of vote tabulating machines is not impracticable[.]”  
14 FAC ¶¶ 39–41. Plaintiff fails to state a claim for relief because Arizona law requires the  
15 exact opposite—electronic tabulating equipment must be used *unless* impracticable. And  
16 county boards have no power to authorize any actions not provided for by law, including a  
hand count of all ballots.

17 **A. Arizona law requires the use of electronic tabulating equipment unless**  
18 **impracticable.**

19 A.R.S. § 16-621 describes the ballot counting procedure for Arizona elections and  
20 requires that: “All proceedings at the counting center . . . shall be conducted in accordance  
21 with the approved [EPM] issued pursuant to § 16-452[.]” The EPM, which has the force of  
22 law, *see, e.g., Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16, in turn states: “Electronic ballot  
23  
24

---

25 <sup>16</sup> Plaintiff is also wrong to suggest that this issue will likely evade review if it arises again  
26 simply because “it involves election cycles.” *See* FAC ¶ 1. Both of the Mohave Board’s  
27 prior votes on hand counting ballots took place about a year or more before the relevant  
28 election. *See* FAC ¶¶ 11, 28. Had the Board voted in favor of a hand count at one of these  
prior votes, a court could have timely adjudicated any disputes. Plaintiff alleges no facts  
indicating a future vote would necessarily preclude judicial review.

1 tabulating systems shall be used for every election.” EPM at 200.<sup>17</sup> Consistent with Title  
2 16, the EPM provides only one limited exception to electronic tabulation equipment—“the  
3 rare circumstance when electronic tabulation is not practicable.” *Id.*; see A.R.S. § 16-621(C)  
4 (“If for any reason it becomes impracticable to count all or a part of the ballots with  
5 tabulating equipment, the officer in charge of elections may direct that they be counted  
6 manually[.]”).

7 Thus, electronic tabulating equipment is mandatory unless it “becomes  
8 impracticable,” in which case the officer in charge of elections “may” conduct a hand count.  
9 EPM at 200. Plaintiff seeks to overwrite this plain legal requirement to make electronic  
10 tabulating equipment “optional,” even where their use is “not impracticable.” FAC ¶¶ 39–  
11 41. But neither Plaintiff nor this Court has the authority to rewrite Arizona’s election laws  
12 to give county boards powers not specifically granted to them by the Legislature. *See*  
13 *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (“County supervisors may exercise  
14 no powers except those specifically granted by statute and in the manner fixed by statute.”  
15 (internal quotation marks omitted); *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz.  
16 345, 349 ¶ 17 (2011) (“[I]t is not [the court’s] place to rewrite [a] statute.”). This should be  
17 the end of the inquiry; because Arizona law is clear that electronic tabulating equipment  
18 must be used, Plaintiff fails to state a claim, and his complaint should be dismissed.

19 In the absence of any statute that allows for discretionary hand counting of ballots,  
20 Plaintiff clumsily strings together a series of statutes, but none casts doubt on the conclusion  
21 that Arizona law requires the use of electronic tabulating equipment in the first instance;  
22 indeed, all of the statutes that Plaintiff relies upon presumes the use of such equipment. *See*  
23 FAC ¶ 39 (citing A.R.S. § 16-441 (setting an effective date for Article 4 of the election  
24 code in relation to when electronic tabulating equipment is approved); A.R.S. § 16-442  
25 (describing procedures for selection of vote tabulating equipment); A.R.S. § 16-443  
26

---

27 <sup>17</sup> Although EPM provisions that directly contradict statutes do not have the force of law,  
28 *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022), Plaintiff has not alleged, nor could he, that  
to be the case here.

(authorizing use of electronic tabulation equipment at all elections); A.R.S. § 16-444 (defining a “voting device” as “an apparatus that the voter uses to record the voter’s votes by marking a paper ballot, which votes are subsequently counted by electronic tabulating equipment”); A.R.S. § 16-445 (requiring computer election programs used on electronic tabulation equipment to be filed with the secretary before an election); A.R.S. § 16-451 (authorizing board of supervisors to finance the cost of vote tabulating equipment as it may deem best for local interests); A.R.S. § 16-468 (requiring ballots used in an optical scanning system to fit the construction of electronic tabulating equipment); A.R.S. § 16-602 (describing the procedures for a limited hand count audit to take place after votes are initially counted by electronic tabulation equipment); A.R.S. § 16-621 (assuming the use of electronic tabulating equipment to count damaged or defective ballots); A.R.S. § 16-622 (defining “the official canvass” of each election district as the result printed by the vote tabulating equipment); A.R.S. § 16-663 (requiring any court-ordered recount to compare the electronic tabulation results from 5% of precincts with a hand count of those ballots, and if the results are within the designated margin of error, the recount is complete and the electronic tabulation is the official result). If these statutes prove anything, it is that Arizona law is replete with provisions that presuppose the use of electronic tabulating equipment. Allowing elective hand counting would impermissibly render large swaths of Title 16 superfluous. *See Ariz. All. II*, 537 P.3d at 822 ¶ 9 (“We will not interpret a statute in a manner that renders a provision superfluous.”); *Herman v. City of Tucson*, 197 Ariz. 430, 434 ¶ 14 (App. 1999) (courts “must avoid interpreting a statute so as to render any of its language mere surplusage, but rather, must give meaning to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial.” (cleaned up)).

Plaintiff’s complaint rests on intentional or unknowing ignorance of Arizona law. But A.R.S. § 16-621 and the EPM are clear: under Arizona law, electronic tabulating equipment must be used except in the rare circumstance where it becomes impracticable.

1           **B. County boards may not authorize a hand count not provided in law or**  
2           **create their own extra-statutory hand counting procedures.**

3           The Mohave Board—to say nothing of Plaintiff in his individual capacity—may not  
4 authorize a hand count for the additional reason that “[a] county board of supervisors has  
5 only those powers ‘expressly conferred by statute, or [as] necessarily implied therefrom.’”  
6 *Hancock*, 188 Ariz. at 498 (quoting *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363  
7 (1967)). This rule stems from the “well-settled” principle “that the legislative powers of  
8 counties are very limited.” *Id.* County boards of supervisors have “entirely derivative” law-  
9 making power: they “may exercise no powers except those specifically granted by statute  
10 and in the manner fixed by statute.” *Id.* (internal quotation marks omitted). “Actions taken  
11 by a board of supervisors by methods unrecognized by statute are ‘without jurisdiction and  
12 wholly void.’” *Id.* (quoting *Mohave Cnty. v. Mohave-Kingman Ests., Inc.*, 120 Ariz. 417,  
13 420 (1978)). And “[a] governmental body may not do indirectly what a statute does not give  
14 it the power to do directly.” *Id.* As explained above, Arizona law does not provide for a  
15 hand count in the first instance, and neither Plaintiff nor the Mohave Board may create  
16 extra-statutory procedures for doing so.

17           In an analogous case brought by the Alliance when the Cochise Board *did* decide to  
18 move forward with a full hand count audit last election cycle, both the trial court and the  
19 court of appeals correctly applied these well-settled limitations in finding the Board’s extra-  
20 statutory attempt unlawful. *See* Ruling, *Ariz. All. I*, No. CV-2022-00518; *Ariz. All. II*, 537  
21 P.3d at 824 ¶ 19. Arizona law allows only for a limited hand count audit of electronically  
22 tabulated results, providing a procedure that starts with a small random sample and only  
23 gradually expands if statutorily defined discrepancies are found. *See* A.R.S. § 16-602(B)–  
24 (F). The Cochise Board sought to ignore the plain statutory text and instead authorize a full  
25 hand count audit of all ballots cast in the election pursuant to its own invented procedures—  
26 just as Plaintiff here seeks to ignore Arizona law and authorize a full hand count of ballots.  
27 The trial court enjoined Cochise’s intended hand count audit, holding that it would  
28 “require[] election officials to audit ballots in a manner not permitted by law,” and was thus

1 unlawful. Ruling at 10, *Ariz. All. I*, No. CV-2022-00518. The court explained: “The decision  
2 as to how to conduct and tabulate elections is appropriately in the domain of the State  
3 Legislature, supplemented by the delegated rule making authority of the Secretary of State.  
4 The Legislature has spoken clearly, and elected officials are required to follow its  
5 direction.” *Id.* at 11. Affirming the trial court’s ruling, the court of appeals similarly held:

6       Because the legislature provided for a detailed method to verify the results  
7       from electronically tabulated voting machines, counties must follow that  
8       method unless and until the legislature determines otherwise. Accordingly,  
9       the County did not have independent authority to conduct a hand-count audit  
      of all precinct or early ballots in the first instance for the 2022 election.

10 *Ariz. All. II*, 537 P.3d at 824 ¶ 19. The same reasoning applies here. Arizona law requires  
11 the use of electronic tabulating equipment in the first instance except in the “rare  
12 circumstance,” where it is “not practicable.” EPM at 200; A.R.S. § 16-621(C). Plaintiff has  
13 pointed to *no* statutory authority outlining, or even contemplating, a procedure for a full  
14 hand count in the first instance when electronic tabulation is a viable option. Nonetheless,  
15 like the Cochise Board last election, Plaintiff seeks to ignore the law and create his own  
16 procedure under the fabricated cloak of election integrity. While Plaintiff may feel his  
17 unlawful actions would “restor[e] voter confidence in elections,” FAC ¶ 7, the Arizona  
18 Supreme Court disagrees.

19       Election laws play an important role in protecting the integrity of the  
20       electoral process. Thus, public officials should, by their words and actions,  
21       seek to preserve and protect those laws. But when public officials . . . change  
22       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.

23 *Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶ 4 (emphasis in original) (internal citations  
24 omitted).

25       In sum, Plaintiff fails to state a claim in Count I because Arizona law requires the  
26       use of vote tabulating machines in the first instance where practicable, and county boards  
27       cannot circumvent the law and create new full hand count procedures.



1           **III. Plaintiff fails to state a claim in Count II because legislative immunity does**  
2           **not apply.**

3           In Count II, Plaintiff seeks declaratory relief that, “as a county legislator,” he has  
4 legislative immunity from being prosecuted for voting to conduct an unlawful hand count.  
5 FAC ¶¶ 45–52. Plaintiff fails to state a claim for relief because Plaintiff does not have  
6 discretion to violate Arizona’s election laws.

7           Legislative immunity applies when an act “reflect[s] a discretionary, policymaking  
8 decision” that occurs in “a field where legislators traditionally have power to act.” *Ariz.*  
9 *Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130, 138 ¶ 21 (App. 2003) (quoting *Bogan*  
10 *v. Scott-Harris*, 523 U.S. 44, 56 (1998)). But under Arizona law, county boards have neither  
11 the discretion nor legal authority to conduct a full hand count where electronic tabulation is  
12 available. *See supra* Section II(B).

13           Plaintiff relies on a single, distinguishable case, *Mesnard v. Campagnolo*, 251 Ariz.  
14 244 (2021), to support his claim that legislative immunity applies. FAC ¶ 45. *Mesnard*  
15 involved legislative immunity for alleged defamation in the form of a legislative report  
16 investigating potential misconduct, which fell squarely within the Legislature’s  
17 discretionary statutory authority. *Id.* at 250–51 ¶¶ 19–22. By contrast, under A.R.S. § 11-  
18 251(3), the county board of supervisors only has specific statutory authority to: set election  
19 precincts, appoint inspectors and election judges, “canvass election returns, declare the  
20 result and issue certificates thereof.” They have no discretionary or policy making authority  
21 in the administration of elections. *See Hancock*, 188 Ariz. at 498 (“The Board of  
22 Supervisors can exercise only those powers specifically ceded to it by the legislature.  
23 . . . Actions taken by a board of supervisors by methods unrecognized by statute are without  
24 jurisdiction and wholly void.” (internal quotations omitted)). Because Plaintiff has no  
25 authority or discretion to order a hand count, he cannot have legislative immunity from  
26 prosecution for doing so.

27                           **CONCLUSION**

28           For these reasons, the Alliance requests that the Court grant its Motion to Dismiss.

1 RESPECTFULLY SUBMITTED this 15th day of July, 2024.

2 **COPPERSMITH BROCKELMAN PLC**

3 By: /s/ D. Andrew Gaona

4 D. Andrew Gaona

5 Austin C. Yost

6 **ELIAS LAW GROUP, LLP**

7 Lalitha D. Madduri\*

8 Dan Cohen\*

9 Julie Zuckerbrod\*

10 *Attorneys for Intervenor-Defendant Arizona*  
11 *Alliance for Retired Americans*

12 \*Admitted *pro hac vice*

13 ORIGINAL e-filed and served via electronic  
14 means this 15th day of July, 2024, upon:

15 Honorable Frank Moskowitz

16 c/o Katrina Berhow

17 [katrina.berhow@jbazmc.maricopa.gov](mailto:katrina.berhow@jbazmc.maricopa.gov)

18 Dennis I. Wilenchik

19 [DIW@wb-law.com](mailto:DIW@wb-law.com)

20 Lisa M. Borowsky

21 [LisaB@wb-law.com](mailto:LisaB@wb-law.com)

22 Brian R. Gifford

23 [admin@wb-law.com](mailto:admin@wb-law.com)

24 Wilenchik & Barmess

25 2810 North Third Street

26 Phoenix, Arizona 85004

27 *Attorneys for Plaintiff Ron Gould*

28 Alexander Samuels

[alexander.samuels@azag.gov](mailto:alexander.samuels@azag.gov)

Emma H. Mark

[Emma.Mark@azag.gov](mailto:Emma.Mark@azag.gov)

Office of the Attorney General

2005 North Central Avenue

Phoenix, Arizona 85004

*Attorneys for Defendant Arizona Attorney General Kris Mayes*

/s/ Diana J. Hanson