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13 IN THE UNITED STATES DISTRICT COURT

14 FOR THE DISTRICT OF ARIZONA

15 Tyler Bowyer, Michael John Burke, Nancy
16 Cottle, Jake Hoffman, Anthony Kern,
17 Christopher M. King, James R. Lamon, Sam
Moorhead, Robert Montgomery, Loraine
18 Pellegrino, Greg Safsten, Salvatore Luke
Scarmardo, Kelli Ward and Michael Ward;

19 Plaintiffs;

20 v.

21 Doug Ducey, in his official capacity as
Governor of the State of Arizona, and Katie
22 Hobbs, in her capacity as Secretary of State
of the State of Arizona;

23 Defendants;

24 Maricopa County Board of Supervisors;
25 and Adrian Fontes, in his official capacity
as Maricopa County Recorder;

26
27 Intervenors.

Case No.: 2:20-cv-02321-DJH

**PLAINTIFFS' REPLY TO
RESPONSES IN OPPOSITION TO
MOTION FOR DECLARATORY,
EMERGENCY, AND PERMANENT
INJUNCTIVE RELIEF AND
MEMORANDUM IN SUPPORT
THEREOF**

28 ¹ District of Arizona admission scheduled for 12/9/2020.

1 COMES NOW Plaintiffs, Tyler Bowyer, Michael John Burke, Nancy Cottle, Jake
2 Hoffman, Anthony Kern, Christopher M. King, James R. Lamon, Sam Moorhead, Robert
3 Montgomery, Loraine Pellegrino, Greg Safsten, Salvatore Luke Scarmardo, Kelli Ward,
4 and Michael Ward, by and through their undersigned counsel, and file this Response, and
5 Memorandum of Law In Support Thereof, to Defendants’ and Intervenor-Defendants
6 Response in Plaintiffs’ November 29, 2020 Motion for Declaratory, Emergency and
7 Permanent Injunctive Relief (“TRO Motion”). ECF No. 7.

8 Arizona is in the midst of an election-integrity crisis. Earlier this year, the Arizona
9 Supreme Court had to step in to prevent Intervenor Maricopa County from conducting its
10 primary election in an illegal and unconstitutional manner. *Ariz. Pub. Integrity All. v.*
11 *Fontes*, No. CV-20-0253-AP/EL, 2020 Ariz. LEXIS 309, at *13 (Nov. 5, 2020) (“Because
12 Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his
13 constitutional and statutory authority, they need not satisfy the standard for injunctive
14 relief.”). In another such matter, *Arizona v Fontes*, Intervenor Maricopa County’s chief
15 elections official had to be restrained from unlawfully mailing every registered voter a
16 ballot, whether they had requested one or not.² Before Defendants feign indignation at
17 Plaintiffs’ claims that they certified an election tainted by illegality, unconstitutionality,
18 and illegal ballots as a fever-dream, they should soberly consider that our courts have
19 already found such things to be all too real a problem in our state this election cycle. This
20 Court can help Arizona do better, not by dismissing the problem, but by confronting it.

21 Despite this procedural history, Defendants seek to have Plaintiffs’ claims dismissed
22 out-of-hand as nothing more than a conspiracy theory. Hobbs’ Motion to Dismiss and
23 Opposition to TRO (“Hobbs Motion”), ECF No. 40 at 1:1-5. Plaintiffs, and those who share
24 their concerns, know that their claims are bold. That is why two members of Arizona’s
25

26 ² See *State of Arizona ex rel Brnovich v. Fontes*, CV-20-0253-AP/EL, Temporary
27 Restraining Order (Sup. Ct. Ariz. Mar. 13, 2020) (“*Fontes* TRO Order”), available at:
28 https://www.azag.gov/sites/default/files/docs/press-releases/2020/motions/State_v_Fontes_TRO_Certified_Signed.pdf.

1 delegation to the United States Congress, Congressman Gossar and Congressman Biggs,
2 have taken the unusual step of putting out statements urging this Court to give Plaintiffs'
3 claims serious consideration and laying out their reasons for making that request.
4 Congressman Gosar, in his formal letter writes, in part:

5
6 Currently pending before the Court is *Bowyer v. Ducey*. We have seen
7 various reports of irregularities, variances, statistical improbabilities, and
8 unorthodox measures occurring in the general election for 2020. To date, in
9 response to the numerous reports, we have received platitudes and
10 condescension "assuring" us, and Arizona voters, that there was no fraud, or
11 now they say that there was not enough fraud to matter. Indeed, those making
12 the assurances, including the Secretary of State, the Maricopa County Board
13 of Supervisors and others, have proffered no evidence that the election
14 tabulation was not manipulated.

15 There has been no thorough investigation, no forensic audit, no signature
16 verification and really no substantive effort to rebut the many deficiencies
17 reported on. There are the objective indicia of manipulation that include:
18 down ballot races all going in favor of the Republicans (with the notable and
19 expected loss of McSally). In counties that did not use Dominion software,
20 the President easily won. There is no voter registration imbalance that would
21 make Maricopa County the outlier.

22 . . .

23 If every vote counts, and if the right to free and fair elections is as important
24 as we always say, then any such vote manipulation must be investigated
25 thoroughly and remedied.

26 . . .

27 In a recent legislative hearing, evidence was presented of voter anomalies that
28 supposedly occurred notwithstanding the mathematical improbability of such
an occurrence.

22 **Exhibit 1.**³ Six additional members of Arizona's legislature, including the Arizona House
23 of Representatives' Majority Leader and the Chair of its Elections Committee, have issued
24 similar letters or declarations echoing these concerns and outlining their own investigative
25 steps which led to them. **Exhibit 2.**

28 ³ This letter may be considered under FRE 803(8) and other applicable law.

1 Few could be more knowledgeable about the poor state of election integrity in
2 Arizona than the members of Arizona’s congressional delegation and state legislature who
3 must operate in that system every day. Their concerns reflect the concerns of the scores of
4 average Arizona voters who are their constituents. Plaintiffs’ moving papers and
5 supporting documentation, including the evidence submitted with this reply, show that over
6 400,000 votes counted in the presidential election must be set aside. This compels the
7 conclusion that defendants’ certification of the 2020 election which finding plurality of
8 10,457 was wrong. Those results must be de-certified.

9 STATEMENT OF FACTS

10 The facts relevant to this Response are set forth in the December 1, 2020 Complaint
11 (“Complaint”), ECF No. 1, filed in the above-captioned proceeding, and its accompanying
12 exhibits, and the TRO Motion.

13 DISCUSSION

14 Defendants and Defendant Intervenor’s filings fail altogether to respond to
15 Plaintiffs’ fact and expert witness testimony presented in the Complaint. Instead, they have
16 chosen to simply dismiss Plaintiffs’ evidence and arguments as a piece of “dystopian
17 fiction.” ECF No. 40 at 1. Nor have they presented any facts or witness testimony that
18 could rebut Plaintiffs’ factual allegations and witnesses.⁴ Accordingly, Plaintiffs’
19 allegation and witness testimony remains unrebutted and unchallenged.

20 This brief will respond to, and dispose of, Defendants and Defendant-Intervenor
21 Maricopa County’s specious legal arguments for denial of Plaintiffs’ TRO Motion on
22 grounds of: (1) standing, (2) laches, (3) mootness, (4) Secretary Hobbs notice of
23 supplemental authority, (5) the Eleventh Amendment, (6) exclusive state jurisdiction, (7)

24
25
26 ⁴ The closest that Defendants come to engaging the Plaintiffs’ factual allegations or
27 witnesses is Defendant Secretary Hobbs’ claim that Plaintiffs have provided
28 “*anonymous*” witness affidavits. ECF No. 40 at 22 n.10. This is incorrect. Plaintiffs filed
redacted affidavits for these witnesses, and have submitted the unredacted versions under
seal to this Court. *See* ECF Nos. 14-18.

1 state proceedings and issue preclusion, (8) abstention, and (9) applicable pleading
2 standards for election fraud.

3 Plaintiffs will also respond to Defendant and Defendant Intervenor's claims that
4 Plaintiffs have not met the requirements for injunctive relief, which are: (1) substantial
5 likelihood of success on the merits, and in particular that Plaintiffs have adequately pled
6 their Constitutional and statutory claims; (2) irreparable injury, (3) the balance of equities
7 tips in their favor, and (4) the requested relief is in the public interest.

8 **I. PRELIMINARY MATTERS**

9 **A. Plaintiffs Have Standing**

10 Each Plaintiff is a registered Arizona voter, and Plaintiffs include all nominees of
11 the Republican Party to be a Presidential Elector on behalf of the State of Arizona. See
12 ECF No. 1, "Parties".

13 **1. Plaintiff Electors Have Standing under Electors and Elections** 14 **Clause.**

15 Defendant Secretary Hobbs' arguments on standing rely on the Third Circuit's
16 decision in *Bognet v. Sec'y of Commonwealth*, No. 20-2314, 2020 WL 6686120 (3d Cir.
17 Nov. 13, 2020). See ECF No. 40 at 1 & 9; see also ECF No. 37 at 6-9. There the court
18 found that electors lacked standing based on the particularities of a Pennsylvania law that
19 are not present here, but did not discuss the significance of State law provisions pursuant
20 to which Presidential Electors are candidates for office.

21 Plaintiff Arizona Electors have standing for the same reason that the Eighth Circuit
22 held that Minnesota Electors had standing in *Carson v. Simon*, 978 F.3d 1051 (8th Cir.
23 2020). The *Carson* court affirmed that Presidential Electors have both Article III and
24 Prudential standing under the Electors and Elections Clauses, "was rooted heavily in the
25 court's interpretation of Minnesota law." Defendants neglect to mention that the *Carson*
26 court relied on provisions of Minnesota law treating electors as candidates for office are
27 just like the corresponding provision of A.R.S. Title 16 because in both States an elector is
28 a candidate for office nominated by a political party, and a vote cast for a party's candidate

1 for President and Vice-President is cast for that party's Electors. A.R.S. § 16-212(A)⁵ The
2 Carson court concluded that, "[b]ecause Minnesota law plainly treats presidential electors
3 as candidate, we do, too." *Carson*, 978 F.3d at 1057.

4 In other words, a vote for President Trump and Vice-President Pence in Arizona is
5 a vote for each of Plaintiff Republican electors, and just as in Minnesota, illegal conduct
6 aimed at harming candidates for President similarly injures Presidential Electors. As such,
7 Plaintiff Elector candidates "have a cognizable interest in ensuring that the final vote tally
8 reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and
9 particularized injury to candidates such as the Electors." *See also McPherson v. Blacker*,
10 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000)
11 (per curiam). Notably, Defendant and Defendant Intervenors have cited no Ninth Circuit
12 or Arizona precedent in support of their position, nor have they shown any relevant
13 similarity between Pennsylvania and Michigan law on election of electors.

14 **2. Plaintiffs Have Standing for Equal Protection and Due Process**
15 **Claims as Registered Voters on their Own Behalf and on Behalf**
16 **Similarly Situated Voters for Republican Candidates.**

17 Defendant and Defendant-Intervenors misrepresent Plaintiffs' Equal Protection and
18 Due Process claims, both in terms of substance and for standing purposes, insofar as they
19 claim that Plaintiffs' claims are based solely on a theory of vote dilution, and therefore is
20

21
22 ⁵ *See also* A.R.S. § 16-344(A) ("The chairman of the state committee of a political party
23 that is qualified for representation on an official party ballot at the primary election and
24 accorded a column on the general election ballot shall appoint candidates for the office of
25 presidential elector equal to the number of United States senators and representatives in
26 Congress from this state"); A.R.S. § 16-212(A) ("On the first Tuesday after the first
27 Monday in November, 1956, and quadrennially thereafter, **there shall be elected a**
28 **number of presidential electors** equal to the number of United States senators and
representatives in Congress from this state"); A.R.S. § 16-212(B) ("the presidential
electors of this state shall cast their electoral college votes for the candidate for president
and the candidate for vice president who jointly received the highest number of votes in
this state as prescribed in the canvass.").

1 a “generalized grievance,” rather than the concrete and particularized injury required for
2 Article III standing. *See* ECF No. 40 at 8-9.⁶ This is incorrect.

3 Plaintiffs’, on behalf of themselves and other similarly situated voters, allege, first,
4 and with great particularity, that Defendants have both violated Arizona law and applied
5 Arizona law to dilute the votes of Arizona Republican voters (or voters for Republican
6 candidates) with illegal, ineligible, duplicate or fictitious that Defendants, in collaboration
7 with public employees, Dominion and Democratic poll watchers and activists, have caused
8 to be counted as votes for Democratic candidates. The fact and expert witness testimony
9 describes and quantifies the myriad means by which the vote tally for Biden and other
10 Democrats was illegally inflated in districts that were predominantly Democratic,
11 including: double voting, dead voting, double counting of same vote, forgery of ballot and
12 voter information, illegally completing or modifying ineligible ballots, ballot switching
13 (Trump to Biden), changing dates or backdating absentee ballots, failure to match
14 signatures, etc. *See* ECF No. 1, Section II and III. Thus, the vote dilution resulting from
15 this systemic and illegal conduct did not affect all Arizona voters equally; it had the intent
16 and effect of inflating the number of votes for Democratic candidates and reducing the
17 number of votes for Trump and Republican candidates.

18 Further, Plaintiffs have presented evidence that, not were the votes of Plaintiffs and
19 similarly-situated voters for Republican candidates diluted, but attempts were made to
20 actively disenfranchise such voters to reduce their voting power, in clear violation of “one
21 person, one vote.” *See generally Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*,
22 377 U.S. 533 (1964). There were several schemes to devalue Republican votes as detailed
23 in the Complaint, including Republican ballots being destroyed or discarded, or “1 person,
24

25 ⁶ Defendant Governor Ducey also cites *Donald J. Trump for President, Inc. v. Boockvar*,
26 No. 4:20-cv-02078, 2020 WL 6821992 (M.D. Penn. Nov. 21, 2020). *See* ECF at 8. This
27 case addressed a number of theories for standing – associational, organizational, and
28 standing of a political party based on harm to that party’s candidates – that are not present
here because each Plaintiff brings suit in their personal capacity as registered Arizona
voters and 11 of the Plaintiffs as Presidential Electors.

1 0 votes,” vote switching “1 person, -1 votes,” (Dominion and election workers switching
2 votes from Trump/Republican to Biden/Democrat), and Dominion algorithmic
3 manipulation, or for Republicans, “1 person, 1/2 votes,” and for Democrats, “1 person, 1.5
4 votes.” *See e.g.*, ECF No. 1, Section II.C (ballot destruction/discarding) Ex. 2 (Dr. Briggs
5 Testimony regarding potential ballot destruction), Ex. 17 (Ramsland testimony regarding
6 additive algorithm), Section IV (multiple witnesses regarding Dominion vote
7 manipulation).

8 Plaintiffs’ injury is that the relative values of their particular votes were devalued,
9 or eliminated altogether, and as such, it is not a “generalized grievance,” ECF No. 40 at 7,
10 as Defendant claims. Federal district courts have held that Arizona voters have standing
11 in cases involving constitutional challenges to Arizona’s absentee voting laws and
12 implementation thereof that invalidated their votes. *See, e.g. Raetzl v. Parks/Bellefont*
13 *Absentee Election Bd*, 762 F.Supp. 1354, 1356 (D. Az. 1990) (“plaintiffs suffered an actual,
14 legally cognizable injury, in that they were not afforded notice or the opportunity to contest
15 the loss of their vote.”). *See also Ariz. Democratic Party v. Hobbs*, No. CV-20-01143-
16 PHX-DLR, 2020 WL 5423898, at *5 (D. Az. Sept. 10, 2020) (political organization had
17 standing to sue on behalf of its members, who had standing in individual capacity to
18 challenge law that could invalidate their absentee ballots); *Mi Familia v. Hobbs*, No. CV-
19 20-01903-PHX-SPL, 2020 WL 5904952 (D. Az. Oct. 5, 2020) (holding plaintiffs had
20 standing in challenge to Arizona’s voter registration deadline). Plaintiffs have thus met the
21 requirements for standing: (1) the injuries of their rights under the Equal Protection and
22 Due Process clauses that concrete and particularized for themselves, and similarly situated
23 voters, whose votes have been devalued or disregarded altogether (2) that are actual or
24 imminent and (3) are causally connected to Defendants conduct because the debasement
25 of their votes is a direct and intended result of the conducts of the Defendants in certifying
26 an election tainted by fraud and the public employee election workers they supervise. *See*
27 *generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

28 **B. Laches**

1 Defendant Secretary Hobbs asserts that Plaintiffs' claims are barred by laches. See
2 ECF No. 40 at 9-13. To establish laches a defendant must prove both an unreasonable
3 delay by the plaintiff and prejudice to itself. Because the application of laches depends on
4 a close evaluation of all the particular facts in a case, it is seldom susceptible to resolution
5 by summary judgment." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951,
6 976, (9th Cir. 2017) (citing *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir.
7 2000) (per curiam) (citations omitted)(held that "[t]here is at least a genuine dispute of
8 material fact as to whether any delay was unreasonable. *Id.* at 976).

9 Defendant Secretary instead relies on *Soules v. Kauians for Nukolii Campaign*
10 *Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), ECF No. 40 at 10, a case with entirely
11 different facts. There, the Ninth Circuit held that plaintiff Equal Protection claim was
12 barred by laches because they "knew the basis of their equal claim well in advance" of the
13 election, months in advance in fact, *Soules*, 849 F.2d at 1181, and failed to provide any
14 explanation for their failure to press their claim before the election. *Id.* at 1182. Yet the
15 standard is that "[b]oth before and after the merger of law and equity in 1938, this Court
16 has cautioned against invoking laches to bar legal relief. *Petrella v. MGM*, 572 U.S. 663,
17 667 (2014) (citing *e.g., Holmberg v. Armbrecht*, 327 U.S. 392, 395-396 (1946)).

18 Here, by contrast to Defendants' assertions, all of the unlawful conduct occurred
19 during the course of the election and in the post-election vote counting, manipulation, and
20 even fabrication. Plaintiffs could not have known the basis of their claim, or presented
21 evidence substantiating their claim, until after the election. Further, because Arizona
22 election officials and other third parties involved did not announce or publicize their
23 misconduct, and in fact prevented Republican poll watchers from observing the ballot
24 counting and handling, it took Plaintiffs additional time post-election to gather the fact and
25 expert witness testimony presented in the Complaint. Had they filed before the election,
26 as the Defendant Secretary asserts, it would have been dismissed as speculative--because
27 the injuries asserted had not occurred--and on ripeness grounds.

28

1 Any “delay” in filing after Election Day is almost entirely due to Defendants failure
2 to promptly complete counting until weeks after November 3, 2020. Arizona did not
3 complete counting at the same time it certified results, which was not until November 30,
4 2020, a mere two days before Plaintiffs filed their initial complaint on December 2, 2020.
5 Defendants cannot now assert the equitable affirmative defense of laches when there is no
6 unreasonable delay nor is there any genuine prejudice to the Defendants.

7 Finally, it is instructive that Arizona law provides that similar challenges in state
8 court are not ripe until an election has been certified and are timely if brought within 5 days
9 thereafter. A.R.S. § 16-673. This suit was brought during the early portion of this period.
10 Although Arizona law is not dispositive in this Court on the issue of laches, this Court
11 may look to it as persuasive authority as to the reasonableness of the date of filing.

12 C. Mootness

13 Defendants’ mootness argument is similarly without merit. *See* ECF No. 38 at 4-5;
14 ECF No. 40 at 21. This argument is based on the false premise that this Court cannot order
15 any of the relief requested in the Complaint or the TRO Motion. Article III mootness is
16 “the doctrine of standing set in a time frame: The requisite personal interest that must exist
17 at the commencement of the litigation (standing) must continue throughout its existence
18 (mootness).” *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1244, (9th Cir. 1999) (*citing*
19 *Arizonans For Official English v. Arizona*, 520 U.S. 43, 68, 117 S. Ct. 1055, 1069, 137 L.
20 Ed. 2d 170 (1997) (*quoting Henry Monaghan, Constitutional Adjudication: The Who and*
21 *When*, 82 Yale L.J. 1363, 1384 (1973))).

22 Without an immediate temporary injunction, electoral votes will be cast, electors
23 will be appointed, and this Court will lose any authority to provide relief to Plaintiffs.
24 There is no harm to Respondents by the potential relief fashioned by this Court. As recently
25 held by a court considering claims similar to those asserted here:

26
27 3 U.S.C §5 makes clear that the Safe Harbor does not expire until December
28 8, 2020, and the Electoral College does not vote for president and vice

1 president until December 14, 2020. According to an October 22, 2020 white
2 paper from the Congressional Research Service titled “The Electoral
3 College: A 2020 Presidential Election Timeline,” the electors will meet and
4 vote on December 14, 2020. [https://crsreports.congress.gov/product/pdf/IF/](https://crsreports.congress.gov/product/pdf/IF/IF11641)
5 [IF11641](https://crsreports.congress.gov/product/pdf/IF/IF11641). December 8, 2020—six days prior to the date the College of
6 Electors is scheduled to meet—is the “safe harbor” deadline under 3 U.S.C.
7 §5. That statute provides that if a state has provided, “by laws enacted prior
8 to the day fixed for the appointment of the electors, for its final determination
9 of any controversy or contest concerning the appointment of all or any of the
10 electors of such State,” and that final determination has been made “at least
11 six days before the time fixed for the meeting of the electors,” that
12 determination—if it is made *under the state’s law* at least six days prior to
13 the day the electors meet— “shall be conclusive, and shall govern in the
14 counting of the electoral votes as provided in the Constitution” It
15 appears, therefore, that December 8 is a critical date for resolution of any
16 state court litigation involving an aggrieved candidate who is contesting the
17 outcome of an election.

18 *Feehan v. Wisconsin Board of Elections*, (Case No. 20-cv-1771) (E.D. Wis. 12/4/20)
19 (December 4, 2020, Doc-29).

20 This Court can grant the primary relief requested by Plaintiffs – de-certification of
21 Arizona’s election results and an injunction prohibiting State Defendants from transmitting
22 the results – as discussed in Section I.E. on abstention below. There is also no question
23 that this Court can order other types of declaratory and injunctive relief requested by
24 Plaintiffs, in particular, impounding Dominion voting machines and software for
25 inspection, nor have State Defendants claimed otherwise.

26 In any case, the Ninth Circuit has recognized that election cases fall within the
27 “capable of repetition, yet evading review” exception to the mootness doctrine “because
28 the inherently brief duration of an election is almost invariably too short to enable full

1 litigation on the merits.” *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (citations
2 omitted). “If such cases were rendered moot by the occurrence of an election,” then the
3 unconstitutional actions of state officials like Secretary Hobbs “could never reach appellate
4 review.” *Id.*

5 **D. Defendant Secretary Hobbs’ Notice of Supplemental Authority**

6 Defendant Secretary Hobbs attempts to salvage her standing argument with today’s
7 notice of supplemental authority regarding the Eleventh Circuit’s decision in *Wood v.*
8 *Raffensperger*, No. 20-14418 (D.C. Cir. Dec. 5, 2020), *see* ECF No. 40 & 40-1, but fails
9 to acknowledge three crucial distinctions between these cases. First, she conflates
10 Plaintiffs with one of their attorneys, who is not a plaintiff or party to this case. ECF No.
11 40 at 2.

12 Second, she fails to recognize that the Eleventh Circuit’s decision in *Wood* supports
13 Plaintiffs’ standing argument and refutes hers. The court dismissed Plaintiff Wood’s claim
14 because he was not a candidate. “[I]f Wood were a political candidate,” like the Plaintiffs
15 here, “harmed by the recount, he would satisfy this requirement because he could assert a
16 personal, distinct injury.” ECF No. 40-1 at 10 (citations omitted).

17 Third, there are important differences between the particular relief sought in *Wood*
18 and those requested by Plaintiffs in the Complaint, and in the claims made. Unlike
19 Plaintiffs, Mr. Wood did not ask the district court to de-certify the election (instead asking
20 for a delay in certification), nor did he assert claims under the Elections and Electors
21 Clause. The *Wood* court held that Georgia’s certification of results mooted Mr. Wood’s
22 request to delay certification, so the court could not consider a request for de-certification
23 “made for the first time on appeal.” *Id.* at 18. Plaintiffs made their request for de-
24 certification and other injunctive relief in the Complaint, Compl. at PP 142-145, and this
25 request is not mooted by Defendants’ certification of the results. While the *Wood* court
26 found that the mootness exception for “capable of repetition yet evading review,” discussed
27 above with respect to the Ninth Circuit opinion in *Porter*, was not applicable, their denial
28

1 was based on the specific “posture of [his] appeal” and the specific relief requested (delay
2 of certification), which are not applicable to Plaintiffs’ claims.

3 Further, Plaintiffs are not asserting a “garden variety” claim about election issues as
4 the court found was the case in *Wood*. The Complaint describes a massive and widespread
5 voting fraud scheme that affected hundreds of thousands of votes in Arizona, as well as
6 additional hundreds of thousands of votes in several other states. The *Wood* court
7 addressed a closed record of what had been submitted in the district court proceeding that
8 did not consider all of the evidence that has been gathered and submitted to date by
9 Plaintiffs in Arizona and separate Republican Elector candidates in other affected states.

10 In addition, unlike in *Wood*, Plaintiffs here are seeking declaratory relief.

11 **E. Eleventh Amendment**

12 Defendants assert that Plaintiffs’ claims are barred by the Eleventh Amendment, but
13 the cases address circumstances that are not present here. *See* ECF No. 38 at 5-6; ECF No.
14 40 at 19-21. While Governor Ducey’s Eleventh Amendment defense appears to be limited
15 to dismissal of the claims against the Governor himself, based on the purported
16 “ministerial” nature of his duties, he acknowledges that under A.R.S. § 16-142(A)(1),
17 Secretary Hobbs, “or the secretary’s designee is [the] chief state election officer ...” ECF
18 No. 40 at 6. Governor Ducey argues that in order to take advantage of the *Ex Parte Young*
19 exception to the state’s sovereign immunity, the state officer must have some connection
20 to the enforcement of the act. Of course, the Governor is expressly given such a connection
21 under federal law. Under 3 USC § 6, the Governor is required to communicate to the
22 Archivist of the United States “under the seal of the State” the results of the final
23 determination of any election “controversy of contest” “as soon as practicable after such
24 determination.” This is to be thereafter transmitted to Congress. *Id.* Complete relief
25 therefore cannot be had without the Governor being subject to this Court’s order. If, as the
26 Governor claims, his act in transmitting the original certified results “cannot be undone”
27 Ducey Resp. 4:19-20, there would be no reason for 3 USC § 6 to contain a provision
28 allowing it to be undone.

1 Secretary Hobbs’ argument is broader -- claiming that it bars Plaintiffs requested
2 relief altogether -- but without merit. The Eleventh Amendment bars claims for
3 retrospective relief such as damages, but it permits claims for prospective and injunctive
4 relief. In *Porter*, The Ninth Circuit squarely addressed the scope of this Eleventh
5 Amendment bar with respect to a state’s Secretary of State enforcement of state election
6 laws, holding that the federal court can provide prospective injunctive relief and that it can
7 “adjudicate the legality of past conduct,” *i.e.*, it can provide a prospective remedy for past
8 violations of state law. *Porter*, 319 F.3d at 491.

9 This is precisely what the Plaintiffs request in the Complaint, namely, equitable and
10 injunctive relief to prospectively enjoin the Defendants to take or not take actions that are
11 within the scope of their statutory authority. The Complaint requests that this Court de-
12 certify the election results; grant a permanent injunction “enjoining Secretary Hobbs and
13 Governor Ducey from transmitting the currently certified election results to the Electoral
14 College[.]” (See ECF No. 1 ¶1); declare the election results unconstitutional, as well as to
15 provide access to voting machines, software and other election-related records and
16 materials. ECF No. 1. PP 142-145. Under *Porter*, the Eleventh Amendment is no bar to
17 this Court granting the requested relief.

18 **F. Exclusive State Jurisdiction**

19 Defendant Secretary argues that “[s]econd, plaintiffs’ claims must be brought in an
20 election contest—a matter reserved exclusively for the jurisdiction of the Arizona state
21 courts.” (See p. 3 of Doc-40). This completely ignores the fact that the states’ authority to
22 conduct federal elections in the first place derives from U.S. Constitution and Article I, §
23 4 and Article II, § 1 of the U.S. Constitution which grants plenary authority to state
24 legislatures to enact laws that govern the conduct of elections.

25 This Court has subject matter jurisdiction under 28 U.S.C. § 1331 which provides,
26 “The district courts shall have original jurisdiction of all civil actions arising under the
27 Constitution, laws, or treaties of the United States.” This Court also has subject matter
28 jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for

1 President of the United States. “A significant departure from the legislative scheme for
2 appointing Presidential electors presents a federal constitutional question.” *Bush v. Gore*,
3 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365
4 (1932). The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C.
5 §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P. “The right to vote is protected in more
6 than the initial allocation of the franchise. As the Supreme Court has made clear, it has
7 jurisdiction to address the right to vote, “Having once granted the right to vote on equal
8 terms, the State may not, by later arbitrary and disparate treatment, value one person's vote
9 over that of another.” *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 16
10 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) (“Once the franchise is granted to the electorate, lines
11 may not be drawn which are inconsistent with the Equal Protection Clause of the
12 Fourteenth Amendment”). It must be remembered that “the right of suffrage can be denied
13 by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly
14 prohibiting the free exercise of the franchise.” (*Bush v. Gore*, 531 U.S. 98, 104-105, 121
15 S. Ct. 525, 530, 148 L. Ed. 2d 388, 398, (2000) (*citing Reynolds v. Sims*, 377 U.S. 533,
16 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)).

17 To the extent the Complaint implicates Arizona statutory or constitutional law,
18 jurisdiction remains appropriate under 28 U.S.C. § 1367. As a threshold matter, the
19 supplemental jurisdiction statute, section 1367, says that district courts “shall have”
20 jurisdiction over the non-federal claims forming part of the same case or controversy, ... if
21 state law claims are asserted as part of the same case or controversy with a federal claim,
22 the district court has discretion to exercise supplemental jurisdiction over the remaining
23 state law claims and the mandatory remand provision of the procedure after removal statute
24 does not apply. Under the plain language of the statutes, logically it cannot “appear[] that
25 the district court lacks jurisdiction” under 1447(c) if it “shall have” jurisdiction under 1367.
26 *Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 937-938, (9th Cir. 2003).

27 Even in removal cases, the court explained, “Section 1447(c) does not mean that if
28 a facially valid claim giving rise to federal jurisdiction is dismissed, then supplemental

1 jurisdiction is vitiated, and the case must be remanded. Once supplemental jurisdiction
2 exists, it remains, subject to the discretionary provision for remand in section 1441. *Id.* at
3 938. Moreover, the Voting Rights Act, 52 U.S.C. §10101(e), further highlights federal
4 jurisdiction to govern federal elections, which provides, in relevant part:

5
6 ... When used in the subsection, the word “vote” includes all action necessary
7 to make a vote effective including, but not limited to, registration or other
8 action required by State law prerequisite to voting, casting a ballot, and
9 having such ballot counted and included in the appropriate totals of votes cast
10 with respect to candidates for public office and propositions for which votes
11 are received in an election.

12 *Id.*

13 Federal law also requires the states to maintain uniform voting standards. *See*
14 Section 301 of the Help America Vote Act of 2002 [HAVA], (Pub. L. 107–252, 116 Stat.
15 1704, codified at 42 U.S.C. § 15481. Unlike the situation where a court is situated in
16 diversity jurisdiction and deciding an entirely state-law matter, as presented in *Guaranty*
17 *Trust Co. v. York*, 326 U.S. 99 (1945), in this action this Court has “no duty ... to
18 approximate as closely as may be State law in order to vindicate without discrimination a
19 right derived solely from a State.” *Holmberg*, 327 U.S. at 395. Rather, the duty here is that
20 “of federal courts, sitting as national courts throughout the country, to apply their own
21 principles in enforcing an equitable right” created under the U.S. Constitution. *Id.*

22 **G. State Proceedings & Issue Preclusion**

23 Defendant Secretary Hobbs erroneously claims that the “Plaintiffs are barred from
24 re-adjudicating their issues here under the doctrine of collateral estoppel, or issue
25 preclusion,” ECF No. 40 at 18, because, in her view, the issues in the Complaint were fully
26 litigated in *Ward v Jackson, et al.*, CV 2020-015285 (filed Sup. Ct. Maricopa Cty. Nov.
27 24, 2020). ECF No. 40-2. As an initial matter: “Some litigants -- those who never appeared
28 in a prior action -- may not be collaterally estopped without litigating the issue. They have

1 never had a chance to present their evidence and arguments on the claim. Due process
2 prohibits estopping them despite one or more existing adjudications of the identical issue
3 which stand squarely against their position.” *Blonder-Tongue Labs. v. Univ. of Ill. Found.*,
4 402 U.S. 313, 329, 91 S. Ct. 1434, 1443, 28 L.Ed.2d 788, 800 (1971). There are fourteen
5 plaintiffs in this action, only one of whom was a Plaintiff in *Ward v Jackson* (and there not
6 in her capacity as nominee for presidential elector). At most, then, any preclusion argument
7 would result merely in the dismissal of Plaintiff Ward but would not otherwise impact the
8 adjudication of this case.

9 Further, issue preclusion applies “[w]hen an issue of fact or law is actually litigated
10 and determined by a valid and final judgment, and the determination is essential to the
11 judgment, the determination is conclusive in a subsequent action between the parties,
12 whether on the same or a different claim.” *B&B Hardware, Inc. v. Hargis Industries, Inc.*,
13 135 S.Ct 1293, 1303 (2015) (*quoting* Restatement (Second) of Judgments § 27, p. 250
14 (1980)). Parsing this definition, a party asserting issue preclusion must show that each of
15 the following four requirements have been met: (1) the disputed issue is identical to that in
16 the previous action, (2) the issue was actually litigated in the previous action, (3) resolution
17 of the issue was necessary to support a final judgment in the prior action, and (4) the party
18 against whom issue preclusion is sought had a full and fair opportunity to litigate the issue
19 in the prior proceeding. *See Louisville Bedding Co. v. Perfect Fit Indus.*, 186 F. Supp. 2d
20 752, 753-754, 2001 U.S. Dist. LEXIS 9599 (*citing Graco Children's Products, Inc. v.*
21 *Regalo International, LLC*, 77 F. Supp. 2d 660, 662 (E.D. Pa. 1999). None of these
22 elements are satisfied with respect to *Ward v. Jackson* and the instant Complaint.

23 Elections challenges under Arizona state law may not be brought before the canvas
24 is completed, after which they must be brought within five days. A.R.S. § 16-673. Arizona
25 completed its canvas on November 30, 2020. *Id.* To Counsel’s knowledge, *Ward v*
26 *Jackson* is the only Contest that had been brought in state court to challenge the results of
27
28

1 the presidential election as of the date and time this suit was filed.⁷ Other election-related
 2 matters this cycle such as *Aguilera v. Fontes* and *Trump v. Hobbs* were brought prior to the
 3 challenge period and Plaintiffs in those matters expressly acknowledged that the outcome
 4 would not impact the results of the presidential election.⁸

5 **1. There is No Identity of Parties Between this Case and Ward v**
 6 **Jackson.**

7 This case is brought by fourteen distinct Plaintiffs representing the Arizona
 8 Republican Party's entire slate of nominees for Presidential Elector and three county party
 9 chairs. The sole Plaintiff in *Ward v Jackson* was Keli Ward, who filed it in her capacity as
 10 a voter and not in her capacity as a presidential elector. Statement of Elections Contest ¶
 11 4.⁹ No other Plaintiffs in this case were Plaintiffs in *Ward v Jackson* in any capacity. *Id.* p
 12 1 [caption]. No Defendants in this case were Defendants in *Ward v Jackson* in any capacity.
 13 *Id.*

14 To this point, the Ninth Circuit has determined that, a private defendant was also
 15 precluded from using collateral estoppel to bar a claim involving nonmutual collateral
 16 estoppel, and the court explained that, "[n]onmutual collateral estoppel refers to use of
 17 collateral estoppel by a nonparty to a previous action to preclude a party to that action from
 18 relitigating a previously determined issue in a subsequent lawsuit against the nonparty.
 19 *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 320-30, 28 L. Ed. 2d
 20 788, 91 S. Ct. 1434 (1971). "Offensive" use of nonmutual collateral estoppel occurs when
 21 a plaintiff seeks to prevent a defendant from relitigating an issue that the defendant

23 ⁷ This Court may take judicial notice, based on the records of the Clerk of the Maricopa
 24 County Superior Court, that *Ward v. Jackson* is the only case brought within the statutory
 25 time period for an election challenge in Maricopa County as of the date and time this suit
 26 was file. <https://www.clerkofcourt.maricopa.gov/records/election-2020>. FRE 201(b)(2).
Ward v. Jackson was assigned a case number prior to the commencement of Arizona's
 challenge period because Plaintiff made a request for pre-litigation discovery.

27 ⁸ See e.g., Verified Complaint for a Special Action ¶ 1.4
<https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1654> (*Aguilera v.*
Fontes); Notice of Partial Mootness (*Trump v. Hobbs*).

28 ⁹ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1836>.

1 previously litigated unsuccessfully against a different party. *Mendoza*, 464 U.S. at 159 n.4.
2 "Defensive" use of nonmutual collateral estoppel involves a defendant attempting to
3 preclude a plaintiff from relitigating an issue that the plaintiff previously litigated
4 unsuccessfully against a different party. *Id.*

5 The Ninth Circuit, therefore, found that "Mendoza's rationale applies with equal
6 force to G&T's attempt to assert nonmutual defensive collateral estoppel against IPC (a
7 state agency). *Idaho Potato Comm'n v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 714,
8 (9th Cir. 2005) (citing *See Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-
9 90 (9th Cir. 2004) (relying on *Mendoza's* reasoning to conclude, under Idaho state law
10 preclusion principles, that nonmutual offensive collateral estoppel did not preclude a state
11 agency from relitigating a legal issue that had previously been determined against the
12 agency by a state court); *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F.2d 1558,
13 1578-79 (11th Cir. 1985) (applying *Mendoza* to hold that nonmutual defensive collateral
14 estoppel did not operate against a state government). We therefore hold that issue
15 preclusion does not prevent IPC from challenging the district court's determination that the
16 no-challenge clause of IPC's licensing agreement is unenforceable." *Id.* Similarly, the
17 Plaintiffs, who are all elected electors, should not be barred from challenging the issues
18 herein, especially where they were also not the same identical issues.

19 **2. This Case Pleads Entirely Different Causes of Action from Ward**
20 **v. Jackson.**

21 *Ward v. Jackson* raises only one cause of action, an elections contest under A.R.S.
22 § 16-673. Statement of Elections Contest 5:22-23. This case raises causes of action for
23 violations of 42 U.S.C. § 1983, the Fourteenth Amendment to the US Constitution, and
24 Election Fraud. Complaint 41:14-50:26.

25 **3. Unlike Ward v Jackson, this Case is Part of National Litigation**
26 **Concerning a Pattern of Similar Problems Nationwide and Raises**
27 **Far Broader Factual Questions.**

28

1 The Statement of Elections Contest (i.e. Complaint) filed in *Ward v. Jackson* was
 2 only nine pages long, including the caption. Statement of Elections Contest *passim*. As
 3 such, it necessarily concerned a much narrower universe of facts than the Complaint in this
 4 matter, which is over five-times as long. The trial court summarized Plaintiff’s claims as
 5 follows:

6
 7 Plaintiff alleges misconduct in three respects. First is that insufficient
 opportunity was given to observe the actions of election officials.

8 . . .

9 Second, Plaintiff alleges that election officials overcounted mail-in ballots by
 not being sufficiently skeptical in their comparison of signatures on the mail-
 10 in envelope/affidavits with signatures on file.

11 . . .Third, Plaintiff alleges errors in the duplication of ballots.¹⁰

12 December 4, 2020 Minute Entry Order (*Ward v Jackson*) p 6-8.¹¹

13 Furthermore, the factual universe in *Ward v. Jackson* seems to have been
 14 constrained to Maricopa County and to not involve issues from anywhere else in the state,
 15 let alone on a national level. Statement of Elections Contest 2:22-5:21.

16 Here, in contrast, Plaintiffs’ primary factual contention is that the results of the
 17 election that Defendants certified are tainted by the two categories of fraud which, taken
 18 together, would be sufficient to change the result of the presidential election in Arizona.
 19 Complaint ¶ 20.

20 The first is that the electronic voting systems used in both Maricopa and Pima
 21 county were intentionally manipulated to give false totals. See e.g. Complaint ¶¶ 19(D, E),
 22 66. The second is that various categories of illegal votes appear to have been counted and
 23 various categories of legal votes appear to be left uncounted. Particularly:

24
 25
 26 ¹⁰ Plaintiffs’ counsel briefly mentioned reports of “vote flipping” within the context of this
 27 factual contention but chalked up reports of it to the software being “highly inaccurate[,]”
 Statement of Elections Contest ¶ 27, not to it being part of a larger pattern of election
 28 fraud as Plaintiffs here have claimed.

¹¹ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1930>.

- 1 ● Unreturned mail ballots unlawfully ordered by third parties (average for Dr. Briggs
2 Error #1): 219,135.
- 3 ● Returned ballots that were deemed unreturned by the state (average for Dr. Briggs
4 Error #2): 86,845.
- 5 ● Votes by persons that moved out of state or subsequently registered to vote in
6 another state for the 2020 election: 5,790.

7 Complaint ¶ 19.

8 Further, Plaintiffs here have alleged that this is a part of a wider, national, pattern.
9 *See e.g.* Complaint ¶¶ 67-75. As Defendants have correctly noted, similar suits have been
10 brought in federal court in other states by Plaintiffs’ national counsel. Once these cases
11 have worked their way through various circuit courts, a petition for review can be expected
12 to be made to the US Supreme Court. A federal court is the right venue to adjudicate such
13 claims due to both the national scope of the claims as well as for the sake of consistency.
14 *See also* A.R.S. § 16-672(B) (election challenge “may” (not must) be brought in Superior
15 Court).

16 **4. A third-party seeking to raise similar issues to the ones before this**
17 **court was denied leave to intervene in *Ward v Jackson*.**

18 Members of the Arizona Election Integrity Association (“AEIA”) sought leave to
19 intervene in *Ward v. Jackson*. [Proposed] Pleading in Intervention 2:2-5 (*Ward v.*
20 *Jackson*).¹² As Plaintiffs do here, the AEIA sought to raise the issues of the unlawful
21 ordering of ballots by third-parties, returned ballots not counted, and votes by out of state
22 persons. *Id.* 3:21-4:18. However, the motion to intervene was denied as being filed too late
23 in the litigation for its scope to be expended to this degree. December 3, 2020 Minute Entry
24 Order p 3.¹³

25 Of equal importance is the fact that the isolated claims in State court do not appear
26 to present evidence demonstrating that a sufficient number of illegal ballots were counted

27 _____
28 ¹² <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1890>.

¹³ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1928>.

1 to affect the result of the 2020 General Election. The fact and expert witnesses presented
 2 in the Complaint do. The Complaint alleges and provides supporting evidence that the
 3 number of illegal votes is potentially multiples of Biden’s 10,457 margin in Arizona,
 4 particularly:

- 5 ● Unreturned mail ballots unlawfully ordered by third parties (average
 6 for Dr. Briggs Error #1): 219,135
- 7 ● Returned ballots that were deemed unreturned by the state (average for
 8 Dr. Briggs Error #2): 86,845
- 9 ● Votes by persons that moved out of state or subsequently registered to
 10 vote in another state for the 2020 election: 5,790.
- 11 ● “Excess votes” to historically unprecedented, and likely fraudulent
 12 turnout levels of 80% or more in over half of Maricopa and Pima County
 13 precincts: 100,724.
- 14 ● And Plaintiffs can show Mr. Biden received a statistically significant
 15 Advantage, based on fraud, from the use of Dominion Machines in a
 16 nationwide Study, which conservatively estimates Biden’s advantage at
 17 62,282 Votes.

18
 19 *See generally* Compl., Section II. No State case has been adjudicated with supporting
 20 documentary and testimonial evidence like what has been submitted here, which is more
 21 than sufficient to change the result of the election.

22 **H. Abstention**

23 Defendant Secretary Hobbs drops a footnote asserting that this Court “should
 24 abstain from hearing the case on federalism and comity grounds.” ECF No. 40 at 19 n.8
 25 (*citing Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-30 (1996)). The abstention
 26 request is cursory, so it is difficult for Plaintiffs to determine what Secretary Hobbs’
 27 argument is and to respond.

28 Accordingly, Plaintiffs would note that the case cited is inapposite. The standard
 for federal abstention in the voting rights and state election law context, *Harman v.*
Forssenius, 380 U.S. 528, 534, (1965) is not favorable to their cause. In *Harman*, the
 Supreme Court rejected the Defendant state’s argument that federal courts should dismiss

1 voting rights claims based on federal abstention, emphasizing that abstention may be
2 appropriate where “the federal constitutional question is dependent upon, or may be
3 materially altered by, the determination of an uncertain issue of state law,” and “deference
4 to state court adjudication only be made where the issue of state law is uncertain.” *Harman*,
5 380 U.S. at 534 (citations omitted). But if state law in question “is not fairly subject to an
6 interpretation which will render unnecessary or substantially modify the federal
7 constitutional question,” then “it is the duty of the federal court to exercise its properly
8 invoked jurisdiction.” *Id.* (citation omitted). Here, the complaint rests on federal
9 constitutional claims based on the Electors Clause and the Equal Protection Clause. These
10 claims are not dependent in any way on an interpretation of Arizona state law.

11 **II. The Complaint Satisfies the Applicable Pleading Standard under Arizona Law** 12 **and the Federal Rules of Civil Procedure**

13 Defendant Intervenor’s assertion that Plaintiffs’ Complaint must be dismissed
14 pursuant to Federal Rule of Civil Procedure 9(b), ECF No. 36 at 2-6, is incorrect because
15 it misstates the standard for ballot fraud under controlling Arizona Supreme Court
16 precedent. In *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180, 877 P.2d
17 277, 279, (S. Ct.1994), the Supreme Court of Arizona explained that election fraud occurs
18 where there are “non-technical” violations of election law that affected the result of the
19 election: “We therefore hold that a showing of fraud is not a necessary condition to
20 invalidate absentee balloting. It is sufficient that an express non-technical statute was
21 violated, and ballots cast in violation of the statute affected the election.” *Id.* The *Miller*
22 Court went on to explain:

23
24 If a statute expressly provides that non-compliance invalidates the vote, then
25 the vote is invalid. If the statute does not have such a provision, non-
26 compliance may or may not invalidate the vote depending on its effect. In the
27 context of this case, affect the result, or at least render it uncertain, means
28 ballots procured in violation of a non-technical statute in sufficient numbers
to alter the outcome of the election.

1 *Id.* (internal citations and quotation omitted). Like the violations at issue in *Miller*,
2 Plaintiffs’ are not alleging “mere technical violations,” *id.*, but rather “substantive
3 irregularities” and systematic violations of procedural safeguards designed to prevent
4 “fraud” and “ballot tampering,” and like in *Miller*, “[t]hese tactics achieved the desired
5 result--they turned the election around” for Biden. *Id.* Plaintiffs’ Complaint alleges serious
6 violations of Arizona state law, as well as the U.S. Constitution and federal laws, as part
7 of a larger scheme of election fraud that affected the result. And, it sets forth these
8 allegations in great detail with substantial expert and fact affidavit support (which would
9 support a FRCP 9(b) analysis even if that standard were applied). As such, Plaintiffs’
10 Complaint meets the applicable pleading requirements under Arizona law and the Federal
11 Rules of Civil Procedure.

12 **III. Plaintiffs are Entitled to Injunctive Relief**

13 “A plaintiff seeking a preliminary injunction must establish that he is likely to
14 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
15 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
16 the public interest.” *Feldman v. Az. Sec. of State’s Office*, 208 F.Supp.3d 1074, 1081 (D.
17 Ariz. 2016) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)). Alternatively,
18 “if a plaintiff can only show that there are ‘serious questions going to the merits’—a lesser
19 showing than likelihood of success on the merits—then a preliminary injunction may still
20 issue if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two
21 Winter factors are satisfied,” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291
22 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
23 Cir. 2011)), i.e., if the injunctive relief is in the public interest and failure to grant would
24 result in irreparable harm to the plaintiff.

25 All elements are met here, under either standard. Defendant and Defendant
26 Intervenor responses have not shown otherwise.

27 Of course, as an initial matter, “[w]hen the acts sought to be enjoined have been
28 declared unlawful or clearly are against the public interest, plaintiff need show neither

1 irreparable injury nor a balance of hardship in his favor.” *Ariz. Pub. Integrity All. v. Fontes*,
2 No. CV-20-0253-AP/EL, 2020 Ariz. LEXIS 309, at *13-14 (Nov. 5, 2020) (quoting 11
3 Wright & Miller, *Federal Practice & Proc.* ¶ 2948 (3d ed. 1998)) (internal quotation marks
4 omitted); *See also Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427
5 (E.D. Mo. 1985) (stating that “[i]n actions to enjoin continued violations of federal statutes,
6 once a movant establishes the likelihood of prevailing on the merits, irreparable harm to
7 the public is presumed.”). Certifying election results tainted by election fraud and failing
8 to retract such a certification is clearly unlawful and against the public interest. Hence,
9 Plaintiffs discuss irreparable hardship and the public interest only in the alternative.

10 **A. Plaintiffs have a substantial likelihood of success on the merits.**

11 Through detailed fact and expert testimony including documentary evidence
12 contained in the Complaint and its exhibits, Plaintiffs have made a compelling showing
13 that Defendants’ intentional actions jeopardized the rights of Arizona citizens to select their
14 leaders under the process set out by the Arizona Legislature through the commission of
15 election frauds that violated laws, including multiple provisions of the Arizona election
16 laws. These acts also violated the Equal Protection and Due Process Clauses of the United
17 States Constitution. U.S. Const. Amend XIV.

18 Defendants and Defendant-Intervenors misrepresent Plaintiffs’ constitutional
19 claims. Plaintiffs allege both vote dilution and voter disenfranchisement, both of which
20 are claims under the Equal Protection and Due Process Clause, due to the actions of
21 Defendants in collusion with public employees and voting systems like Dominion. The
22 Complaint describes in great detail the actions taken to dilute the votes of Republican
23 voters through counting and even manufacturing hundreds of thousands of illegal,
24 ineligible, duplicative or outright fraudulent ballots.

25 While the U.S. Constitution itself accords no right to vote for presidential electors,
26 “[w]hen the state legislature vests the right to vote for President in its people, the right to
27 vote as the legislature has prescribed is fundamental; and one source of its fundamental
28 nature lies in the equal weight accorded to each vote and the equal dignity owed to each

1 voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). The evidence shows not
2 only that Defendants failed to administer the November 3, 2020 election in compliance
3 with the manner prescribed by the Arizona Legislature, but that those in collaboration with
4 Dominion and other third parties fraudulently and illegally manipulated the vote count to
5 make certain the election of Joe Biden as President of the United States. This conduct
6 violated Plaintiffs’ constitutional equal protection and due process rights as well their rights
7 under the Arizona election laws. ARS §§ 16-101, et seq.

8 But Defendants’ actions also disenfranchised Republican voters in violation of the
9 U.S. Constitution’s “one person, one vote” requirement by certifying an election where the
10 following occurred:

- 11 • Republican Ballot Destruction: “1 Person, 0 Votes.” Fact and witness expert
12 testimony alleges and provides strong evidence that tens or even hundreds of thousands of
13 Republican votes were destroyed, thus completely disenfranchising that voter.
- 14 • Republican Vote Switching: “1 Person, -1 Votes.” Plaintiffs’ fact and expert
15 witnesses further alleged and provided supporting evidence that in many cases,
16 Trump/Republican votes were switched or counted as Biden/Democrat votes. Here, the
17 Republican voter was not only disenfranchised by not having his vote counted for his
18 chosen candidates, but the constitutional injury is compounded by adding his or her vote
19 to the candidates he or she opposes.
- 20 • Dominion Algorithmic Manipulation: For Republicans, “1 Person, 0.5 Votes,”
21 while for Democrats “1 Person, 1.5 Votes. Plaintiffs presented evidence in the Complaint
22 regarding Dominion’s algorithmic manipulation of ballot tabulation, such that Republican
23 voters in a given geographic region, received less weight per person, than Democratic
24 voters in the same or other geographic regions. See ECF No. 6, Ex. 104. This unequal
25 treatment is the 21st century of the evil that the Supreme Court sought to remedy in the
26 apportionment cases beginning with *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v.*
27 *Sims*, 377 U.S. 533 (1964). Further, Dominion appears to have done so in collusion with
28 State actors, so this form of discrimination is under color of law.

1 This Court should consider the totality of the circumstances in evaluating Plaintiffs’
2 constitutional and voting rights claims, *see, e.g., Chisom v. Roemer*, 111 S.Ct 2354, 2368
3 (1991), and thus the cumulative effect of the Defendants’ voter dilution,
4 disenfranchisement, fraud and manipulation, in addition to the effects of specific practices.
5 Taken together, these various forms of unlawful and unconstitutional conduct destroyed or
6 shifted tens or hundreds of thousands of Trump votes, and illegally added tens or hundreds
7 of thousands of Biden votes, changing the result of the election, and effectively
8 disenfranchising the majority of Arizona voters. And this is not the first time that
9 Defendant and Defendant Intervenor have enabled attempts to “vote ballots that are not
10 lawfully authorized.” *See Fontes* TRO Order at 2 (enjoining Defendant Intervenor
11 Maricopa County attempt to send absentee ballots to voters that have not requested them).
12 Dr. Briggs’ testimony demonstrates that Defendant and Defendant Intervenor likely
13 violated Arizona law and the express terms of the *Fontes* TRO Order.

14 While Plaintiffs allege several categories of traditional “voting fraud”, Plaintiffs
15 have also alleged new forms of voting dilution and disenfranchisement made possible by
16 new technology. The potential for voter fraud inherent in electronic voting was increased
17 as a direct result of Defendants’ and Defendant-Intervenors’ decision to transform
18 traditional in-person paper voting – for which there are significant protections from fraud
19 in place – to near universal absentee voting with electronic tabulation – while at the same
20 time eliminating through legislation or litigation – and when that failed by refusing to
21 enforce – traditional protections against voting fraud (voter ID, signature matching, witness
22 and address requirements, etc.).

23 Thus, while Plaintiffs’ claims include novel elements due to changes in technology
24 and voting practices, that does not nullify the Constitution or Plaintiffs’ rights thereunder.
25 Defendants and Defendant-Intervenors have certified an election tainted by likely the most
26 wide-ranging and comprehensive mechanism to facilitate voting fraud yet devised,
27 integrating new technology with old fashioned urban machine corruption and
28

1 skullduggery. The fact that this scheme is novel does not make it legal or prevent this Court
2 from fashioning appropriate injunctive relief to protect Plaintiffs' rights.

3 William Briggs provides a rebuttal to Stephen Ansolabehere that fully defends and
4 even strengthens his findings of widespread voter fraud regarding tens of thousands of mail
5 in ballots that failed to arrive and others ordered by third parties. While specific matters
6 are discussed in the rebuttal, what cannot be ignored is the added confidence that results
7 when this pattern of this fraud is repeated across all five of the swing states where the
8 analysis was performed, Georgia, Michigan, Pennsylvania, Arizona and Wisconsin. To
9 see statistical significance found repeatedly -- in fact, five times in a row, should put any
10 doubts to rest.

11 Teasley also provides a rebuttal to Jonathan Rodden, a PhD in political science, and
12 fully defends his model that found statistical significance in the advantage that Biden
13 gained from Dominion machines relative to all others in a nationwide analysis. This
14 argument was soundly defended as Rodden failed to apply any meaningful evaluation and
15 made numerous basic errors in terms of inferring cause from correlation.

16 Further, as set forth in the rebuttal report of Russell Ramsland, attached hereto, **Ex.**
17 **5**, none of Defendants criticisms have any merit.

18 **B. The Plaintiffs will suffer Irreparable Harm.**

19 Plaintiffs will suffer an irreparable harm due to the Defendants' myriad violations
20 of Plaintiffs' rights under the U.S. Constitution, and Arizona Election Code, and Defendant
21 and Defendant Intervenors have not shown otherwise.

22 In this Response, Plaintiffs have refuted and rebutted their arguments in detail, in
23 particular, regarding standing, equitable defenses, and jurisdictional claims, as well as
24 establishing their substantial likelihood of success. Having disposed of those arguments,
25 and shown a substantial likelihood of success, this Court should presume that the
26 requirement to show irreparable injury has been satisfied.

27 "It is well established that the deprivation of constitutional rights," such as
28 violations of the Fourteenth Amendment rights to Equal Protection and Due Process,

1 “unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002
2 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547
3 (1976) (where plaintiff had proven a probability of success on the merits, the threatened
4 loss of First Amendment freedoms “unquestionably constitutes irreparable injury”); see
5 also *Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) (“The existence of a
6 continuing constitutional violation constitutes proof of an irreparable harm.”). Moreover,
7 courts have specifically held that infringement on the fundamental right to vote constitutes
8 irreparable injury. See *Ariz. Democratic Party v. Ariz. Republican Party*, 2016 WL
9 8669978, at *11 (D. Ariz. Nov. 4, 2016) (citing *Obama for Am. v. Husted*, 697 F.3d 423,
10 435 (6th Cir. 2012) (“A restriction on the fundamental right to vote ... constitutes
11 irreparable injury.”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that
12 plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged
13 upon”).”

14 C. The Balance of Equities & The Public Interest

15 Defendant and Defendant Intervenors make a few half-hearted attempts on this
16 element but add nothing new or that merits a response.

17 The remaining two factors – the balance of the equities and the public interest – are
18 frequently analyzed together, see, e.g., *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901,
19 920 (9th Cir. 2016), and both factors tip in favor Plaintiffs. Granting Plaintiffs’ primary
20 request for injunctive relief, enjoining certification of the 2020 General Election results, or
21 requiring Defendants to de-certify the results, would not only not impose a burden on
22 Defendants, but would instead relieve Defendants of the obligation to take any further
23 affirmative action. The result would be to place the decision regarding certification and
24 the selection of Presidential Electors back into the hands of the Arizona State Legislature,
25 which is the ultimate decision maker under the Elections and Electors Clause of the U.S.
26 Constitution.

27 Conversely, permitting Defendants’ certification of an election so tainted by fraud
28 and unlawful conduct would impose a certain and irreparable injury not only on Plaintiff,

1 but would also irreparably harm the public interest insofar as it would undermine
2 “[c]onfidence in the integrity of our electoral processes,” which “is essential to the
3 functioning of our participatory democracy.” *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006)
4 (per curiam).

5 In this regard, Plaintiffs would highlight a recent Eleventh Circuit decision
6 addressed a claim in 2018 related to Georgia’s voting system and Dominion Voting
7 Systems that bears on the likelihood of Plaintiffs’ success on the merits and the balance of
8 harms in the absence of injunctive relief:

9 In summary, while further evidence will be necessary in the future, the Court finds
10 that the combination of the statistical evidence and witness declarations in the record here
11 (and the expert witness evidence in the related Curling case which the Court takes notice
12 of) persuasively demonstrates the likelihood of Plaintiff succeeding on its claims. Plaintiff
13 has shown a substantial likelihood of proving that the Secretary's failure to properly
14 maintain a reliable and secure voter registration system has and will continue to result in
15 the infringement of the rights of the voters to cast their vote and have their votes counted.
16 *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1294-1295, (11th Cir. 2018).

17 **D. Plaintiffs Reiterate Their Request for Emergency Injunctive Relief Prior**
18 **to December 14, 2020.**

19 Plaintiffs urge this Court to grant the emergency injunctive relief requested in the
20 TRO motion immediately, and in no event, later than December 10, 2020. In this regard,
21 Plaintiffs bring to this Court’s attention the December 4, 2020 order in *William Feehan v.*
22 *Wisconsin Elections Commission, et al.*, Case No. 20-cv-1771-pp (E.D. Wis. Dec. 4, 2020)
23 (“Feehan”). The Plaintiffs in Feehan raised largely identical federal claims as those
24 presented in the current in this Complaint, and they requested an expedited briefing
25 schedule, as “time was of the essence because the College of Electors was schedule to meet
26 December 8,” which “is the ‘safe harbor’ deadline under 3 U.S.C. § 5.” *Id.* at 7.

27 Of relevance here, the Feehan court held that, while December 8, 2020 is a critical
28 date for resolution of any state court litigation,” or state law claims, it is not the deadline

1 for federal courts. Feehan at 8. The applicable date for resolution of federal claims is
2 December 14, 2020, the date on which the electors meet and vote. *Id.* The court then set
3 a "less truncated" briefing schedule in light of the additional time. Accordingly, Plaintiffs
4 request that this Court grant the TRO Motion not later than December 10, 2020.

5 **IV. Relief Requested**

6 Plaintiffs seek a de-certification of Arizona's election results. They also seek stay
7 in the delivery of the certified results to the Electoral College to preserve the status quo
8 while this case proceeds, as well that the voting machines be impounded and made
9 available, and other equitable relief, on an emergency basis.

10
11 Respectfully submitted this 5th day of December, 2020

12
13 /s Sidney Powell
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CERTIFICATE OF SERVICE

I hereby certify that on December 5th, 2020, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

By: /s/ Chris Viskovic