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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WARREN PETERSEN, in his official capacity as President of the Arizona Senate; BEN TOMA, in his official capacity as Speaker of the Arizona House of Representatives, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	No. CV2024-001942 **BRIEF OF AMICI CURIAE ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO IN SUPPORT OF DEFENDANT** (Assigned to the Hon. Scott Blaney)

INTRODUCTION

Arizona law requires the Secretary of State to "consult[] with each county board of supervisors or other officer in charge of elections" and then "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for" conducting the state's elections. A.R.S. § 16-452(A). As required by this mandate, the Secretary issued the Elections Procedures Manual ("EPM") with the approval of the Governor and Attorney General on December 30, 2023. Over the course of 268 pages, the EPM addresses how Arizona's election laws should be implemented, ensuring that the 2024 elections will be administered fairly and consistently across the state.

Apparently unhappy with the Secretary's lawful execution of his duties, the Republican leaders of the Arizona Senate and House of Representatives filed this lawsuit, attempting to convince this Court to overrule the state's chief election official on several crucial points of election administration. The relief they seek is not only unwarranted, but it would also have far-reaching negative consequences for voters across the state. Among other things, this action threatens to result in removal of lawful voters from the widely used active early voting list ("AEVL") and to effectively prohibit the Secretary from enforcing any election procedure that is subject to an active litigation challenge, even if it has not been ruled unlawful. If that were not enough, Plaintiffs also ask this Court to issue an order that would allow county boards to shirk their nondiscretionary duty to canvass election returns, giving them permission to potentially change vote totals, reject election results, or even prevent statewide certification. Given Arizona's experiences during 2020 and 2022—when basic tenets of democracy were repeatedly attacked based on lies about the integrity of the state's elections that led to several schemes to intimidate voters and even overrule the will of the electorate—the implications of this claim cannot be overstated.

To start, Plaintiffs lack standing to bring these claims. No doctrine allows individual legislators to broadly use the judiciary to order the executive branch to interpret the law as they see fit, much less to mandate that gaps left by Arizona's election statutes be filled as Plaintiffs dictate in litigation. The Legislature has delegated to the Secretary the legal

authority and duty to do exactly what he has done here. If Plaintiffs disagree with the Secretary's interpretation of the law, then they may use their positions to propose legislation to address it, subject to the ordinary legislative process. Plaintiffs are *not* free to ask the judiciary to do their political work for them. Indeed, Arizona's standing doctrine is clear that the sort of generalized grievance Plaintiffs assert here cannot confer standing. The case can and should be dismissed on this ground alone.

Even if Plaintiffs had standing, dismissal would still be required because the complaint fails on the merits. Plaintiffs' causes of action misconstrue both the EPM and Arizona's election laws. Because there is no direct conflict between the challenged provisions of the EPM and any express provision of valid state law, and because the Secretary, in issuing each of these provisions, acted well within his legal authority, Plaintiffs fail to state any claim on which relief can be granted. Finally, even apart from the legal shortcomings of Plaintiffs' suit, the equities militate strongly against relief that would undermine the administration of Arizona's elections and even disenfranchise lawful voters.

ARGUMENT

Plaintiffs ask this Court to issue expedited relief invalidating key EPM provisions that ensure the fair and orderly administration of Arizona's elections, but their arguments fail as a matter of both law and equity. As a threshold matter, the Court lacks jurisdiction to even consider the challenges because Plaintiffs lack standing. The claims are also meritless on their face. And the relief that Plaintiffs seek risks widespread and unjustifiable voter confusion and even disenfranchisement of lawful voters in the upcoming elections. Plaintiffs' request for an injunction should be denied, and the complaint should be dismissed in its entirety with prejudice.

I. Plaintiffs lack standing.

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

The Arizona Constitution's "express mandate . . . that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately . . . . underlies [the] requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue." *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 19 (2003). Accordingly, Plaintiffs must show a "cognizable injury" to assert their claims against the Secretary. *Id.* at 524 ¶ 17; *see also, e.g.*, *Sears v. Hull*, 192 Ariz. 65, 69–70 ¶¶ 16–17 (1998) (denying standing to citizens seeking relief against Governor where they failed to plead and prove palpable injury personal to themselves). The same principles apply in declaratory judgment actions: Courts lack "jurisdiction to render a judgment" unless the complaint "set[s] forth sufficient facts to establish that there is a justiciable controversy." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972); *see also Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986) (similar); *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980) (refusing to interpret Declaratory Judgments Act "to create standing where standing did not otherwise exist"). "A contrary approach would inevitably open the door to multiple actions asserting all manner of claims against the government." *Bennett*, 206 Ariz. at 524 ¶ 16.

Plaintiffs premise their standing on a purported injury to the Legislature as a whole, alleging that "[t]he Legislature has institutional interests in defending the proper scope of authority delegated to other branches of government, including the Secretary." Verified Special Action Compl. for Decl. & Inj. Relief ¶ 8 ("Compl."); *see also* Reply in Supp. of Pls.' Mot. for Prelim. Inj. at 4 ("Reply").[1] They also note that, "[a]s leaders of the Arizona Legislature, the Speaker and President have authority to take legal action to prevent institutional injuries to the Legislature." Compl. ¶ 10. But while legislative authorization to initiate suit might be *necessary* for legislative standing—and even then, the adequacy of the broad, unspecific authorization on which Plaintiffs rely is in dispute—it is not alone

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

sufficient: Plaintiffs must still "allege[] a direct institutional injury." *Forty-Seventh Legislature*, 213 Ariz. at 487 ¶¶ 16, 18. They have failed to do so.

In their complaint and reply in support of their preliminary-injunction motion, Compl. ¶¶ 8–10, Reply at 4, Plaintiffs articulate various injuries that *can* confer legislative standing, but none is actually present here. *Cf. Tennessee ex rel. Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 511–12 (6th Cir. 2019) ("Merely alleging an institutional injury is not enough."). For example, Plaintiffs repeatedly cast the Legislature as an injured party because its authority to create laws is allegedly threatened by the EPM. *See* Compl. ¶ 9, Reply at 3–5. But the Legislature remains free to enact voting- and election-related laws notwithstanding the EPM—and *has done so* since the EPM was adopted. *See, e.g.*, H.B. 2785, 56th Leg., 2d Reg. Sess. (Ariz. 2024). The caselaw that Plaintiffs cite demonstrates why no institutional injury exists here. *See, e.g.*, Compl. ¶ 9; Reply at 4. Unlike in *Coleman v. Miller*, 307 U.S. 433 (1939), for instance, there are no allegations about "'maintaining the effectiveness' of a vote," as there might be if, for example, the Governor improperly vetoed a legislative enactment, Compl. ¶ 8 (quoting *Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 418 ¶ 11 (2014)). For the same reason, Plaintiffs' reliance on *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006), in which the Arizona Supreme Court considered whether the governor exceeded his authority by vetoing a legislative act, is misplaced—Plaintiffs do not allege that the Secretary exceeded his authority in promulgating the EPM in the first instance. Plaintiffs also cite the U.S. Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, but the Legislature had standing there because the challenged initiative would have "'completely nullif[ied]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." 576 U.S. 787, 804 (2015) (quoting *Raines v. Byrd*, 521 U.S. 811, 823–24 (1997)).

Here, by contrast, the Secretary has not sought to strip the Legislature of its authority to enact election rules; quite the contrary, he issued the EPM pursuant to the very authority that *the Legislature itself* prescribed through statute. Nor is this an instance where the

Legislature's "specific powers are disrupted" or their constitutionally assigned role is intruded upon. *Priorities USA v. Nessel*, 978 F.3d 976, 982 (6th Cir. 2020); *Tenn. Gen. Assembly*, 931 F.3d at 511–12; *see also* Reply at 4. As discussed, the Legislature has continued to enact voting- and election-related laws since the EPM was adopted.

None of the other authorities Plaintiffs cite give them standing here. (Indeed, given the short shrift Plaintiffs give them, their citations most likely reflect a "kitchen-sink" attempt to save their suit, not serious arguments for standing.) For example, Plaintiffs cite Arizona's declaratory-judgment statute as a basis for standing, *see* Compl. ¶ 8; Reply at 5, but never explain how the Legislature's "rights, status or other legal relations are affected" by an EPM adopted consistent with the statutory process, A.R.S. § 12-1832. Relying on *Biggs*, 236 Ariz. at 418 ¶ 11, Plaintiffs wrongly suggest that an even lower threshold for standing applies, and it is enough if Plaintiffs articulate some "interest" in the action, here a purported "interest in maintaining the effectiveness of a vote," as to the Legislature's delegation of authority to the Secretary. *See* Reply at 5. But that delegation has not been nullified; it is threatened only by Plaintiffs' lawsuit. Nor is the discussion of standing for mandamus actions in *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62 ¶¶ 10–11 (2020), helpful in this special action, which seeks to "prohibit[] the Secretary from enforcing or implementing" the challenged provisions of the EPM, Compl. 21, not compel him to perform a legally imposed duty, *see Sears*, 192 Ariz. at 69 ¶ 11 (mandamus does not lie "to restrain a public official from doing an act" or where "the action of a public officer is discretionary" (citations omitted), *id.* at 68 ¶ 11). And *Cochise County v. Kirschner* concerned an exercise of administrative discretion beyond what was provided by statute and did not address standing, *see* 171 Ariz. 258, 261–62 (App. 1992), while here the Secretary is specifically charged with "prescrib[ing election] rules," A.R.S. § 16-452(A).

At bottom, Plaintiffs cannot manufacture a cognizable injury based on mere "disagreement between political branches." Reply at 4–5. The U.S. Supreme Court has noted the distinction between "the level of vote nullification at issue in *Coleman*"—which is to say, the sort of concrete institutional injury that confers legislative standing—and "the

abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826. Plaintiffs' asserted injury falls squarely within the latter category: a disagreement with how the law should be interpreted, not any actual harm to the Legislature's institutional interests or constitutional prerogatives. All Plaintiffs have claimed is "[a]n allegation of generalized harm that is shared alike by all or a large class of citizens generally"—namely, that election laws are not being interpreted to their liking—which "is not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16.[2]

Ultimately, this is a case where Plaintiffs are attempting to "coerce[]" the judiciary "into resolving political disputes between the executive and legislative branches"—precisely a situation in which Arizona courts have applied a more rigorous standing inquiry. *Bennett*, 206 Ariz. at 525 ¶ 20 ("Concern over standing is particularly acute when, as here, legislators challenge actions undertaken by the executive branch."). Plaintiffs' suggestion that the Court should dispense with standing requirements any time an election issue is presented, Reply at 5–6, flips bedrock separation of powers principles on their head. While Plaintiffs disagree with the Secretary's interpretation of the state's election laws, they are free to use the legislative process to respond—this Court should not step in as a referee. Because Plaintiffs lack standing, they have no right to injunctive relief, and their claims must be dismissed.

II. Plaintiffs cannot succeed on the merits of their claims because their claims fail as a matter of law.

This lawsuit attempts to obscure a critical legal reality: It is squarely within the Secretary's authority to prescribe rules related to voter registration and elections. A.R.S. § 16-452(A). Thus, to prevail, it is not sufficient for Plaintiffs to demonstrate that the EPM

[2] For this reason, the legislative authorization on which Plaintiffs rely cannot be properly invoked in this case. Plaintiffs are allowed only to assert claims "arising out of [an] injury to the [Legislature's] powers or duties." *Senate Rules: Fifty-Sixth Legislature* 6, Ariz. S., https://www.azsenate.gov/alispdfs/SenateRules2023-2024.pdf (last visited Mar. 25, 2024); *Rules of the Arizona House of Representatives: 56th Legislature* 3, Ariz. H.R., https://www.azhouse.gov/alispdfs/AdoptedRulesofthe56thLegislature.pdf (last visited Mar. 25, 2024). Here, no such legislative injury has actually been alleged.

establishes a rule that is not codified in statute: rather, Plaintiffs must demonstrate a direct conflict between an EPM provision and a statute. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022). They fail to do so. The challenged EPM provisions are consistent with Arizona's statutes and were properly adopted. They therefore have the force of law, and Plaintiffs' claims necessarily fail.

A. The Secretary must prescribe rules interpreting and implementing Arizona election law to ensure uniformity across counties.

Arizona law mandates that the Secretary "*shall* prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A) (emphasis added); *see also Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 15 (noting that "[t]he Legislature has expressly delegated to the Secretary the authority to promulgate" voting-related rules). Consistent with this delegation, the Secretary may prescribe rules interpreting and implementing statutory commands. *See Griffith Energy, L.L.C. v. Ariz. Dep't of Revenue*, 210 Ariz. 132, 137 ¶ 23 (App. 2005) ("Although the legislature cannot delegate the authority to enact laws to a government agency, it can allow the agency 'to fill in the details of legislation already enacted.'" (quoting *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971))). And, "[o]nce adopted, the EPM has the force of law." *Ariz. Pub. Integrity All.*, 250 at 63 ¶ 16. Only in the rare instance where the EPM "contradicts" state law does it lose that distinction. *Leibsohn*, 254 Ariz. at 7 ¶ 22. This is not that rare case.[3]

[3] Nor is it "problematic" that any EPM provision might have been added after the public-comment period, as Plaintiffs suggest. *See* Compl. ¶¶ 27, 29. Notably, Plaintiffs fail to identify any actual legal claim regarding the EPM's ratification process. The purpose of the notice-and-comment period—which is *not* statutorily required—is to solicit feedback about how the draft EPM should be edited, so it is not surprising that additions, deletions, or amendments might occur after this period. At any rate, the 2023 EPM was approved by the Governor and Attorney General and has the force of law. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16.

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

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

A.R.S. § 16-544(L) provides that, "[o]n or before January 15 of each odd-numbered year, the county recorder or other officer in charge of elections shall send a notice to each voter who is on the [AEVL] and who did not vote an early ballot in all elections *for two consecutive election cycles*." (Emphasis added). The statute defines an "election cycle" as "the two-year period beginning on January 1 in the year after a statewide general election." A.R.S. § 16-544(S). Putting these two provisions together, AEVL removal notices can be sent only to voters who did not cast early ballots in all elections *for two consecutive two-year periods beginning on January 1 in the year after a general election*. As Plaintiffs acknowledge, S.B. 1485, which amended A.R.S. § 16-544 to add the AEVL removal process, took effect on September 29, 2021. Compl. ¶¶ 42 n.3, 74; Mot. 8. While it might be true that "S.B. 1485 [] was operative throughout all statewide elections held during the 2022 election cycle," Mot. at 11, it is also true that it was *not* in effect for the entire two-year period beginning on January 1, 2021. Accordingly, the first full "election cycle" as contemplated by A.R.S. § 16-544(L) began on January 1, 2023, and the second will begin on January 1, 2025—meaning that, as the EPM correctly reflects, AEVL notices can be sent out *at the earliest* after the conclusion of the 2025–2026 election cycle, in January 2027.

Plaintiffs' focus on retroactivity, *see* Mot. 9–10; Reply 9–10, is a red herring. Regardless of the EPM's purported basis for beginning the AEVL maintenance process on January 15, 2027, it does not "unilaterally postpone" issuance of notices until that date, Reply at 9—that is its proper commencement date under the plain terms of A.R.S. § 16-

544. Plaintiffs might wish to remove voters earlier, but "[f]idelity to the statutory text," Mot. at 8, *requires* the process outlined by the EPM.[4]

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

Count V fails to state a claim that the EPM's guidance on the duty to canvass directly conflicts with statutory authority. *See* Compl. ¶¶ 48–54, 91–107; Mot. 13. Indeed, the EPM is consistent with Arizona law and will ensure the timely certification of election results.

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

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

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

Arizona law requires that the boards of supervisors complete the canvass of election returns by a specified deadline. *See* A.R.S. § 16-642(A). To complete the canvass, boards must prepare an "official canvass," recording "the number of ballots cast," "the number of votes . . . received by each candidate," and the "the number of votes . . . for and against" each proposed amendment or other measure on the ballot. *Id.* § 16-646(A). The statutory provisions specify that "[t]he result printed by the vote tabulating equipment, . . . when certified by the board of supervisors or other officer in charge, *shall* constitute the official canvass of each precinct or election district." *Id.* § 16-622(A) (emphasis added). These duties are mandatory, not discretionary, as reflected by the plain statutory text: A board "*shall*" canvass the county's election results and "*shall*" prepare an "official canvass," which "*shall*" reflect the results printed by tabulation equipment. *Id.* §§ 16-622(A), 16-642(A), 16-646(A) (emphases added); *see also Ins. Co. of N. Am. v. Superior Ct. ex rel. Cnty. of Santa Cruz*, 166 Ariz. 82, 85 (1990) (in banc) ("The use of the word 'shall' indicates a mandatory intent by the legislature."). By stating that the boards "shall" perform certain tasks, this statutory scheme "lists duties, not powers." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 132 ¶ 19 (2020) (rejecting argument that statutes conferred discretion). Thus, the Legislature has established the boards' nondiscretionary duty to canvass election returns without rejecting the results, changing the vote totals, or delaying certification.[5]

Plaintiffs claim that the EPM "directly conflicts with the plain language of A.R.S. §§ 16-642, 16-643, 16-646," Compl. ¶ 103, but cannot point to any language in those statutes permitting boards to change vote totals, reject election results, or delay certification beyond the statutorily imposed deadline. To the contrary, these statutes require boards to perform the mandatory acts of canvassing by a specified deadline, A.R.S. § 16-642(A), in

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

public, *id.* § 16-643, and by preparing an "official canvas" containing "[t]he result printed by the vote tabulating equipment," *id.* § 16-622(A).

Plaintiffs' claim that Arizona law does not "forbid[] boards of supervisors from independently evaluating the election returns," Mot. 14, incorrectly presumes that boards have unlimited authority absent statutory prohibitions. This is backwards: Arizona courts have consistently stressed that boards have *only* those powers "expressly conferred by statute" and "may exercise no powers except those specifically granted by statute and in the manner fixed by statute." *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (first quoting *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363 (1967); and then quoting *Mohave County v. Mohave-Kingman Ests., Inc.*, 120 Ariz. 417, 420 (1978)); *see also Ariz. All. for Retired Ams., Inc. v. Crosby*, 537 P.3d 818, 824 (App. 2023) (rejecting Cochise County's attempt to implement hand-count audit procedures because "counties must follow [prescribed] method unless and until the legislature determines otherwise"). Plaintiffs further claim that "the EPM unlawfully constricts the county boards of supervisors' canvassing authority," Mot. 13, but this is without merit. Plaintiffs do not and cannot point to any statutory authority permitting boards to perform any canvassing-related actions not reflected in the EPM, and the EPM cannot "constrict[]" boards from performing activities that they are otherwise foreclosed from undertaking. In short, the EPM accurately states that the boards have "no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order," Compl. Ex. 1, at 248, since there is no statutory authority for boards to independently evaluate election returns or otherwise perform these proscribed post-election activities.[6]

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

Plaintiffs' contrary argument hinges entirely on the meaning of "determining" in A.R.S. § 16-643, which states that "[t]he canvass of the election returns shall be made in public by opening the returns, other than the ballots, and determining the vote of the county." Plaintiffs are simply wrong to suggest that this language "empowers the Board" to change vote totals or reject election results. Compl. ¶¶ 100–01. Arizona law requires that "[w]ords and phrases shall be construed according to the common and approved use of the language," A.R.S. § 1-213(A), and, "[a]bsent statutory definitions, courts generally give words their ordinary meaning, and may look to dictionary definitions," *DBT Yuma, L.L.C. v. Yuma Cnty. Airport Auth.*, 238 Ariz. 394, 396 ¶ 9 (2015) (citation omitted). Here, neither Arizona statues' general definitions, *see* A.R.S. § 1-215, nor the provisions of Title 16 specifically define the word "determine," so the word is interpreted using its ordinary meaning: "to fix conclusively or authoritatively." *Determine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/determine (last visited Mar. 25, 2024). To "fix," in turn, means "to make firm, stable, or stationary" or "to give a permanent or final form to." *Fix*, Merriam-Webster, https://www.merriam-webster.com/dictionary/fix (last visited Mar. 25, 2024). Consistent with these definitions, during the canvass of election returns, vote totals are "conclusively" and "authoritatively" put in "final form." Nothing empowers boards to *change* vote totals, *reject* election results, or *delay* certification.

Pursuant to the Secretary's statutory authority to regulate voting and the counting and tabulation of votes, *see* A.R.S. § 16-452(A), the EPM states that the Secretary must canvass election results within 30 days of an election, even if a county fails to transmit its canvass by that date as required by law. Compl. Ex. 1, at 252. Plaintiffs challenge this guidance as inconsistent with A.R.S. § 16-648(C). Compl. ¶¶ 54, 105. But A.R.S. § 16-648(C) was *repealed* by H.B. 2785 and *is no longer law*.[7] Separately, H.B. 2785 establishes clear deadlines for both counties and the Secretary to complete their canvasses, and thus reinforces the boards' and the Secretary's ministerial, nondiscretionary duty to complete

[7] Plaintiffs, incidentally, both voted for H.B. 2785. *See Votes: AZ HB2785*, LegisScan (Feb. 9, 2024), https://legiscan.com/AZ/votes/HB2785/2024.

their canvass by the statutory deadline. *See* A.R.S. § 16-642(A). This duty is consistent with the EPM's provision that an unlawful delay by a county cannot engender further misconduct by the Secretary—namely, unlawfully delaying his canvass in turn.

Finally, Plaintiffs' concern that the EPM's guidance could allow the Secretary to disenfranchise entire counties and "potentially millions of voters" has no basis in law. *See* Compl. ¶ 105; *see also id.* at ¶¶ 53–54; Mot. at 16; Reply at 11. The EPM does not allow the Secretary to discount the canvasses of any county that timely transmits its canvass. Compl. Ex. 1, at 252. Therefore, counties can ensure that the votes of their residents are counted by timely completing and transmitting their canvasses—as required by law. In the event a county fails to complete its canvass in the time prescribed by statute, the courts can be called on to ensure that this nondiscretionary duty is completed. *See, e.g.*, Minute Entry, *Ariz. All. for Retired Ams., Inc. v. Crosby*, No. CV-2022-00552 (Cochise Cnty. Super. Ct. Dec. 1, 2022) (ordering board of supervisors to meet and canvass its election results that day).

D. Count VI should be dismissed because it does not allege a legal claim and the EPM accurately reflects Arizona's current legal landscape.

Finally, Count VI of the complaint fails for a clear reason: It does not (and cannot) point to any statute or law that has been violated. *See* Compl. ¶¶ 108–16. Plaintiffs claim that the EPM "pick[s] and choose[s] which judicial rulings to adopt substantively," and that the Secretary incorporated some "non-final and non-injunctive rulings" while ignoring others. *Id.* ¶ 110. But Plaintiffs merely make general references to Arizona's declaratory-judgment act and the EPM statute and do not identify any such inconsistencies or explain *how* the Secretary's purported (mis)interpretations of court rulings violate Arizona law. Absent a cognizable cause of action, Count VI fails as a matter of law. *See, e.g.*, *Hannosh v. Segal*, 235 Ariz. 108, 111 ¶ 4 (App. 2014) (dismissal is appropriate where "the plaintiff would not be entitled to relief even if all alleged facts could be proven to be true").

Even if Plaintiffs could identify some legal basis for this claim, their complaint fails to allege that the EPM does not accurately reflect Arizona's current legal landscape.

Plaintiffs primarily fault the EPM for "incorporat[ing] certain non-final and non-injunctive rulings from" the federal case *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB (D. Ariz. 2024), *see, e.g.*, Compl. ¶¶ 109–10, but most of the EPM's references to that case state simply that "[l]itigation is pending," Compl. Ex. 1, at 3 n.5, 12 n.8, 15 n.13, 22 n.19, 40 nn.25–26, 41 n.27. Otherwise, the EPM's treatment of *Mi Familia Vota* and other cases accurately reflect federal-court rulings. For example, the EPM references a 2018 consent decree entered into by a former Secretary of State, *see id.* at 6 (citing Consent Decree, *League of United Latin Am. Citizens of Ariz. v. Reagan*, No. 2:17-cv-04102-DGC (D. Ariz. June 18, 2018), ECF No. 37), on which the *Mi Familia Vota* court relied in a summary-judgment ruling last year, *see id.* at 12 n.9 (citing *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *12 (D. Ariz. Sept. 14, 2023)). The EPM cites that same order in noting that "a federal court has declared these provisions preempted by the NVRA" and in further describing the *Mi Familia Vota* court's summary-judgment conclusions. *Id.* at 14 n.11; *see also id.* at 12 n.9, 15 nn.14–15, 22 n.20. Last month, the *Mi Familia Vota* court issued a final order after a 10-day bench trial. *See generally Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406 (D. Ariz. Feb. 29, 2024). Not only did that final order decline to disturb the court's earlier summary-judgment conclusions, but it also incorporated many of them by reference. *See, e.g.*, *id.* at *3 nn.9–10, 12, *41. Accordingly, the EPM simply reports and reflects the final judgments of a federal court—which are, of course, binding on State officials. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18–20 (1958) (per curiam).

The EPM also cites a temporary restraining order entered by a federal court in describing "actions that likely constitute voter intimidation or harassment." Compl. Ex. 1, at 74 n.40 (citing *Ariz. All. for Retired Ams. v. Clean Elections USA*, 638 F. Supp. 3d 1033 (D. Ariz. 2022)). Although that order was subsequently vacated on mootness grounds, the Ninth Circuit did not disturb the district court's substantive conclusions. *See Ariz. All. for Retired Ams. v. Clean Elections USA*, No. 22-16689, 2023 WL 1097766, at *1 (9th Cir. Jan.

26, 2023). Again, Plaintiffs do not and cannot explain how the EPM's accurate recounting and application of federal-court orders somehow constitutes unlawful action.[8]

Plaintiffs further accuse the EPM of "not incorporating substantive rulings" from a pending case in Yavapai County Superior Court. Compl. ¶ 110. But the only ruling that litigation has produced is a non-binding order denying motions to dismiss, *see* Under Advisement Ruling & Order, *Arizona Free Enterprise Club v. Fontes*, No. S1300CV2023-00202 (Yavapai Cnty. Super. Ct. Sept. 1, 2023)—which, substantive or not, has no effect on the application of any Arizona election law, and thus could not be "incorporat[ed]" into the EPM's mandated procedures.

In short, even if Plaintiffs had a cognizable legal hook for Count VI, they fail to identify *any* treatment of court decisions in the EPM that is even inaccurate, let alone misleading to the point of unlawfulness. This claim, like the others, should be dismissed.

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

Contrary to Plaintiffs' claim, the remaining injunction factors are not "effectively subsumed into the plaintiff's [sic] success on the merits." Reply at 2 (citing *Ariz. Pub. Integrity All*, 250 Ariz. at 64 ¶ 27). As the Court of Appeals recently clarified, a showing of other injunction factors is still required unless the challenged provision has been declared unlawful in a separate proceeding. *See City of Flagstaff v. Ariz. Dep't of Admin.*, 526 P.3d 152, 159 (App. 2023) (holding "failure to show irreparable harm is dispositive" where challenged assessment had not been declared unlawful in any proceeding besides the instant one). Because no court has previously declared the challenged EPM provisions unlawful, Plaintiffs must satisfy the remaining equitable factors. *See Swain v. Bixby Vill. Golf Course Inc*, 247 Ariz. 405, 413 ¶ 33 (App. 2019) (Courts considering permanent injunctive relief consider "equitable considerations, such as the parties' relative hardships, the parties' misconduct, public interest, and adequacy of other remedies."). They fail to do so.

[8] Nor do Plaintiffs identify anything suspect in the EPM's treatment of other state-court rulings. *See* Compl. Ex. 1, at 118 n.56 (citing *Leibsohn v. Hobbs*, 254 Ariz. 1 (2022)); *id.* Ex. 1, at 119 n.57 (citing Under Advisement Ruling & Order, *Leibsohn v. Hobbs*, No. CV 2022-009709 (Maricopa Cnty. Super. Ct. Aug. 18, 2022)).

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

Other equitable considerations also militate against an injunction. Plaintiffs' requested relief is not in the public interest. The Arizona Supreme Court has explained, "[e]lection laws play an important role in protecting the integrity of the electoral process," and "public officials should, by their words and actions, seek to preserve and protect those laws." *Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶ 4. By contrast, "when public officials, in the middle of an election, change the law"—or, in this case, *seek* a court order that would require the Secretary to change the law—"based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process." *Id.* Plaintiffs should not be allowed to ignore the law, which in some cases they themselves enacted, and inject uncertainty into the electoral process—especially where they retain the legislative power to enact whichever election laws they and their caucuses see fit.

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

CONCLUSION

For these reasons, Amici Curiae Arizona Alliance for Retired Americans and Voto Latino respectfully request that the Court deny injunctive relief and dismiss Plaintiffs' verified special action complaint with prejudice.

RESPECTFULLY SUBMITTED this 25th day of March, 2024.

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