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12 **ARIZONA SUPERIOR COURT**

13 **MARICOPA COUNTY**

14 WARREN PETERSEN, in his official
15 capacity as the President of the Arizona
State Senate; and STEVE
16 MONTENEGRO, in his official capacity
as the Speaker of the Arizona House of
17 Representatives

18 Plaintiffs,

19 v.

20 ADRIAN FONTES, in his official
21 capacity as Arizona Secretary of State,

22 Defendant.

No. CV2024-001942

**REPLY IN SUPPORT OF
MOTION FOR STAY
PENDING APPEAL**

(Assigned to Hon. Scott Blaney)

23
24 Defendant Arizona Secretary of State Adrian Fontes is seeking a limited stay of
25 this Court's March 4, 2025 Judgment pending appeal to avoid irreparable harm to the
26 Secretary and to prevent serious harm to the public interest in the form of
27 disenfranchisement of voters and National Voter Registration Act ("NVRA")
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1 enforcement actions against county recorders. Weighed against these grave harms is
2 Plaintiffs' interest in having the legislation their legislative chambers enacted be carried
3 out, without regard to contrary federal law. Moreover, while the requested stay will
4 permit county recorders to move certain voters to inactive status instead of canceling
5 their voter registrations outright, it will not thwart the purpose of the statute—preventing
6 ineligible voters from casting ballots—because Arizona law requires inactive voters to
7 affirm their residence in-person before voting. As explained more fully below, the
8 Secretary has a strong likelihood of success on the merits of this claim, and the equities
9 weigh heavily in favor of granting the limited stay the Secretary seeks.

10 “A party seeking a stay on appeal must . . . establish the following elements: (1) a
11 strong likelihood of success on the merits; (2) irreparable harm if the stay is not granted;
12 (3) that the harm to the requesting party outweighs the harm to the party opposing the
13 stay; and (4) that public policy favors granting of the stay.” *Smith v. Ariz. Citizens Clean*
14 *Elections Comm’n*, 212 Ariz. 407, 410, ¶ 10 (2006). (parentheses added). This analysis
15 does not call for a rigid application of the factors favoring or opposing a stay, but is a
16 “sliding scale”—the greater the likelihood of success on the merits, the lower the need to
17 show hardship, and vice versa. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). “The
18 critical element in this analysis is the relative hardship to the parties.” *Id.*

19 Here, the Secretary’s likelihood of success on the merits, the irreparable harm to
20 the Secretary, and the public interest all militate in favor of the limited stay requested.

21 **I. The Secretary has a strong likelihood of success on the merits.**

22 The Secretary is likely to succeed on appeal because the NVRA preempts A.R.S.
23 § 16-165(A)(9)(b). To the extent state law requires immediate cancellation of voter
24 registrations, as opposed to moving those voter registrations to inactive status for the two-
25 election-cycle period the NVRA requires, the state law is pre-empted. *See* 52 U.S.C. §
26 20507(d)(1)(B)(ii). Simply put, the summary jury reports are derived from juror
27 questionnaires that do not adequately inform voters of their potential effect on voter
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1 registration, and do not constitute the direct communication from voter to county recorder
2 that would allow registration cancellation instead of placement on inactive status for the
3 period the NVRA requires. The Secretary has a strong likelihood of success on the
4 merits.

5 Plaintiffs rely on the same Seventh Circuit cases that informed the Secretary’s
6 drafting of EPM Ch. 1, § 9(C)(1)(b) and which the Motion for Stay Pending Appeal (the
7 “Motion”) explained. (See Mot. at 5-6; Resp. at 4-5 (citing *League of Women Voters of*
8 *Ind., Inc. v. Sullivan*, 5 F.4th 714, 723 (7th Cir. 2021) (“*LWV Ind.*”) and *Common Cause*
9 *Ind. v. Lawson*, 937 F.3d 944, 961 (7th Cir. 2019)). Plaintiffs cite no other authority to
10 support their view of the NVRA requirements, and they misinterpret *LWV Ind.* and
11 *Common Cause*.

12 The Seventh Circuit cases provide significant and persuasive explanations why
13 their statutes, which are similar to Arizona’s juror questionnaire summary law, all violate
14 the NVRA. In *Common Cause*, the state amended its law so that when a voter registered
15 to vote in a different state that voter’s earlier registration would be cancelled when the
16 new out-of-state registration was reported to an interstate voter registration program
17 known as “Crosscheck.” *Common Cause Ind.*, 937 F.3d at 957-58. But the *Common*
18 *Cause* court explained that under the NVRA, “[t]he only way to know whether voters
19 want to cancel their registration is to ask them.” *Id.* at 960. Indeed, the court explained
20 multiple circumstances where a voter may move, register in a new state, and yet move
21 back and must be able to rely on the NVRA’s voter registration protections to prevent
22 their wrongful removal. *Id.* Simply put, the “ordinary meaning of ‘remov[al] . . . at the
23 request of the registrant’ is that *the registrant requests removal.*” *Id.* at 960.

24 In *LWV Ind.*, the Indiana legislature made another attempt after the *Common*
25 *Cause* decision to cancel voter registration more quickly than generally allowed under the
26 NVRA. The legislation in *Common Cause* allowed cancellation based on out-of-state
27 information obtained via Crosscheck, while the legislation at issue in *LWV Ind.* “replaced
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1 Crosscheck with a new system” but this change was “largely cosmetic” and “functionally
2 identical to Crosscheck.” *LWV Ind.*, 5 F.4th at 719. Ultimately, the *LWV Ind.* court
3 found the NVRA pre-empted Indiana law to the extent that it required cancellation of a
4 voter’s registration “if there appears to be a duplicate registration and the non-Indiana
5 registration postdated Indiana’s registration” when that cancellation must be done
6 “without any further inquiry” to the voter. *Id.* at 724. The Seventh Circuit fully
7 explained why the text of the Indiana’s law violated, and was thus pre-empted by, the
8 NVRA. *Id.* at 723-27. The same logic applies to Arizona’s jury questionnaire law,
9 which relies on third-hand knowledge that, as a summary, does not provide the proof of
10 the voter’s intent that was similarly missing from, and therefore fatal to, Indiana’s laws in
11 *Common Cause* and *LWV Ind.*

12 Plaintiffs argue that the Secretary was “not obligated to affirmatively opine” on
13 the interplay between the NVRA and A.R.S. § 16-165(A)(9)(b), nor “gratuitously
14 anticipate and adjudicate a hypothetical challenge to it.” (Resp. at 3). But this argument
15 ignores the Secretary’s statutory duties to “coordinat[e] state responsibilities under [the
16 NVRA]” and to develop and administer the statewide voter registration database. A.R.S.
17 §§ 16-142(A)(1), -168(J). Arizona law mandates that the Secretary “provide for
18 maintenance of the [statewide voter registration] database, including provisions regarding
19 removal of ineligible voters that are consistent with the [NVRA].” A.R.S. § 16-168(J).
20 And federal law requires the Secretary, “as the chief State election official to be
21 responsible for coordination of State responsibilities under this chapter.” 52 U.S.C. §
22 20509. The EPM provision this Court enjoined carries out those statutory duties. In
23 other words, the EPM properly addresses voter registration issues pursuant to both State
24 and Federal law, and specifically to “coordinate” Arizona’s duties under the NVRA. *Id.*;
25 A.R.S. § 16-142(A)(1).

26 Plaintiffs further argue that it “is the province of the Court,” not the Secretary, to
27 “interpret and harmonize election laws.” (Resp. at 3). While the Secretary agrees that
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1 courts are the final word on interpretation of laws, in the absence of such an
2 interpretation, the Secretary is well within his statutory authority to recognize the
3 NVRA's preemptive effect on A.R.S. § 16-165(A)(9)(b) in the EPM. Moreover, the
4 EPM is not solely a product of the Secretary. It cannot be issued without the Attorney
5 General's (and Governor's) review and approval. A.R.S. § 16-452(B). The Attorney
6 General is authorized to render opinions on "any question of law relating" to the
7 Secretary's office, including his obligations regarding voter registration list maintenance.
8 Accordingly, it was appropriate for the Secretary to include in the EPM a provision that
9 harmonized the NVRA with state law.

10 **II. The costs—in dollars and staff time—of reprogramming the statewide voter**
11 **registration system constitute irreparable harm.**

12 As explained in the Motion, absent a stay, the Secretary will need to reprogram the
13 statewide voter registration system to immediately cancel the voter registrations of those
14 who inform jury commissioners that they are not county residents, instead of moving
15 those voters to inactive for the two-election-cycle period required by the NVRA.
16 Without a stay, and if successful on appeal, the Secretary must ensure the statewide voter
17 registration system can track all those cancelled voters in order to ensure the ability to
18 identify voters cancelled under this law and revert them back to inactive, as well as
19 change the statewide voter registration database programming yet again to revert to the
20 practice before the court entered the Judgment in this case.

21 This involves expenditure of both money and staff time—expenditures that cannot
22 be recouped in this action. While the general rule is that loss of money does not
23 constitute irreparable harm, when that money cannot be recouped in the litigation that
24 caused the expenditure, that loss of funds can constitute irreparable harm. *See Philip*
25 *Morris USA v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., Circuit Justice) ("Normally
26 the mere payment of money is not considered irreparable, but that is because money can
27 usually be recovered from the person to whom it is paid. If expenditures cannot be
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1 recouped, the resulting loss may be irreparable.”) (internal citations omitted); *Mori v.*
2 *Int’l Brotherhood of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., Circuit
3 Justice) (granting stay because escrowed funds “would be very difficult to recover” if the
4 stay were not granted). Unlike a commercial dispute or tort action where money
5 damages are at issue, this declaratory judgment action does not provide a vehicle for the
6 Secretary to recoup the monetary and non-monetary loss that reprogramming the
7 statewide voter registration database will cause.

8 The difficulty regarding programming the voter registration database is further
9 compounded by the special election that is taking place this year. Simple money
10 damages are insufficient compensation when the Secretary and the counties are required
11 to make major modifications to the statewide voter registration database, which may be
12 subject to more revisions later, all conducted on an expedited schedule while they are
13 conducting an unplanned special election. As such, the Secretary will suffer irreparable
14 harm absent a stay. This irreparable harm can only be avoided by the issuance of a stay
15 pending appeal.

16 **III. The balance of hardships and the public interest support a stay.**

17 In addition to the loss of resources that will occur absent a stay, the public interest
18 (including the interests of Arizona’s fifteen county recorders and disenfranchised voters)
19 weighs heavily in favor of stay. Balanced against those interests is Plaintiffs’ assertion of
20 “damage to constitutional structures when executive branch edicts are allowed to
21 subordinate legislative commands.” (Resp. at 8). But here, the Secretary simply seeks a
22 temporary stay to preserve resources and protect county recorders and the public while
23 the court of appeals decides the underlying issue.

24 Plaintiffs’ desire to avoid the NVRA’s limits on their lawmaking authority does
25 not outweigh the interests served by complying with the NVRA’s inactive period. The
26 purpose of A.R.S. § 16-165(A)(9)(b) is manifest on its face—to remove ineligible voters
27 from the voter registration rolls so that they may not cast ballots. But maintaining such
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1 voters on the inactive voters list also serves this purpose. Voters moved to inactive status
2 because their residency within the County is in question cannot cast a ballot until they: 1.)
3 Appear in person in their county to vote; and 2.) Affirm that they reside within the
4 County with appropriate documentation. A.R.S. §§ 16-579, -583(A). As such, the harm
5 to Plaintiffs of the stay requested here is minimal (if not entirely hypothetical).

6 Plaintiffs contend that the likelihood of disenfranchisement of eligible voters is too
7 speculative to support the requested stay. But any voter disenfranchisement is irreparable
8 harm. *E.g., Ariz. All. for Retired Americans v. Hobbs*, 630 F. Supp. 3d 1180, 1197-98 (D.
9 Ariz. 2022) (“The denial of the opportunity to cast a vote that a person may otherwise be
10 entitled to cast—even once—is an irreparable harm.”) (citation omitted). Indeed, even
11 when the prospect of disenfranchisement is extremely remote, courts have concluded that
12 such a potential harm supports injunctive relief. *See Am. Encore v. Fontes*, No. CV-24-
13 01673-PHX-MTL, 2024 WL 4333202, at *21 (D. Ariz. Sept. 27, 2024). Plaintiffs’
14 concern is that a voter who should be marked “cancelled” in the database will be labelled
15 “inactive” instead. The Secretary’s concern is that a validly registered voter, who takes
16 the time to travel to a voting location in their county to cast their ballot will be entirely
17 disenfranchised despite the NVRA. The minimal harm to Plaintiffs from voters
18 remaining on the inactive list, compared to the prospect of even one voter being
19 erroneously disenfranchised strongly supports the Secretary’s stay request.

20 CONCLUSION

21 For the reasons in the Motion and as set forth above, this Court should stay the
22 portion of the judgment that granted declaratory and injunctive relief regarding EPM
23 Chapter 1, § 9(C)((1) pending appeal.

24 RESPECTFULLY SUBMITTED this 14th day of April, 2025.

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FILED via TurboCourt
this 14th day of April, 2025.

COPIES served via TurboCourt and email
this 14th day of April, 2025, to:

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