

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

KRISTIN K. MAYES  
Attorney General  
Firm State Bar No. 14000  
  
Kara Karlson, No. 029407  
Karen J. Hartman-Tellez, No. 021121  
Senior Litigation Counsel  
Kyle Cummings, No. 032228  
Assistant Attorney General  
2005 North Central Avenue  
Phoenix, AZ 85004-1592  
Telephone (602) 542-8323  
Facsimile (602) 542-4385  
[Kara.Karlson@azag.gov](mailto:Kara.Karlson@azag.gov)  
[Karen.Hartman@azag.gov](mailto:Karen.Hartman@azag.gov)  
[Kyle.Cummings@azag.gov](mailto:Kyle.Cummings@azag.gov)  
[adminlaw@azag.gov](mailto:adminlaw@azag.gov)  
*Attorneys for Defendant Arizona*  
*Secretary of State Adrian Fontes*

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

American Encore, an Arizona non-profit corporation; Karen Glennon, an Arizona individual; American First Policy Institute, a non-profit corporation,

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State; Kris Mayes, in her official capacity as Arizona Attorney General; Katie Hobbs, in her official capacity as Governor of Arizona,

Defendant.

No. CV-24-01673-PHX-MTL

**ARIZONA SECRETARY OF STATE'S MOTION TO DISMISS**

1 Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), defendant Arizona Secretary of State  
2 Adrian Fontes (the “Secretary”) moves to dismiss Plaintiffs’ Complaint. (Doc. 1). This  
3 Motion is supported by the following Memorandum of Points and Authorities, which  
4 focuses on Count One of the Complaint. With respect to Count Two, the Secretary joins  
5 the Motion to Dismiss and Response to Motion for Preliminary Injunction filed by  
6 Attorney General Kristin K. Mayes. (Doc. 31, 32).

## 7 MEMORANDUM OF POINTS AND AUTHORITIES

### 8 INTRODUCTION

9 Plaintiffs American Encore, America First Policy Institute, and Karen Glennon,  
10 an Arizona voter who resides in Apache County (collectively, “Plaintiffs”), set forth in  
11 their Complaint a parade of horrors that could only occur if a lengthy chain of  
12 contingencies—including illegal acts perpetrated by third parties not before this Court—  
13 all happen before statutory deadline for the Secretary to conduct the statewide canvass,  
14 and no court order or new legislation otherwise addresses the situation. As election  
15 officials are prone to do, the Secretary has planned for this extremely remote possibility  
16 by including in the Arizona Elections Procedures Manual (the “EPM”) a provision that  
17 reflects current Arizona law, which gives no leeway in the canvass deadline, but notes  
18 that the Legislature and the courts have the power to provide otherwise if this remote  
19 possibility ever materializes. (*See* Doc. 16-1, at 4; Doc. 16-2, at 252) (the “Canvass  
20 Provision”).<sup>1</sup>

21 Lest the Court be concerned that the Secretary would callously move forward  
22 with his canvassing duties without using all of the tools at his disposal to include every  
23 legally-cast vote in the state’s vote totals, it need not be. The Secretary has committed to  
24 using all legal means at his disposal to avoid the dilemma of canvassing without one  
25

26 <sup>1</sup> The Secretary has published the 2023 EPM on his website, in a searchable format:  
27 [https://apps.azsos.gov/election/files/eprm/2023/20231230\\_EPM\\_Final\\_Edits\\_406\\_PM.pdf](https://apps.azsos.gov/election/files/eprm/2023/20231230_EPM_Final_Edits_406_PM.pdf)  
28 [f](https://apps.azsos.gov/election/files/eprm/2023/20231230_EPM_Final_Edits_406_PM.pdf).

1 county's results or not timely canvassing at all, thereby risking the effectiveness of the  
2 entire state's votes. (Doc. 26-3, at 2). And there is precedent for this commitment. As  
3 the Court noted during the July 19, 2024 status conference, the appropriate remedy for a  
4 recalcitrant county's failure to carry out its statutory duties is a mandamus action in state  
5 court, not a federal court's entanglement in state election law and procedures long before  
6 there is any dispute to resolve.

7 At this point, however, the dispute about the Secretary's future actions with  
8 respect to his duty to conduct the statewide canvass is purely theoretical. The harm that  
9 Plaintiffs fear is so remote that they do not have standing to invoke this federal court's  
10 jurisdiction, and Plaintiffs' Complaint must be dismissed on standing and ripeness  
11 grounds. Even if the Plaintiffs could get past their failure to meet the "irreducible  
12 constitutional minimum" of standing, the *Anderson-Burdick* balance weighs in favor of  
13 the state's interests here, and Plaintiffs' Complaint fails to state a claim on which relief  
14 can be granted.

## 15 LEGAL AND FACTUAL BACKGROUND

### 16 I. Arizona's Election Deadlines.

17 Election administration is largely a matter of state law, subject to modification by  
18 Congress pursuant to its Elections Clause power to "make or alter" state laws regarding  
19 the "times, places and manner of holding" federal elections. U.S. Const. Art. I, § 4, cl.1.  
20 In Arizona, the interplay between state and federal law has led to some very tight  
21 deadlines with very little room to accomplish required tasks within the time provided by  
22 law.<sup>2</sup> In particular, the Uniformed and Overseas Citizens' Voting Act ("UOCAVA")

23  
24 <sup>2</sup> See Ariz. Sec. of State Election Calendar 2023-2024, available at:  
25 [https://apps.azsos.gov/election/2024/2024\\_Election\\_Calendar.pdf](https://apps.azsos.gov/election/2024/2024_Election_Calendar.pdf). Pursuant to Fed. R.  
26 Evid. 201(b), the Court may take judicial notice of this and the other government-  
27 published documents cited herein that are hosted on a government website in considering  
28 this Motion to Dismiss. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th  
Cir. 2010); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)  
(assessing Rule 12(b)(6) motion, courts may "consider . . . matters of which a court may  
take judicial notice"); *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000)

1 requires that ballots be sent to UOCAVA voters no fewer than 45 days before an  
 2 election. 52 U.S.C. § 20302(a)(8). As such, after a primary election, ballots for the  
 3 general election must be finalized and printed before the UOCAVA deadline, which falls  
 4 in mid-September. In addition, in 2024, the Electoral Count Act, as modified by the  
 5 Electoral Count Reform Act, requires that the governor issue certificates of  
 6 ascertainment of appointment of Presidential electors by December 11, 2024—36 days  
 7 after the November 5, 2024 general election. 3 U.S.C. § 5(a)(1).

8 Impacting the state’s ability to meet these federal deadlines are two post-election  
 9 actions governed by state law: “automatic” recounts and election contests. In 2022, the  
 10 Arizona Legislature amended A.R.S. § 16-661 to raise the vote difference requiring a  
 11 recount from 200 votes for state and federal offices or 50 votes for legislative seats to  
 12 one-half of one percent of the votes cast for the top two candidates.<sup>3</sup> 2022 Ariz. Sess.  
 13 Laws ch. 230, § 1 (55th Leg. 2d Reg. Sess.). In the first election in which the amended  
 14 recount law was in effect, two statewide races and one legislative race were subject to a  
 15 recount, none of which would have been subject to recount before the law’s  
 16 amendment.<sup>4</sup> In addition, Arizona law permits any elector to file an action contesting an  
 17 election on certain statutory bases. *See* A.R.S. § 16-672(A). Election contests are  
 18 considered and decided on an expedited basis, but from filing to resolution by the  
 19 superior court, may still take up to 20 days. *See* A.R.S. § 16-676(A)-(B). In 2022, the

---

20 (explaining courts “need not accept as true . . . allegations that contradict facts that may  
 21 be judicially noticed by the court”).

22 <sup>3</sup> Under the pre-2022 recount statute, a recount was required when the margin was the  
 23 lesser of the numbers above or one-tenth of one percent. As such, unless the top two  
 24 candidates in a state race received fewer than 200,000 votes combined or 50,000  
 25 combined in a legislative race, the numbers above would control. *See* 2022 Ariz. Sess.  
 26 Laws ch. 230, § 1 (55th Leg. 2d Reg. Sess.)

27 <sup>4</sup> *See In the Matter of the November 8, 2022 General Election for Atty. Gen’l,*  
 28 *Superintendent of Pub. Instr. and State Rep. for Dist.13*, No. CV2022-015915, Petition  
 for Automatic Recount, ¶¶ 4, 6, 8 (Ariz. Super. Ct. Maricopa Cnty., Dec. 5, 2022),  
 available at:

<https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4099/638058525370970000>.

1 losing candidates for Governor, Attorney General, and Secretary of State each filed  
2 contests. The last superior court decision confirming the results of the election in those  
3 cases was entered on December 24, 2022.<sup>5</sup> Recounts and contests of federal, statewide,  
4 and legislative offices cannot be commenced until the election is canvassed by the  
5 counties (for recounts) and the Secretary (for contests). *See* A.R.S. §§ 16-661(A)  
6 (requiring recount based on the margin shown in the canvass); -672(A) (providing for  
7 contest of “the election of any person *declared elected* to a state office, or *declared*  
8 *nominated* to a state office at a primary election) (emphasis added).

9 In view of the strong likelihood of post-election recounts and contests, in early  
10 2024 the Legislature enacted House Bill 2785, which included an emergency clause and  
11 became effective immediately upon the Governor’s signature on February 9, 2024. 2024  
12 Ariz. Sess. Laws, ch. 1 (56th Leg. 2d Reg. Sess.). With respect to election deadlines, H.B.  
13 2785 made three important changes. It moved the 2024 Primary Election from August 6  
14 to July 30, it changed the deadlines for both county boards of supervisors and the  
15 Secretary to canvass elections, and it removed statutory provisions permitting delay of a  
16 county or the state canvass. *See id.* §§ 13-16 (amending A.R.S. §§ 16-642, -645, -646. -  
17 648); § 20 (changing the primary date). In particular, provisions in A.R.S. § 16-642(C)  
18 allowing up to six postponements of a canvass no longer apply to boards of supervisors.  
19 And former A.R.S. § 16-648(C), which allowed for postponement of the state canvass  
20 “[i]f the official canvass of any county has not been received . . . until all canvasses from  
21 all counties are received,” was deleted from the law. 2024 Ariz. Sess. Laws, ch. 1, § 16.  
22 In short, as amended by H.B. 2785, Arizona statutes do not permit a county board of  
23 supervisors or the Secretary to delay their canvassing duties beyond the day set in A.R.S.  
24 § 16-642(A). *See Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1303 (9th Cir.

25  
26 <sup>5</sup> *See Lake v. Hobbs*, No. CV2022-095403, Under Advisement Ruling, at 10 (Ariz.  
27 Super. Ct. Maricopa Cnty., Dec. 24, 2022), available at:  
28 <https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4531/638074764564170000>.

1 1997), *amended* 136 F.3d 1208 (9th Cir. 1998) (stating that the Legislature’s removal of  
2 language from as statute “is a telling clue as to the Legislature's intent.”)

## 3 **II. The Elections Procedures Manual.**

4 While state law governs elections, counties are largely responsible for the conduct  
5 and administration of elections. Consequently, the Arizona Legislature has directed that  
6 “after consultation with each county board of supervisors or other officer in charge of  
7 elections, the secretary of state shall prescribe rules to achieve and maintain the  
8 maximum degree of correctness, impartiality, uniformity and efficiency on the  
9 procedures for early voting and voting, and of producing, distributing, collecting,  
10 counting, tabulating and storing ballots.” A.R.S. § 16-452(A). After obtaining approval  
11 of the Governor and Attorney General, the Secretary issued the 2023 EPM on December  
12 30, 2023. *See* A.R.S. § 16-452(B).

13 Chapter 13 of the 2023 EPM governs certifying election results, including the  
14 content and timing of the canvass of elections by the governing body that conducted an  
15 election. (*See generally* Doc. 16-2 (EPM, at 247-54)). It also provides rules for the  
16 Secretary’s canvass of election results for federal, statewide, appellate court, and  
17 legislative offices, as well as statewide ballot measures. *See id.* at 252. Plaintiffs  
18 challenge a single sentence of the section regarding the Secretary’s canvassing duties:  
19 “[i]f the official canvass of any county has not been received by this deadline, the  
20 Secretary of State must proceed with the state canvass without including the votes of the  
21 missing county (i.e., the Secretary of State is not permitted to use an unofficial vote  
22 count in lieu of the county’s official canvass).” (Doc. 1, ¶ 2 ; Doc. 16-1, at 4).<sup>6</sup> While  
23 the Secretary finalized and issued the 2023 EPM before the statutory amendments from  
24 H.B. 2785, to the extent the manual guides the Secretary’s canvassing duties, it is wholly  
25 consistent with the new law.

26 \_\_\_\_\_  
27 <sup>6</sup> It is worth noting that the Canvass Provision refers to “this deadline,” which in turn  
28 refers to the deadline for the state canvass in former A.R.S. § 16-648(C), a deadline that  
has been superseded by the dates set forth in the current version of A.R.S. § 16-642(A).

**ARGUMENT**

**I. Plaintiff Glennon Lacks Standing.<sup>7</sup>**

Standing “is a core component of the Article III case or controversy requirement.” *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 897 (9th Cir. 2011). The party invoking federal jurisdiction bears the burden of establishing each element of standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). “[A]t an ‘irreducible constitutional minimum,’” a plaintiff must demonstrate (1) an injury in fact, (2) that is fairly traceable to the defendant’s conduct, and (3) susceptible to redress by a decision in their favor.” *Lake v. Fontes*, 83 F.4th 1199, 1202-03 (9th Cir. 2023) (cleaned up). Neither “abstract, theoretical concerns,” nor an “interest shared generally with the public at large in the proper application of the Constitution and laws,” will satisfy constitutional standing requirements.” *Id.* Here, Plaintiff’s claim regarding the Canvass Provision fails at each step of the standing analysis.

**A. Glennon’s claimed injuries are too conjectural and speculative.**

To establish an injury in fact, “a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A “concrete” and “particularized” injury must be “real,” not “abstract.” *Id.* And it “must affect the plaintiff in a personal and individual way.” *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quotation omitted). To be “actual or imminent,” a threatened injury must be “certainly impending”—“allegations of possible future injury are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (cleaned up).

---

<sup>7</sup> Plaintiffs do not offer any well-pleaded factual allegations that Plaintiffs American Encore or America First Policy Institute are injured by the Canvass Provision. (See Doc. 1, ¶¶ 11-18, 23-30). Accordingly, this Motion focuses on Plaintiff Karen Glennon’s standing.



1 Here, the injury alleged is purely hypothetical. As such it “is far too speculative  
2 and conjectural” to establish standing. *Drake v. Obama*, 664 F.3d 774, 781 (9th Cir.  
3 2011). Indeed, Plaintiffs argue that the existence of the Canvass Provision changes “the  
4 nature of [Arizona voters’] right to vote and have their vote counted from an unqualified  
5 right to one subject to *potential* disqualification by the actions of government officials.”  
6 (Doc. 1, ¶ 91). Plaintiffs spend several paragraphs of their Complaint positing situations  
7 in which county boards of supervisors fail to carry out their non-discretionary duty to  
8 canvass or unknown non-governmental bad actors prevent a board from complying with  
9 its statutory duty to canvass, but none of these situations are anything more than  
10 conjecture. (*Id.* ¶¶ 82-85).

11 Plaintiffs further point to the Cochise County Board of Supervisors’ failure to  
12 timely canvass the 2022 general election. (*Id.* ¶ 86). They assert that there is a credible  
13 threat of harm to Plaintiff Glennon, an Apache County resident, because if one of the  
14 members of the Cochise County Board had not “backed away from the ledge at the  
15 eleventh hour,” Cochise County voters may not have had their votes included in the  
16 statewide canvass. (*Id.* ¶ 102). What Plaintiffs fail to mention is that the supervisor who  
17 “backed away from the ledge” was ordered to do so after the Secretary filed a mandamus  
18 action and secured relief because a county’s duty to timely canvass is a nondiscretionary  
19 statutory duty. *See Hobbs v. Crosby*, 2022 WL 17406494, No. S0200CV202200553, at  
20 \*2 (Ariz. Super. Ct. Cochise Cnty. Dec. 1, 2022). In addition, Defendant Fontes has  
21 informed Plaintiffs that he “intends to use all lawful means to” enfranchise Arizona  
22 voters, “including seeking judicial remedies if a county fails to timely carry out its duty  
23 to canvass.” (Doc. 26-3, at 2).

24 In short, far from alleging an imminent harm to Plaintiff Glennon’s right to vote,  
25 Plaintiffs have offered nothing more than a “long chain of hypothetical contingencies  
26 that have never occurred in Arizona and must take place for any harm to occur.” *Lake*,  
27 83 F.4th at 1204 (cleaned up). Indeed, only one link in that chain has ever occurred, and  
28



1 Plaintiffs’ own allegations show that it is far less likely to occur in the future. (*See*  
2 Compl. ¶¶ 87-88). As the *Lake* court further explained, “[t]his is the kind of speculation  
3 that stretches the concept of imminence ‘beyond its purpose.’” *Id.* (quoting *Lujan*, 504  
4 U.S. at 564 n.2). As such, Plaintiffs have failed to plead a plausible “real and immediate  
5 threat of” harm to Glennon’s right to vote, and their claim regarding the Canvass  
6 Provision fails at the first step. *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95,  
7 103 (1983)).

8 **B. Plaintiffs raise only generalized grievances, not particularized injury.**

9 In addition to being imminent, an injury must be a “concrete and particularized”  
10 harm, personal to Plaintiff. *See, e.g., Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir.  
11 2020) (generalized “interest in seeing that the law is obeyed” is neither concrete nor  
12 particularized). The existence of the prospect of a recalcitrant county’s votes not being  
13 included in the statewide canvass is a potential harm that every Arizona voter has the  
14 same (extremely remote) risk of experiencing. Indeed, the Complaint contains no  
15 allegation that Apache County is any more likely than another Arizona county to fail to  
16 timely canvass its election results. As such, Plaintiff Glennon has nothing more than a  
17 generalized grievance about the Canvass Provision, which lacks the requisite  
18 particularity to demonstrate standing. *Cf. Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711  
19 (D. Ariz. 2020).

20 **C. Plaintiff’s alleged harm is not fairly traceable to the Canvass Provision.**

21 Even if Plaintiffs could establish an injury, that injury must be “fairly . . .  
22 trace[able]” to the Secretary’s promulgation of the EPM provision they challenge, “and  
23 not . . . th[e] result [of] the independent action of some third party not before the court.”  
24 *Lujan*, 504 U.S. at 560-61 (citation omitted). All of the harm that Plaintiffs allege stems  
25 not from the Secretary’s inclusion of the Canvass Provision in the EPM, but from the  
26 potential illegal actions of the Apache County Board of Supervisors or some unidentified  
27  
28

1 non-governmental bad actors who block the Board from carrying out its statutory duty.  
2 The injury that Plaintiff fears is not traceable to the Secretary.

3 **D. A decision barring enforcement of the Canvass Provision will not redress**  
4 **Plaintiff Glennon's alleged injury.**

5 Finally, it must be likely, as opposed to merely "speculative," that the Plaintiff's  
6 injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation  
7 omitted). Plaintiffs have challenged only the EPM's Canvass Provision. (*See* Doc. 1,  
8 Prayer for Relief). They have not challenged the Arizona statutes that set the deadline  
9 for the statewide canvass, make no allowance for postponing the canvass, and use  
10 mandatory language giving the Secretary no discretion not to follow the law's dictates.  
11 *See* A.R.S. §§ 16-642(A)(2)(b) ("The secretary of state *shall* canvass . . . [f]or the  
12 general election, not later than the third Monday after the election.") (emphasis added).  
13 As such, even in the absence of the Canvass Provision, the Secretary would have no  
14 discretion not to canvass on the date set by Arizona law, even if fewer than all fifteen  
15 counties have completed their own nondiscretionary duty to canvass.

16 **II. Plaintiffs' Claims Are Not Ripe.**

17 As a corollary to Plaintiff's lack of standing is the ripeness doctrine. "A claim is  
18 not ripe for adjudication if it rests upon contingent future events that may not occur as  
19 anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300  
20 (1998) (cleaned up). Plaintiffs bear the burden of demonstrating that their claim  
21 constitutes a live controversy that is ripe for this Court's review. *Renne v. Geary*, 501  
22 U.S. 312, 315-16 (1991). Here, like the Voting Rights Act claim at issue in *Texas v.*  
23 *U.S.*, "we have no idea whether or when" a county's votes will be left out of the  
24 statewide canvass, and therefore "the issue is not fit for adjudication." *Texas*, 523 U.S. at  
25 300 (cleaned up).

### 1 **III. The Eleventh Amendment Bars Plaintiff's Claim.**

2 To the extent that Plaintiffs ask the Court to order the Secretary and Attorney  
3 General, state officials, to diverge from the statutory text and follow a different version  
4 of state law according to Plaintiffs' specific (incorrect) interpretation of it, the Eleventh  
5 Amendment bars their claim regarding the Canvass Provision. (*See* Doc. 1, Prayer for  
6 Relief, ¶ E (seeking a mandatory injunction that the Secretary issue, and the Attorney  
7 General approve "an EPM that complies with the First and Fourteenth Amendments")).

8 The Eleventh Amendment prevents a state from being sued in federal court  
9 without its consent. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir.  
10 2008). This immunity extends to "suit[s] against state officials when the state is," as it is  
11 here, "the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v.*  
12 *Halderman*, 465 U.S. 89, 101 (1984) (quotations omitted). The *Ex parte Young*  
13 exception to this immunity applies only to "claims seeking prospective injunctive relief  
14 against state officials to remedy a state's ongoing violation of federal law." *Ariz.*  
15 *Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (citing *Ex*  
16 *parte Young*, 209 U.S. 123 (1908) (emphasis added)). But Plaintiffs have not challenged  
17 the underlying statutes or alleged ongoing violation of federal law. They have offered  
18 only bare speculation that the Secretary might in the future take steps that will harm  
19 Plaintiff. That is not enough to justify entangling this federal Court in regulation of  
20 Arizona's elections. *See Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1030 (D. Ariz. 2022)

21 Plaintiffs try to disguise their claims as alleged violations of the federal  
22 Constitution. But because their claims turn on application of state law, they are barred.  
23 Courts have repeatedly rejected similar state law claims cloaked as federal law  
24 violations. *See, e.g., S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1204-05  
25 (11th Cir. 2019) (Eleventh Amendment barred alleged federal constitutional claim that  
26 "relied on a determination that state officials had not complied with state law"); *DeKalb*  
27 *Cnty. Sch. Dist. v. Schrenko*, 109 F.3d 680, 682 (11th Cir. 1997) (rejecting attempt to  
28

1 cloak claims in federal constitutional law because the “gravamen” and “substance” of the  
 2 complaint was that the state improperly interpreted and applied a state statute); *Bowyer*,  
 3 506 F.Supp.3d at 716 (“where the claims are state law claims, masked as federal law  
 4 claims” Eleventh Amendment immunity applies) (citing *Massey v. Coon*, 865 F.2d 264  
 5 (9th Cir. 1989)).<sup>8</sup>

#### 6 **IV. Plaintiffs Fail to a State Cognizable Constitutional Claim in Count Two.**

7 “Dismissal [under Rule 12(b)(6)] is proper when the complaint does not make out  
 8 a cognizable legal theory or does not allege sufficient facts to support a cognizable legal  
 9 theory.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir.  
 10 2011). A court generally “must accept as true all material allegations of the complaint,  
 11 and must construe the complaint in favor of the complaining party.” *Hong Kong*  
 12 *Supermarket v. Kizer*, 830 F.2d 1078, 1080 (9th Cir. 1987). But the court is not  
 13 “required to accept as true allegations that are merely conclusory, unwarranted  
 14 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266  
 15 F.3d 979, 988 (9th Cir. 2001). “The complaint is properly dismissed if it fails to plead  
 16 enough facts to state a claim to relief that is plausible on its face.” *In re Gilead Scis. Sec.*  
 17 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (cleaned up).

##### 18 **A. The Canvass Provision Is Not a Severe Burden on Plaintiff’s Right to Vote.**

19 “A court considering a challenge to a state election law must weigh the character  
 20 and magnitude of the asserted injury to the rights protected by the First and Fourteenth  
 21 Amendments that the plaintiff seeks to vindicate against the precise interests put forward  
 22

---

23 <sup>8</sup> Alternatively, the Court should abstain from determining Plaintiffs’ claims under the  
 24 *Pullman* abstention doctrine. “By allowing ‘federal courts to refrain from deciding  
 25 sensitive federal constitutional questions when state law issues may moot or narrow the  
 26 constitutional questions,’” *Pullman* abstention is “intended both to avoid ‘a collision  
 27 between the federal courts and state . . . legislatures’ and to prevent ‘the premature  
 28 determination of constitutional questions.’” *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir.  
 2003) (citation omitted). Plaintiffs’ claims about how the canvass is conducted turns on  
 questions of state law. This sets up precisely the type of collision that *Pullman* aims to  
 avoid. See *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010).

1 by the State as justifications for the burden imposed by its rule, taking into consideration  
2 the extent to which those interests make it necessary to burden the plaintiff's rights.”  
3 *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S.  
4 780, 789 (1983)). The *Anderson-Burdick* “flexible” standard means that although a law  
5 imposing a severe burden on voting rights must meet strict scrutiny, a lesser burden  
6 “trigger[s] less exacting review, and a State’s important regulatory interests will usually  
7 be enough to justify reasonable, nondiscriminatory restrictions.” *Ariz. Democratic Party*  
8 *v. Hobbs*, 18 F.4th. 1179, 1187 (9th Cir. 2021) (cleaned up). Moreover, “states retain  
9 broad authority to structure and regulate elections.” *Short v. Brown*, 893 F.3d 671, 676  
10 (9th Cir. 2018).

11 Plaintiffs assert that the Canvass Provision is a severe burden on Glennon’s right  
12 to vote because it results in “vote nullification” and that “when it becomes operative, all  
13 voters in the affected county are completely disenfranchised.” (Doc. 1, ¶ 112). But the  
14 premise of Plaintiffs’ claim wholly ignores that the loss of the effect of Glennon’s vote,  
15 in the unlikely event that occurred in the future, would be caused not by the Canvass  
16 provision, but by the illegal acts of third parties who are not before the court, or by the  
17 operation of a state law that Plaintiffs have not challenged. An example illustrates the  
18 logical fallacy of Plaintiffs’ argument. Arizona law requires that voters who wish to vote  
19 by mail must return their early ballot to the county recorder by 7:00 pm on election day.  
20 A.R.S. § 16-548(A). If a voter timely deposits their ballot in the mail, but a thief steals  
21 the mail from the U.S.P.S. mail box or a postal worker deliberately does not deliver the  
22 ballot on time, the vote cannot be counted under Arizona law. But the law requiring  
23 timely delivery does not burden the voter’s right to vote. *See Ariz. Democratic Party*, 18  
24 F.4th at 1189. Instead, the intervening acts of third parties prevent the vote from being  
25 counted. So to, the existence of the Canvass Provision does not impose a severe burden  
26 on the right to vote. If Plaintiff’s vote is not included within the statewide canvass, it  
27 will be due to violation of Arizona law by parties not before this court. There is simply  
28

1 no causal link between the severe burden that Plaintiffs allege and the EPM provision  
2 that they challenge.

3       Importantly, when determining the burden, if any, on Plaintiff Glennon’s right to  
4 vote, this Court must presume that county and state election officials will follow the  
5 law—and in particular the provisions of A.R.S. §§ 16-642 and -648 requiring both  
6 county officials and the Secretary to timely carry out their respective canvassing duties.  
7 The only way the burden on Glennon’s right to vote becomes severe is if this Court  
8 assumes a county is not carrying out its canvassing duty, which would violate the EPM,  
9 as well as A.R.S. §§ 16-642(A) and -1009. But government actors are entitled to a  
10 presumption that they will follow the law. *See Dodge v. Meyer*, 444 P.3d 159, 164 &  
11 n.21 (Alaska 2019) (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)  
12 (“Where no evidence indicating otherwise is produced, the presumption of regularity  
13 supports the official acts of public officers, and courts presume that they have properly  
14 discharged their official duties.”)). This Court cannot rely on Plaintiffs’ conjured harm  
15 of illegal acts to establish a burden on the right to vote.

### 16       **B. Compelling State Interests Justify the Canvass Provision.**

17       In view of the slight (indeed, nonexistent) burden on Glennon’s right to vote due  
18 to the Canvass Provision, the Secretary “need not establish a compelling interest to tip  
19 the constitutional scales in its direction.” *Burdick*, 504 U.S. at 439. However, even if  
20 this Court were to require a compelling interest to outweigh Plaintiffs’ alleged burden,  
21 two state interests tip the scales in the state’s favor here: (1) the importance of finality of  
22 elections and (2) not disenfranchising every voter in Arizona.

23       Arizona election laws reflect “the strong public policy favoring stability and  
24 finality of election results.” *Donaghey v. Att’y Gen.*, 584 P.2d 557, 559 (Ariz. 1978)  
25 (requiring strict compliance with the deadlines for election contests). Under Arizona  
26 law, the canvass, which generally constitutes the official results of an election, provides  
27 that finality. And to the extent that other proceedings such as a recount or election  
28

1 contest provide the final results, the county or statewide canvass are the necessary step to  
2 initiate such proceedings. *See* A.R.S. §§ 16-662, -673(A). Without the statewide  
3 canvass, there is no final result at all.

4 Plaintiffs insist that the solution to a county not submitting its official canvass  
5 cannot be the Secretary not including that county's votes, but they are silent as to what  
6 the Secretary should do if the Secretary does not receive the official canvass of a county  
7 by the Secretary's statutory deadline to canvass, and if every other potential cure fails.  
8 The Secretary's "authority is limited to those powers expressly or impliedly delegated to  
9 him by the state constitution or statutes," he does not have the authority to simply choose  
10 to certify unofficial vote counts. *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 307,  
11 ¶ 14 (Ariz. 2020).

12 The problem caused by the Secretary's inability to timely conduct the statewide  
13 canvass is particularly salient with respect to the deadline for certificates of  
14 ascertainment for Presidential electors. Neither the Secretary nor a state court judge can  
15 excuse compliance with the federal deadlines. As such, if one county does not timely  
16 canvass, thereby preventing the Secretary from carrying out his canvassing duties in time  
17 to comply with the Electoral Count Reform Act, the alternative to canvassing without  
18 one county's votes is to not canvass at all—thereby nullifying the vote for president of  
19 every single Arizona voter instead of only those from the recalcitrant county. The  
20 Canvass Provision reflects the Secretary's effort to minimize the follow-on effects of a  
21 county not meeting its statutory obligations and chart a path that protects as many  
22 Arizona voters as possible in the unlikely event the fantastical scenarios Plaintiffs posit  
23 every come to be.

## 24 CONCLUSION

25 For the foregoing reasons, the Court should dismiss Count One with prejudice.  
26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

RESPECTFULLY SUBMITTED this 9th day of August, 2024.

Kristin K. Mayes  
Attorney General

/s/ Karen J. Hartman-Tellez \_\_\_\_\_

Kara Karlson  
Karen J. Hartman-Tellez  
Senior Litigation Counsel  
Kyle Cummings  
Assistant Attorney General  
*Attorney for Defendant Arizona*  
*Secretary of State Adrian Fontes*

RETRIEVED FROM DEMOCRACYDOCKET.COM

**CERTIFICATE OF GOOD FAITH CONFERRAL**

Pursuant to Local Rule 12.1(c), I certify that on August 7, 2024, I participated in a video conference with counsel for Plaintiffs and counsel for Defendant Attorney General Kristin K. Mayes. During the video conference, I notified Plaintiffs' counsel of the issues asserted in the foregoing Motion. Plaintiffs did not offer to make any permissible amendment that would cure the defects in the Complaint.

Kristin K. Mayes  
Attorney General

/s/ Karen J. Hartman-Tellez  
Kara Karlson  
Karen J. Hartman-Tellez  
Senior Litigation Counsel  
Kyle Cummings  
Assistant Attorney General  
*Attorney for Defendant Arizona*  
*Secretary of State Adrian Fontes*

RETRIEVED FROM DEMOCRACYDOCS.COM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9th day of August, 2024, I filed the forgoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/Karen J. Hartman-Tellez

RETRIEVED FROM DEMOCRACYDOCKET.COM