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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WARREN PETERSEN, in his official capacity as the President of the Arizona State Senate; and BEN TOMA, in his official capacity as the Speaker of the Arizona House of Representatives,

Plaintiffs,

v.

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

Defendant.

No. _____

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to A.R.S. § 12-1801 and Arizona Rule of Civil Procedure 65, Plaintiffs respectfully move for entry of a preliminary injunction prohibiting the implementation or enforcement of the 2023 Elections Procedures Manual ("EPM") to the extent it purports to:

1. Allow county recorders to merely move to inactive status—rather than cancel the registrations of—voters who affirmatively stated on juror questionnaires that they do not reside in the relevant county and have not responded within 35 days to a notice from the county recorder;

2. Prohibit county recorders from relying on information provided by third parties in determining whether there is reason to believe a registered voter is not a United States citizen;

3. Delay implementation of statutorily required maintenance of the active early voting list until January 2027;

4. Excuse mistakes or errors in the statutorily required registrations of paid or out-of-state ballot measure petition circulators;

5. Compel county boards of supervisors to reflexively vote to adopt only the returns provided by the election official when conducting a canvass; and

6. Authorize the Secretary of State to certify a statewide canvass that consists of returns of fewer than fifteen counties.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' entitlement to injunctive relief derives from the confluence of two complementary legal truisms. First, the lawmaking power is lodged entirely, exclusively and irrevocably in the legislative branch, subject only to the electorate's exercise of the initiative or referendum process. *See* ARIZ. CONST. art. IV; *Wallace v. Smith in and for Cnty. of Maricopa*, 255 Ariz. 377, ¶ 9 (2023) ("The Arizona Constitution vests the 'legislative authority of the state' in the legislature, and thus "[t]he legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution.'" (cleaned up)). Second, executive branch edicts that administer or interpret a statute—such as the EPM—must hew closely to the confines of a specific legislative authorization and

cannot conflict with or undermine an applicable statute. *See Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021) ("[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law."); *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021) (EPM provisions that "fall outside the mandates" specifically prescribed by statute are not binding).

For the reasons set forth below, each of the challenged EPM provisions transgresses these foundational limitations on the executive power by purporting to imbue with the force of criminal law regulatory commands that are inconsistent with—and, in some instances, diametrically contradict—superseding legislative directives. Implementation of the challenged EPM provisions would defy controlling law, exact an irreparable injury on the Legislature as an institution (which Plaintiffs are authorized to prevent against and defend), and derogate the constitutional separation of powers, which nowhere is "more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988).

ARGUMENT

In considering a motion for preliminary relief, this Court evaluates (1) the likelihood that the movant will succeed at trial on the merits, (2) the possibility of irreparable injury to the movant not remediable by damages if the requested relief is not granted, (3) whether the balance of hardships favors the movant, and (4) whether public policy favors an injunction. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410–411, ¶ 10 (2006); *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Traditionally, the factors are considered on a sliding scale, and a movant is entitled to injunctive relief if it establishes "*either* (1) probable success on the merits and the possibility of irreparable injury; *or* (2) the presence of serious questions and 'the balance of hardships tip sharply' in his favor." *Shoen*, 167 Ariz. at 63 (emphasis added).

But when, as here, a government official "has acted unlawfully and exceeded his constitutional and statutory authority, [plaintiffs] need not satisfy the standard for injunctive relief." *Ariz. Pub. Integrity All.* ("AZPIA") *v. Fontes*, 250 Ariz. 58, 64, ¶ 26 (2020). In any event, all four considerations impel preliminary relief.

I. Plaintiffs Are Highly Likely to Succeed in Establishing That Each of the Challenged EPM Provisions Is Contrary to Law

It is well-established that any EPM provision that exceeds a legislative grant of authority or that contravenes a substantive statutory provision is null and void. The Legislature has directed the Secretary of State to adopt on a biennial basis, with the assent of the Governor and Attorney General, an elections procedures manual that, in relevant part:

> prescribe[s] 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). This general conferral of rulemaking power is supplemented by various additional discrete authorizations to regulate in the EPM certain narrow and specific facets of the electoral process. *See* Compl. n. 1 (listing delegations). Violations of valid EPM provisions are punishable as class 2 misdemeanors. *See* A.R.S. § 16-452(C).

Cognizant of the constitutional imperative that the EPM can merely implement—and not augment, abridge or modify—legislative enactments, courts have rigorously enforced two critical strictures cabining the EPM. First, the EPM cannot regulate topics that lie outside the scope of an explicit legislative authorization. *See McKenna*, 250 Ariz. at 473, ¶ 20 (EPM provisions concerning topics that "fall outside the mandates of § 16-452" or other authorization are not binding). Second, "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach*, 250 Ariz. at 576, ¶ 21.

Exercising its "responsibility . . . to declare existing law," *Yes on Prop. 200 v. Napolitano*, 215 Ariz. 458, 465, ¶ 14 (App. 2007), the judicial branch has on four occasions in as many years invalidated an EPM provision as either *ultra vires* or inconsistent with a controlling statute. *See McKenna*, 250 Ariz. at 473, ¶ 20 (no statutory authority to regulate the legal sufficiency of candidate nomination petitions); *Leach*, 250 Ariz. at 576, ¶ 20 (EPM's creation of "de-registration" process for petition circulators could not negate the

circulators' statutory obligations); *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022) (EPM provision that excused petition circulators from uploading new affidavit when amending registration was contrary to law and invalid); *Ariz. All. for Retired Ams. v. Crosby*, 537 P.3d 818, 823, ¶ 18 (Ariz. App. 2023) (finding that EPM provision concerning hand count audit of ballots "directly conflicts with" the statute "and is therefore void"). A court evaluating a challenged EPM provision owes no deference to the Secretary's preferred interpretation of the applicable statutes. *See Leibsohn*, 254 Ariz. at 7 ¶ 22 ("[I]t is this Court's role, not the Secretary's, to interpret [a statute's] meaning."); A.R.S. § 12-910(F).

At least six provisions of the 2023 EPM either regulate in realms the EPM has no statutory authority to be or are inconsistent with a governing legislative pronouncement.

A. The EPM Purports to Nullify Express Statutory Requirements Governing the Cancellation of Non-Residents' Voter Registrations

Current and accurate voter rolls are the fulcrum of free and secure elections. The Arizona Constitution limits the franchise to adult citizens who are residents of this State. *See* ARIZ. CONST. art. VII, § 2. And it requires the Legislature to enact "registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." *See id.* art. VII, § 12. The Legislature accordingly has constructed multifaceted mechanisms to identify, initiate contact with, and cancel the registrations of individuals who are not eligible to vote. *See* A.R.S. §§ 16-165, 16-166(A)-(E).

One crucial component of this structure relies on voters' own self-reports of non-residency in juror questionnaires. Specifically, if a periodic report provided by the jury commissioner or juror manager indicates that an individual who is a registered voter represented on a juror questionnaire that she is not, in fact, a resident of the county, the county recorder must send a notice by forwardable mail to the voter requesting that she confirm her residency status. If she does not respond within 35 days, "the county recorder ***shall cancel*** the person's registration." A.R.S. § 16-165(A)(9)(b) (emphasis added).

Defying this statutory command, the EPM instead provides that if the voter does not respond to the county recorder's residency confirmation request by the specified deadline,

her registration is ***not*** canceled, but rather simply moved to "inactive" status. *See* Compl. Ex. 1 at 41. Critically, an "inactive" voter retains all the attributes and rights of a qualified elector. *See* A.R.S. § 16-583. An inactive voter's registration will be canceled only if he does not vote in any election over the course of two cycles (*i.e.*, four calendar years) and does not otherwise update his voter registration during that period. *See* A.R.S. § 16-166(C).

This EPM provision "directly conflicts with the express and mandatory," *Ariz. All.*, 537 P.3d at 823, ¶ 18, language of A.R.S. § 16-165(A)(9)(b). No ambiguity clouds the statute; the recorder "shall cancel the registration" if the voter has not confirmed his residency within 35 days of the recorder's request. The Secretary has by fiat converted this explicit cancelation trigger into effectively a four-year grace period during which a voter who has already affirmatively represented his ineligibility remains on the rolls.

Any reliance by the Secretary on the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq.* ("NVRA"), to justify the EPM's rewriting of clear statutory text falls flat. When a registered voter no longer appears to reside in the relevant jurisdiction but has not confirmed her residency status, the NVRA generally contemplates a redesignation of her registration to inactive status. *See* 52 U.S.C. § 20507(d)(1). Importantly, however, the NVRA permits immediate cancelation of the registration if the registrant "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered." *Id.* § 20507(d)(1)(A). By definition, responses to juror questionnaires consist entirely and exclusively of an ***explicit*** affirmation of non-residency that the voter has personally disclosed. *See* A.R.S. § 21-314. A written confirmation by the voter himself that he no longer resides in the relevant county comports with the NVRA's express allowance of immediate cancelations.

More fundamentally, any question concerning the statute's conformance with the NVRA resides solely in the judicial domain, not the executive. The Secretary cannot misuse the EPM to codify his divinations of how a court might evaluate A.R.S. § 16-165(A)(9)(b). Discerning and synthesizing the relationship between a state statute and an applicable federal law is entrusted to the courts and the courts alone. *See Roberts v. State*, 253 Ariz.

259, 266, 269, ¶¶ 20, 35 (2022) (independently construing relevant statutes and explaining that while "the *legislature* may incorporate federal law" into state law, it did not authorize administrative agency to do so via rulemaking); *see also Leibsohn*, 254 Ariz. at 7 ¶ 22.

B. The EPM Unlawfully Abridges the County Recorders' Statutory Responsibility to Investigate Potentially Invalid Voter Registrations

While databases of State records are indispensable to ensuring accurate and current voter rolls, they are neither infallible nor exhaustive. Recognizing that information relevant to voters' eligibility can derive from various external sources, the Legislature in 2022 mandated that county recorders must conduct inquiries of the Systematic Alien Verification for Entitlements ("SAVE") program—an informational repository maintained by the United States Citizenship and Immigration Services—if the recorder "has reason to believe" the voter is not a United States citizen. *See* A.R.S. § 16-165(I).

The EPM acknowledges this investigatory responsibility but instructs that "third-party allegations of non-citizenship are not enough to initiate this process." Compl. Ex. 1 at 42. This limitation is textually and conceptually irreconcilable with A.R.S. § 16-165(I). The statutory precondition to a SAVE inquiry—*i.e.*, "reason to believe" that a registered voter may not be a U.S. citizen—is not confined to any particular source(s) of information. If the Legislature had wished to allow citizenship inquiries only when the county recorder's "reason to believe" a registration may be invalid is premised solely on certain informational channels or a level of reliability, it would have said so. Instead, it obligated the county recorders to undertake additional inquiries whenever information—from any source and in any context—is sufficiently credible and reliable to supply "reason to believe" a voter may not be a citizen. Neither the courts nor the executive branch may "read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself." *Cicoria v. Cole*, 222 Ariz. 428, 431 ¶ 15 (App. 2009); *see also State v. Arbolida*, 206 Ariz. 306, 308 ¶ 8 (App. 2003) ("We will not imply words . . . when the legislature easily could have limited the statute's scope had it so intended.").

To the extent the Secretary purports to rely on the EPM's aspiration of "uniformity" or "efficiency" in citizenship investigation procedures, *see* A.R.S. § 16-452(A), that defense flounders for at least three reasons.

First, the "uniformity" and "efficiency" criteria can merely guide effectuation of the Legislature's written intent; they are not an independent fount of executive power to abridge or modify clear statutory terms. *See Law Off. of Anne Brady, PLLC v. Dept of Econ. Sec., ESA Tax Unit*, 255 Ariz. 302, ¶ 20 (App. 2023) (invalidating regulation that "impermissibly restricted the intended scope of the" underlying statute).

Second, even if the EPM could subordinate the substantive commands of a statute to the executive branch's subjective conceptions of "uniformity" or "efficiency," the EPM's categorical prohibition on the consideration of third-party allegations is concomitantly overinclusive and underinclusive. There is no correlation between a complaint's third-party genesis and its capacity to induce "reason to believe" that a voter is potentially not a citizen. Third-party complaints occupy an expansive continuum. While a purely conjectural "tip" may carry no persuasive weight, records transmitted by a law enforcement agency or complaints corroborated by reliable documentation easily could engender "reason to believe" a voter may not be a U.S. citizen. Conversely, the EPM offers no parameters that might actually foster uniformity or efficiency—*e.g.*, guidance on how to prioritize or process various sources of information when calibrating a "reason to believe" assessment.

Third, the EPM's professed aversion to the use of third-party information is discredited by its treatment of the same evidentiary rubric (*i.e.*, "reason to believe") in other contexts. Arizona law provides that if the Secretary of State has "reasonable cause" to believe a violation of the campaign finance code has occurred in any election under his jurisdiction, he must refer the matter to the Attorney General for further investigation. *See* A.R.S. § 16-938. Notably, the EPM instructs that, in formulating a "reasonable cause" determination, the Secretary or other filing officer may rely not only on the parties' submissions and government records but also "any other information available in the public record." Compl. Ex. 1 at 264. This allowance implies a sensible recognition that salient

information can arise from a multitude of sources and that, as experienced professionals, elections officials can be trusted to use prudent judgment on a case-by-case basis. Similarly, in the criminal context, the "reason-to-believe standard requires a level of reasonable belief similar to that required to support probable cause" which may include information that the police receive from "*reasonably trustworthy information* and circumstances [that] would *lead a person* of reasonable caution to believe an offense *has* been committed." *State v. Smith*, 208 Ariz. 20, 23–24 ¶¶ 10–12 (App. 2004) (emphasis added).

In sum, by preemptively foreclosing any reliance on third-party complaints—irrespective of their origin, credibility or substance—the EPM provision conflicts with A.R.S. § 16-165(I)'s plain text and undermines its manifest purpose. *See Leach*, 250 Ariz. at 576, ¶ 21; *Law Off. of Anne Brady*, 255 Ariz. 302, ¶ 20 ("Because the narrow scope of the implementing regulation contravenes the legislative purpose, it cannot stand.").

C. The EPM Impermissibly Delays Implementation of an Operative Statute

In unilaterally postponing any implementation of the statutory active early voting list ("AEVL") maintenance program for more than five years after the enactment date, the EPM collides with controlling law. In 2021, the Legislature reconstructed what had been the "permanent early voting list" into the AEVL. Voters who wish to automatically receive early ballots by mail on an indefinite basis may continue to do so. *See* A.R.S. § 16-544(A), (H). On January 15 of every odd-numbered year, however, the county recorder must send by forwardable mail a notice to every AEVL member who has not cast an early ballot in any election over the course of two consecutive election cycles (*i.e.*, four calendar years). *See id.* § 16-544(K), (L). The notice asks the voter whether she would like to remain on the AEVL. *See id.* § 16-544(L). If the voter does not respond to the notice within 90 days, she will be removed from the AEVL, but may re-enroll at any time. *See* A.R.S. § 16-544(M). The relevant statutory provisions became effective on September 29, 2021. *See* 2021 Ariz. Laws ch. 359 (S.B. 1485); ARIZ. CONST. art. IV, pt. 1, § 1(3).

Fidelity to the statutory text obligates the county recorders to issue on January 15, 2025 notices to every AEVL enrollee who did not cast an early ballot in any election during

the 2022 or 2024 election cycles. *See* A.R.S. § 16-544(H), (K), (L). Defying this legislative directive, the EPM orders county recorders to refrain from issuing any notices until January 15, 2027, and instructs them to send notices only to AEVL enrollees who did not vote by early ballot in the 2024 or 2026 election cycles. *See* Compl. Ex. 1 at 61 n.34.

The EPM purports to excuse its negation of the county recorders' statutory duty by appealing to the presumption against retroactivity. *See id.* An "election cycle" for AEVL purposes is defined (in relevant part) as "the two-year period beginning on January 1 in the year after a statewide general election." A.R.S. § 16-544(S). Because the 2022 election cycle began on January 1, 2021, the EPM insists that the entire 2022 election cycle must be excluded for AEVL list maintenance purposes. This is wrong for two reasons.

1. Reliance on Prior Voting History When Issuing Notices Is Not a "Retroactive" Application of S.B. 1485

First, merely sending notices to AEVL members who did not cast any early ballot in the 2022 or 2024 election cycles does not impair any such voter's substantive rights, and hence does not constitute a "retroactive" application of S.B. 1485. The EPM's facile reasoning that any consideration of an AEVL voter's (in)activity in the 2022 election cycle is a "retroactive" application obscures that "laws are not retroactive simply because they relate to past events." *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 139 (1986). The presumption against retroactivity does not "appl[y] to laws that operate on pre-existing conditions, *and such laws are not retrospective by their mere relation to antecedent conditions.*" *Id.* (citation omitted; emphasis in original); *see also Zuther v. State*, 199 Ariz. 104, 109 ¶ 17 (2000) ("A statute is not necessarily retroactive because it 'relate[s] to antecedent facts.'" (citation omitted)). A retroactive effect exists only when a statute's application "disturb[s] vested substantive rights by retroactively changing the law that applies to completed events." *State v. Aguilar*, 218 Ariz. 25, 32, ¶ 25 (App. 2008) (quoting *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999)).

An AEVL's voter's inactivity during the 2022 election cycle (and 2024 election cycle) does not result in his removal from the AEVL or otherwise impair any substantive

right. Rather, it merely obligates the county recorder to send him a notice on January 15, 2025. Upon receipt of that notice, the voter then may choose whether and in what manner to respond. If, and only if, the voter opts not to respond to the January 15, 2025 notice will he be removed from the AEVL. In other words, the actions or occurrences that precipitate a voter's removal from the AEVL—*i.e.*, the issuance of a notice and the voter's failure or decision not to respond—all occur after S.B. 1485's effective date, and hence entail no retroactive application of the statute. That the notice's issuance may be predicated in part on facts or events that precede the effective date does not render S.B. 1485 retroactive.[1] *See Anderson v. Indus. Comm'n of Ariz.*, 205 Ariz. 411, 413, ¶¶ 7–8 (App. 2003) (application of new benefits suspension statute to existing beneficiary was not retroactive where "the last moment [beneficiary] could have acted to avoid suspension of his benefits occurred *after* the enactment of the suspension statute"); *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248 (1973) (new tax on rent payments applies to leases that pre-dated the statute; statute was not "retroactive merely because it draws upon some antecedent facts for its operation").

2. The EPM Provision Is Incompatible with the Statutory Text

Second, even assuming *arguendo* that anti-retroactivity principles are implicated at all, the EPM's interpretation is textually untenable and effectively suspends S.B. 1485's constitutionally mandated effective date of September 29, 2021. The *presumption* against retroactivity is just that—an inference from legislative silence. *See* A.R.S. § 1-244. But this interpretive canon serves only to illuminate the statutory text, not subordinate it. When navigating the application of a statute in relation to the presumption, the lodestar is the Legislature's intent, as embodied in the words it adopted into law. *Krol v. Indus. Comm'n*, 255 Ariz. 495, ¶ 16 (App. 2023) ("The legislature need not use magic words. Instead, '[a]ny language that shows a legislative purpose to bring about [retroactivity] is sufficient.' We use the same rules of statutory construction we ordinarily use." (citations omitted)).

[1] Any elections that were held during the 2022 cycle but prior to S.B. 1485's effective date would have been only local elections in select jurisdictions. The EPM's misconceived "retroactivity" concern is irrelevant to the numerous AEVL enrollees who do not reside in jurisdictions that held local elections between January 1 and September 29, 2021.

S.B. 1485 (1) was operative throughout all statewide elections held during the 2022 election cycle, including the August 2022 primary election and the November 2022 general election, and (2) will be operative on January 15, 2025. It follows ineluctably from these premises that the county recorders must issue the required notices on January 15, 2025 and must consider AEVL members' voting history during the 2022 election cycle—or at least that portion of the 2022 election cycle that post-dates September 29, 2021—when doing so.

D. The EPM Improperly Negates Statutorily Required Elements of a Valid Circulator Registration

The EPM purports to excuse certain circulators of statewide ballot measure petitions from providing on their registrations complete and accurate contact information, in direct contravention of explicit statutory requirements with which the Legislature has mandated "strict compliance." *Voice of Surprise v. Hall*, 255 Ariz. 510, 517 ¶ 29 (2023). Arizona law has long required paid or out-of-state circulators of statewide initiative or referendum petitions to file a basic registration with the Secretary of State prior to obtaining any signatures. *See* A.R.S. § 19-118(A), (C). A valid registration must include the circulator's "full name, residence address, telephone number and email address," and an affidavit that "all of the information provided is correct to the best of [the circulator's] knowledge." *Id.* § 19-118(B). All signatures collected by circulators who fail to timely and properly register are invalid. *See id.* §§ 19-118(A), 19-121.01(A)(1)(h). The Legislature has buttressed the entire ballot measure infrastructure with a plenary mandate that all statutory requirements governing the initiative or referendum process be "strictly construed" and demand "strict compliance." *Id.* §§ 19-101.01, 19-102.01; *Arrett v. Bower*, 237 Ariz. 74, 81 ¶ 22 (App. 2015) ("[S]trict compliance 'requires nearly perfect compliance with constitutional and statutory referendum requirements.'"); *Voice of Surprise*, 255 Ariz. at 517, ¶ 29.

Debilitating these legislative directives, the EPM instead assures circulators that:

> The requirement to list certain information on the circulator portal does not mean that a circulator's signatures shall be disqualified if the circulator makes a mistake or inconsistency in listing that information (e.g., a phone number or email address that is entered incorrectly; a residential address that

doesn't match the residential address listed on that circulator's petition sheets; etc.). Compl. Ex. 1 at 119 n.58.

The EPM's foray into the judicial sphere is doubly deficient, defying both statutory text and precedent. While the Secretary may establish in the EPM "a procedure for registering circulators, including circulator registration applications," A.R.S. § 19-118(A), this discrete administrative flexibility is not a grant of policymaking authority. *Leibsohn v. Hobbs*, 254 Ariz. 1 (2022), illustrates the point effectively. A valid circulator registration must include a signed and notarized certification. *See* A.R.S. § 19-118(B)(5). The then-operative EPM instructed that, when a previously registered circulator simply updates his existing registration, he need only provide an electronic attestation instead of a new notarized document. Countering that a notarized certification is, in fact, required for amended registrations, the Supreme Court commented that it was "not persuaded to reach a different interpretation of [the statute] simply because the Secretary may construe the requirement differently," *Leibsohn*, 254 Ariz. at 7 ¶ 22, and emphasized that "an EPM regulation that contradicts statutory requirements does not have the force of law," *id.* So it is here. The EPM's diktat that circulators are free to provide "mistake[n]" and perhaps even fictive contact information in registrations collides with the Legislature's explicit pronouncements to the contrary. Circulators must not only itemize their true and accurate "residence address, telephone number and email address," A.R.S. § 19-118(B)(1), but must "strictly comply" with this mandate, *id.* §§ 19-101.01, 19-102.01.

The courts agree. The Arizona Supreme Court has held expressly that "[c]irculators are required to provide a correct telephone number at the time they submit their registration application," Decision Order, *Mussi v. Hobbs*, No. CV-22-0207-AP/EL, 2022 WL 3652456, at *2 (Ariz. Aug. 24, 2022) (en banc)—a conclusion that extends in equal measure to residential and email addresses. Eliding a critical distinction, the EPM's categorical assertion that the address provided on a registration need not "match the residential address listed on that circulator's petition sheets," Compl. Ex. 1 at 119 n.58,[2] is, at best, deeply

[2] Circulators must disclose their residential addresses on the affidavits that accompany

misleading. The legal sufficiency of an address is always conditioned upon its ***accuracy***. If a circulator were to relocate after registering and then use her new address on petition sheet affidavits, the EPM is correct that the address discrepancy does not disqualify the associated petition signatures because the registration address was accurate at the time it was disclosed. By contrast, if the disparate addresses are attributable to the circulator's provision of inaccurate information on the registration, the EPM's announcement that the "mistake" is inconsequential simply is wrong as a matter of law. *See Mussi*, 2022 WL 3652456, at *2 (affirming disqualification of signatures collected by circulators who the parties stipulated had "submitted incorrect addresses" on their registrations); 255 Ariz. 395, ¶ 22 (2023) (elaborating that signatures could be disqualified where "differing addresses due to a change in residence could not be confirmed"). To be sure, there are countless factual permutations between these polarities that may present arguable questions (*e.g.*, does an accidental transposition of digits in a telephone number invalidate a registration?). Such hypotheticals, however, must be left for the courts to resolve, if and when they arise. *See Leibsohn*, 254 Ariz. at 77, ¶ 22 (under separation of powers principles, "it is this Court's role, not the Secretary's, to interpret" statutes).

E. The EPM Cannot Dictate How County Boards of Supervisors Canvass Election Returns or Instruct the Secretary to Disenfranchise the Voters of an Entire County

In purporting to regulate the canvassing of election returns, the EPM unlawfully constricts the county boards of supervisors' canvassing authority while arrogating to the Secretary of State an extraordinary power to certify a statewide canvass that omits entirely the returns of any counties that have not met a statutory deadline—*i.e.*, disenfranchising thousands, if not millions, of voters. Specifically, the EPM provides:

> The Board of Supervisors has a non-discretionary duty to canvass the returns as provided by the County Recorder or other officer in charge of elections and has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order.

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every petition sheet they circulate. *See* A.R.S. § 19-112(D).

Compl. Ex. 1 at 248 (the "County Canvass Provision"). A few pages later, the EPM then instructs as follows:

> All counties must transmit their canvasses to the Secretary of State, and the Secretary of State must conduct the statewide canvass, no later than 30 days after the election. A.R.S. § 16-648(C). If the official canvass of any county has not been received by this deadline, the Secretary of State must proceed with the state canvass without including the votes of the missing county (i.e., the Secretary of State is not permitted to use an unofficial vote count in lieu of the county's official canvass).

Id. at 252 (the "State Canvass Provision").

Both directives are *ultra vires* because the EPM dispenses authority to regulate (in relevant part) only "the producing, distributing, collecting, counting, tabulating and storing [of] ballots," A.R.S. § 16-452(A)—not canvassing. The distinction is not a semantic subtlety. Tabulation and canvassing are conceptually, temporally and legally independent facets of election administration. The latter is addressed in a separately codified set of statutes, *see* Title 16, Chapter 4, Article 11 ("Official Canvass"), and embodies a specific legal process that is denoted entirely by statute. Because the canvass is not within the EPM's statutorily defined purview, both provisions lack any binding force. And even assuming *arguendo* that the EPM may regulate canvassing processes, both provisions are afflicted with the same flaw: they purport to pronounce categorical, absolute rules that have no basis in statute. Nothing in Arizona law forbids boards of supervisors from independently evaluating the election returns under *any* circumstances. Similarly, Arizona law does not empower the Secretary of State to exclude a dilatory county from the statewide canvass. Whether a board of supervisors or the Secretary of State has—under any given set of facts—misused its canvassing authority is for the courts alone to decide.

1. The EPM Cannot Command Boards of Supervisors to Vote to Reflexively Ratify the Election Official's Tally of Returns

The County Canvass Provision conflates the duty to canvass with the content of the canvass. As to the former, the EPM is correct that each county board of supervisors has a legal obligation to complete a canvass of returns in its jurisdiction by the statutorily

specified deadline. *See* A.R.S. §§ 16-642, 16-645; *Hunt v. Campbell*, 19 Ariz. 254, 279 (1917). It does not follow, however, that the board is constrained to do nothing other than rubber stamp whatever returns are presented by the election official. A.R.S. § 16-643 defines the canvass; it consists of "opening the returns, other than the ballots, and determining the vote of the county, by polling places, for each" candidate and measure.

To be sure, in all or virtually all instances, the returns as provided by the election official will embody an accurate record of the vote totals. If, however, a genuine question arose as to the completeness of the returns proffered by the election official (for example, the election official had excluded tallies from certain precincts), the final determination as to the disposition of the disputed return resides with the board of supervisors, as the governing body of the jurisdiction. *See* A.R.S. §§ 16-646, 11-251(1), (3); *Campbell v. Hunt*, 18 Ariz. 442, 452 (1917) (indicating that the "simple function" of adding up the returns during the canvass presupposes there is no allegation that the returns "are forged or spurious, that they are not the returns, and all the returns, and signed by the proper officers"). If the board of supervisors' canvass is alleged to be erroneous, it can be challenged in court. *See* A.R.S. § 16-672; *Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183 (App. 2005) (considering challenge to validity of canvass).

The troubling notion that the Secretary of State, through the EPM, can peremptorily order independently elected officials that they must vote to reflexively ratify whatever returns the election official places in front of them—under any and all circumstances—finds no statutory sustenance. *See generally Williams v. Parrack*, 83 Ariz. 227, 230–31 (1957) (courts cannot issue injunction requiring legislative body to adopt or not adopt a proposal).

2. A Statewide Canvass Must Include Returns From Every County

The Secretary complements his abridgement of the board's statutory authority with a correspondingly unlawful enlargement of his own, insisting that "[i]f the official canvass of any county has not been received by this deadline, the Secretary of State must proceed with the state canvass without including the votes of the missing county." Compl. Ex. 1 at 252. By definition, however, the statewide canvass intrinsically is the aggregation of the

fifteen counties' respective canvasses, and state law directs the Secretary to certify "all offices for which the nominees filed nominating petitions and papers with the secretary of state." A.R.S. § 16-648(A). Theoretically, the Secretary could modify—but not outright reject—a county's canvass upon concluding that the county's returns are inaccurate or corrupted in some way, in the same manner that a county board of supervisors may do so in appropriate circumstances. *See Campbell*, 18 Ariz. at 452. But the notion of a 14-county statewide canvass is an unprecedented legal impossibility that condones the disenfranchisement of potentially millions of Arizona voters. It is alarming that the Secretary would summarily adopt such a sweeping rule—which appears to have been hastily inserted by the Governor or Attorney General after the public comment period on the draft EPM had closed—that could nullify the votes of entire counties with the stroke of a pen.

Simply put, Arizona law places two mandatory conditions on the Secretary: (1) to canvass within 30 days from the date of the election and (2) include the canvasses from all counties. *See* A.R.S. § 16-648. The EPM must give meaning to both elements of this statute. Of course, a county's inability or unwillingness to certify a canvass would place the Secretary in the pincers of dueling statutory duties—*i.e.*, either adopt an incomplete and legally defective canvass, or fail to certify the election by the statutory deadline. *See* A.R.S. §§ 16-648(A), 16-650. But resolution of such a dilemma is the clear prerogative of the courts, construing the controlling statutes through the prism of the facts that precipitated the impasse. In purporting to preemptively adjudicate hypothetical disputes by promulgating a novel, universal, and absolute rule of decision, the State Canvass Provision impinges both legislative and judicial functions in violation of the separation of powers.

II. The EPM's Statutory Violations Irreparably Injure Plaintiffs by Infringing on the Legislature's Lawmaking Powers

Because the challenged EPM provisions stand in clear contravention of controlling statutes, Plaintiffs' entitlement to injunctive relief is not conditioned upon a separate showing of irreparable injury. *See AZPIA*, 250 Ariz. at 64, ¶ 26 ("Because Plaintiffs have

shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy the standard for injunctive relief."). This subsummation of the other elements of the traditional injunction standard into the merits inquiry reflects that "irreparable harm to the public is presumed" when a public officer abuses his position. *Id.*

Further, an EPM provision that exceeds the scope of a statutory delegation or that conflicts with a statutory provision exacts an institutional injury by infringing the legislative power. "The legislature has the exclusive power to declare what the law shall be," *State v. Prentiss*, 163 Ariz. 81, 85 (1989), and is the repository of all other "power not expressly prohibited or granted to another branch of the government." *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, ¶ 5 (1999) (citation omitted)). "In contrast, the executive branch's duty is to carry out the policies and purposes declared by the Legislature." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). It follows from these constitutional axioms that, when the executive branch unlawfully purports to abrogate or nullify a legislative act, "the Legislature, as an institution, has sustained a direct injury to its authority to make and amend laws by a majority vote." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487 ¶ 15 (2006); *see also Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 418 ¶ 9 (2014) (reaffirming that "the legislature as a body suffers a direct institutional injury . . . when an invalid gubernatorial veto improperly overrides a validly enacted law").

III. Equitable and Public Policy Considerations Support Injunctive Relief

Because the Secretary's enforcement or implementation of the challenged EPM provisions "does not comply with Arizona law, public policy and the public interest are served by enjoining his unlawful action." *AZPIA*, 250 Ariz. at 64 ¶ 27.

CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin the Secretary from implementing or enforcing the provisions of the EPM set forth above.

RESPECTFULLY SUBMITTED this 31st day of January, 2024.

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