Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-001942 12/16/2024

HONORABLE SCOTT A. BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

WARREN PETERSEN, et al.

JOSEPH KANEFIELD

v.

ADRIAN FONTES

KAREN HARTMAN-TELLEZ

DAVID ANDREW GAONA
DANIEL D MAYNARD
JAMES E BARTON II
JARED G KEENAN
ROY HERRERA
TRACY A OLSON
KORY A LANGHOFER
AUSTIN C YOST
KYLE ROBERT CUMMINGS
KARA MARIE KARLSON
THOMAS J. BASILE
DANIEL A ARELLANO
JILLIAN L ANDREWS
AUSTIN TYLER MARSHALL
ALEXIS E DANNEMAN
MARGO R CASSELMAN
DOUGLAS C ERICKSON
LALITHA D MADDURI
MARILYN GABRIELA ROBB
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

1. Plaintiffs' *Verified Special Action Complaint for Declaratory and Injunctive Relief*;
2. Plaintiffs' *Motion for Preliminary Injunction*;
3. Secretary of State's *Response in Opposition to Motion for Preliminary Injunction*;
4. Plaintiffs' *Reply in Support of Plaintiffs' Motion for Preliminary Injunction*;
5. Secretary of State's *Motion to Dismiss*;
6. Plaintiffs' *Response to Motion to Dismiss*;
7. Secretary of State's *Reply in Support of Motion to Dismiss*;
8. *Amicus Brief of American Civil Liberties Union of Arizona*;
9. *Brief of Amicus Curiae Arizona Election Officials*;
10. *Brief of Amici Curiae Democratic National Committee and Arizona Democratic Party*;
11. *Brief of Amici Curiae Living United For Change in Arizona, League of United Latin American Citizens, Arizona Students' Association, San Carlos Apache Tribe and Inter Tribal Council of Arizona, Inc., in Support of Defendants*;
12. Plaintiffs' *Consolidated Response to the Briefs of Amici Curiae*;
13. Plaintiffs' *Supplemental Brief*;
14. Secretary of State's *Supplemental Brief*;
15. *Joint Notice of Supplemental Authorities*; and
16. The arguments received at each of the hearings in this matter.

This case involves a challenge to the current Elections Procedures Manual ("EPM") by the President of the Arizona Senate and the Speaker of the Arizona House of Representatives on behalf of their respective chambers ("Plaintiffs"). Plaintiffs argue that the Secretary exceeded his authority through the promulgation of several rules in the current EPM. Plaintiffs seek declaratory and injunctive relief.

The Elections Procedures Manual

The Legislature delegated to the Secretary the authority and responsibility to create rules and procedures for voting. A.R.S. § 16-452. Subsection A provides:

> After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots. The secretary of state shall also adopt rules

> regarding fax transmission of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens[.]

The statute further provides "[a] person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor." A.R.S. § 16-452(C). "Once adopted, the EPM has the force of law[.]" *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020).

In 2023, the Secretary of State led a review and modification of the prior election EPM. After receiving approval from both Governor Hobbs and Attorney General Mayes, the Secretary issued the Arizona 2023 EPM in December 2023.

The EPM is written to "ensure election practices are consistent and efficient throughout Arizona." *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021). As stated above, the Secretary has the authority to prescribe rules to achieve this result. *Id*.; *see* A.R.S. § 16-452(A).

Plaintiff brought the present case seeking to invalidate six provisions in the EPM, which focus upon: (1) the steps a county recorder should take after receiving a report from the jury commissioner regarding non-residency of registered voters; (2) when county recorders must investigate the citizenship status of voters who are already registered; (3) the date on or after which county recorders must begin to send notices to voters regarding removal from the Active Early Voting List ("AEVL") for not casting early ballots; (4) the effect of mistaken or incorrect information on a registered petition circulator's registration; (5) county boards of supervisors' duty to canvass election results; and (6) the Secretary's ability to timely conduct the statewide canvass, even without results from one or more counties.

The Secretary moved to dismiss Plaintiffs' action pursuant to Rules 12(b)(1) and (6), Ariz.R.Civ.P. The Secretary argued in his *Motion* that Plaintiffs lacked standing to bring the present litigation because Plaintiffs failed to demonstrate an institutional injury to the Legislature and further, because Plaintiffs failed to establish that the Legislature authorized Plaintiffs to bring this litigation on its behalf. The Secretary's *Motion* also challenged the merits of Plaintiffs' challenges to specific EPM provisions.

The parties subsequently stipulated to stay the determination of Plaintiff's Count II (Investigations of Citizenship Status Rule) and to dismiss without prejudice Count VI (Secretary's Authority to Interpret and Codify Court Rulings). *See* March 5, 2024 Hearing Minute Entry at pg. 3 (filed 03/06/2024); *see also* April 4, 2024 Order Dismissing Count VI (filed 04/08/2024). Counts I, III, IV, and V remain.

The Court received briefing on the *Motion to Dismiss* and on the merits of the case, as well as briefing of amici curiae. The Court held an oral argument combined with trial on the merits on

May 23, 2024. The Court subsequently held an oral argument on the parties' supplemental briefing on October 2, 2024.

Standing

The Secretary argues that Plaintiffs lack standing in this case. "A plaintiff has standing to bring an action if it alleges a distinct and palpable injury; a generalized harm shared by all or by a large class of people is generally insufficient." *Mills v. Arizona Board of Technical Registration*, 253 Ariz. 415, 423 ¶ 24 (2022) (internal quotations omitted). "To have standing, a party generally must allege a particularized injury that would be remediable by judicial decision." *Brewer v. Burns*, 222 Ariz. 234, 237 ¶ 12 (2009). The Court will analyze standing based upon whether Plaintiffs have "plausibly alleged particularized injury *before* analyzing the merits of the parties' disputes." *Id. at* ¶ 14 (emphasis added). The Secretary "cannot defeat standing merely by assuming [he] will ultimately win." *Id*.

Plaintiffs seek declaratory relief in this action. A.R.S. § 12-1831 grants this Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." The Uniform Declaratory Judgments Act is remedial and is therefore to be liberally construed and administered. A.R.S. § 12-1842. Thus, Plaintiffs are merely required to plead "sufficient facts to establish that there is a justiciable controversy, i.e., one that arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination." *Café' Valley, Inc. v. Navidi*, 235 Ariz. 252, 255 ¶ 10 (App. 2010) (internal quotations omitted).

The Secretary first argues that Plaintiffs do not have standing because Plaintiffs have failed to establish that the Legislature authorized them to bring the present action on its behalf. But as Plaintiffs point out, the majorities of both legislative chambers adopted rules at the start of the legislative session that authorized Speaker Toma and President Petersen, respectively, to "bring or assert in any forum on behalf of [their chambers] any claim or right arising out of any injury to [their chambers'] powers or duties under the Constitution or Laws of this state." *Plaintiffs' Response to Motion to Dismiss* at 15 (citing each chamber's Rules for the 56th Legislature 2023-2024).

Based upon separation of powers principles, this Court is not in a position to scrutinize the Legislature's internal rules. Our constitution empowers legislative houses to determine and implement their own rules and procedures. *See* Ariz.Const. art IV, pt. 2 §§ 8, 9. "That authority is absolute and continuous, meaning each successive embodiment of a house is empowered to establish its own procedures." *Puente v. Arizona State Legislature*, 254 Ariz. 265, 270 ¶ 14 (2022).

The Secretary argues, *inter alia*, that authorization for litigation must be specific and made on a case-by-case basis. But Division One of the Arizona Court of Appeals recently rejected a nearly identical argument in *Toma v. Fontes*, 553 P.3d 881 (App. 2024), stating:

> Finally, Defendants think it would be easy for the Legislature to authorize litigation on a case-by-case basis. But the practical ease of Defendants' proffered requirement is beside the point. The Constitution vest the Legislature with the power to create rules authorizing litigation. The Legislature authorized Speaker Toma and President Petersen to bring litigation, and the claims here fall within that authorization – that is the end of the matter so far as the judiciary is concerned.

Id. at 890 ⁋ 32. Here, Plaintiffs have alleged an injury to their respective chamber's powers under the Arizona Constitution. The Court "will not superintend the specificity with which the Legislature authorizes litigation." *Id*. at 889 ¶ 29. The claims in this case fall sufficiently within the scope of the authorizations.

THE COURT FINDS that Plaintiffs have established that they had authority to bring this case on behalf of the Legislature.

The Secretary further argues that Plaintiffs have failed to establish standing because they have not sufficiently alleged an institutional injury. "Legislative standing based on institutional injury turns on the facts and circumstances in each case." *Toma*, 553 P.3d at 890 ⁋ 38. Generally, those facts and circumstances must show that the Legislature suffered a "particularized injury to the legislative body as a whole." *Id*. However, Plaintiffs, having brought an action for declaratory relief, are not required to suffer an *actual* injury before their claims become justiciable. They simply need to allege that an actual controversy exists between the parties. *Mills*, 253 Ariz. at 424 ¶ 29.

Here, Plaintiffs argue that the Legislature has an institutional interest in defending the proper scope of any authority it has delegated to other branches of government, including the Secretary. Plaintiffs further argue that the Secretary has violated the limits of its delegated authority by issuing EPM rules that exceed the scope of the delegation and/or nullify or amend currently existing statutory provisions.

The Secretary counters that the disputed EPM rules do not regulate the Legislature as an entity or nullify legislative power because the Legislature retains its full authority to enact laws to override the rules set forth in the EPM, or even to change the law authorizing the EPM.[1]

[1] The Court finds the Secretary's suggested remedy – that the Legislature can simply enact laws that override the disputed rules in the EPM – to be unworkable and unreasonable. Requiring the Legislature to

THE COURT FINDS that Plaintiffs have sufficiently alleged that an actual controversy exists between the parties that supports legislative standing in this case. Here, each of the *Verified Complaint's* counts that are still in dispute identifies an EPM rule that, at a minimum, conflicts with the language of an existing statute. For example:[2]

- Count I alleged that the EPM rule conflicted with the statute governing the cancellation of non-residents' voter registrations by disregarding the words "shall cancel the person's registration" and instead directing that the registration be placed in an inactive status for four years. *See* A.R.S. § 16-165(A)(9)(b). As alleged, the disputed EPM rule contradicts the controlling statute.

- Count III alleged that the EPM rule conflicted with the governing statute by applying an incorrect implementation date for compliance with the statute's mandates.

- Count IV alleged that the EPM rule regarding circulator registrations conflicted with A.R.S. § 19-102.01(A)'s mandate of strict compliance with statutory requirements governing the initiative process by excusing mistakes or inconsistencies in the circulator's recording of required information.

- Count V alleged that the EPM rule addressing the Board of Supervisors' duty to canvass was *ultra vires* because the scope of a legislative or executive official's duty to canvass an election is not a topic that the Secretary is authorized by A.R.S. § 16-452 to include in the EPM. Count V further alleged that the EPM rule conflicted with the plain language of A.R.S. §§ 16-642, 16-643, and 16-646.

When the executive branch promulgates rules that conflict with and, as alleged here, improperly override validly enacted statutes, an actual controversy exists between the parties and the Legislature suffers an institutional injury. *Biggs v. Cooper*, 236 Ariz. 415, 418 ¶ 9 (2014) ("[T]he legislature as a body suffers a direct institutional injury, and so has standing to sue, when an invalid gubernatorial veto improperly overrides a validly enacted law."). Plaintiffs are correct

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create new laws each time an administrative actor promulgates a rule that contradicts existing statutes or strays beyond the scope of a delegation would be to ignore the separation of powers doctrine and force the Legislature into an ongoing game of "whack-a-mole."

[2] This is not a case in which the institutional injury can be traced to the statute that delegated authority to the Secretary, as was the case in *Toma*. *Toma*, 553 P.3d at 893 ¶ 52. Here, the alleged institutional injury is directly traceable to the EPM rules that allegedly conflict with and functionally override existing Arizona statutes.

that the Arizona Constitution places the power and authority to make laws with the Legislature. Ariz. Const. art IV. That principle is further clarified in Article III of the Arizona Constitution:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, *and no one of such departments shall exercise the powers properly belonging to either of the others*.

(emphasis added). The Legislature is free to delegate authority to the Secretary, but the Secretary must stay within the scope of the delegation. "Any excursion by an administrative body beyond the legislative guidelines is a usurpation of constitutional powers vested only in the major branch of government." *Toma*, 553 P.3d at 893 ¶ 53 (quoting *Cochise County v. Kirschner*, 171 Ariz. 258, 261-62 (App. 1992)). [3] That is precisely what Plaintiffs have alleged in the present case and, accordingly, an actual controversy exists between the parties. *Mills*, 253 Ariz. at 424 ¶ 29.

THE COURT THEREFORE FINDS that Plaintiffs have standing to pursue declaratory relief based upon the claims asserted in this case. Thus, the Court may reach the merits of Plaintiffs' claims.

Count I

In Count I, Plaintiffs challenge Chapter 1, Section 9, Subsection C(1)(b) of the EPM. That provision addresses County Recorders' duties upon receiving a summary report from the Jury Commissioner or Jury Manager that indicates a voter is not a resident of the county or state. Plaintiffs argue that the EPM provision conflicts with the governing statute, A.R.S. § 16-165(A)(9), which states:

> The county recorder shall cancel a registration … [w]hen the county recorder receives written information from the person registered that the person has a change of address outside the county, including when the county recorder … [r]eceives a summary report from the jury commissioner or jury manager … indicating that the person has stated that the person is not a resident of the county.

§ 16-165(A)(9) specifically details what steps the County Recorder must take before canceling the registration:

[3] The Court recognizes that the court in *Toma* appeared to distinguish the quoted language from *Kirschner* by pointing out that the court did not make the proclamation while considering the issue of legislative standing. *Id*. But the Court finds the quoted language to be directly on point to a determination of whether the offending rules' alleged conflict with the statutes supports a finding of institutional injury.

> Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by forwardable mail and a postage prepaid preaddressed return form requesting the person confirm by signing under penalty of perjury that the person is a resident of the county and is not knowingly registered to vote in another county or another state. The notice shall inform the person that failure to return the form within thirty-five days *will result in the person's registration being canceled*. *If the person fails to return the notice within thirty-five days the county recorder shall cancel the person's registration*. (Emphasis added).

The plain, unambiguous language of the statute requires County Recorders to cancel a person's registration if the person does not return the required notice within thirty-five days. But the EPM provision at issue replaces the operative wording of § 16-165(A)(9) with the following: "If the person fails to respond to the notice after thirty-five days, the voter's registration status will be changed to *inactive*." (Emphasis added). The operative section further states that, after placement in an inactive status, the person's registration *may* (replacing the statute's use of "shall") be canceled if the person does not subsequently verify his or her registration address or vote in two election cycles after being placed in inactive status. Thus, the EPM – which has the effect of law – directs County Recorders to not cancel a registration as required by the statute, but instead to place the registration into an inactive status and maybe cancel the registration after another four years of inaction (two election cycles).

When a statute is "subject to only one reasonable interpretation, we apply it without further analysis." *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) (internal quotations omitted). The Court can find no ambiguity in § 16-165(A)(9). The EPM provision directly conflicts with the statute's plain, nondiscretionary language and timelines. The two simply cannot coexist.

The Secretary argues that he is simply "harmonizing" the state statute with federal law because, according to the Secretary, the state statute conflicts with the National Voter Registration Act of 1993, 52 U.S.C. § 20501, *et seq*. Based upon his legal assessment, the Secretary has disregarded portions of the state statute that he believes do not conform to the NVRA. But "it is the Court's role, not the Secretary's, to interpret [election statutes]." *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The Secretary does not have the authority to overrule and rewrite state law, even in part, on his mere belief that a conflict exists between state and federal law.

Moreover, as Plaintiffs correctly argue, no conflict actually exists between the NVRA and Arizona statutes. More specifically, § 20507(d)(1)(A) permits the State to remove the name of a

person from the official list of eligible voters if the person confirms in writing that he or she has changed residence to a place outside the county. And pursuant to Arizona law, persons that seek disqualification from jury duty based upon an attestation that he or she does not reside within the county do so on a court questionnaire. Thus, the individual has confirmed his or her nonresidence in writing. Additionally, the questionnaire the person uses to seek disqualification from jury duty specifically notifies the person that disqualification from jury duty based upon residence outside the county will result in cancellation of the person's voter registration. A.R.S. § 21-314(B); *see also* Trial Exhibit 4 at AG136657.

The Court can find no conflict between the NVRA and applicable state statutes, nor can the Court find any basis to conclude that persons are unaware that their request for exemption from jury service based upon out-of-county residence will result in cancellation of their voter registration.

THE COURT THEREFORE FINDS that Chapter 1, Section 9, Subsection C of the EPM is invalid and unenforceable because it directly conflicts with Arizona law and further, because the Secretary acted beyond the scope of his authority under the delegation.

IT IS THEREFORE ORDERED declaring the 2023 EPM's Non-Residency of Juror Questionnaire Rule in Chapter 1, Section 9, Subsection C(1)(b) exceeds the Secretary's specific statutory authorization and lawful authority, does not carry the force of law, and is void.

Count III

In Count III, Plaintiffs challenge Chapter 2, Section 1, Subsection B(7) of the EPM. Count III addresses the Active Early Voter List ("AEVL") which is "a list of voters who receive an early ballot by mail for any election for which the county voter registration roll is used to prepare the election register." A.R.S. § 16-544(A). The list is maintained by County Recorders. At issue is § 16-544(H)(4), which states that a voter on the AEVL will continue to receive an early ballot by mail until, *inter alia*, the voter fails to vote an early ballot in all elections for two consecutive election cycles. On January 15 of every odd-numbered year, the County Recorder must send a notice to every voter on the AEVL that has not voted in two consecutive election cycles. The notice asks the voter whether he or she would like to remain on the AEVL. If the voter does not respond within 90 days, the voter is removed from the AEVL, but may re-enroll at any time.

The parties dispute which specific election cycle occurring after § 16-544(H)(4) became effective should be the first election cycle included in the statute's "two consecutive election cycles." The disputed EPM section addresses the date for implementation, and mandates that:

> "[b]ecause the 2022 election cycle began before S.B. 1485 (2022) took effect and S.B. 1485 does not apply retroactively, the first two full election cycles after S.B. 1485's effective date are the 2024 and 2026 election cycles. Therefore, the first AEVL removal notices must be sent out by January 15, 2027 to AEVL voters who vote by early ballot in zero eligible elections in the 2024 and 2026 election cycles."

Plaintiffs argue that because § 16-544(H)(4) became effective during the 2022 election cycle, the registrant's subsequent voting or failure to vote in the 2022 and 2024 election cycles must be given full effect. Thus, according to Plaintiffs, AEVL removal notices must be sent out in 2025, not 2027. Both parties agree that the statutory provision became effective during the 2022 election cycle. The statute itself is silent on this issue.

THE COURT FINDS that Plaintiffs have failed to establish good cause for the relief they seek in Count III of the *Verified Complaint*. Plaintiffs have not identified any statute or constitutional provision with which the EPM provision directly conflicts. Moreover, given the fact that the § 16-544(H)(4) became effective ***during*** the 2022 election cycle, the Secretary's determination that implementation should begin on the next full election cycle is reasonable, and within the Secretary's statutory authority to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting[.]" A.R.S. § 16-452(A).

IT IS THEREFORE ORDERED denying the relief sought by Plaintiffs in Count III.

Count IV

In Count IV, Plaintiffs challenge footnote 58 in Chapter 6, Section 2, Subsection C of the EPM, which purports to excuse situations in which a circulator does not properly list his or her information when applying for registration as a circulator in the Circulator Portal. Footnote 58 states:

> 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.).

Again, "[o]nce adopted, the EPM has the force of law[.]" *Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16. There are multiple problems with the language of footnote 58. First, the Secretary's edict directly conflicts with Arizona statutes. For example, the information that the Secretary believes need not be accurate or complete in the circulator application is expressly required by Arizona

statute, specifically A.R.S. § 19-118(B), which states: "[t]he circulator registration application required by subsection A of this section *shall* require the following…." (emphasis added). Second, pursuant to Arizona statute, the Secretary must remove the signature sheets for any circulator that was required to be registered but who did not properly register. A.R.S. § 19-121.01. A registration based upon an inaccurate or incomplete application is not a "proper" registration of the circulator.

Third, the footnote disregards the need for strict compliance with statutory requirements in the initiative and referendum processes. *See* A.R.S. § 19-101.01 (requiring "that the … statutory requirements for the referendum be strictly construed and that persons using the referendum process strictly comply with those … statutory requirements."); § 19-102.01 ("[S]tatutory requirements for statewide initiative measures must be strictly construed and persons using the initiative process must strictly comply with those … statutory requirements.").[4] The Court finds the Secretary's citation to *Leibsohn v. Hobbs*, 254 Ariz. 1 (2022) to be unhelpful. The court in *Leibsohn* did not excuse the circulator's failure to include his apartment unit number in the circulator application; the court instead found that the applicable law does not require an apartment number when listing the address. By contrast, however, footnote 58 improperly seeks to excuse the omission of information that is actually required by statute, which is a violation of A.R.S. §§ 19-101.01 and 19-102.01.

Finally, the footnote is impermissibly vague. For example, the act of knowingly omitting or misrepresenting information on the application is a criminal offense – a class 1 misdemeanor. A.R.S. § 19-118(H). Footnote 58 purports to excuse situations where a circulator applicant submits an application with factual inconsistencies which, if considered to have been intentional, would be a criminal act under § 19-118(H). The footnote also purports to excuse factual inaccuracies if they are the product of mistake but identifies no standards for determining what would be an excusable mistake or inconsistency versus a criminal act. Counsel for the Secretary informed the Court at the May 23, 2024, hearing that footnote 58 directs the actions of the Secretary and his office, not the superior court. Thus, the Secretary intends to make the determination whether inaccuracies or inconsistencies in a circulator application are the product of mistake – and therefore excusable – or whether the applicant "knowingly" submitted an inaccurate or incomplete application. The language of the footnote is vague and "is drafted in such a way that allows for arbitrary and discriminatory enforcement." *In re Dayvid S.*, 199 Ariz. 169, 172 ¶ 11 (App. 2000) (discussing impermissible vagueness in the criminal context).

[4] The Court notes that both statutes also mandate that *constitutional* requirements be strictly construed. But our Supreme Court called into question whether "under separation-of-powers principles … the legislature can direct how courts apply our constitution." *Voice of Surprise v. Hall*, 255 Ariz. 510, 517 n. 1 (2023). The Court will therefore only focus on the need for an applicant to strictly comply with *statutory* requirements and the need for the Court to strictly construe *statutory* requirements.

THE COURT THEREFORE FINDS that footnote 58 in Chapter 6, Section 2, Subsection C of the EPM is invalid and unenforceable because it directly conflicts with Arizona law, is impermissibly vague – allowing for arbitrary and discriminatory enforcement, and is beyond the scope of the Secretary's authority under the delegation.

IT IS THEREFORE ORDERED declaring that footnote 58 in Chapter 6, Section 2, Subsection C of the EPM exceeds the Secretary's specific statutory authorization and lawful authority, does not carry the force of law, and is void.

Count V

In Count V, Plaintiffs challenge two portions of Chapter 13, Section 2 of the EPM, both of which address duty to canvass.

Subsection A(2) purports to place limits on the scope of what a county Board of Supervisors is permitted to do when canvassing. The disputed section states:

> 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 court order.

Both parties cite to A.R.S. § 16-643, which states that a canvass of election returns "shall be made in public by opening the returns … and determining the vote of the county[.]" The statute does not define what it means to "determine" the vote, nor does the statute expressly preclude the Board of Supervisors from "chang[ing] vote totals, reject[ing] the election results, or delay[ing] certifying the results." Indeed, the statute does not suggest in any way the proper scope of "determining the vote."

The Secretary has relied on the statute's silence and interpreted it to preclude the Board of Supervisors from doing anything other than opening the returns and counting what they find. But again, "it is the Court's role, not the Secretary's, to interpret [election statutes]." *Leibsohn*, 254 Ariz. at 7 ¶ 22. Here, the Secretary, without proper authority, has attempted to create a legally-enforceable presumption in the EPM that the Board of Supervisors is limited to simply opening and counting during a canvass, unless the Board seeks an exception from the judiciary on a case-by-case basis. However, the Secretary's presumption does not exist in the statute, and the Secretary does not have the authority to read such a presumption into the statute. It would be more appropriate for either party to bring this issue before a court of competent jurisdiction once the issue actually arises in an election and is ripe for determination on specific, existing facts.

Plaintiffs also challenge Subsection B(2), which states that the Secretary must proceed with the state canvass without including the votes of any county that has not forwarded its official canvass by the deadline. In support, the Secretary points to the strict deadlines with which he must comply. The Secretary is correct about the short deadlines and their non-discretionary nature. But nothing in the statutes permits the Secretary to exclude a particular county's canvass and/or, by extension, disenfranchise the entirety of the county's voters. The Secretary does not have the authority to read such a drastic course of action into the governing statutes. Instead, this issue is more appropriately resolved by a court of competent jurisdiction in the context of: (1) an actual dispute that is ripe for determination; (2) involving a missing county canvass and approaching deadlines; (3) based upon existing facts; and (4) a request for mandamus or similar relief.

THE COURT THEREFORE FINDS that Chapter 13, Section 2, Subsections A(2) and B(2) of the EPM are invalid and unenforceable because the Secretary acted beyond the scope of his authority under the delegation.

IT IS THEREFORE ORDERED declaring that Subsections A(2) and B(2) of Chapter 13, Section 2 of the EPM exceed the Secretary's specific statutory authorization and lawful authority, do not carry the force of law, and are void.

Injunctive Relief

Plaintiffs seek injunctive relief in addition to declaratory relief. As detailed above, Plaintiffs have established that the Secretary exceeded his specific statutory authorization and lawful authority in Counts I, IV, and V. "Because Plaintiffs have shown that [the Secretary] has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy the standard for injunctive relief." *Arizona Public Integrity Alliance*, 250 Ariz. at 64 ¶ 26. Plaintiffs are therefore entitled to injunctive relief on Counts I, IV, and V.[5]

[5] The Secretary argues that Plaintiffs must meet the traditional, four-factor test for injunctive relief. The Secretary states that the standard the Arizona Supreme Court enunciated in *Arizona Public Integrity Alliance* ("AZPIA") does not apply in this case based upon two arguments: (1) *AZPIA* was a mandamus action and mandamus actions are subject to different standards; and (2) the Arizona Supreme Court's subsequent decision in *Fann v. State* utilized the traditional, four-factor test, indicating that the court was not abandoning the traditional test. *Fann v. State*, 251 Ariz. 425 (2021). Neither argument is compelling. First, the paragraphs from *AZPIA* cited by the Secretary to demonstrate a different standard for mandamus actions actually address *standing* to bring a mandamus action; they do not address a different standard for determining whether a party succeeded in demonstrating an *entitlement to mandamus relief*. *Id*. at ¶¶ 11-14. Second, the *Fann* case did not involve an action to enjoin a public official that had acted unlawfully – as is the case here and in *AZPIA*. Instead, *Fann* considered the propriety and application of a voter-approved initiative.