

1 Roopali H. Desai (024295)
D. Andrew Gaona (028414)
2 Kristen Yost (034052)
COPPERSMITH BROCKELMAN PLC
3 2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
4 T: (602) 381-5478
rdesai@cblawyers.com
5 agaona@cblawyers.com
kyost@cblawyers.com

6 Sambo (Bo) Dul (030313)
7 **STATES UNITED DEMOCRACY CENTER**
8205 South Priest Drive, #10312
8 Tempe, Arizona 85284
T: (480) 253-9651
9 bo@statesuniteddemocracy.org

10 Christine Bass *
11 **STATES UNITED DEMOCRACY CENTER**
3749 Buchanan Street, Unit 475165
12 San Francisco, California 94147-3103
T: (309) 242-8511
christinebass@statesuniteddemocracy.org

13 * *Application for Pro Hac Vice Pending*
14 *Attorneys for Defendant*
15 *Arizona Secretary of State Katie Hobbs*

16
17 **UNITED STATES DISTRICT COURT**
18 **DISTRICT OF ARIZONA**

19 Kari Lake and Mark Finchem,) No. 2:22-cv-00677-JJT
20)
Plaintiffs,)
21)
v.) **ARIZONA SECRETARY OF**
22) **STATE’S MOTION TO DISMISS**
Katie Hobbs, in her official capacity as) **FIRST AMENDED COMPLAINT**
23 Arizona Secretary of State, et al.,)
24 Defendants.)
25)
26)

Introduction

1
2 Plaintiffs Kari Lake and Mark Finchem seek a mandatory injunction compelling
3 Arizona election administrators to follow Plaintiffs' preferred procedures for preparing,
4 distributing, collecting, and tabulating ballots, including forcing them to hand-count every
5 ballot cast in Arizona elections. [Doc. 3 ¶ 153].

6 Plaintiffs' request for this unprecedented relief hinges on their conjectural allegations
7 of potential "vulnerabilities" in electronic voting equipment. For starters, the allegations in the
8 First Amended Complaint ("FAC") are inaccurate and misleading, and many are provably
9 false. For example, contrary to Plaintiffs' repeated allegations that Arizona uses "untested and
10 unverified electronic voting machines" and that some ballots are cast electronically [*e.g.*, Doc.
11 3 ¶¶ 2, 153, 173], every ballot cast in Arizona is a paper ballot, and every piece of electronic
12 voting equipment is tested and verified before being certified for use in Arizona elections and
13 is again tested before and after every election. For these reasons and others, Plaintiffs' claims
14 are frivolous and violate Rule 11(b), Fed. R. Civ. P., and the Arizona Secretary of State Katie
15 Hobbs ("Secretary") seeks an award of her attorneys' fees and costs incurred in filing this
16 Motion under 42 U.S.C. § 1988(b).

17 But even accepting Plaintiffs' allegations as true for purposes of this Motion only, the
18 Court should dismiss the FAC with prejudice. Despite claiming throughout the FAC that they
19 seek relief "in the upcoming 2022 Midterm Election," [Doc. 3 ¶ 1], Plaintiffs inexplicably
20 waited until the eve of the election to file their complaint, then waited several weeks to even
21 serve the complaint, and still haven't filed a motion for preliminary injunction. As the County
22 Defendants explain in their Motion to Dismiss [Doc. 27], Plaintiffs brought their claims far too
23 late to get the relief they seek in this election. The Secretary will not repeat the County
24 Defendants' arguments, but she joins in their motion and incorporates it here. The Secretary
25 also moves to dismiss the FAC under Rule 12(b)(1) and (b)(6) for three other reasons.

26 First, Plaintiffs lack standing. Their claims rest on contingency after contingency: that

1 Arizona’s voting equipment is vulnerable to hacking or manipulations, that third-parties will
2 in fact hack that equipment, that election officials won’t be able to detect or stop it, and that
3 the hacking will affect Plaintiffs’ votes or the outcome of the election. This “speculative chain
4 of possibilities” cannot establish a concrete injury-in-fact. *Clapper v. Amnesty Int’l USA*, 568
5 U.S. 398, 414 (2013). And Plaintiffs’ vague allegations of broad harm to “all Arizona voters”
6 is a generalized grievance, not a particularized injury personal to Plaintiffs.

7 Second, the Eleventh Amendment bars Plaintiffs’ claims. Plaintiffs try to mask their
8 claims as violations of their right to vote under the U.S. Constitution, but their claims depend
9 on allegations that Arizona’s election equipment does not comply with state law. [*E.g.*, Doc. 3
10 ¶¶ 156-64, 181, 194]. The Eleventh Amendment and principles of federalism don’t allow
11 federal courts to “instruct[] state officials on how to conform their conduct to state law.”
12 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

13 Last, Plaintiffs fail to state a cognizable constitutional claim. They allege no facts
14 sufficient to give rise to an inference that their right to vote has been or will be violated. The
15 FAC contains only sheer conjecture about possible hacking of electronic voting equipment and
16 irrelevant allegations about other jurisdictions. That is not “enough to raise a right to relief
17 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead,
18 Plaintiffs’ claims are mere policy preferences about election administration. But “it is the job
19 of democratically-elected representatives to weigh the pros and cons of various balloting
20 systems”—Plaintiffs don’t have a constitutional right to their preferred method of counting
21 votes. *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003).

22 The Court should dismiss the FAC with prejudice.

23 **Factual Background**

24 **I. The Use of Electronic Voting Equipment in Arizona.**

25 Arizona authorized the use of electronic voting systems as early as 1966. H.B. 204, 27th
26 Leg., 2d. Reg. Sess. (Ariz. 1966) <https://azmemory.azlibrary.gov/digital/collection/azsession>

1 [/id/22/rec/4](#). All electronic voting systems undergo federal and state testing and certification
2 before being used in Arizona elections, counties perform logic and accuracy testing on all
3 equipment before and after every election, and the Secretary separately performs logic and
4 accuracy testing on a sample of each county’s equipment before each election with a federal,
5 statewide, or legislative race. *See, e.g.*, A.R.S. §§ 16-442, 16-449, 16-602; 2019 Elections
6 Procedures Manual (“2019 EPM”) at 76-82, 86-100, 235, [https://azsos.gov/sites/default/files/
7 2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

8 Though Arizona uses electronic equipment to tabulate votes (and has done so for many
9 decades), every vote cast in Arizona is on a paper ballot. *E.g.*, A.R.S. §§ 16-462, 16-468(2),
10 16-502. Voters with disabilities may use accessible electronic voting devices to select their
11 choices on a ballot, but Arizona law requires that every accessible voting device produce a
12 paper ballot or voter verifiable paper audit trail. 2019 EPM at 80. The Secretary has certified
13 each electronic voting system that will be used in each county in the 2022 elections. Ariz. Sec’y
14 of State, *2022 Election Cycle / Voting Equipment*, [https://azsos.gov/sites/default/files/2022_
15 Election_Cycle_Voting_Equipment-Feb-Final.pdf](https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment-Feb-Final.pdf).

16 **II. The 2020 Election Results.**

17 In the face of a once-in-a-century pandemic and unprecedented levels of
18 misinformation, Arizona election officials successfully administered free, fair, and secure
19 elections in 2020. Over 3.4 million Arizonans exercised their right to vote in the general
20 election, and counties completed and passed post-election audits and logic and accuracy testing
21 confirming the results.

22 The Secretary and other dedicated election officials defended nearly a dozen post-
23 election lawsuits in Arizona, including several suits seeking to overturn the results of the
24 presidential election. Every lawsuit failed. *E.g.*, *Bowyer v. Ducey*, 506 F.Supp.3d 699, 716,
25 724 (D. Ariz. 2020) (“Plaintiffs failed to provide the Court with factual support for their
26 extraordinary claims” challenging accuracy of election results in Maricopa County, including

1 implausible allegations of fraud and “irregularities” relating to Dominion voting systems).

2 After these legal challenges failed, the Arizona Senate hired a private company called
3 the “Cyber Ninjas” to conduct an “audit” of the election results in Maricopa County. The Cyber
4 Ninjas failed to meet industry standards for any credible audit (much less for an election audit),
5 showed a lack of understanding of election processes, and tried to perform (and botched) a
6 hand-count of the top two races. *E.g.*, Ariz. Sec’y of State, *Report on the Partisan Review of*
7 *the 2020 Election in Maricopa County*, [https://azsos.gov/sites/default/files/2020-](https://azsos.gov/sites/default/files/2020-Ballot_Review_Report_ver20210819-03_Review.pdf)
8 [Ballot_Review_Report_ver20210819-03_Review.pdf](https://azsos.gov/sites/default/files/2020-Ballot_Review_Report_ver20210819-03_Review.pdf). The Cyber Ninjas’ final “audit report”
9 included various misleading and inaccurate findings, all of which were debunked by Maricopa
10 County elections officials. *See* Maricopa Cnty., *Correcting the Record: Maricopa County’s In-*
11 *Depth Analysis of the Senate Inquiry* (Jan. 2022), [https://recorder.maricopa.gov/justthefacts/](https://recorder.maricopa.gov/justthefacts/pdf/Correcting%20The%20Record%20-%20January%202022%20Report.pdf)
12 [pdf/Correcting%20The%20Record%20-%20January%202022%20Report.pdf](https://recorder.maricopa.gov/justthefacts/pdf/Correcting%20The%20Record%20-%20January%202022%20Report.pdf). Even so, the
13 Cyber Ninjas’ “audit” report didn’t contradict the certified election results.

14 **III. Plaintiffs’ Claims Challenging All Electronic Voting Systems.**

15 Undeterred, Plaintiffs now challenge the use of electronic voting systems in Arizona,
16 raising many of the same inaccurate theories about electronic voting systems. Plaintiffs
17 vaguely allege that electronic voting systems—in general—have certain security risks,
18 complain about a lack of “transparency” from manufacturers, and allude to various election
19 equipment issues in other jurisdictions. Based on these allegations, they ask [¶ 23] the Court
20 to infer that all voting systems certified for use in Arizona are “potentially unsecure, lack
21 adequate audit capacity, fail to meet minimum statutory requirements, and deprive voters of
22 the right to have their votes counted and reported in an accurate, auditable, legal, and
23 transparent process.” Plaintiffs then ask the Court [¶ 153] to order Arizona’s election officials
24 to conduct elections following a 9-step list of Plaintiffs’ preferred election procedures.

25
26

Argument

I. Plaintiffs Lack Standing.

The standing doctrine “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). It “asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves ‘both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.’” *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish Article III standing, Plaintiffs must show: (1) that they suffered an injury in fact; (2) that the challenged conduct caused their alleged injury; and (3) that a favorable decision would likely redress the claimed injury. *Barnum Timber Co.*, 633 F.3d at 897. Plaintiffs fail at step one.

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 “must affect the plaintiff in a personal and individual way.” *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quotation omitted). And to be “actual or imminent,” a threatened injury must be “certainly impending”—“allegations of possible future injury are not sufficient.” *Clapper*, 568 U.S. at 409 (cleaned up).

Plaintiffs offer nothing but innuendo and conjecture about “potential” vulnerabilities in election equipment generally, but they do not (and cannot) allege that any election equipment in Arizona has caused or will cause them harm. Further, Plaintiffs cannot pursue their “generalized grievance” over the use of electronic voting equipment in Arizona’s elections.

A. Plaintiffs’ claimed injuries are too conjectural and speculative.

First, Plaintiffs’ asserted injury “is far too speculative and conjectural” to establish standing. *Drake v. Obama*, 664 F.3d 774, 781 (9th Cir. 2011).

1 According to Plaintiffs, the use of electronic voting equipment could impair their right
2 to vote because the equipment cannot “reliably provide trustworthy and verifiable election
3 results.” [Doc. 3 ¶ 172]. They make vague allegations that electronic voting equipment—in
4 general—has potential security vulnerabilities. [*E.g.*, Doc. 3 ¶ 4 (alleging issues with
5 “electronic voting systems” generally); ¶ 23 (alleging voting equipment is “potentially”
6 unsecure); ¶ 29 (claiming electronic voting equipment has “common shortcomings” that “leave
7 the systems vulnerable to generalized, widespread-effect attacks”); ¶ 61 (alleging that any
8 voting machine “can be hacked or compromised”); ¶ 107 (alleging without elaboration that
9 voting equipment manufactured by ES&S and Dominion are “opaque, easily hacked, and
10 vulnerable to incorporation of compromised components”); ¶ 181 (claiming voting systems
11 “must be presumed to be compromised and incapable of producing verifiable results”); ¶ 199
12 (alleging voting equipment “may miscount” voters’ votes)].

13 And every example Plaintiffs offer of alleged “issues” with election equipment involves
14 other jurisdictions, not Arizona. [Doc. 3 ¶ 32 (alleging “other countries” have “largely banned
15 or limited the use of electronic voting machines due to the security risks they present”); ¶¶ 73-
16 80 (alleging issues with voting equipment in other states up to twenty years ago); ¶¶ 81-89
17 (various allegations about issues with security and equipment in other states over several
18 years); ¶¶ 90-92 (alleging equipment used in “many jurisdictions” is “vulnerable” to attack
19 from other countries); ¶¶ 93-102 (vague allegations about election security issues generally in
20 the United States); ¶¶ 103-106 (alleging a voting machine not used in Arizona once failed a
21 certification test in Texas); ¶¶ 108-116 (vague allegations of issues with equipment in other
22 jurisdictions); ¶¶ 125-31, 133-34 (allegations of potential security issues in the 2020 election
23 in other jurisdictions); *see also* Section III.A below].¹

24
25 ¹ The few times Plaintiffs try to tie their allegations to Arizona, they again raise only
26 vague, speculative allegations of potential security risks. [Doc. 3 ¶ 4 (alleging an unnamed
expert in an undisclosed “secret” report found “catastrophic failures” in an unidentified voting
machine allegedly used in Arizona); ¶ 132 (vaguely alleging—based on a debunked report of

1 All these allegations depend on a chain of contingencies to get to Plaintiffs’ alleged
2 harm: that Arizona’s specific electronic voting systems are in fact vulnerable to security
3 breaches; that third parties will in fact exploit those vulnerabilities and interfere in a future
4 election; that Arizona’s election officials will not detect or stop this interference; and that this
5 interference will affect Plaintiffs’ votes or enough votes to impact the outcome of the election
6 in a way that harms Plaintiffs. This “speculative chain of possibilities” cannot establish Article
7 III standing. *Clapper*, 568 U.S. at 414.

8 *Shelby Cnty. Advocs. for Valid Elections v. Hargett* is instructive. There, the plaintiffs
9 made similar allegations that their county’s electronic voting equipment was “vulnerable to
10 undetectable hacking and malicious manipulation.” 2019 WL 4394754, at *2 (W.D. Tenn.
11 Sept. 13, 2019), *aff’d* *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977 (6th Cir.
12 2020). The district court found these allegations were “based only on speculation, conjecture
13 and [the plaintiffs’] seemingly sincere desire for their ‘own value preferences’ in having voting
14 machines with a paper trail,” *id.* *7, but the plaintiffs failed to allege facts to show “that Shelby
15 County’s voting system is any more likely to miscount votes than any other system used in
16 Tennessee.” *Id.* at *10. The court held that this “conjectural and hypothetical injury cannot
17 survive as the foundation for [the plaintiffs’] claims.” *Id.* The Sixth Circuit affirmed. *Shelby*,
18 947 F.3d at 981, 983 (plaintiffs’ allegations of “prior system vulnerabilities, previous
19 equipment malfunctions, and past election mistakes” do not support a claim of alleged future
20 harm, and arguments about election equipment used in other states “does not translate into an
21 imminent risk that individuals will hack the voting machines in Shelby County, Tennessee”).

22 _____
23 a company with no election experience—that certain “cyber security best practices and
24 guidelines were not followed” in the 2020 general election in Maricopa County); ¶ 139
25 (alleging one “expert” has stated that an accessible voting device used by voters with
26 disabilities in Arizona has “flaws” and “security vulnerabilities”). That these allegations are
pure conjecture is obvious from the first paragraph of the FAC: Plaintiffs claim that Arizona’s
voting equipment must be “subjected to scientific analysis by objective experts to determine
whether it is secure from manipulation or intrusion.” [Doc. 3 ¶ 1 (emphasis added)]

1 Other courts around the country have held the same. *See, e.g., Stein v. Cortes*, 223 F.
2 Supp. 3d 423, 432 (E.D. Pa. 2016) (voter’s “allegation that voting machines may be
3 ‘hackable,’ and the seemingly rhetorical question they pose respecting the accuracy of the vote
4 count, simply do not constitute injury-in-fact”); *Samuel v. Virgin Islands Joint Bd. of Elections*,
5 2013 WL 842946, at *5 (D.V.I. Mar. 7, 2013) (plaintiffs’ “conjectural” allegations “that the
6 election process ‘may have been’ left open to compromise” by using certain voting machines
7 were “amorphous due process claims, without requisite concreteness”); *Schulz v. Kellner*, 2011
8 WL 2669456, at *7 (N.D.N.Y. July 7, 2011) (allegations that “votes will allegedly not be
9 counted accurately” because of “machine error and human fraud resulting from Defendants’
10 voting procedures” were “merely conjectural and hypothetical and do not demonstrate a
11 concrete or particularized injury to Plaintiffs”); *Landes v. Tartaglione*, 2004 WL 2415074, at
12 *3 (E.D. Pa. Oct. 28, 2004), *aff’d*, 153 F. App’x 131 (3d Cir. 2005) (plaintiffs’ claimed injury
13 was only “conjectural or hypothetical” where she claimed “that voting machines are
14 vulnerable to manipulation or technical failure”). So too here.

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

16 Second, Plaintiffs’ generalized complaints about the use of electronic voting equipment
17 in elections is not a particularized injury.

18 Like the plaintiffs in *Shelby Cnty. Advocs. for Valid Elections*, Plaintiffs’ claims are no
19 more than “general dissatisfaction with the voting system and processes used in” Arizona. 2019
20 WL 4394754, at *9; [*see* Doc. 3 ¶ 2 (asserting rights of “Plaintiffs and their fellow voters and
21 office seekers” to have “all ballots . . . counted accurately and transparently”); ¶ 23 (alleging
22 the use of voting machines “violates the voting rights of every Arizonan”); ¶ 143 (alleging
23 security vulnerabilities “affecting Arizona voters”); ¶ 172 (claiming “[a]ll persons who vote in
24 the Midterm Election, if required to vote using an electronic voting system or have their vote
25 counted using an electronic voting system, will be irreparably harmed”); ¶¶ 199, 211 (alleging
26 use of voting equipment will “violate the rights of the citizens of the State”)].

1 These allegations fail to establish “concrete and particularized” harm personal to
 2 Plaintiffs. *See, e.g., Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (generalized “interest
 3 in seeing that the law is obeyed” is neither concrete nor particularized); *Stein*, 223 F. Supp. 3d
 4 at 433 (allegations about harm to all “Pennsylvania voters” was an improper “generalized
 5 grievance”); *Samuel*, 2013 WL 842946, at *4 (“Plaintiffs’ allegations do not distinguish their
 6 concerns—about the use of certain voting machines in the election or the election results in
 7 general—from concerns of other voters or even other candidates. . . . At best, Plaintiffs allege
 8 ‘a type of institutional injury’—use of improper voting machines—‘which necessarily
 9 damages’ all Virgin Islands voters ‘equally.’”) (cleaned up) (citing *Raines*, 521 U.S. at 821).

10 Plaintiffs’ failure to allege an injury-in-fact dooms their claims.

11 **II. The Eleventh Amendment Bars Plaintiffs’ Claims.**

12 Next, Plaintiffs ask the Court to order state officials to follow state law according to
 13 Plaintiffs’ specific (incorrect) interpretation of it. The Eleventh Amendment doesn’t allow this.

14 The Eleventh Amendment prevents a state from being sued in federal court without its
 15 consent. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir. 2008). This
 16 immunity extends to “suit[s] against state officials when the state is,” as it is here, “the real,
 17 substantial party in interest.” *Pennhurst*, 465 U.S. at 101 (quotations omitted). The *Ex parte*
 18 *Young* exception to this immunity applies only to “claims seeking prospective injunctive relief
 19 against state officials to remedy a state’s ongoing violation of federal law.” *Ariz. Students’*
 20 *Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (citing *Ex parte Young*, 209
 21 U.S. 123 (1908) (emphasis added)).

22 *Ex parte Young* doesn’t apply here. The relief Plaintiffs seek is not in fact to remedy a
 23 violation of federal law because they don’t plausibly allege such a violation.² *See, e.g., Weber*,

24 ² *Ex parte Young* also doesn’t apply when the plaintiff seeks damages. *Ulaleo v. Paty*,
 25 902 F.2d 1395, 1398 (9th Cir. 1990). Eleventh Amendment immunity thus bars Plaintiffs’
 26 purported claim for “damages” against the Secretary in her official capacity. [Doc. 3 ¶¶ 42,
 199]; *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) (“The Eleventh Amendment
 bars claims for damages against a state official acting in his or her official capacity.”).

1 347 F.3d at 1107 (“Nothing in the Constitution forbids” the use of touchscreen voting systems;
2 “it is the job of democratically-elected representatives to weigh the pros and cons of various
3 balloting systems. So long as their choice is reasonable and neutral, it is free from judicial
4 second-guessing”); *Pettengill v. Putnam Cnty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir.
5 1973) (“[The] complaint asks the federal court to oversee the administrative details of a local
6 election. We find no constitutional basis for doing so[.]”); *N.Y. State Democratic Party v.*
7 *Lomenzo*, 460 F.2d 250, 251 (2d Cir. 1972) (given “the wide latitude which the state has in
8 deciding the manner of conducting elections” there was no “substantial constitutional
9 question” raised); *Green Party of N.Y. v. Weiner*, 216 F.Supp.2d 176, 190-91 (S.D.N.Y.
10 2002) (use of voting machines “is for the elected representatives of the people to decide[.]
11 There is no constitutional right to any particular method of registering and counting votes.”).

12 Instead, Plaintiffs’ claims can only stem from an argument that Defendants are violating
13 Arizona law by using insecure or inaccurate electronic voting systems. Arizona statutes set out
14 a comprehensive set of requirements for the conduct of elections in the state, including the
15 casting and counting of ballots. *See* A.R.S. § 16-400 *et seq.* There are requirements on voting
16 equipment, *see* A.R.S. § 16-441 *et seq.*, including that electronic voting systems are “used
17 safely, efficiently and accurately in the conduct of elections and counting ballots,” “record
18 correctly and count accurately every vote cast,” and “[p]rovide for voting in secrecy.” A.R.S.
19 § 16-446(B)(1), (4), (6). Plaintiffs cannot plausibly claim these laws themselves violate the
20 federal Constitution. Their claims, therefore, boil down to allegations that Defendants are
21 violating these and other state law requirements. [*E.g.*, Doc. 3 ¶¶ 156-61 (claiming the
22 Secretary “has failed to meet the duties” in Arizona statutes, including: voting equipment
23 requirements in A.R.S. § 16-446(B); the requirement to “prescribe rules to achieve and
24 maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the
25 procedures” for voting in A.R.S. § 16-452; and the requirement that computer election
26 programs “shall be used by the Secretary of State or Attorney General to preclude fraud or any

1 unlawful act” under A.R.S. § 16-445(D)); ¶¶ 162-64 (describing statutory requirements that
2 the County Defendants allegedly violated); ¶¶ 181, 194 (claiming Defendants “abrogated their
3 statutory duties”)].

4 Even if Plaintiffs are correct in their interpretation of state law (they’re not), they cannot
5 raise these claims in federal court. The Eleventh Amendment’s protections are at their apex
6 where, as here, a plaintiff asks a federal court to “order state actors to comply with state law.”
7 *Hale v. Arizona*, 967 F.2d 1356, 1369 (9th Cir. 1992). Indeed, the Supreme Court has said that
8 “it is difficult to think of a greater intrusion on state sovereignty than when a federal court
9 instructs state officials on how to conform their conduct to state law.” *Pennhurst*, 465 U.S. at
10 106; *see also Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018);
11 *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 6383222, at *6
12 (M.D.N.C. Oct. 30, 2020) (rejecting challenge to election board’s actions in curing ballots and
13 holding that “[f]ederal courts are prohibited from directing state actors to implement state law
14 in a particular fashion”).

15 Plaintiffs try to disguise their claims as alleged violations of the federal Constitution.
16 But because their claims turn on application of state law, they are barred. Courts have
17 repeatedly rejected similar state law claims cloaked as federal law violations. *See, e.g., S&M*
18 *Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1204-05 (11th Cir. 2019) (Eleventh
19 Amendment barred alleged federal constitutional claim that “relied on a determination that
20 state officials had not complied with state law”); *DeKalb Cty. Sch. Dist. v. Schrenko*, 109 F.3d
21 680, 682 (11th Cir. 1997) (rejecting attempt to cloak claims in federal constitutional law
22 because the “gravamen” and “substance” of the complaint was that the state improperly
23 interpreted and applied a state statute); *Bowyer*, 506 F.Supp.3d at 716 (“where the claims are
24 state law claims, masked as federal law claims” Eleventh Amendment immunity applies)
25 (citing *Massey v. Coon*, 865 F.2d 264 (9th Cir. 1989)); *Balsam v. Sec’y of New Jersey*, 607 F.
26 App’x 177, 183-84 (3d Cir. 2015) (rejecting plaintiff’s “attempt to tie their state law claims

1 into their federal claims”).³

2 Plaintiffs ask this Court to become impermissibly “entangled, as [an] overseer[] and
3 micromanager[], in the minutiae of state election processes,” *Ohio Democratic Party v. Husted*,
4 834 F.3d 620, 622 (6th Cir. 2016), by not only enjoining Defendants from using electronic
5 voting systems and retaining jurisdiction to ensure compliance, but also requiring Defendants
6 to conduct elections according to Plaintiffs’ detailed demands about how ballots must be cast,
7 conveyed, counted, and recounted, and how the whole process must be recorded, streamed,
8 and archived. [Doc. 3 ¶ 153]. “Such a result conflicts directly with the principles of federalism
9 that underlie the Eleventh Amendment,” *Pennhurst*, 465 U.S. at 106, and the Court should
10 reject it. *See Ulaleo*, 902 F.2d at 1400 (“For a federal court to decide such state issues would
11 offend federalism and does not further the interests of federal law, the justification for the *Ex*
12 *parte Young* exception to the eleventh amendment.”).⁴

13 **III. Plaintiffs Fail to State Cognizable Constitutional Claims.**

14 Even if Plaintiffs had standing (they don’t) and the Eleventh Amendment didn’t bar
15 their claims (it does), the Court should dismiss the FAC for failure to state a claim upon which

16 ³ Alternatively, the Court should abstain from determining Plaintiffs’ claims under the
17 *Pullman* abstention doctrine. “By allowing ‘federal courts to refrain from deciding sensitive
18 federal constitutional questions when state law issues may moot or narrow the constitutional
19 questions,’” *Pullman* abstention is “intended both to avoid ‘a collision between the federal
20 courts and state . . . legislatures’ and to prevent ‘the premature determination of constitutional
21 questions.’” *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (citation omitted). Plaintiffs’
22 claims about how votes are cast and counted in Arizona turn on disputed questions of state law.
23 This sets up precisely the type of collision that *Pullman* aims to avoid. *See Wolfson v. Brammer*,
24 616 F.3d 1045, 1066 (9th Cir. 2010).

25 ⁴ Plaintiffs’ allegations are replete with baseless speculation, but if they could muster real
26 evidence that serious irregularities have occurred in an Arizona election, state law provides an
explicit mechanism for contesting a state election. A.R.S. § 16-671 *et seq.* Because of the
“strong public policy favoring stability and finality of election results,” the Arizona Supreme
Court requires that election contests be made in “strict compliance” with the statutory
requirements. *Donaghey v. Ariz. Att’y Gen.*, 584 P.2d 557, 559 (Ariz. 1978). Those
requirements include A.R.S. § 16-672(B)’s mandate that election contests be brought in state
court, thus underscoring the federalism concerns at play here.

1 relief can be granted. To state a claim that survives a Rule 12(b)(6) motion, “a complaint must
 2 contain sufficient factual matter, accepted as true to ‘state a claim to relief that is plausible on
 3 its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).
 4 That is, factual allegations “must be enough to raise a right to relief above the speculative
 5 level.” *Twombly*, 550 U.S. at 555. A claim that is merely “conceivable” or “a sheer possibility”
 6 is insufficient. *Iqbal*, 556 U.S. at 678, 680.

7 The FAC contains no well-pled facts sufficient to show a violation of Plaintiffs’ “right
 8 to vote [and] to have that vote counted.” [Doc. 3 ¶ 192] Instead, the FAC relies on innuendo,
 9 speculation, and immaterial claims about other jurisdictions to allege a mere possibility that
 10 Arizona election systems could be susceptible to intrusion. But without plausible allegations
 11 that Arizona’s systems have been or will be compromised, Plaintiffs’ claims are no more than
 12 a demand that Defendants adopt Plaintiffs’ policy preferences for election administration. That
 13 is not a cognizable claim—Plaintiffs don’t have a constitutional right to their preferred method
 14 of counting votes.

15 **A. Plaintiffs do not plausibly allege any deficiencies in Arizona’s election**
 16 **systems or any burden on Plaintiffs’ right to vote.**

17 Plaintiffs allege various issues with voting systems in other jurisdictions (up to 20 years
 18 ago). [Doc. 3 ¶¶ 71-89].⁵ These allegations are immaterial to Plaintiffs’ claims that Arizona’s
 19 voting systems are “unsecure and vulnerable to manipulation and intrusion and incapable of
 20 producing verifiable results” today. [Doc. 3 ¶¶ 185, 194]. Equally irrelevant are Plaintiffs’
 21 allegations that manufacturers source and assemble components in foreign nations. [Doc. 3 ¶¶
 22 90-92]. These allegations suggest the vague possibility that a foreign attack “could happen”
 23 during the manufacturing process of some unidentified election equipment. [Doc. 3 ¶ 90].
 24 Plaintiffs also raise generalized concerns about election cybersecurity, [¶¶ 93-102], but fail to

25 _____
 26 ⁵ The lone reference to Arizona in this section has nothing to do with a voting system; it
 describes a reported breach of Arizona’s voter registration system in 2016. [Doc. 3 ¶ 79].

1 connect their allegations to Arizona’s voting systems. Rattling off incomplete and out-of-
2 context quotes that don’t refer to Arizona does not plausibly support a conclusion that
3 Arizona’s systems are somehow deficient.

4 Even when Plaintiffs try to tie their allegations to Arizona, their allegations are
5 insufficient. For example, Plaintiffs note that Texas declined to certify Dominion’s Democracy
6 Suite 5.5A voting system in a past election, then declare, without explanation, that this system
7 is “substantially similar” to Democracy Suite 5.5B used in Maricopa County this year. [Doc 3
8 ¶¶ 103-106]. Even if Plaintiffs alleged that Democracy Suite 5.5B has the same “risks” alleged
9 for Democracy Suite 5.5A (they don’t), one state choosing not to certify an electronic voting
10 system doesn’t mean that the use of a “similar” system is unconstitutional. *See, e.g., Weber,*
11 *347 F.3d at 1107* (a state’s choice to certify election equipment is “free from judicial second-
12 guessing”). And even if Plaintiffs had alleged specific security “risks,” that wouldn’t translate
13 to a deprivation of due process, equal protection, or the right to vote. This is all the more true
14 given that election officials implement policies to mitigate risks. *See, e.g., 2019 EPM at 95-98*
15 (establishing physical and data security measures for electronic voting systems).⁶

16 Plaintiffs’ allegations [¶¶ 135-43] that Dominion’s Democracy Suite 5.5B is
17 noncompliant with state and federal requirements are also implausible (and irrelevant) given
18 that they misstate the law and allege noncompliance with voting system guidelines that are (1)
19 voluntary, and (2) outdated. A.R.S. § 16-442(B) requires that equipment comply with the Help
20 America Vote Act of 2002 (HAVA) and be approved by an accredited laboratory. HAVA
21 establishes standards for electronic voting equipment under 52 U.S.C. § 21081. It does not, as
22 Plaintiffs allege, require voting equipment to conform to the Federal Election Commission’s
23 2002 Voting System Standards (VSS). The VSS were never mandated under federal law, and

24 ⁶ The Court may take judicial notice of this public record without converting this motion
25 to dismiss into a motion for summary judgment. *E.g., Intri-Plex Techs., Inc. v. Crest Grp., Inc.,*
26 *499 F.3d 1048, 1052* (9th Cir. 2007); *see also Gonzalez v. Arizona, 677 F.3d 383, 397* (9th Cir.
2012) (the EPM “has the force and effect of law”).

1 were superseded by the Election Assistance Commission’s 2005 Voluntary Voting System
2 Guidelines (VVSG), promulgated under 52 U.S.C. § 21101. *See* Karen L. Shanton, Cong.
3 Rrsch. Serv., IN11592, *Voluntary Voting System Guidelines (VVSG): An Overview 1* (2021)
4 <https://crsreports.congress.gov/product/pdf/IN/IN11592>. Because the federal guidelines are
5 voluntary, Plaintiffs’ allegations of noncompliance (even if true) would not violate HAVA.
6 Even more, Plaintiffs’ reliance on the defunct 2002 VSS renders their allegations irrelevant.
7 Had Plaintiffs bothered to look at the EAC website, they would have easily discovered that
8 Democracy Suite 5.5B was tested and certified under the VVSG in 2019. U.S. Election
9 Assistance Comm’n, *Democracy Suite 5.5B (Modification)*, [https://www.eac.gov/voting-](https://www.eac.gov/voting-equipment/democracy-suite-55b-modification)
10 [equipment/democracy-suite-55b-modification](https://www.eac.gov/voting-equipment/democracy-suite-55b-modification).

11 Beyond that, Plaintiffs ignore that 14 of Arizona’s 15 counties don’t even use Dominion
12 machines. Ariz. Sec’y of State, *2022 Election Voting Equipment List* (updated Feb. 2022),
13 <https://azsos.gov/elections/voting-election/voting-equipment>. Despite 13 counties using ES&S
14 equipment, Plaintiffs offer only a few vague allegations that ES&S’s equipment is “vulnerable”
15 to hacking [¶¶ 28, 61, 107], and a conclusory statement that Arizona’s certification of certain
16 ES&S equipment was “improper.” [Doc. 3 ¶ 21].⁷ Plaintiffs never even mention Unisyn, the
17 manufacturer of Yavapai County’s equipment. Given that Plaintiffs couldn’t be bothered to
18 identify all the voting equipment used in Arizona, much less allege any facts showing its
19 purported deficiencies, Plaintiffs’ claims that electronic voting systems unconstitutionally
20 burden due process, equal protection, and the right to vote are implausible on their face.

21 Plaintiffs’ innuendo about “irregularities” and “vote manipulation” in the 2020 elections
22 also does not plausibly support their claims. [Doc. 3 ¶ 125-34]. In fact, Plaintiffs allege no vote
23 manipulation in Arizona, and rely mostly on allegations about Dominion systems in other
24

25 _____
26 ⁷ They also reference ES&S advertising, public statements, and usage in other states, but
fail to allege Arizona-specific facts. [Doc. 3 ¶¶ 73, 87, 88, 113, 150].

1 jurisdictions. [Doc. 3 ¶¶ 126-29, 134].⁸ Plaintiffs do not allege that Arizona uses the same
2 equipment and procedures that caused the alleged issues they point to. Even so, allegations that
3 certain cybersecurity practices were not followed in another election [*e.g.*, ¶ 127], that a state’s
4 election results “could have been modified” [¶ 128], and that some machines may have been
5 connected to the internet [¶ 129, 133] do not give rise to a plausible inference that Arizona’s
6 voting systems are at risk of being compromised.

7 Plaintiffs next make broad allegations [¶¶ 108-16] about a lack of “transparency” by
8 certain voting system manufacturers, and claim [¶¶ 117-18] that Defendants “refused” to adopt
9 open-source voting technologies. But nothing in the Constitution requires this; Plaintiffs
10 merely argue that voting “should be open to the public.” [Doc. 3 ¶ 123]. In all events, Plaintiffs
11 ignore Arizona’s many opportunities for public observation throughout the election process,
12 including open meetings of the Election Equipment Certification Committee and logic and
13 accuracy testing of voting equipment before each election. *See, e.g.*, A.R.S. §§ 16-442, 16-449.

14 Finally, Plaintiffs allege deficiencies in Arizona’s election “audit regime.” [Doc. 3 ¶¶
15 144-52]. Yet Plaintiffs fail to even describe Arizona’s auditing procedures, much less make a
16 plausible claim that they violate any constitutional rights. *Compare with, e.g.*, A.R.S. §§ 16-
17 449 (pre-election logic and accuracy testing), 16-602 (post-election hand count audits); 2019
18 EPM at 86-100 (pre-election logic and accuracy testing; security measures for electronic voting
19 systems), 213-34 (hand count audit), 235 (post-election logic and accuracy testing). They
20 instead raise second-hand allegations [¶ 146] that malware could defeat Georgia’s procedural
21 protections. And even if Plaintiffs had alleged facts suggesting Arizona’s “audit regime” is
22 somehow inadequate, they cannot allege any burden on their right to vote. *See Shipley v.*
23 *Chicago Bd. of Election Comm’ns.*, 947 F.3d 1056, 1061-62 (7th Cir. 2020) (plaintiffs “cannot
24

25 ⁸ Plaintiffs’ only allegation about Arizona relies on the “audit” of Maricopa County’s
26 2020 election results. [Doc. 3 ¶ 132]. This fails to show that Plaintiffs’ right to vote has been
or will be infringed. [*See supra* at 4].

1 state a claim for a violation of the right to vote” based on post-election audit procedures that
2 “cannot alter or discard any vote cast”).

3 Plaintiffs vague allegations of possible “vulnerabilities” in voting equipment cannot
4 “nudge[] their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

5 **B. Plaintiffs’ claims are not cognizable because they merely reflect a general
6 policy preference for the manner of casting and counting ballots.**

7 Because Plaintiffs fail to plausibly allege deficiencies with Arizona’s voting systems—
8 to say nothing of any burden on their right to vote—their FAC amounts to a mere desire for
9 the Court to impose Plaintiffs’ preferred methods of election administration. Indeed, Plaintiffs’
10 proposed remedy makes clear that their FAC is rooted not in any constitutional requirements,
11 but in Plaintiffs’ dislike for electronic voting systems in general. [*See* Doc. 3 ¶¶ 153-55].

12 Simply put, nothing in the Constitution requires that ballots be cast or counted the way
13 Plaintiffs prefer. “[T]he framers of the Constitution intended the States to keep for themselves,
14 as provided by the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft*,
15 501 U.S. 452, 461-62 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)); *see*
16 *also* U.S. Const. art. I, § 4, cl. 1 (broadly delegating power to the states over the “times, places,
17 and manner” of elections even for congressional offices). It is thus “the job of democratically-
18 elected representatives to weigh the pros and cons of various balloting systems.” *Weber*, 347
19 F.3d at 1107. The Arizona Legislature did just that when it authorized electronic voting systems
20 over five decades ago. *See* H.B. 204, 27th Leg., 2d. Reg. Sess. (Ariz. 1966). Plaintiffs have
21 therefore failed to state a cognizable constitutional claim.

22 **Conclusion**

23 For all these reasons, the Court should dismiss the FAC with prejudice. The Court
24 should also award the Secretary her attorneys’ fees under 42 U.S.C. § 1988(b).
25
26

1 Respectfully submitted this 8th day of June, 2022.

2 **COPPERSMITH BROCKELMAN PLC**

3 By /s/ Roopali H. Desai

4 Roopali H. Desai
5 D. Andrew Gaona
6 Kristen Yost

6 **STATES UNITED DEMOCRACY CENTER**

7 Sambo (Bo) Dul
8 Christine Bass *

9 **Application for Pro Hac Vice Pending*

10 *Attorney for Defendant Arizona Secretary of*
11 *State Katie Hobbs*

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