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19 * *Pro Hac Vice* Motion forthcoming

20 *Attorneys for Plaintiffs*
21 *Arizona Alliance for Retired Americans, Inc.*
and Stephani Stephenson

22
23 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

24 ARIZONA ALLIANCE FOR RETIRED
25 AMERICANS, INC. and STEPHANI
26 STEPHENSON,

27 Plaintiffs,

28 v.

FILED
2022 OCT 31 PM 3:05
BY DEPUTY

No. **CV 202200518**

**PETITION FOR WRIT OF
MANDAMUS, OR IN THE
ALTERNATIVE MOTION FOR
PRELIMINARY INJUNCTION
(Expedited relief requested)**

1 TOM CROSBY, ANN ENGLISH, and
2 PEGGY JUDD, in their official capacities
3 as the Cochise County Board of
4 Supervisors; DAVID STEVENS, in his
5 official capacity as the Cochise County
6 Recorder; and LISA MARRA, in her
7 official capacity as the Cochise County
8 Elections Director,

9 Defendants.

10 Pursuant to Rule 4(c) of the Arizona Rules of Procedure for Special Actions,
11 Plaintiffs hereby petition this Court for a writ of mandamus, or in the alternative, pursuant
12 to Rules 57 and 65 of the Arizona Rules of Civil Procedure, move for a preliminary
13 injunction. Defendants' plan to conduct a full hand count audit of all early ballots clearly
14 violates Arizona law. Plaintiffs request that the Court order Defendants to Conduct hand
15 count audits of early ballots only as permitted by and in accordance with A.R.S. § 16-602
16 and the Election Procedures Manual, and prohibit Defendants from conducting a hand count
17 audit of all early ballots. This request is supported by the following Memorandum of Points
18 and Authorities.

19 MEMORANDUM OF POINTS AND AUTHORITIES

20 INTRODUCTION

21 Arizona law carefully prescribes—and expressly limits—how manual hand count
22 audits of early ballots are performed. Within 24 hours of the election but no later than the
23 deadline for the county canvass, election officials must randomly select *at most* 5,000 early
24 ballots to audit by hand. A.R.S. §§ 16-602(F), (I). Only if the difference between the hand
25 count and the electronic count twice meets or exceeds a designated margin as to a given
26 race may officials increase the sample size of ballots to be manually audited for that race,
27 but even then they may add no more than 5,000 ballots to the sample. *Id.* § 16-602(F). If at
28 any step of this process the results of the hand count fall within the designated margin of
error, the electronic count is canvassed “and *no further manual audit of the early ballots*
shall be conducted.” *Id.* (emphasis added).

1 Arizona law thus clearly and expressly prohibits county officials from conducting a
2 hand count audit of ballots beyond the limited sample size allowed by statute, let alone all
3 early ballots cast in the election. Against the advice of its own County Attorney and the
4 Secretary of State, the Cochise County Board of Supervisors (the “Board”) plans to conduct
5 a full audit of all early ballots cast in the 2022 general election (the “Full Early Ballot
6 Audit”). But hand counting all early ballots is not permitted under Arizona law, which
7 prescribes the exclusive procedures by which election officials must audit election results.
8 Such an approach is not only unlawful, but also risks undermining both the integrity of the
9 election and voter confidence in the election results and threatens to delay Cochise County’s
10 ability to timely certify results.

11 Because hand-counting all early ballots would be contrary to Arizona law, Plaintiffs,
12 including Cochise County voters, are entitled to a writ of mandamus compelling Defendants
13 to conduct their audit in compliance with Arizona law. Plaintiffs are separately entitled to a
14 preliminary injunction enjoining Defendants from conducting such an audit. This Court’s
15 intervention is necessary to prevent an unlawful, chaotic, time-consuming, and unnecessary
16 audit, which has a significant likelihood of delaying Cochise County’s certification of the
17 2022 general election results and, at minimum, will seriously undermine voter confidence.

18 BACKGROUND

19 **I. Although Arizona’s voting machines and practices are subject to rigorous** 20 **scrutiny, some are determined to end the state’s reliance on them.**

21 Every election cycle, Arizona’s election equipment undergoes thorough testing by
22 independent, neutral experts, *see* A.R.S. § 16-442(A), (B), as well as four independent
23 audits, two before the election, and two after. The pre-election audits include (1) a logic and
24 accuracy test performed by the Secretary of State on a sample of the tabulation equipment,
25 *see* A.R.S. § 16-449(A), (B); and (2) a logic and accuracy test performed by the counties on
26 all tabulation equipment, *see* 2019 Arizona Elections Procedures Manual (“EPM”) at 86.¹

27 ¹ The Secretary of State promulgated the operative Election Procedures Manual in 2019.
28 The Manual has the force of law unless it contradicts statutory requirements. *See* A.R.S.

1 The post-election audits include (3) a limited hand count of a small percentage of ballots
2 overseen by both county election officials and representatives of the political parties, *see*
3 A.R.S. § 16-602(B), (F), and; (4) post-election logic and accuracy testing performed by the
4 counties, *see* EPM at 235.

5 In the aftermath of the 2020 general election, however, some who continue to
6 question the validity of the 2020 election have aggressively pushed to end Arizona’s use of
7 voting machines, which they claim cannot be trusted. In 2021, this effort culminated in a
8 months-long and expensive effort by a partisan cybersecurity group, the Cyber Ninjas, to
9 hand count all of Maricopa County’s ballots from the 2020 general election. That “audit,”
10 despite its many shortcomings, only confirmed that President Biden won the election and
11 that Maricopa County’s results were accurate. As the Secretary’s Office has explained,
12 “[t]he 2020 election was secure and accurate, and it is well past the time to accept the results
13 and move forward.” Ex. G at 5.²

14 But the crusade against voting machines and in favor of election conspiracies has
15 persisted into 2022. Earlier this year, Representative Mark Finchem and candidate Kari
16 Lake sued to ban the use of voting machines and electronic ballot tabulation equipment in
17 Maricopa and Pima Counties, seeking to require county election officials to hand-count all
18 ballots during the 2022 elections. *See Lake v. Hobbs*, 2022 WL 3700756, No. 2:22-cv-
19 00677 (D. Ariz. Aug. 26, 2022). This past August, a federal judge dismissed their suit and
20 denied a preliminary injunction, finding that their claims of election hacking were far too
21 speculative to create a justiciable case. *Id.* at ECF No. 100. More importantly, however, the
22 court found that conducting a hand count of election results would not be in the public
23 interest, citing a lack of any evidence that a hand count would be more accurate, the

24
25 § 16–452; *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (Ariz. 2020); *Leibsohn v.*
26 *Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz. 2022). The manual is available at:
https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

27 ² The court may take judicial notice of all attached exhibits because they are public records
28 of Cochise County and the State of Arizona. *See* Ariz. R. Evid. 201(b)(2); *see also, e.g.,*
Mathieu v. Mahoney, 174 Ariz. 456, 457 n.1 (1993) (“We take judicial notice of the records
of the Secretary of State.”).

1 impossibility of conducting a hand count without enormous resources, and the expectation
2 that “the results of the election would be delayed.” *Id.* at *2 n.1.

3 That conclusion was correct. In contrast to voting machines, which are subject to
4 rigorous standards, hand counting ballots is an unreliable method. Studies have found that
5 “vote counts originally conducted by computerized scanners were, on average, more
6 accurate than votes that were originally tallied by hand.” Stephen Ansolabehere, Barry C.
7 Burden, Kenneth R. Mayer, & Charles Stewart III, *Learning from Recounts*, 17 Elec. Law
8 J. 100, 115 (2018), <https://www.liebertpub.com/doi/epdf/10.1089/elj.2017.0440> (last
9 visited Oct. 30, 2022). Hand counting is also extremely time-intensive. The so-called
10 “audit” of the 2020 Maricopa County results as to only two contests took the Cyber Ninjas
11 six months to complete. As the Secretary’s Elections Director has explained, “[a]ny election
12 director in Arizona—the official responsible for overseeing tabulation of ballots—can attest
13 that it’s impossible to complete an accurate hand count of an election . . . in time to comply
14 with applicable statutory deadlines, including the county canvass deadline.” Ex. A.

15 **II. Defendants are planning to conduct a hand count audit of all early ballots**
16 **despite repeated warnings that it is unlawful.**

17 By mid-October, it became clear that the Board was considering conducting a hand
18 count audit of all ballots cast in the 2022 General Election, including of all early ballots. On
19 October 19, 2022, in a letter to the Board on behalf of the Secretary, State Elections Director
20 Kori Lorick warned against an eleventh-hour full hand count audit, emphasizing that it
21 would create a “significant risk of administrative error” and could “cause voter confusion
22 and mistrust” in the election. Ex. A. The Secretary’s Office explained that, “[w]hile A.R.S.
23 § 16-602 and the [EPM] lay out procedures for a limited post-election hand count audit,
24 nothing in Arizona law authorizes the Board to conduct a full hand count outside of those
25 procedures.” *Id.* At the Board’s October 24 meeting, the Cochise County Attorney Brian
26 McIntyre echoed these same concerns to the Board, stating:

27 There is no statutory authorization for this proposed separate hand count or
28 validation. It violates the Election Statutes and the [EPM] Because I have
advised you that there is no legal basis for this, I cannot ethically defend you

1 against any claims over this action. . . . I implore you, do not attempt to order
2 this separate hand count.

3 Video Recording of October 24, 2022 Special Meeting Hand Count of Ballots (“October 24
4 Special Meeting Video”) at 2:59:25–3:03:13.³

5 At that time, the Board voted *not* to conduct “a hand count of all ballots cast in the
6 General Election.” *Id.* at 3:06:02-3:06:20; *see also* Ex. B. But in the final minutes of the
7 meeting, the Board considered and by a 2-1 vote adopted another proposal, which
8 authorized a hand count of all Election Day ballots (the “October 24 Audit Measure”):

9 Pursuant to ARS 16-602 B; the County Recorder or other officer in charge of
10 elections shall take such action necessary to perform a hand count audit of all
11 County precincts for the 2022 General Election to assure agreement with the
12 voting machine count. Such audit shall be completed prior to the canvass of
13 general election results by the Board of Supervisors.

14 *Id.* at 3:42:09–3:43:09; Ex. B.

15 Shortly after the Board’s meeting, the Secretary of State sent another letter to
16 Cochise County, seeking to confirm that Cochise County did not intend to conduct a hand
17 audit of all early ballots, which the Secretary’s Office said would be unlawful. *See* Ex. D at
18 1. The Secretary’s Office advised it would consider legal action if the Board did not agree
19 to comply with statutes. The next day, the Board stated in response to the Secretary’s letter
20 that it “wishe[d] to follow all applicable requirements” in conducting its audit. Ex. E. But it
21 did not clarify what any of those procedures would be.

22 On October 28, 2022, however, Supervisor Judd once again expressed an intent to
23 conduct a hand count of all early ballots. Supervisor Judd referenced an informal,
24 nonbinding opinion received from the Office of the Attorney General which stated that the
25 Board could conduct a full hand count of “100 percent of early ballots cast[.]” Oct. 28 Board
26 Work Session Video at 11:47–12:44⁴; *see also* Ex. F. County Attorney McIntyre disagreed
27 with this interpretation and has maintained that he cannot represent the Board if they
28

³ Available at <https://www.youtube.com/watch?v=170xHmbhnJI&feature=youtu.be> (last visited October 31, 2022).

⁴ Available at <https://www.youtube.com/watch?v=ZSS4VuE7PGM> (last visited Oct. 31, 2022).

1 conduct such a hand count of all early ballots. *See* Oct. 28 Work Session Video at 54:38-
2 56:44 (reiterating, “[i]t remains my opinion that conducting whether it’s called the expanded
3 hand count or a separate process that . . . [it] remains barred by EPM and . . . the statute”).

4 Defendants plan to hand count audit all early ballots for up to five races based on the
5 Attorney General’s October 28, 2022 nonbinding, advisory opinion. *See* Ex. F; *see also*
6 October 28 Board Work Session Video at 11:47-12:44 (Supervisor Judd agreeing, “[t]he
7 board must limit the number of competitive statewide and federal races audited to five.”).

8 LEGAL STANDARD

9 “A writ of mandamus allows a ‘party beneficially interested’ in an action to compel
10 a public official to perform an act imposed by law.” *Ariz. Pub. Integrity All.*, 250 Ariz. at
11 62 ¶ 11.

12 A court considering a motion for a preliminary injunction examines four factors: (1)
13 the likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is
14 not granted, (3) the balance of hardships, and (4) whether public policy favors granting the
15 injunctive relief. *See Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021). The legal test is not an
16 absolute scale, but a “sliding” one. *Id.* To meet their burden, “the moving party may
17 establish either 1) probable success on the merits and the possibility of irreparable injury;
18 or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply in
19 favor of the moving party.” *Id.* (quoting *Smith v. Ariz. Citizens Clean Elections Comm’n*,
20 212 Ariz. 407, 410 ¶ 10 (2006)). But a plaintiff who demonstrates, on a mandamus claim,
21 that a public official has acted unlawfully “need not satisfy the standard for injunctive
22 relief.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 64 ¶ 26.

23 ARGUMENT

24 I. This Court should grant a writ of mandamus compelling Defendants to count ballots in compliance with Arizona law.

25 a. Plaintiffs have standing to seek a writ of mandamus.

26 Courts apply a particularly “relaxed standard for standing in mandamus actions.”
27 *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶11. Under A.R.S. § 12-2021, a writ of mandamus
28

1 allows a “party beneficially interested in an action to compel a public official to perform an
2 act imposed by law.” *Id.* (quotation omitted). The mandamus statute “reflects the
3 Legislature’s desire to broadly afford standing to members of the public to bring lawsuits
4 to compel officials to perform their public duties.” *Id.* (citing *Ariz. Dep’t of Water Res. v.*
5 *McClennen*, 238 Ariz. 371, 377 ¶ 32 (2015)).

6 The Arizona Alliance for Retired Americans, which has over 1,200 members in
7 Cochise County, and Ms. Stephenson, a Cochise County voter, have standing to pursue their
8 mandamus action for the same reasons that Arizona voters and citizens had standing to
9 pursue their mandamus action concerning unlawful voting procedures in *Arizona Public*
10 *Integrity Alliance*. In that case, a voting organization and voter sued the Maricopa County
11 Recorder to enjoin him from including an instruction with mail-in ballots which they alleged
12 did not comply with his duties under Arizona law. *See id.* at 60-61. The Arizona Supreme
13 Court held that both plaintiffs had standing because “as *Arizona citizens and voters*,
14 seek[ing] to compel the Recorder to perform his *non-discretionary duty* to provide ballot
15 instructions that comply with Arizona law . . . they have shown a sufficient beneficial
16 interest to establish standing.” *Id.* at 62 ¶ 12 (emphases added). The same is true of Plaintiffs
17 here, who have a sufficient beneficial interest in ensuring Defendants conduct the general
18 election in accordance with Arizona law, and specifically that they count early ballots in
19 accordance with Arizona law.

20 **b. Defendants have a non-discretionary duty to conduct hand counts only**
21 **in limited circumstances and under certain procedures.**

22 A writ of mandamus is appropriate where a public official has a non-discretionary
23 duty and fails to act in accordance with the law. *See Stagecoach Trails MHC, L.L.C. v. City*
24 *of Benson*, 231 Ariz. 366, 370 ¶ 19 (2013). Here, Defendants do not intend to conduct an
25 audit that is consistent with Arizona law and Plaintiffs are accordingly entitled to a writ of
26 mandamus, just as the Plaintiffs in *Arizona Public Integrity Alliance* were entitled to the
27 writ after they showed Recorder Fontes did not intend “to provide ballot instructions that
28 comply with Arizona law” as required. *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 12. Here,

1 Defendants have a statutory obligation to count ballots and conduct audits only as
2 prescribed by Arizona law. They may not exceed their statutory authority and invent new
3 audit procedures beyond those prescribed by law.

4 The basic procedures under state law for counting and auditing early ballots are clear.
5 All early ballots and ballots cast in polling places must be tabulated in the first instance by
6 electronic tabulators: “The result printed by the vote tabulating equipment, to which have
7 been added write-in and early votes, shall, when certified by the board of supervisors or
8 other officer in charge, constitute the official canvass of each precinct or election district.”
9 A.R.S. § 16-622(A). Ballots may be counted manually only if “it becomes impracticable to
10 count all or a part of the ballots with tabulating equipment.” *Id.* § 16-621(C). To confirm
11 that electronic tabulation is accurate, A.R.S. § 16-602 provides detailed procedures for
12 auditing votes “cast on an electronic voting machine or tabulator.” *Id.* § 16-602(A). Those
13 procedures are mandatory: “The hand count shall be conducted as prescribed by this section
14 and in accordance with hand count procedures established by the secretary of state in the
15 official instructions and procedures manual adopted pursuant to § 16-452.” *Id.* § 16-602(B).
16 A.R.S. § 16-602 is also the sole authorization for hand count audits. No other provision of
17 Arizona law allows for separate hand count audits.

18 Under A.R.S. § 16-602, a hand count of all early ballots is not permitted. Rather, the
19 statute requires that hand count audits start with small samples and expand *only* on an
20 individual race basis and *only* if hand counts repeatedly differ from electronic tabulations
21 for that race by more than a designated margin for error. *See* A.R.S. § 16-602(F) (“If at any
22 point in the manual audit of early ballots the difference between any manual count of early
23 ballots is less than the designated margin when compared to the electronic tabulation of
24 those ballots, the electronic tabulation shall be included in the canvass *and no further*
25 *manual audit of the early ballots shall be conducted.*” (emphasis added)).

26 Under Arizona law, an early ballot audit cannot begin with all early ballots. To the
27 contrary, at the outset, election workers “shall *randomly select* one or more batches of early
28 ballots” that were counted by each tabulation machine and sequester them, and then “shall

1 randomly select” from those sequestered ballots a sample of one percent of all early ballots
2 cast, or five thousand ballots, “*whichever is less.*” *Id.* (Emphases added). This language is
3 not ambiguous: Election workers are permitted to hand count audit, in the first instance, no
4 more than 5,000 early ballots. While the Attorney General’s office appears to have
5 determined, in an “informal” opinion—which admitted it skipped the “several layers of
6 review” that a more reasoned opinion would typically undergo—that this language is
7 ambiguous, *see supra* at p. 6; Ex. F, the statute is clear.⁵

8 Nor does the EPM provide legitimate authorization for Defendants to conduct a hand
9 count audit of all early ballots. While the EPM purports to authorize counties to “audit a
10 higher number of [early] ballots at their discretion,” all other relevant provisions of the EPM
11 require counties to undertake a limited hand count audit of early ballots. Moreover, that one
12 sentence of the EPM directly conflicts with the statute, which makes explicit that “no further
13 manual audit of the early ballot shall be conducted” beyond that provided for in the statute.
14 A.R.S. § 16-602(F). “[A]n EPM regulation that contradicts statutory requirements does not
15 have the force of law.” *Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz. 2022) (citing *Leach*
16 *v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021)). As the Arizona Supreme Court has explained,
17 “it is this Court’s role, not the Secretary’s, to interpret [a statute’s] meaning.” *Id.* Even if
18 the EPM could be read consistently with statute to authorize, in the first instance, an audit
19 of a higher *percentage* of early ballots, which is still facially inconsistent with A.R.S. § 16-
20 602(F), that provision of the EPM cannot plausibly be read to authorize a pre-emptive audit
21 of *all* early ballots. *See Leach*, 250 Ariz. at 576 ¶ 21 (“[A]n EPM regulation that . . .
22 contravenes an election statute’s purpose does not have the force of law.”).⁶

23 ⁵ Even “formal” Attorney General opinions that receive the standard “several layers of
24 review” are not binding. *See Ruiz v. Hull*, 191 Ariz. 441, 449 ¶ 28 (1998) (“Opinions of the
25 Attorney General are advisory, and are not binding.”); *see also* Office of the Arizona
26 Attorney General, Attorney General Opinions (“Opinions of the Attorney General are
advisory, and do not have the same effect as decisions of a court of law.”) (last visited Oct.
30, 2022), available at: <https://www.azag.gov/opinions>.

27 ⁶ Other provisions of the EPM also align with A.R.S. § 16-602(F) in limiting the number of
28 early ballots to be audited. *See EPM* at 230 (“On Election Day, the officer in charge of
elections shall calculate the exact number of early ballots tallied up to that point in time.

1 Finally, while Defendants have not explained their precise procedures for conducting
2 their Full Early Ballot Audit, any audit must comply with all other requirements under
3 Arizona law, including conducting the audit at a secure facility, maintaining a proper chain
4 of custody of the ballots, and having the elections director oversee the audit. *See* A.R.S.
5 § 16-602(H); *see also* EPM at 225 (“Throughout the hand count, the officer in charge of
6 elections must retain custody and control of all hand counted ballots.”). Accordingly,
7 Defendant Marra must retain custody of the ballots during any audit.

8 Defendants have no authority to create new procedures. They have only those powers
9 “expressly conferred by statute” and “may exercise no powers except those specifically
10 granted by statute and in the manner fixed by statute.” *Hancock v. McCarroll*, 188 Ariz.
11 492, 498 (App. 1996) (quotation omitted); *see Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14
12 (Defendants’ powers “[are] limited to those powers expressly or impliedly delegated to
13 [them] by the state constitution or statutes.”). Indeed, “[a]ctions taken by a board of
14 supervisors by methods unrecognized by statute are without jurisdiction and wholly void
15 [because] [a] governmental body may not do indirectly what a statute does not give it the
16 power to do directly. *Hancock*, 188 Ariz. at 498 (internal quotations omitted). And “[t]he
17 absence of a statutory prohibition does not mean the county has inherent authority to engage
18 in certain conduct.” *Id.* (internal quotations omitted); *see also Maricopa Cnty. v. Black*, 19
19 Ariz. App. 239, 241 (1973).

20 **c. This Court may grant a writ of mandamus without considering the**
21 **other traditional injunction factors.**

22 Where Plaintiffs have shown that a public official has acted unlawfully and outside
23 the scope of their authority, “they need not satisfy the standard for injunctive relief.” *Ariz.*
24 *Pub. Integrity All.*, 250 Ariz. at 64 ¶ 26; *see also Burton v. Celentano*, 134 Ariz. 594, 596
25 (App. 1982) (“[W]hen the acts sought to be enjoined have been declared unlawful . . .
26 plaintiff need show neither irreparable injury nor a balance of hardship in his favor.”

27 _____
28 From this number, the officer in charge of elections shall calculate a number equaling 1%
of the total early ballots. This shall serve as the number of ballots to audit.”).

1 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §
2 2948 (3d ed. 1998))). Thus, while Plaintiffs have separately shown an entitlement to an
3 injunction, *see infra* at Section II, if this Court finds Defendants have a non-discretionary
4 duty to act—here to conduct a hand count audit of early ballots in accordance with A.R.S.
5 § 16-602—but will fail to do so, this Court need not consider whether the other traditional
6 preliminary injunction factors weigh in their favor before granting the writ.

7 **II. In the alternative, Plaintiffs are entitled to a preliminary injunction enjoining**
8 **Defendants from conducting a full hand count audit.**

9 **a. Plaintiffs have standing to seek an injunction under the Uniform**
10 **Declaratory Judgment Act.**

11 A plaintiff may seek relief under the Uniform Declaratory Judgment Act if they can
12 show the issue is ripe and they have standing. *See Mills v. Ariz. Bd. of Tech. Registration*,
13 514 P.3d 915, 923 ¶ 24 (Ariz. 2022). Both requirements are met here. A case is ripe if “there
14 is an actual controversy between the parties.” *Id.* at 923 ¶ 24. Because Defendants have
15 already voted on a hand count audit procedure, which they now insist will include all early
16 ballots (despite prior representations that they will comply with the law), this issue is ripe.
17 Plaintiffs also have standing. In particular, Plaintiff Stephenson, a Cochise County voter
18 whose early ballot has already been received and accepted for counting, *see Verified Compl.*
19 at ¶ 12, has standing as a voter whose ballot will be subject to unlawful counting procedures.

20 The Alliance also has standing as a membership organization whose members
21 include more than 1,200 voters in Cochise County. *See Verified Compl.* at ¶ 11. An
22 organization has representational standing if it has “a legitimate interest in an actual
23 controversy involving its members” and “judicial economy and administration will be
24 promoted” by conferring standing. *Armory Park Neighborhood Ass’n v. Episcopal Cmty.*
25 *Servs. in Ariz.*, 148 Ariz. 1, 6 (1985). Here, the Alliance, as a 501(c)(4) organization
26 dedicated to ensuring the voting rights of its members, has a legitimate interest in ensuring
27 its Cochise County members’ early ballots are cast and counted in accordance with Arizona
28 law. *See Verified Compl.* at ¶ 11. Moreover, because the Alliance seeks only injunctive
relief, and not damages, judicial economy favors “allowing the issues to be settled in a

1 single action rather than in a multitude of individual actions because the relief sought is
2 universal to all of its members and requires no individual quantification by the court.”
3 *Armory Park*, 148 Ariz. at 6.

4 The Alliance also has direct standing as well because the Full Audit will require the
5 Alliance to divert resources. Arizona courts find federal case law instructive on the matter
6 of standing. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 ¶ 11 (2005) (quotation
7 omitted). In federal court, an organization has direct standing if it must divert resources to
8 public education aimed at counteracting a defendant’s actions that are contrary to the
9 organization’s mission. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879–80
10 (9th Cir. 2022). Here, the Alliance accomplishes its mission by ensuring its members have
11 access to the franchise and can meaningfully participate in Arizona’s elections. *See Verified*
12 *Compl.* at ¶ 10. The Full Early Ballot Audit directly frustrates the Alliance’s mission by
13 sowing confusion and doubt about the election results. *See id.* Consequently, to restore
14 public confidence in Arizona’s electoral system, the Alliance will have to divert resources
15 to a public education campaign and answer questions about the limitations of the Full Early
16 Ballot Audit, *see id.*, which is sufficient to establish standing.

17 **b. Plaintiffs are likely to show the Full Early Ballot Audit is unlawful.**

18 For all the reasons that Plaintiffs have explained *supra* at Section I(b), the Full Early
19 Ballot Audit directly conflicts with the Board’s non-discretionary legal duties under A.R.S.
20 § 16-602, and the Board does not have the authority to adopt new audit rules in the first
21 place. For the sake of brevity, Plaintiffs do not repeat those arguments here.

22 **c. Plaintiffs are likely to suffer irreparable harm absent relief.**

23 Absent this Court’s intervention, Defendants will proceed to conduct a hand count
24 audit of all early ballots in Cochise County, which is directly contrary to Arizona law. While
25 Defendants’ actions do not affect Plaintiff Stephenson’s or the Alliance members’ ability
26 to *cast* their ballots, they do affect how those ballots will be *counted*, which is an essential
27 part of the right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (“The right to
28 vote includes the right to have the ballot counted.”). And if the right to have one’s ballot

1 counted means anything, surely it means having one’s ballot counted in accordance with
2 the laws of the state, and not at whims of county officials who have invented a new (and
3 unlawful) process for counting ballots on the eve of the election. This kind of injury cannot
4 be remedied after the election. *See, e.g., League of Women Voters of N.C. v. North Carolina*,
5 769 F.3d 224, 247 (4th Cir. 2014) (finding irreparable injury on the basis that “once the
6 election occurs, there can be no do-over and no redress”).

7 This risk of injury is heightened given the County’s decision to create brand new
8 procedures for the audit without sufficient resources or trained volunteers to do so. As the
9 Secretary of State’s Election Services Director explained to Defendants, it would be
10 “impossible to complete an accurate hand count of an election . . . in time to comply with
11 applicable statutory deadlines, including the county canvass deadline.” Ex. A (citing A.R.S.
12 § 16-642(A)). In any event, Plaintiffs need not show irreparable injury is certain, or even
13 likely, where they have shown “probable success” on the merits of their claims, as they have
14 here. *See Fann*, 251 Ariz. at 432 ¶ 16. Under such circumstances, a “possibility” of
15 irreparable harm is all that is required, *see id.*, which Plaintiffs have shown.

16 **d. The balance of harms and public interest tips sharply in Plaintiffs’**
17 **favor.**

18 Defendants are plainly not harmed if they are restrained from conducting a full hand
19 count audit in the immediate aftermath of the general election. Granting Plaintiffs’ motion
20 would simply retain Arizona’s existing requirements for ballot auditing and counting, which
21 involve machine counting that is more accurate, less expensive, and less time consuming
22 than hand-counting. *See* Ex. A. And because all ballots must be preserved in Arizona for 24
23 months following the election, *see* A.R.S. § 16-624, if there is later a lawful reason to
24 conduct a recount of all ballots, including all early ballots, Defendants will be able to do so.

25 But if Defendants are permitted to move forward with their new plan to conduct a
26 hand count all early ballots before the canvass, there is unlimited opportunity for electoral
27 chaos. Defendants’ plan is a recipe for “two sets” of election results, where only one count
28 is legally valid. Moreover, additional counties have begun to consider following suit, which

1 will lead to uncertainty across Arizona as election officials attempt to implement illegal full
2 audits on the eve of the election. *See* Bob Christie, *Arizona AG gives county OK for full*
3 *ballot hand counts*, AP News (Oct. 29, 2022), [https://apnews.com/article/2022-midterm-](https://apnews.com/article/2022-midterm-elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23)
4 [elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23](https://apnews.com/article/2022-midterm-elections-arizona-voting-phoenix-0480b41258d2ef50c25c87dae648ac23). There is plainly
5 no public interest in allowing for such chaos, and there is no public interest in the use of a
6 less accurate method of vote counting that is contrary to Arizona law.

7 Finally, the public interest cuts against changing election procedures at the last
8 moment. “[W]hen public officials, in the middle of an election, change the law based on
9 their own perceptions of what they think it *should* be, they undermine public confidence in
10 our democratic system and destroy the integrity of the electoral process.” *Ariz. Pub.*
11 *Integrity All.*, 250 Ariz. at 61.

12 CONCLUSION

13 For the foregoing reasons, Plaintiffs’ Petition for a Writ of Mandamus and Motion
14 for a Preliminary Injunction should be GRANTED.

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Dated: October 31, 2022

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* *Pro Hac Vice* Motion forthcoming

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