ARIZONA SUPREME COURT

ARIZONA PUBLIC INTEGRITY ALLIANCE, INC., et al., Appellants, v. ADRIAN FONTES, in his official capacity as Maricopa County Recorder, et al., Appellees.	Arizona Supreme Court No. CV-20-0253-AP/EL Arizona Court of Appeals No. CV-20-0458 Maricopa County Superior Court No. LC2020-00252-001 DT

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL MARK BRNOVICH IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The Attorney General is a constitutional, executive officer, who is elected by the voters every four years and serves as the state's chief legal officer. Ariz. Const. art. V, § 1; A.R.S. § 41–192(A). Arizona law empowers the Attorney General to enforce provisions of Title 16 "[i]n any election for state office, members of the legislature, justices of the supreme court, judges of the court of appeals or statewide initiative or referendum … through civil and criminal actions." A.R.S. § 16–1021. Accordingly, the Attorney General has authority to enforce provisions of Title 16 for the upcoming November 3, 2020 General Election ("General Election"), which includes all the aforementioned races. The Attorney General also approves the Election Procedures Manual ("EPM"), which is promulgated by the Secretary of State ("Secretary") and carries the force of law. A.R.S. § 16–452(B), (C).

The Attorney General files this as-of-right amicus brief under Ariz. R. Civ. App. P. 16(b)(1)(B) to further the important, statewide interest of ensuring that public officials follow Arizona's election laws to preserve the integrity of Arizona's elections.[1] The ruling below allows the Maricopa County Recorder and the Maricopa County Board of Supervisors ("Appellees")—without authority of

[1] Although the Attorney General was entitled to intervene as-of-right in the below action, the Attorney General has elected to participate as amicus curiae to conserve judicial resources and facilitate an expeditious determination of this matter.

law—to mail Arizona voters an instruction about how to mark their ballots, which contravenes Arizona's election laws. Although the superior court held the challengers were likely to succeed on the merits, the court's ruling erroneously allows the flawed instructions to be mailed with the General Election early ballots. More importantly, this ruling threatens election integrity far beyond the General Election and may very well lead to post-election challenges that call into question the legitimacy of the General Election. For these reasons, the Court should grant Appellants' motion for preliminary injunction and order Appellees to supply the required Overvote Instruction with early ballots.

BACKGROUND

The Attorney General, through the Elections Integrity Unit of the Attorney General's Office, received several complaints from Maricopa County voters surrounding the Maricopa County Recorder's ("Recorder") instructions that accompanied early ballots for the August 4, 2020 Primary Election ("Primary Election").[2] Specifically, the instruction permitted voters to "[c]ross out [a] mistake" and "[f]ill in the oval next to [the voter's] corrected selection" and

[2] Appellees' counsel suggested below the Attorney General should have known about the New Instruction as early as February 2020 because the instruction allegedly accompanied early ballots for the March 17th Presidential Preference Election ("PPE"). However, the Attorney General received no complaints related to PPE instructions. The first time the Attorney General became aware of the New Instruction was after receiving the complaints pertaining to the Primary Election.

displayed an image showing two options selected where only one selection is permitted ("New Instruction"). *See* Appendix to Opening Brief ("Appx.") at 059.[3]

The Attorney General undertook an investigation and concluded the New Instruction did not satisfy State requirements for ballot instructions. Most notably, the New Instruction violated the following unambiguous requirement in Chapter 2, § I(C)(3) of the EPM, which applies to all county recorders:

> A County Recorder must supply printed instructions that:
> …
> 3. Inform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote.

See EPM at 56 ("Overvote Instruction");[4] Appx. at 061.

On August 11th, just one week after the conclusion of voting for the Primary Election, the Attorney General sent a letter to the Recorder, copying the Maricopa County Board of Supervisors ("Board") and the Secretary, stating that the New

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[3] In previous filings, the Attorney General referred to the "New Instruction" as the "Mistake Instruction." Because Appellants and the superior court refer to it as the "New Instruction," the Attorney General uses the same term here for consistency.

[4] The 2019 EPM, which applies in the 2020 General Election, is available here: https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (last visited Sept. 7, 2020). This Court may take judicial notice of the Secretary of State's website. *See* Ariz. R. Evid. 201; *Arizonans For Second Chances, Rehab., and Pub. Safety et al. v. Hobbs*, __ Ariz. ___, 2020 WL 5265545, at *2, ¶ 12 n.1 (Sept. 4, 2020) (citing *Pederson v. Bennett*, 230 Ariz. 556, 559, ¶ 15 (2012)).

Instruction was deficient. *See* Appx. at 063.[5] The Attorney General demanded the Recorder ensure that the early ballot instructions for the General Election comply with State requirements. *See id*.

On August 24th, the Recorder responded to the Attorney General, acknowledging the rules promulgated by the Secretary in the EPM under A.R.S. § 16–452 "ha[ve] the force of law" and that "the EPM still requires the Recorder to include" the Overvote Instruction.[6] *See* Appx. at 065–067. Nonetheless, the Recorder surprisingly insisted he is empowered to violate the EPM and promulgate his own rules, based on his unilateral (and erroneous) determination that the Overvote Instruction is invalid. *See id*. at 068.

Appellants, on their own accord and unbeknownst to the Attorney General, sent a cease-and-desist letter to the Recorder on August 17th, similarly pointing out that the New Instruction violates provisions of Title 16 and must not be included in the early ballot instructions for the General Election. Appx. at 033–035. The

[5] Appellees' counsel suggested to the superior court at the hearing below that the Recorder did not receive the letter until August 17th. But the letter was emailed to afontes@risc.maricopa.gov at 1:47pm on August 11th, and the Recorder's office signed for the certified letter at 7:56am on August 13th.

[6] While the Attorney General initially sought a response by August 21st, the Attorney General granted the Recorder a brief extension to permit the Board an opportunity to review and discuss the instruction issue at the Board's August 24th Special Executive Session.

Recorder sent a letter to Appellants on August 24th, again refusing to conform the early ballot instructions to Arizona law as Appellants requested. *Id*. at 037–042.

Appellants immediately initiated special action proceedings below, seeking to enjoin Appellees from including the New Instruction with early ballot instructions in connection with the General Election. The superior court conducted a return hearing on September 3rd and issued a ruling the next day. The superior court correctly reasoned that the "EPM does not allow the New Instruction" and Appellants "are likely to succeed on the merits." Appx. at 271. However, the court decided that "the lack of irreparable harm, balance of hardships, and public policy countenance against a preliminary injunction." *Id*. at 274.

Time is of the essence in light of impending deadlines for mailing early ballots to Arizona voters, which necessitates expedited judicial review. *See* EPM at A34–35 (reflecting September 19th deadline for Recorder to mail early ballots to "persons who are subject to the uniformed and overseas citizens absentee voting act of 1986" under A.R.S. § 16–543(C), and **October 7th deadline** for the Recorder to mail early ballots for the General Election to voters on the Permanent Early Voting List under A.R.S. § 16–544(F)). As Appellants point out, the September 19th deadline for UOCAVA ballots is applicable to a very small number of early ballots—"likely only a few thousand ballots[.]" Op. Br. at 4. And although the Attorney General cited the ballot-*printing* deadline of October 1st in

its amicus brief below, Appellants correctly noted at the hearing that the instructions at issue in this lawsuit are separate from the instructions that appear on the ballots themselves.

Accordingly, for the Court's purposes in issuing an expedited ruling, the critical deadline—October 7th—is almost a full month away, providing Appellees more than adequate time to conform their conduct to the law.

ARGUMENT

The superior court correctly found that Appellants "are likely to succeed on the merits of whether [Appellees] may include the New Instruction" because "the EPM does not allow the New Instruction; just the opposite, the EPM *commands* boards of supervisors to tell voters to ask for another ballot if they over vote." Appx. at 271 (emphasis added). But the court erred when it did not order Appellees to comply with Arizona law by including the legally required Overvote Instruction in the General Election. Contrary to the superior court's determination, the remaining preliminary injunction factors do not support allowing Appellees—public election officials charged with statutory responsibilities to administer Arizona's elections—to continue to violate Arizona's election laws and procedures.

An injunction of the New Instruction is an appropriate and equitable remedy because Appellees have exceeded their statutory authority. *See McCluskey v.*

Sparks, 80 Ariz. 15, 20–21 (1955) (holding injunction was appropriate where plaintiffs sought to require officials "to comply with the statutes and constitutions of Arizona and of the United States"); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 616, ¶ 16 (App. 2017) (noting that courts may grant injunctive relief "when a public officer enforces a public statute in a manner that exceeds the officer's power"); *see, e.g., Hess v. Purcell*, 229 Ariz. 250, 252, ¶ 4 (App. 2012) (appeal arising from superior court's grant of mandamus relief ordering Maricopa County to comply with EPM). Despite acknowledging the New Instruction was unlawful, the superior court dubiously found the only irreparable harm Appellants faced was a "generalized concern about the election process[.]" Appx. at 272. Further, the court enigmatically found the balance of hardships favored mitigating Appellees' self-inflicted and purely financial injury, and that public policy supported congruity between the Primary and General Elections. *Id*. at 273–74.

The fact that Appellees already violated the law in the Primary Election, however, presents no reason to pave the way for Appellees to engage in another *ultra vires* act during the General Election. Indeed, public policy demands that public officials adhere to mandatory and uniform election laws. *See Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978) (emphasizing that "[t]he rationale for requiring strict compliance" with a deadline for initiating a post-election contest "is the strong public policy favoring stability and finality of election results"). A

judicial decision allowing Appellees to continue to violate the law and disregard their statutory obligations jeopardizes public confidence in Arizona's elections and undermines election integrity. This cost to the public far outweighs the financial costs that Appellees must incur to bring their actions into compliance with the law.

I. The Recorder Lacks Authority to Promulgate Election Rules; Additionally, The Court Rightly Found, and All Parties Agree, the New Instruction Violates The EPM

Appellees have only those powers prescribed by law. *See* Ariz. Const. art. XII, § 4 (powers of county officers are limited to those "prescribed by law"); A.R.S. § 11–201(A) ("The powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law."). Arizona courts "have consistently required counties and county boards of supervisors to show an express grant of power whenever they assert that [] statutory authority exists" for exercising such power. *Marsoner v. Pima County*, 166 Ariz. 486, 488 (1991). "They have only those powers that are expressly or by necessary implication delegated to them by the legislature." *Id.* And "the burden is on the county to point out the constitutional or statutory power that permits the conduct." *Southwest Gas Corp. v. Mohave County*, 188 Ariz. 506, 509 (App. 1997).

Arizona law requires the Recorder to "supply printed instructions to early voters that direct them to sign the affidavit, mark the ballot and return both in the

enclosed self-addressed envelope[.]" A.R.S. § 16–547(C).[7] As discussed below, the instructions supplied by the Recorder must conform to the rules promulgated by the Secretary in the EPM, and the Recorder lacks discretion to deviate from the EPM's unambiguous requirement. *See* A.R.S. § 16–452.

A. The Legislature Delegated the Duty of Promulgating Election Rules And Procedures to the Secretary

Neither the Recorder nor the Board has inherent or statutory authority to promulgate election rules or procedures, especially ones incongruent with those legally established. Instead, the Legislature expressly delegated to the Secretary the duty to "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." A.R.S. § 16–452(A).

Notably, the Secretary prescribes the rules "[a]fter consultation with each county board of supervisors or other officer in charge of elections[.]" *Id.* Promulgation of these rules is not optional; the Secretary must issue the EPM in

[7] The court below appears to have attributed A.R.S. § 16–513 to the Board's authority to provide early ballot instructions. Appx. at 271. But section 16-513 governs instructions "*at the election*" whereas A.R.S. § 16–547(C) more specifically governs "printed instructions to *early voters*[.]" (emphasis added). The best reading of these statutes suggests that the Board supplies instructions for casting ballots on Election Day at precincts and vote centers, while the Recorder supplies the instructions provided with the early ballots mailed to voters.

"official" form by "December 31 of each odd-numbered year immediately preceding the general election" *only after* obtaining the Governor's and the Attorney General's approval. A.R.S. § 16–452(B). In 2019, the Secretary, in consultation with all 15 counties, issued a draft manual for public review on August 9th, then incorporated over 500 public comments to submit a final draft to the Governor and Attorney General on October 1st.[8] After 10 weeks of discussion, the Secretary, Governor, and Attorney General agreed upon the final EPM, which was issued on December 19, 2019.[9]

B. The New Instruction Is Unlawful

As the superior court correctly reasoned, "the EPM does not allow the New Instruction; just the opposite, the EPM commands boards of supervisors to tell voters to ask for another ballot if they over vote." Appx. at 271. In fact, even the Recorder admits the current EPM requires county recorders "to include instructions with the early ballots that state that overvotes will not be counted and

[8] *See* Press Release, *Elections Procedures Manual draft to be released for public comment* (Aug. 8, 2019), https://azsos.gov/about-office/media-center/press-releases/1016 (last accessed Sept. 7, 2020); Press Release, *Secretary of State's Office submits draft Elections Procedures Manual to the attorney general and governor* (Oct. 1, 2019), https://azsos.gov/about-office/media-center/press-releases/1039 (last accessed Sept. 7, 2020).

[9] *See* Press Release, *Secretary of State's Office marks major milestone with the approval of the Elections Procedures Manual* (Dec. 20, 2019), https://azsos.gov/about-office/media-center/press-releases/1079 (last accessed Sept. 7, 2020).

voters who make a mistake when voting must request a new early ballot." Appx. at 067. And the Secretary likewise agrees that "[p]age 56 of the 2019 EPM states that the County Recorders must include instructions with early ballots that [contain the Overvote Instruction]." Appx. at 147.

The Overvote Instruction is not simply a construct of the EPM; related statutes do not permit voters to "mark[] more names than there are persons to be elected to an office" because when this occurs, Arizona law directs that such "ballot[s] *shall not be counted for that office*." A.R.S. § 16–611 (emphasis added); *see also* A.R.S. §§ 16–502(F) (requiring ballots to include the words: "Vote for not more than ___" with the respective "number to be elected" below each office); –610 ("If on any ballot the names of more persons are designated for the same office than are to be chosen … all the names designated for that office shall be rejected."). The Arizona Supreme Court has long recognized that although "the determination of the intent of the voter is the question of primary importance" in counting ballots, "this rule 'is always subject to statutory mandates as to how the voter's intention must be expressed.'" *White v. De Arman*, 89 Ariz. 327, 328 (1961) (quoting *Findley v. Sorenson*, 35 Ariz. 265, 270 (1929)). Here, as in *White*, state law "constitutes a mandate to the voters and election officers with reference to the exact manner in which votes can legally be cast" and "[t]he wording in the statute is clear[.]" *See* 89 Ariz. at 329.

Yet the New Instruction tells voters to "[c]ross out [a] mistake" after having selected one name, and "[f]ill in the oval next to [the voter's] corrected selection." Appx. at 059. But the damage to the ballot is already done. The Recorder's suggestion to a voter who makes a "mistake" that the voter should make another selection on the same ballot to clarify the voter's intent finds no support in statute. To the contrary, A.R.S. §§ 16–610 and –611 establish that marking more names than are allowed on a ballot is a defect that invalidates that particular vote; a mistake, once marked, cannot be remedied in the non-statutory fashion suggested by the Recorder.

As a practical matter, the New Instruction promotes defaced, marked-up, and potentially unreadable ballots, which will necessitate the subjective judgment of two election workers under the Board's direction to determine the voter's intent. *See* Appx. at 075 (EPM provision directing that "[i]f the voter's choice for a specific race or ballot measure cannot be positively determined, no selection shall be counted for that race or ballot measure[,]" citing A.R.S. §§ 16–610 and –611). The Recorder argued below that the Legislature's creation of an electronic tabulation procedure to rehabilitate *potential* overvotes, i.e., those created by pen rests, ink blots, bleed through, smudges, or other unintentional defects, empowered the Recorder to unilaterally create the New Instruction. Appx. at 105–06. Not so.

The superior court rightly rejected the Recorder's assertion. Appx. at 271. Simply put, the Recorder's authority under A.R.S. § 16–547(C) does not extend so far.

C. The EPM's Overvote Instruction Implements Arizona Law

The Recorder unsuccessfully argued below that the Overvote Instruction is "invalid" because recent amendments to A.R.S. §§ 16–602 and –621 (through Senate Bill ("S.B.") 1135),[10] which govern the Electronic Adjudication process, "superseded" the Overvote Instruction. Appx. at 103–07. The Recorder's attempt to challenge the validity of the EPM's requirement is untimely and ultimately meritless. The drafting, reviewing, and approving of the EPM requires hundreds, if not thousands, of hours contributed by county election officials in Arizona's 15 counties, the public, the Secretary, the Attorney General, and the Governor with painstaking attention to details.

And even though the Secretary now suggests the Overvote Instruction was an "oversight," Appx. at 148, endorsing a blatant violation of the EPM is inapposite to the Secretary's statutory duty to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency[.]" A.R.S. § 16–452(A). Such statewide standards, by which every county recorder is equally held accountable, are imperative to avoid numerous

[10] S.B. 1135 is available here: https://www.azleg.gov/legtext/54leg/2R/laws/0001.pdf (last visited Sept. 1, 2020).

problems, including the kind of equal protection concerns raised in *Bush v. Gore*, 531 U.S. 98, 110 (2000).

In any event, the Recorder's refusal to comply with the EPM is unjustified because the Overvote Instruction is entirely consistent with Arizona law, including the laws and procedures that apply during the tabulation and counting process. S.B. 1135 was signed into law on February 3, 2020, and establishes the requirements for utilizing electronic adjudication features of ballot tabulation equipment. *See* Appx. at 072–78. The recent Electronic Adjudication Addendum to the EPM implements the new provisions in A.R.S. § 16–621(B). *See* Appx. at 075.[11] The Addendum allows the Board to appoint "Electronic Vote Adjudication Boards" to "evaluate over-vote conditions to determine the voter's intent" as "an alternative to manual duplication of ballots performed by the Ballot Duplication Board." *See id.*; *see also* EPM at 201–02 (providing that "over-voted ballots shall

[11]The Addendum appears in the record on appeal and is also available here: https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf (last visited Aug. 31, 2020). The Secretary implied below that the Attorney General's approval of the EPM and the Addendum tacitly sanctioned the New Instruction. *See* Appx. at 147. Not so. The Attorney General was never provided with an opportunity to review the New Instruction prior to Recorder's issuance of it. And the Attorney General could not reasonably anticipate that the Recorder would unilaterally disregard the Overvote Instruction and fail to obtain legal authorization to substitute the Overvote Instruction with the New Instruction.

be sent to the Ballot Duplication Board … [and i]f voter intent can be determined, the ballot shall be duplicated and counted").

Simply put, as the superior court noted, the Addendum "does not change the instructions for counties to give voters." Appx. at 269. The recent statutory changes have nothing to do with Arizona laws or procedures governing the written instructions that county recorders must supply with early ballots. Instead, the law merely allows the Board to appoint Electronic Vote Adjudication Boards to determine a voter's intent when overvote conditions are present.

Moreover, neither the EPM nor A.R.S. § 16–621 permits voters to intentionally overvote, i.e., vote for more candidates than permitted. Rather, both the EPM and A.R.S. § 16–621 demand deference to A.R.S. §§ 16–610 and –611, which require elections officials to *reject* overvotes. Indeed, A.R.S. § 16–621(B)(2) states "[t]he board of supervisors or officer in charge of elections shall appoint an electronic vote adjudication board … to adjudicate and submit for tabulation a ballot that is read by the tabulation machine as blank in order to determine if voter intent is clear on a portion or all of the ballot, or any portion of any ballot *as prescribed by* § 16–610 or 16–611, or to tally write-in choices as prescribed by § 16–612." (Emphasis added); *see also* A.R.S. §§ 16–610 ("If on any ballot the names of more persons are designated for the same office than are to be chosen, or if for any reason it is impossible to positively determine the voter's

choice, all the names designated for that office shall be rejected."); –611 ("If the voter marks more names than there are persons to be elected to an office, or if from the ballot it is impossible to determine the voter's choice for an office, his ballot shall not be counted for that office.").

The Recorder appears to overlook the important purpose underlying the Overvote Instruction: to enable elections officials to discern the intent of the voter in the clearest manner possible, and thereby safeguard the integrity of the election, by striving for clean ballots with single selections for each contest. *See* Ariz. Const. art. VII, § 12 ("There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise"); A.R.S. § 16–452(A) (one purpose of the EPM is "to achieve and maintain the maximum degree of correctness … on the procedures for … counting [and] tabulating … ballots"). The Overvote Instruction has not been superseded by state law and remains valid.

The Recorder's intentional disregard of the EPM—which unambiguously requires county recorders to provide the Overvote Instruction to voters and leaves no room for discretion—undermines the statutory goals of A.R.S. § 16–452(A). The New Instruction advises voters to "cross out" a mistake and make a "corrected selection" (Appx. at 059) while the approved Overvote Instruction advises voters to "request a new early ballot" if they make a mistake (Appx. at 061). The

instructions cannot be reconciled and therefore cannot stand together. And because the Secretary is the only official authorized to prescribe rules in the EPM under A.R.S. § 16–452, Appellees cannot claim that the New Instruction prevails over the EPM's Overvote Instruction.

II. The Superior Court Erred In Concluding The Equitable Preliminary Injunction Factors Weighed Against An Injunction Of The New Instruction

As discussed above, the superior court correctly found Appellants were likely to succeed on the merits of their claim—the first "equitable criteria" courts should consider when ruling on a request for a preliminary injunction. *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). But the court erred in concluding that the three remaining preliminary injunction factors weighed in Appellees' favor. Permitting the unlawful New Instruction to be included in the General Election will cause irreparable harm not only to Appellants, but to all voters, will result in significant hardships to state and national election results, and is repugnant to public policy considerations.

A. The Superior Court's Analysis of the Possibility-of-Irreparable-Harm Factor Is Erroneous

First, the superior court erred by misidentifying the possibility of irreparable harm that Appellants faced. This error caused the court to misapply the possibility-of-irreparable-harm factor in a manifestly unreasonable manner. *See TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492, ¶ 8 (App. 2013) (superior court

abuses its discretion when it applies the appropriate preliminary injunction standard "in a manner resulting in an abuse of discretion"); *Quigley v. City Court of City of Tucson*, 132 Ariz. 35, 37 (App. 1982) (explaining "[a]n 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.").

Appellants alleged in their motion for preliminary injunction that if Appellees' unlawful conduct was "not enjoined or otherwise prohibited prior to the general election, the opportunity for that election to be conducted according to the rules will be lost forever." Appx. at 026. The superior court did not address this possibility of harm. Instead, the court inexplicably equated Appellants' concerns to "a generalized concern about the election process." Appx. at 272.

In a case like this one, however, an injunction is necessary to prevent public officials from exceeding their authority in an upcoming election—a form of irreparable injury itself. *See McCluskey*, 80 Ariz. at 20–21; *Boruch*, 242 Ariz. at 616, ¶ 16. Moreover, if Appellees are permitted to issue the erroneous New Instruction to voters in the General Election, this could very well delay or call into question election results and lead to post-election challenges. *See, e.g.,* A.R.S. § 16–672(A)(1) (providing "misconduct on the part of election boards" as one of several grounds for contesting an election).

The gravity of permitting the unapproved New Instruction, which patently permits counting of intentional overvotes in violation of A.R.S. §§ 16–610 and –611, cannot be overstated. If an election board commits a statutory violation, any elector could initiate an election challenge asserting misconduct, which would delay election results and erode voter confidence in the election process. The extent of this kind of irreparable harm is incalculable at this pre-election moment; but the harm is certainly "possible" for purposes of an injunction and easily preventable with a simple order instructing the Recorder to include lawful instructions with the General Election early ballots. *See Shoen*, 167 Ariz. at 63.

The court therefore erred as a matter of law when it unreasonably characterized the possibility of harm to Appellants as "a generalized concern about the election process." *See Simms*, 232 Ariz. at 492, ¶ 8; *Quigley*, 132 Ariz. at 37. Indeed, there is no limiting principle to the superior court's reasoning. Any violation of the EPM, *i.e.* Election *Procedures* Manual, could be characterized as a "concern about the election process," yet the Legislature still made a knowing violation of the manual a misdemeanor, showing the seriousness of the violation. *See* A.R.S. § 16–452(C). The superior court's conclusion thus proves too much and is inconsistent with the Legislature's policy determination that the EPM carries the force of law.

B. The Superior Court Improperly Applied The Balance-Of-Hardships Factor

Second, the superior court erred when it decided that the financial costs to Appellees (spending approximately $125,000 to print new instruction sheets) was a hardship that weighed against an injunction. *See* Appx. at 273. A party establishes that the balance of hardships favors himself by establishing "probable success on the merits and the possibility of irreparable injury[.]" *Shoen*, 167 Ariz. at 63. That is precisely what Appellants established here, as discussed above.

Moreover, Appellees cannot claim any hardship associated with being required to comply with mandatory provisions in the EPM. Appellees' financial costs associated with printing unlawful and erroneous instructions are best described as a self-inflicted harm, which does not factor into the equitable analysis. *See Jiffy Lube Int'l v. Weiss Bros.*, 834 F. Supp. 683, 693 (D.N.J. 1993) ("To the extent that the defendants suffer … damage from the granting of the preliminary injunction, this harm is a predictable consequence of their willful breach of contract and their misconduct. As such, it is not the type of harm from which we seek to protect a defendant."). In any event, the superior court gave extraordinary and unreasonable weight to the relatively small costs that would be incurred to avoid the possibility of irreparable harm, i.e., "threats to the right to a fair election[.]" *See* Appx. at 027. Spending $125,000 to ensure compliance with

Arizona's election laws is a small price to pay. And the shortened timeline at this point is due to Appellees' ongoing refusal to comply with the law.[12]

To the extent that the deadline for military and overseas ballots is looming, Appellants asserted in supplemental filings below that there are less than 10,000 voters that will be mailed early ballots on September 19.[13] There is still almost a full month before early ballots are mailed to all early voters. *See* A.R.S. § 16–544(F). No party has asserted that no vendor anywhere in the state or country could accommodate Appellees' printing needs, and such a claim would be incredulous. For all of these reasons, the superior court erred when it attributed "delay" to Appellants and then heavily weighed this as a factor in Appellees' favor. *See* Appx. at 268 (stating "the delay bringing the issue to the Court affected the analysis"); *id.* at 274.

[12] Appellees argued below that their current vendor cannot timely print the instructions; even taking this as true, Appellees need not use their current vendor and do not appear to have taken any steps to contact other vendors.

[13] To put this number in context, there are 500 sheets of paper in a ream, and 10 reams in a case; accordingly, 10,000 pieces of paper is 2 cases of paper. A pallet of paper is 200,000 sheets; accordingly, Appellees' stated need of 2.5 million copies of ballot instructions is just 12.5 pallets of paper. *See* "How Many Reams of Paper in a Case?" available at https://www.quill.com/content/index/resource-center/office-supplies/faq/how-many-reams-of-paper-in-a-case/ (last accessed Sept. 8, 2020).

C. Contrary to the Superior Court's Reasoning, Public Policy Demands Faithful Execution Of Election Laws

Finally, the public policy factor strongly favors an injunction because it is in the public interest to require election officials to adhere to generally-applicable and neutral procedures, including the Overvote Instruction, which are outlined in the EPM. Because states are "primarily responsible for regulating federal, state, and local elections," they have a "strong interest in their ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011). And allowing the New Instruction does not promote "public confidence in the integrity of the electoral process," which the United States Supreme Court has stated "has independent significance." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008).

Given that the Appellees were on notice as early as August 11th that the New Instruction violated the law, it was incumbent upon them to make arrangements to assure correct instructions could be printed before the deadlines. *See Kerby v. Griffin*, 48 Ariz. 434, 450 (1936) ("it was unquestionably the duty of the [Secretary], knowing the [voter pamphlet printing deadline] to make every preparation within his power so that the actual printing could start as soon as possible…."). Finally, the public interest is also served by promoting certainty with elections and protecting against "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *see*

also Tedards v. Ducey, 398 F.Supp.3d 529, 548 (D. Ariz. 2019) (recognizing the state has a "substantial interest[]" in "lessening voter confusion").

The superior court erred as a matter of law when it decided that maintaining the unlawful New Instruction served the public interest to promote consistency between the Primary and General Elections. *See* Appx. at 274 (stating "the Court is uneasy with altering instructions from one 2020 election to the next"). Striving for consistency at the expense of legitimacy is untenable. Such reasoning is akin to elevating form over substance and defeats the important statutory objectives underpinning Arizona's election laws.

The public interest is best served when election officials adhere to established election procedures; when public officials fail to perform their statutory duties, the public interest is best served when the judiciary holds officials accountable. Courts should dissuade public officers from deviating from and creating their own election rules by demanding compliance, despite the associated financial costs and inconveniences the unlawful actor may incur to comply.

CONCLUSION

The superior court's ruling is internally inconsistent and erroneous. The court found that Appellants are likely to succeed on the merits of their claim that Appellees exceeded their lawful authority to issue the New Instruction, yet unreasonably determined that the remaining preliminary injunction factors do *not*

support enjoining Appellees' unlawful act. If the New Instruction stands, it could very well lead to disenfranchisement of voters, voter confusion, delayed election results, and unnecessary post-election challenges. The Court should prevent Appellees from exceeding their statutory authority and salvage the integrity of the upcoming General Election by reversing the superior court's ruling denying Plaintiffs' motion for preliminary injunction and ordering Appellees to supply the required Overvote Instruction with early ballots. *See Eu v. San Francisco Cty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989) (emphasizing a state "indisputably has a compelling interest in preserving the integrity of its election process").

RESPECTFULLY SUBMITTED this 10th day of September, 2020.

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