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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Kari Lake; Mark Finchem,

Plaintiffs,

v.

Kathleen Hobbs, as Arizona Secretary of State;
Bill Gates; Clint Hickman; Jack Sellers;
Thomas Galvin; and Steve Gallardo, in their
capacity as members of the Maricopa County
Board of Supervisors; Rex Scott; Matt Heinz;
Sharon Bronson; Steve Christy; Adelita
Grijalva, in their capacity as members of the
Pima County Board of Supervisors,

Defendants.

No. 22-cv-00677-JJT
(Honorable John J. Tuchi)

**PLAINTIFFS' OPPOSITION TO
ARIZONA SECRETARY OF
STATE'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Oral Argument Requested

1 Plaintiffs respectfully submit this Opposition to the Motion to Dismiss the First
2 Amended Complaint (“Hobbs Mot.”) (ECF no. 45) filed by the Arizona Secretary of
3 State (“Hobbs”). Plaintiffs’ claims are conventional, proper, and follow in the path of
4 similar claims currently pending in another federal district court. *See Curling v.*
5 *Raffensperger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020) (challenging constitutionality of
6 electronic voting system). Notably, in *Curling*, plaintiffs’ allegations of critical security
7 failures in Dominion Voting Systems Inc.’s (“Dominion”) software and voting
8 equipment proved correct, and on June 3, 2022, the federal government announced that
9 the ImageCast X device, which is approved for use in Arizona, has nine security failures
10 “that should be mitigated as soon as possible.”¹

11 For Hobbs’s motion, Plaintiffs’ well-pled allegations must be accepted as true.
12 The allegations show that electronic voting systems used in Arizona are insecure and
13 nontransparent. Am. Compl. ¶¶ 73, 124 (ECF no. 3) (“Complaint”). Moreover,
14 compromises of the security of these voting machines can be undetectable by any current
15 safety protocols or certification. *Id.* ¶¶ 31, 75, 116, 136(i), 146. Such security failures
16 nullify the fundamental right to vote by permitting elections to be decided by computer
17 manipulation rather than vote totals – a constitutionally unacceptable system. “The right
18 to vote freely for the candidate of one’s choice is of the essence of a democratic society,
19 and any restrictions on that right strike at the heart of representative government.”
20 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). “Other rights, even the most basic, are
21 illusory if the right to vote is undermined.” *Id.* at 560 (quoting *Wesberry v. Sanders*, 376
22 U.S. 1, 17 (1964)). The right to vote includes the right to have one’s ballot counted, and
23 the Constitution prohibits destroying the right to vote by alteration of ballots or ballot
24 box stuffing. *United States v. Classic*, 313 U.S. 299, 315 (1941); *Reynolds*, 377 U.S. at

25 _____
26 ¹ Cybersecurity & Infrastructure Security Agency, *ICS Advisory (ICSA-22-154-01):*
27 *Vulnerabilities Affecting Dominion Voting Systems ImageCast X* (June 3, 2022),
28 available at <https://www.cisa.gov/uscert/ics/advisories/icsa-22-154-01>. Per Hobbs Mot.
at 14 n.6, the “public record” of CISA’s action concerning this undisputed fact may be
judicially noticed by the Court.

1 554-55. Plaintiffs’ Complaint pleads a state of affairs in Arizona’s election process that
 2 nullifies Plaintiffs’ constitutional right to vote. Hobbs’s arguments seeking dismissal are
 3 without merit.²

4 **I. PLAINTIFFS’ ALLEGATIONS**

5 The Amended Complaint (“Complaint”) alleges that Hobbs, as the chief election
 6 officer in Arizona, intends to cause Arizona to use electronic voting machines to administer
 7 future elections, including the 2022 Election scheduled for November 8, 2022. Compl.
 8 ¶¶ 1, 9-11, 177-183 (ECF no. 3). It is well established that electronic voting systems are
 9 open to hacking, tampering, and fraud to wrongfully alter vote totals. *Id.* ¶¶ 71-92.
 10 Protective measures are inadequate to remediate these security failures. *Id.* ¶¶ 144-152.
 11 Wrongful manipulation of votes through electronic voting machines can be done so as to
 12 remove the evidence that such manipulation occurred—despite all current safety
 13 procedures and certifications—leaving no trace of the stolen votes. *Id.* ¶¶ 4, 31, 75, 116,
 14 146. Conducting an election by a means that allows vote totals to be undetectably
 15 manipulated violates Plaintiffs’ fundamental constitutional right to vote. *Id.* ¶¶ 178-81.

16 These allegations state an obvious, redressable wrong. If the result of an election
 17 can be determined by an electronic intruder secretly altering votes or vote totals in
 18 Arizona’s computerized voting equipment, then the votes cast by voters are meaningless
 19 and their right to vote has been nullified.

20 **II. HOBBS’S FACTUAL ASSERTIONS**

21 **PROVIDE NO BASIS FOR DISMISSAL.**

22 “[O]n a Rule 12(b)(6) motion, ‘The facts alleged in a complaint are to be taken as
 23 true.’” *Hoffman v. Preston*, 26 F.4th 1059, 1061 (9th Cir. 2022). The facts alleged must be
 24 “construed in the light most favorable to the nonmoving party.” *Hamm v. Equifax Info.*

25
 26
 27 ² Hobbs incorporates by reference the arguments for dismissal made by the other
 28 defendants. Hobbs Mot. 1. Those arguments, too, are without merit for the reasons stated
 in Plaintiffs’ Opposition to Maricopa County Defendants’ Motion to Dismiss First
 Amended Complaint (ECF no. 56), which are incorporated herein by reference.

1 *Servs. LLC*, No. CV-17-03821-PHX-JJT, 2018 U.S. Dist. LEXIS 123505, at *3-4 (D. Ariz.
2 July 24, 2018). Hobbs’s motion begins by improperly advancing factual allegations taken
3 from outside the Complaint. Hobbs Mot. 1, 2-4. Facts outside the complaint may not be
4 considered to support a Fed. R. Civ. P. 12(b)(6) motion to dismiss. *WBS, Inc. v. Croucier*,
5 762 Fed. Appx. 424, 428 (9th Cir. 2019); *Ree v. Zappos.com, Inc.*, 888 F.3d 1020, 1028
6 (9th Cir. 2018). The Court must “disregard[]” evidence outside the Complaint, such as
7 “portions of the Federal Communications Commission’s website.” *Enos v. Arizona*, No.
8 CV-16-00384-PHX-JJT, 2017 U.S. Dist. LEXIS 19268, at *10 (D. Ariz. Feb. 10, 2017).
9 The “simple question before the Court” on a motion to dismiss is “whether Plaintiffs have
10 alleged sufficient facts in the Amended Complaint to allow the Court to plausibly infer”
11 that the Defendants’ conduct will deny Plaintiffs their rights. *See id.* The Complaint easily
12 surpasses that threshold.

13 III. PLAINTIFFS HAVE STANDING.

14 Hobbs’ argument that Plaintiffs lack standing to bring their claims is incorrect.
15 Hobbs Mot. 5-9. The only element of Plaintiffs’ standing challenged by Hobbs is the
16 “injury in fact” element. *Id.* An injury in fact is “an invasion of a legally protected interest
17 which is (a) concrete and particularized and (b) actual or imminent, not conjectural or
18 hypothetical.” *Meland v. Weber*, 2 F.4th 838, 844 (9th Cir. 2021). The Complaint alleges
19 a concrete and particularized injury – nullification of Plaintiffs’ fundamental rights as
20 candidates and as voters to vote and have their votes properly counted without being diluted
21 or debased by other fictitious or manipulated votes. “[O]ne thing is clear: total and
22 complete disenfranchisement of the electorate as a whole is patently and fundamentally
23 unfair (and, hence, amenable to rectification in a federal court).” *Bonas v. Town of N.*
24 *Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001). The injury is also actual and imminent, as it
25 will occur during the 2022 Elections through use of electronic election equipment that
26 Hobbs acknowledges Arizona will use.

27 “**Conjectural and speculative.**” Hobbs first argues that Plaintiffs’ injuries are too
28 speculative and conjectural to establish standing. Hobbs Mot. 5. Not so. A plausible threat

1 of misconduct that would jeopardize the accurate counting of votes in an election
2 constitutes adequate injury to establish standing. “An allegation of future injury may
3 suffice if . . . there is a substantial risk that the harm will occur.” *Susan B. Anthony List v.*
4 *Driehaus*, 573 U.S. 149, 158 (2014) (quotation omitted). “An inaccurate vote tally is a
5 concrete and particularized injury to candidates” sufficient to meet the injury-in-fact
6 requirement. *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). An “increased
7 probability of injury” as a result of the challenged act by the defendant can provide
8 standing. *Sierra Club v. United States EPA*, 774 F.3d 383, 392 (7th Cir. 2014).
9 Accordingly, the U.S. District Court for the Northern District of Georgia properly held that
10 standing was established where the plaintiffs “plausibly allege a threat of a future hacking
11 event that would jeopardize their votes and the voting system at large.” *Curling v. Kemp*,
12 334 F. Supp. 3d 1303, 1316 (N.D. Ga. 2018).

13 The Complaint alleges that the electronic equipment Hobbs intends to use in the
14 2022 Election has existing security failures that allow unauthorized persons to manipulate
15 votes, and that such manipulation has repeatedly occurred in the past. Compl. ¶¶ 23-30, 61,
16 69-89. In addition, these security failures are *ongoing* – CISA announced on June 3, 2022,
17 that nine security failures can be used “to steal votes” in Arizona, *see supra* at 1 & n.1. –
18 and remain unaddressed. *Id.* ¶¶ 4, 139-40. The Complaint pleads detailed allegations
19 showing that existing safety procedures and certifications can be defeated and that
20 manipulation of votes can be performed without leaving any record of the changes. *Id.*
21 ¶¶ 31, 75, 98, 128, 138-40, 145-46. Further, future hacking of elections is expected by
22 former federal officials; and at least one person has hacked Arizona’s state voter
23 registration records. *Id.* ¶¶ 79, 80, 94, 99, 101, 130. Still further, the Complaint alleges that
24 electronic election equipment used in Arizona in 2020 was found after the election to have
25 vote total discrepancies, missing data, and security failures. *Id.* ¶¶ 70, 132. The threat is
26 real and imminent. *See Curling*, 493 F. Supp. 3d at 1342 (“The Plaintiffs’ national
27 cybersecurity experts convincingly present evidence that this is not a question of ‘might
28 this actually ever happen?’ — but ‘when it will happen.’”).

1 Taken as true, and drawing all inferences in Plaintiffs’ favor, these allegations plead
2 an injury that is neither conjectural nor speculative: Plaintiffs’ rights as candidates and
3 voters to vote and have an accurate count of the vote are nullified because the outcome of
4 the election can be determined without regard to the actual votes cast, *and no one will ever*
5 *know that this happened*. Under such a system, the casting of a vote is a sham. Voting is
6 meaningless unless the vote is fairly counted and the winner of the election is determined
7 by the majority of the legally-cast votes – not the undetectable interference of an
8 unscrupulous computer expert. *See Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994)
9 (affirming injunction against candidate taking office after election in which fraud may have
10 changed the outcome, based on violation of the right to vote when the “possibility is left
11 open that some other candidate actually received more votes than the declared winner,
12 which would mean that each of the votes cast for this other candidate was ignored”); *Griffin*
13 *v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978) (affirming injunction requiring new
14 election, where the “integrity” of the initial election “was severely impugned” by voters
15 using ballots quashed by the state supreme court, in part because “due process involves the
16 appearance of fairness as well as actual fairness”); *Bonas*, 265 F.3d at 74 (where “organic
17 failures in a state or local election process threaten to work patent and fundamental
18 unfairness, a colorable claim lies for a violation of substantive due process (and, hence,
19 federal jurisdiction attaches)”).

20 Hobbs attempts to minimize the threat posed by Arizona’s fatally flawed election
21 equipment by arguing that the injury depends on a “chain of contingencies.” Hobbs Mot.
22 7. All lawsuits seeking injunctive relief rely on the occurrence of a contingency, so that
23 consideration is not itself sufficient to defeat standing. The possibility of illegal conduct
24 changing an election outcome has been held by this Court to establish standing. *Ariz.*
25 *Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 U.S. Dist.
26 LEXIS 154086, at *4 (D. Ariz. Nov. 4, 2016) (allegation that plaintiff “will suffer
27 immediate and irreparable injury if Defendants’ alleged conspiracy to intimidate voters
28 ‘succeeds in disrupting or changing the results of the election’” sufficient to

1 establish standing). If illegal conduct changing the result of an election is plausible, a
2 plaintiff has shown injury to establish standing. That is the case here.

3 Two of the cases cited by Hobbs, Hobbs Mot. 8, to support her “conjectural”
4 argument were cases challenging *past* elections and did not allege the election result would
5 change if they were granted relief. *E.g. Stein v. Cortés*, 223 F.3d 423, 426 (E.D. Pa. 2016)
6 (candidate who received less than 1% of votes demanded recount of votes “during last
7 month’s election”); *Samuel v. V.I. Joint Bd. of Elections*, No. 2012-0094, 2013 U.S. Dist.
8 LEXIS 31538, at *1 (D.V.I. Mar. 7, 2013) (plaintiffs sought “to decertify the November 6,
9 2012 general election in the Virgin Islands” but “do not claim that they have been deprived
10 of something to which they personally are entitled – such as election to the various
11 positions they sought.”) (internal quotation marks and citation omitted). For obvious
12 reasons, federal courts are loath to invalidate elections that have already been completed,
13 without strong evidence of fraud. Moreover, the consideration that courts will not touch a
14 completed election without strong evidence of fraud weighs in *favor* of Plaintiffs’ standing
15 here, for the Complaint alleges Arizona’s electronic election equipment can be hacked
16 undetectably. Taken as true, these allegations mean that Plaintiffs could *never* obtain relief
17 when their votes were stolen or overruled by manipulation of the computerized election
18 system, because they will not be able to show the fraud that occurred. They must seek relief
19 now based on the high risk of manipulation, and prevent the irreparable harm before it
20 occurs. The other cases relied on by Hobbs to support her argument on this issue, Hobbs
21 Mot. 7-8, are not applicable here or are inconsistent with *Carson* and *Curling*.³

22 **“Generalized grievances.”** Hobbs also argues that Plaintiffs’ injuries are
23 insufficiently “concrete and particularized.” Hobbs Mot. 8-9. Contrary to Hobbs’s
24 assertion, though, Plaintiffs do not claim a generalized interest in “seeing that the law is
25

26 ³ In *Shelby Cnty. Advocs. for Valid Elections v. Hargett*, 2019 WL 4394754, at *2 (W.D.
27 Tenn. Sept. 13, 2019), *aff’d* *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977
28 (6th Cir. 2020), unlike this case, none of the plaintiffs were current candidates for office.

1 obeyed.” *See id.* at 9. Plaintiffs are both candidates for office in the 2022 Election. Compl.
2 ¶¶ 35-41. “[A]s candidates” they “have a cognizable interest in ensuring that the final vote
3 tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete
4 and particularized injury to candidates.” *Carson*, 978 F.3d at 1058 (footnote omitted);
5 *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 924 (7th Cir. 2020). As voters, Plaintiffs
6 possess a fundamental right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). They
7 have a particular and individual interest in casting ballots that they can be assured will be
8 counted as votes for the candidates they prefer, rather than scanned by a black-box piece
9 of equipment that counts the votes in an unknown and unknowable way and can easily
10 manipulate votes whether through hacking, malware implanted in the source code, or illicit
11 components manufactured or assembled in adversarial countries like China.

12 Plaintiffs may seek judicial intervention to prevent this injury, and a state may not,
13 by arbitrary action or other unreasonable impairment, burden it. *Baker v. Carr*, 369 U.S.
14 186, 208 (1962). “[S]ince the right to exercise the franchise in a free and unimpaired
15 manner is preservative of other basic civil and political rights, any alleged infringement of
16 the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds*, 377
17 U.S. at 562. The right to vote includes the right to have the citizen’s vote counted, *Classic*,
18 313 U.S. at 315, “correctly counted and reported,” *Gray v. Sanders*, 372 U.S. 368, 380
19 (1963), and not debased or diluted by the introduction of fraudulent votes, *Reynolds*, 377
20 U.S. at 556. “[T]he free exercise and enjoyment of the rights and privileges guaranteed to
21 the citizens by the Constitution and laws of the United States” entails “the right and
22 privilege . . . to have their expressions of choice given full value and effect by not having
23 their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots
24 fraudulently cast and counted, recorded, returned, and certified.” *United States v. Saylor*,
25 322 U.S. 385, 386 (1944). Plaintiffs have pleaded that Arizona’s electronic election
26 equipment is so unsecure that there is actual and imminent risk that their votes and votes
27 for them as candidates will be rendered meaningless. This is a concrete and particularized
28 injury. *Carson*, 978 F.3d at 1058; *Curling*, 334 F. Supp. 3d at 1316.

1 The fact that Defendants’ wrongful conduct also inflicts the same concrete and
2 particularized injury on other Arizona voters does not prevent Plaintiffs from having
3 standing to pursue relief concerning their own injuries. “[W]here a harm is concrete, though
4 widely shared, the [Supreme] Court has found ‘injury in fact.’” *FEC v. Akins*, 524 U.S. 11,
5 24 (1998). “This conclusion seems particularly obvious . . . where large numbers of voters
6 suffer interference with voting rights conferred by law.” *Id.* In *FEC*, the Supreme Court
7 held that a claim “directly related to voting, the most basic of political rights” was
8 “sufficiently concrete” to establish standing. *Id.* at 24-25. In *Brakebill v. Jaeger*, the Eighth
9 Circuit held that the plaintiff had standing to challenge a voter identification law
10 notwithstanding that the burden of the law would fall on any person who had a residential
11 street address. 932 F.3d 671, 677 (8th Cir. 2019). In *Common Cause/Georgia v. Billups*,
12 the Eleventh Circuit held that the plaintiffs had standing to challenge a voter ID statute,
13 and that the statute could be challenged even by persons who possessed an acceptable form
14 of ID. 554 F.3d 1340, 1351-52 (11th Cir. 2009). That court noted that the “inability of a
15 voter to pay a poll tax” would not be required to challenge a statute imposing a tax on
16 voting. *Id.* at 1352. A suit challenging a poll tax would assert an injury applicable to all
17 voters, but the requirement of standing would nevertheless be met. The same is true here.

18 In *Ariz. Democratic Party*, this Court held that standing existed for the plaintiff to
19 bring election-related claims based on the possibility that the defendants’ alleged conduct
20 might “succeed[] in disrupting or changing the results of the election.” No. CV-16-03752-
21 PHX-JJT, 2016 U.S. Dist. LEXIS 154086, at *4. That outcome is the outcome Plaintiffs
22 here also seek to prevent. *See also Donald J. Trump for President, Inc. v. Bullock*, 491 F.
23 Supp. 3d 814, 828 (D. Mont. 2020) (“Because the alleged injuries to the members’ voting
24 rights at issue in this case could conceivably be asserted by any Montanan does not
25 eradicate the standing necessary to assert these claims. On the contrary, the Supreme Court
26 has repeatedly enumerated the principle that claims alleging a violation of the right to vote
27 can constitute an injury in fact despite the widespread reach of the conduct at issue.”).

28 The nullification of Plaintiffs’ right to vote, and to receive accurate votes as

1 candidates, is an injury concrete and particularized enough to give Plaintiffs standing to
2 seek a remedy from this Court. Hobbs’s arguments to the contrary are without merit.

3 IV. NO ELEVENTH AMENDMENT BAR APPLIES.

4 Hobbs argues that Eleventh Amendment immunity bars Plaintiffs’ claims. Hobbs
5 Mot. 9-12. The Eleventh Amendment does not prevent “actions for prospective declaratory
6 or injunctive relief against state officers in their official capacities for alleged violations of
7 federal law” if the state officer has “some connection with enforcement of the act.” *Mecinas*
8 *v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (citations omitted). Here, Plaintiffs’ claims
9 seek prospective declaratory and injunctive relief against Hobbs, a state officer in her
10 official capacity, for violations of federal constitutional law. Compl. ¶¶ 183, 189, 195, 197,
11 211. Hobbs, as Secretary of State, is Arizona’s “chief state election officer” and responsible
12 for the approval of election equipment. A.R.S. §§ 16-142(A)(1), 16-441; Compl. ¶¶ 156-
13 58. The Complaint cannot be dismissed on the basis of the Eleventh Amendment.

14 Though Hobbs uses the label “Eleventh Amendment,” this section of her Motion
15 actually argues, incorrectly, that Plaintiffs’ claims fail on the merits – that Plaintiffs “don’t
16 plausibly allege” a violation of federal law. Hobbs Mot. 9. Hobbs asserts the Constitution
17 does not forbid the use of touchscreen voting systems and gives states wide latitude to
18 decide the manner of conducting elections. *Id.* at 10. Federal courts have recognized since
19 at least the 1960s that the Constitution both grants power to states to regulate elections *and*
20 forbids states, when regulating elections, from infringing their citizens’ constitutional
21 rights. *E.g. Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (“When a State exercises
22 power wholly within the domain of state interest, it is insulated from federal judicial
23 review. But such insulation is not carried over when state power is used as an instrument
24 for circumventing a federally protected right.”). Plaintiffs allege that the use of electronic
25 equipment is an election regulation that falls outside the zone of Arizona’s permissible
26 constitutional discretion, because it allows elections to be decided without regard to the
27 votes actually cast, thereby nullifying the right to vote and have one’s vote counted without
28 being debased, diluted, or destroyed. To be constitutional, election regulations must

1 produce a reliable count of the legal votes. Plaintiffs' claims plausibly allege that Arizona's
2 equipment and system do not. Plaintiffs allege a violation of federal law.

3 Nor do Plaintiffs' claims depend on any application of Arizona state law. Without
4 regard to whether Arizona's use of electronic election equipment satisfies Arizona state
5 law requirements, use of the equipment violates Plaintiffs' federal constitutional rights.
6 This Court need make no pronouncement concerning whether Arizona's procedures
7 comply with state law, in order to grant Plaintiffs relief. Allegations that Arizona's
8 equipment fails to meet state law standards provide evidentiary support for Plaintiffs'
9 allegations that the equipment is not sufficiently secure and reliable, but the Court can, and
10 should, grant Plaintiffs the relief they seek irrespective of any Arizona state law standards.

11 Hobbs repeatedly cites *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003). Hobbs Mot.
12 at 2, 9, 14, 17. *Weber* mandates denial of Hobbs's motion to dismiss, for the court in *Weber*
13 reviewed a grant of *summary judgment*. That is, in *Weber* the plaintiff's complaint alleging
14 that an electronic voting system was unconstitutional was *not* dismissed at the pleadings
15 stage, but proceeded through discovery to summary judgment, where the plaintiff failed to
16 prove her claims. *Weber*, 347 F.3d at 1105. Much has happened since 2003 to show that
17 electronic election equipment is inherently less accurate and less verifiable than other
18 systems. Plaintiffs in this case are entitled to an opportunity to gather and present that
19 evidence, just as the plaintiff in *Weber* was afforded that opportunity.

20 Hobbs argues in a footnote that *Pullman* abstention should stay the Court from
21 hearing Plaintiffs' claims. Hobbs Mot. 12 n.3. "*Pullman* abstention is an extraordinary and
22 narrow exception to the duty of a District Court to adjudicate a controversy" that applies
23 when "state law issues may moot or narrow the constitutional questions." *Porter v. Jones*,
24 319 F.3d 483, 492 (9th Cir. 2003) (quotation omitted). Hobbs does not identify any pending
25 "state law issues" in controversy that might "moot or narrow" Plaintiffs' constitutional
26 claims, and does not even attempt to show how this case meets the three elements required
27 for *Pullman* abstention. *Id.* Hobbs does not deny that Arizona intends to the use electronic
28 election equipment alleged in the Complaint. There is no reason to believe that any

1 unidentified state law issue might moot or narrow Plaintiffs’ claim. Hobbs is merely citing
2 *Pullman* as a means to try to avoid addressing Plaintiffs’ claims on the merits. *Pullman*
3 abstention “should rarely be applied.” *Id.* This is not a case for *Pullman*.

4 V. PLAINTIFFS PLEAD VIABLE CLAIMS.

5 Hobbs lastly, and repetitively, argues that the Complaint fails to state a cognizable
6 constitutional claim because it purportedly “contains no well-pled facts sufficient to show
7 a violation of Plaintiffs’ ‘right to vote [and] to have that vote counted.’” Hobbs Mot. 12-13.
8 To support this conclusion, Hobbs argues that the Complaint doesn’t address Arizona’s
9 specific voting equipment and practices, and that the Complaint does not “give rise to a
10 plausible inference that Arizona’s voting systems are at risk of being compromised.” *Id.*
11 15-16. Hobbs is wrong. The Complaint is replete with detailed allegations demonstrating
12 that (1) *all* electronic voting equipment *can be* compromised through a variety methods of
13 including hacking, source code manipulation, and compromise of components assembled
14 or manufactured in adversarial countries like China, (2) *Arizona’s* electronic voting
15 equipment *can be* compromised through the same paths; (3) multiple attempts have been
16 made in the past to hack U.S. election equipment; (4) Arizona’s voter registration database
17 *has been* hacked; (5) a federal judge, after hearing evidence related to the *same* electronic
18 election system used in part of Arizona, concluded it was not a matter of “if” but of “when”
19 an election would be hacked; and (6) votes could be changed in an electronic election
20 system without leaving any evidence of the change. These allegations are well-pled,
21 specific, and give rise to plausible inferences that Arizona’s voting systems can be
22 compromised to change the results of future elections and that it is reasonably likely this
23 will occur. *See* Compl. ¶¶ 80, 84, 94. As a result, the Complaint states a claim that
24 Plaintiffs’ fundamental right to vote will be infringed if Arizona uses the electronic
25 equipment to administer future elections.

26 **A. The Complaint Alleges Specific Facts Showing Arizona’s Use of Electronic** 27 **Election Equipment Is Insecure.**

28 The Complaint alleges the following:

1 1. Plaintiffs have a constitutional right to vote and have their votes counted
2 accurately so that only legal votes determine the winners of offices. *Id.* ¶ 2.

- 3 • Hobbs does not dispute this, and she acknowledges Plaintiffs are asserting the
4 right to vote and have their votes counted. *See* Hobbs Mot. at 13.

5 2. “Every county in Arizona intends to tabulate votes cast in the Midterm Elections
6 through optical scanners” and upload vote tallies “over the internet to an election reporting
7 system.” Compl. ¶¶ 14-15. “All optical scanners and ballot marking devices certified by
8 Arizona, as well as the software on which they rely deprive voters of the right to have
9 their votes counted and reported in an accurate” way. *Id.* ¶ 23. “All electronic voting
10 machines and election management systems, including those slated to be used in Arizona
11 in the Midterm Election, can be manipulated through internal or external intrusion to alter
12 votes and vote tallies.” *Id.* ¶ 24. A vast body of real-world evidence shows that electronic
13 voting machines and election management systems can be hacked to manipulate votes. *Id.*
14 ¶¶ 73-89. Dominion and ES&S electronic voting machines “can be hacked or compromised
15 with malware, as has been demonstrated by recognized computer science experts, including
16 experts from the University of Michigan, Princeton University, Georgetown University,
17 and other institutions.” *Id.* ¶ 61. Dominion and ES&S electronic election equipment is
18 intended to be used in Arizona. *Id.* ¶¶ 14, 16, 19. “Electronic voting machines and software
19 manufactured by . . . Dominion and ES&S, are vulnerable to cyberattacks before, during,
20 and after an election in a manner that could alter election outcomes.” *Id.* ¶ 28. The
21 equipment used in Maricopa County, Arizona during the 2020 election exhibited data
22 inconsistencies, missing information, and basic cyber security deficiencies. *Id.* ¶ 132.

- 23 • Hobbs is plainly incorrect in asserting that the Complaint “fail[s] to connect [its]
24 allegations to Arizona’s voting system” and “ignore[s] that 14 of Arizona’s 15
25 counties don’t even use Dominion machines.” Hobbs Mot. 13-14, 15.⁴ The

26
27 ⁴ Some of Hobbs’s assertions appear intended to be taken not at face value. For example,
28 she declares (wrongly) that “every example” in the Complaint of “issues” with election

1 Complaint speaks specifically to Arizona. Hobbs’s argument that security
 2 incidents in other jurisdictions are “immaterial,” *id.* at 13, is also incorrect.
 3 Incidents elsewhere show the threat in Arizona is real, not speculative.

- 4 • Hobbs attacks the Complaint for making “vague allegations of possible
 5 ‘vulnerabilities’” or “potential security vulnerabilities,” Hobbs Mot. 17, 6; but
 6 the Complaint alleges Arizona’s equipment **is** flawed and **can be** used to
 7 manipulate votes. The security failures are not “possible.” They are actual.

8 3. Litigation in Georgia concerning Dominion Democracy Suite 5.5b election
 9 equipment resulted in expert testimony that the Dominion system is flawed due to
 10 inadequate “hardening” against a security attack. Compl. ¶ 83. The Georgia federal court
 11 found substantial evidence that the system “was plagued by security risks and the potential
 12 for votes to be improperly rejected or misallocated,” and wrote, “national cybersecurity
 13 experts convincingly present evidence that this is not a question of ‘might this actually ever
 14 happen?’ – but ‘when it will happen.’” *Id.* ¶ 84. The voting system used in Georgia is the
 15 same system used in Arizona. *Id.* ¶¶ 139-40.

- 16 • Hobbs argues the Complaint does not allege “that Arizona uses the same
 17 equipment and procedures that caused the alleged issues they point to.” Hobbs
 18 Mot. 16. This is simply incorrect; the Complaint alleges that Arizona uses the
 19 same equipment used in Georgia. Moreover, even if Arizona’s equipment was
 20 unique among states this would not matter, because the Complaint plausibly
 21 alleges *all* electronic equipment – including Arizona’s – is unconstitutionally
 22 unsecure for use in voting and counting votes.

23 4. “Expert testimony demonstrates that all safety measures intended to secure
 24 electronic voting machines against manipulation of votes, such as risk limiting audits and
 25 logic and accuracy tests, can be defeated.” Compl. ¶ 31; *id.* ¶ 4. “All post-election audit
 26 procedures can be defeated by sophisticated manipulation of electronic voting machines.”

27
 28 equipment “involves other jurisdictions, not Arizona.” Hobbs Mot. 6. Yet on the same
 page, she admits “Plaintiffs try to tie their allegations to Arizona.” *Id.* n.1.

1 *Id.* ¶ 145. A professor of computer science has testified that malware can defeat acceptance
 2 testing, logic and accuracy testing, external firmware validation, and risk-limiting audits as
 3 protections for election equipment in Georgia, which is also used in Arizona. *Id.* ¶ 146.

- 4 • Hobbs argues, citing evidence outside the Complaint and without providing any
 5 reason to believe these efforts are successful (which would, in any event, only
 6 create a dispute of material fact that cannot support dismissal of Plaintiffs’
 7 claims), that Arizona “election officials implement policies to mitigate risks,”
 8 and that Arizona has election “auditing procedures.” Hobbs Mot. 14, 15-16. But
 9 the Complaint pleads that all such security policies and audits can be defeated,
 10 and it provides expert testimony to substantiate this allegation. A manual review
 11 of the votes at 2% of the precincts in a county, the hand count procedure from
 12 A.R.S. § 16-602 and EPM 213-34 cited by Hobbs, Mot. at 16, does not protect
 13 against hacking of election equipment in 98% of the county.
- 14 • Contrary to Hobbs’s assertion, Hobbs Mem. 14-15, Plaintiffs are well aware that
 15 the election equipment Arizona intends to use has been “certified.” The
 16 Complaint plausibly pleads that the review and certification process for election
 17 equipment is meaningless, because it does not catch security failures and
 18 approves equipment with serious security problems. Experts for years have
 19 demonstrated the ability to hack election machines certified for use in elections.
 20 Compl. ¶¶ 74-78, 89. The Complaint plausibly⁵ pleads that the equipment

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 22 ⁵ Allegations that certification does not assure security are plausible in part because they
 23 are consistent with published conclusions of relevant experts. *E.g.* Steven M. Bellovin et
 24 al., *Seeking the Source: Criminal Defendants’ Constitutional Right to Source Code*, 17
 25 Ohio St. Tech. L. J. 1, 35 (Dec. 2020) (Decl. of Andrew Parker Ex. G (ECF no. 42-1))
 26 (Voting machines are the “best-documented example” of “adversarial testing” finding
 27 “flaws in software that had been certified by outside parties,” and “outside auditors . . .
 28 have *always* found flaws” in voting machine software, so that “There is broad consensus
 among elections experts that modern software systems are, by virtue of their design, too
 complex and unreliable to be relied upon for determining the outcomes of civil elections.”);
Russian Interference in the 2016 U.S. Elections at 76, Hearing of S. Sel. Comm. on

1 Arizona intends to use, and the software on which it relies, was “wrongly
 2 certified” because it “deprives voters of the right to have their votes counted and
 3 reported in an accurate, auditable, legal, and transparent process.” *Id.* ¶ 23. For
 4 example, Dominion tabulators approved by the EAC were found to contain
 5 “erroneous code” that caused the equipment to exclude ballots from reported
 6 election results. *Id.* ¶ 116. The Dominion system used in Georgia, the same
 7 Dominion system certified to be used in Arizona, was found by a federal court
 8 to be plagued by security risks and the potential for votes to be improperly
 9 rejected or misallocated. *Id.* ¶¶ 84-85. In response to expert analysis in the
 10 Georgia case, *id.* ¶ 4, CISA, the federal agency responsible for certifying
 11 election equipment, announced that a Dominion device, which is approved for
 12 use in Arizona,⁶ has nine different security vulnerabilities, *see supra* at 1 & n.1
 13 Certification of voting equipment for use by federal and state authorities clearly
 14 does not mean the equipment is secure against unauthorized manipulation.

15 5. Malware that causes the changing of votes on electronic election equipment can
 16 delete itself after the election, “leaving no evidence that the voting machine was ever
 17 hijacked or any votes stolen.” Compl. ¶ 75.

- 18 • This means Arizona’s election audit procedures are not likely to discover
 19 whether an election’s result has been changed by computerized manipulation.

20 6. Foreign states have attempted to use electronic intrusion to interfere in U.S.
 21 elections in the past, and a former Obama administration official predicted that “the 2020
 22 election will be hacked no matter what we do.” *Id.* ¶¶ 79-80, 94. The Biden administration

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 24
 25 Intelligence, S. Hrg. 115-92 (June 21, 2017) (Decl. of Andrew Parker Ex. H (ECF no. 43))
 26 (“Cybersecurity experts have studied a wide range of U.S. voting machines—including
 both DREs and optical scanners—and in *every single case*, they’ve found severe
 vulnerabilities that would allow attackers to sabotage machines and to alter votes.”).

27 ⁶ See Arizona Secretary of State, 2022 Election Cycle/Voting Equipment, *available at*
 28 https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment-Feb-Final.pdf.

1 in 2021 announced sanctions against Russia for election interference in the 2020 election.
 2 *Id.* ¶ 130. The Arizona state voter registration database was breached in 2016. *Id.* ¶¶ 79,
 3 94. U.S. Senators and Representatives have publicly warned about the risks of electronic
 4 voting machines being hacked since at least 2018. *Id.* ¶¶ 95-100. A federal court found that
 5 it was not a matter of “if” but “when” an election would be hacked, after hearing evidence
 6 related to the same Dominion system used in Arizona. *Id.* ¶ 84.

- 7 • Hobbs repeatedly asserts that future hacking of Arizona’s electronic election
 8 equipment is not “plausible.” Hobbs Mot. 13, 16, 17. The Complaint alleges
 9 specific facts showing that it is plausible.

10 7. Election equipment can be opened to malicious manipulation “through illicit
 11 software installed on their component parts during the manufacturing process.” Compl.
 12 ¶ 90. Similar such attacks were discovered by the U.S. Department of Defense in 2010,
 13 Intel Corp. in 2014, an FBI investigation in 2015, and a government contractor providing
 14 intelligence services in 2018. *Id.* ¶ 91.

- 15 • Hobbs argues that a foreign attack during the manufacturing process is a “vague
 16 possibility.” Hobbs Mot. at 13. To the contrary, the Complaint specifically
 17 pleads that such attacks have repeatedly occurred already. They are not a “vague
 18 possibility”; they are a historical fact that can easily recur.

19 Taken as true, the Complaint alleges specific, plausible facts showing that Arizona’s
 20 electronic election equipment can be manipulated to change votes and decide the results of
 21 elections without regard to votes actually cast; that such manipulation can occur without
 22 leaving evidence to show it happened; that any efforts by Arizona to prevent this from
 23 happening are ineffective; that there exist actors with the desire to manipulate U.S.
 24 elections. Means, motive, opportunity, and impunity to manipulate Arizona’s elections all
 25 exist. Arizona’s use of electronic voting equipment nullifies Plaintiffs’ right to vote.

26 **B. Plaintiffs Allege Viable Legal Theories, Not a Mere Policy Preference.**

27 Hobbs finally argues that Complaint “amounts to a mere desire for the Court to
 28 impose Plaintiffs’ preferred methods of election administration.” Hobbs Mot. 17. As

1 discussed above, the Constitution denies states the power to administer elections in such a
2 fashion as to infringe rights guaranteed by the Constitution, including the right to vote.
3 *Gomillion*, 364 U.S. at 347; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217
4 (1986) (state’s “power to regulate the time, place, and manner of elections does not justify,
5 without more, the abridgment of fundamental rights, such as the right to vote”). The
6 Complaint is not about Plaintiffs’ preferences; it is about Hobbs’s intention to nullify
7 Plaintiffs’ constitutional rights by permitting computer manipulations to overrule
8 Plaintiffs’ ballots and determine the election outcomes. That is a cognizable legal claim.

9 **VI. CONCLUSION**

10 For the foregoing reasons, Hobbs’s Motion should be denied. If the Court grants the
11 motion in whole or in part, Plaintiffs should be given leave to amend the Complaint to add
12 additional factual allegations, including among other things information from the
13 declarations filed in support of Plaintiffs’ motion for a preliminary injunction. *See* ECF
14 nos. 35-41.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2022, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Andrew D. Parker