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ARIZONA COURT OF APPEALS
DIVISION TWO

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA, LLC, and YAVAPAI COUNTY REPUBLICAN PARTY, Plaintiff-Appellants, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant-Appellee, VOTO LATINO, ARIZONA ALLIANCE FOR RETIRED AMERICANS, DEMOCRATIC NATIONAL COMMITTEE, and ARIZONA DEMOCRATIC PARTY, Intervenor-Defendant-Appellees.	No. 2 CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553

PLAINTIFF-APPELLANTS' REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (con't)

Statutes

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

Other Authorities

INTRODUCTION

The EPM contains rules of general applicability that carry the force of law. Violation of these rules is a crime. A.R.S. § 16-452(C). The Secretary and Intervenors would have this Court hold that any public participation in the creation of the EPM is gratuitous; the Secretary is free to flout the APA because the statute authorizing the EPM impliedly displaces the APA; and because secretaries before him have not complied with the APA, he is excused from doing so. The practice—however long it has gone on—of making the rules governing Arizona's elections without protecting the right of the public to participate in that process is not authorized by the legislature. It cannot and should not be condoned by this Court. Because the 2023 EPM was adopted in violation of the APA, it is necessarily void. This Court should say so. Even if this Court holds that the APA does not apply to the EPM, distinct provisions should be invalidated as exceeding the Secretary's authority.

ARGUMENT

I. The 2023 EPM Is Subject to the APA's Rulemaking Process.

The Secretary and Intervenors offer a patchwork of reasons for why the Secretary can avoid the APA's rulemaking process. Each seeks, in various ways, to avoid the outcome of a straightforward application of A.R.S. § 41-1002. None succeed.

A. A.R.S. § 41-1002(A) and (B) control.

The *second* section of the APA (after the definitions) establishes both its "[a]pplicability" and its "relation to other law." A.R.S. § 41-1002. As to

"applicability," subsection 1002(A) speaks in absolutes: the APA "appl[ies] to *all* agencies and *all* proceedings not *expressly exempted*." (Emphases added.) As for the APA's "relation to other law," subsection 1002(B) provides three directives: (1) the APA "creates only procedural rights and imposes only procedural duties"; (2) the procedural rights and duties "are *in addition to* those created and imposed by other statutes"; and, (3) "[t]o the extent that any other statute would diminish a right created or duty imposed by this chapter, *the other statute is superseded* ... , unless the other statute expressly provides otherwise." (Emphasis added.) As synthesized, the APA provides uniform minimum procedures applicable to all agencies and all proceedings that are in addition to those imposed by other statutes and that cannot be varied absent express exemption.

The Court need not take Plaintiffs' word for it. Subsections 1002(A) and (B) track verbatim subsections 1-103(a) and (b) of the 1981 Uniform Model State Administrative Procedure Act (1981 Model Act) (available on Westlaw).[1] The 1981 Model Act "assur[es] a uniform minimum procedure to which all agencies will be held in the conduct of their functions." 1981 Model Act, Prefatory Note. The Act imposes duties "in addition to those ... imposed by other statutes. And, except to the extent another statute expressly provides that it shall take precedence over this Act, the [1981] Model Act ... take[s] precedence over all other statutes, including those subsequently enacted, that appear to diminish a right created or a duty imposed by the Model Act." *Id.* "[W]hen a statute is based on a uniform act,

[1] The Arizona Legislature adopted the 1981 Model Law in 1986. *See* 1986 Ariz. Sess. Laws, ch. 232 (1986).

[Arizona courts] assume that the legislature intended to adopt the construction placed on the act by its drafters" and the "[c]ommentary to such a uniform act is highly persuasive unless erroneous or contrary to the settled policy of Arizona." *Cao v. PFP Dorsey Invs., LLC*, 545 P.3d 459, 466 (Ariz. 2024) (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 26 P.3d 510, 515 (Ariz. 2001)).

Thus, as Plaintiffs argued in their opening brief and below, the only relevant question is whether the legislature "expressly exempted" the EPM from the APA's rulemaking process. (*See* OB, 8/21/2024 p 15.) If it hasn't—and it hasn't—the APA's rulemaking process is "in addition to" the process in the EPM Statute, and, if there is a conflict between the two statutes, the APA's process controls.

While the statutory text makes this plain, the drafters emphasized the point in section 1-103's comments. This section "explicitly assures that where there is a direct conflict between the requirements of another statute and this Act, this Act will prevail unless there is a wholly unambiguous contrary legislative decision." 1981 Model Act, § 1-103 [Applicability and Relation to Other Law], cmt.; *see also* Arthur E. Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part 1: General Provisions, Access to Agency Law and Policy, Rulemaking, and Review of Rules*, 35 Admin. L. Rev. 1, 4 (1982). And the "burden" is on "those seeking any exemption from the Act to demonstrate their entitlement thereto in unmistakable statutory language indicating that the legislature has actually considered the question of an exemption and determined that an exemption is warranted." 1981 Model Act, § 1-103, cmt.

There are two ways for the legislature to provide "unmistakable statutory

language" that it deemed an exemption warranted: one, to include an express exemption in the APA itself, *see* A.R.S. § 1005 (providing nearly 40 exemptions); two, to include an express exemption in the implementing statute (*see* OB, 8/21/2024, pp 7, 17 (collecting examples of exemptions in implementing statutes, including in title 16). *See also Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 349 P.3d 220, 226 (Ariz. App. 2015). The legislature included neither for EPM rulemaking, so the APA applies.

To be sure, the DNC Intervenors force an "express exemption" argument by claiming the legislature *impliedly* exempted the EPM from the APA's rulemaking process by *expressly* providing additional procedures in the EPM Statute. (DNC AB, 10/1/2024 pp 13–14.) This is laughable and flatly contrary to the law. If DNC Intervenors were correct, it would mean that *every* statute that provides for procedures that do not precisely match those of the APA impliedly creates an express exemption from the APA. But the APA itself is explicit that its procedures "are *in addition to* those created and imposed by other statutes."

In the end, DNC Intervenors are trying to convert a supposed conflict into an express exemption. But conflicts create, at best, implied exemptions, not express exemptions. *Cf. Varela v. FCA US LLC*, 505 P.3d 244, 251 (Ariz. 2022) (discussing "[e]xpress preemption" and stating, "it occurs when federal lawmakers *explicitly state* that related state law is preempted," as opposed to implied preemption, which includes conflict preemption (emphasis added)). An implied exemption is obviously not an express one, and A.R.S. § 41-1002(A) and (B) require express exemptions. Nor does a claimed "conflict" help here; subsection

1002(B) leaves no doubt that the APA "supersedes" conflicting provisions in other statutes. *See City of Phoenix v. 3613 Ltd.*, 952 P.2d 296, 299 (Ariz. App. 1997); 1981 Model Act, § 1-103, cmt.

At bottom, the inescapable conclusion is the EPM contains hundreds of pages of *rules*, the Secretary is an *agency* subject to the APA, and there is *no express exemption* relieving the Secretary from the APA's rulemaking process.

B. A.R.S. § 41-1030(A) does not save the 2023 EPM.

Considering there is no express exemption for EPM rulemaking, it is no surprise the Secretary and Intervenors advocate for a second form of implied–express exemption in A.R.S. § 41-1030(A). (*See* Sec'y AB, 9/30/2024 pp 15–18; DNC AB, 10/1/2024 pp 7 –13; VL AB, 9/30/2024 pp 13–16.) This asks too much.

The Secretary and Intervenors ask the Court to rule that when an implementing statute provides for rulemaking procedures other than those in the APA, the agency need not follow the APA's process. This fails for at least two reasons. *First*, the Secretary and Intervenors' "way out" is contrary to A.R.S. § 1002(A) and (B). As explained, the APA provides a minimum procedural floor for agencies to follow. The legislature may impose requirements beyond the minimum, but, absent an unambiguous express exemption, the minimum floor remains. *See* § 1002(A). The Secretary and Intervenors make a hash of subsection 1002(B)'s "superseding" language. Subsection 1002(B) stipulates that conflicting procedural obligations in other statutes are superseded by the APA, even if adopted later; yet, the Secretary and Intervenors argue that the APA's rulemaking process must yield to conflicting processes "otherwise provided by law" under subsection

1030(A). Both statements cannot be true, and courts should "seek to harmonize statutory provisions and avoid interpretations that result in contradictory provisions." *Pima Cnty. v. State*, 552 P.3d 512, 517 (Ariz. 2024). The Secretary and Intervenors' interpretation would turn section 1002 on its head. Instead of a minimum procedural floor that the legislature can add to, or exempt from altogether, it becomes a maximum procedural ceiling that falls away when the legislature includes other processes in the implementing statute.[2]

Not only does the Secretary and Intervenors' interpretation force a contradiction between subsections 1002(A) and (B), on the one hand, and 1030(A), on the other, but the idea that subsection 1030(A) includes a hidden means of exemption is illogical. The legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If the legislature intended to recognize a second way to exempt agency rulemaking—wholesale—from the APA, it would have said so in the APA's exemptions or in the provisions outlining that rulemaking process. The Secretary and Intervenors contend that such an exemption is hiding in the provision defining the remedy for a violation of the APA's rulemaking process.

[2] The Court rejected the government's argument on this score in an unpublished decision. *See Legacy Educ. Grp. v. Ariz. State Bd. for Charter Sch.*, No. 1 CA-CV 17-0023, 2018 WL 2107482, at *6 (Ariz. App. May 8, 2018) (holding despite supplementary process in implementing statute "no statute has expressly exempted the Board from the APA's rulemaking provisions" and therefore "the Board must follow the APA's rulemaking provisions in promulgating [the framework rules]").

That is not where one would expect to find an express exemption—particularly one that is at odds with the APA's own language stating that its procedures control over conflicting procedures in other statutes.

Second, the Secretary and Intervenors are plain wrong on the text and history of subsection 1030(A). The Secretary and Intervenors each argue some variation of the surplusage canon. (Sec'y AB, 9/30/2024 p 16; DNC AB, 10/1/2024 p 11; VL AB, 9/30/2024 p 15.) That is, the last phrase in subsection 1030(A), "unless otherwise provided by law," does no work unless it provides yet another exemption from the APA's rulemaking process. The Secretary and Intervenors invoke the canon based on a false premise. The phrase *is* necessary to explain that a "rule" is not per se "invalid" if it fails to substantially comply with the APA. Some rules published in the state's code of regulations after the 1992 amendment were issued as part of an exempt rulemaking. These rules are not invalid under subsection 1030(A). Why? Because an express exemption from the APA's rulemaking process says so. While the Secretary and Intervenors discount the legislature's choice to speak with precision, the critique does not mean the phrase lacks purpose. Not only that, but the legislative history on subsection 1030(A) confirms Plaintiffs' interpretation. (*See* OB, 8/21/2024 pp 20–21.) The Secretary and Intervenors avoid this history altogether. (*See* Sec'y AB, 9/30/2024 17–18; DNC AB, 10/1/2024 pp 12–13; VL AB, 9/30/2024 p 19.)

In sum, the lower court erred by relying on subsection 1030(A) to end-run subsection 1002(A)'s express-exemption requirement.

C. The Secretary's and Intervenors' other arguments fail.

The Secretary and Intervenors offer five other arguments to justify the Secretary's noncompliance with the APA. Each fails.

1. ***No multi-agency rulemaking.*** The Secretary invites the Court to approve a never-recognized exemption under the APA for "multi-party" rulemakings. (Sec'y AB, 9/30/2024 p 20.) The Secretary cites no caselaw, nor does he reconcile his view with A.R.S. § 41-1002(A), stating the APA's rulemaking process "appl[ies] to all agen*cies* and *all* proceedings." (Emphasis added.) Further, while multi-agency participation is legally irrelevant, the EPM Statute actually assigns the duty to "prescribe rules" to the secretary. A.R.S. § 16-452(A). "The legislature has expressly delegated to *the Secretary* the authority to promulgate rules and instructions" under section 452; it is the issuing agency. *See Ward v. Jackson*, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (unpublished) (emphasis added). (*See also* ROA 1 ep 31 (stating the EPM is "A PUBLICATION OF *THE ARIZONA SECRETARY OF STATE'S OFFICE* ELECTIONS SERVICES DIVISION" (emphasis added)).)

Nor does the Secretary's passing reference to the governor's involvement change the analysis. (Sec'y AB, 9/30/2024 p 21; *see also* DNC AB, 10/1/2024 p 14; VL AB, 9/30/2024 p 16.) Again, this argument wrongly assumes the governor is responsible for co-issuing the EPM. She is not. Further, the APA allows for additional procedural requirements beyond the minimum floor provided by the APA. *See* A.R.S. § 41-1002(B). "This is merely one additional step in the rule-making process." (ROA 39 ep 43 (attaching Arizona Attorney General

Opinion, dated Oct. 19, 1979).)

2. ***No claimed conflict.*** The Secretary and the DNC Intervenors spend pages fashioning a "conflict" between the APA's rulemaking process and the supplemental processes in the EPM Statute. (*See* Sec'y AB, 9/30/2024 pp 18–23; DNC AB, 10/1/2024 pp 14–17.) But, as explained, even if a conflict exists, the APA supersedes any conflicting rulemaking requirement in the EPM Statute. (*See* pages 1–5, *supra*.) Further, the claimed conflict is a fiction devised for this litigation. Before both the lower court and this Court, Plaintiffs explained how the Secretary could comply with the APA and the EPM Statute. (ROA 39 ep 7–8, 10–11; OB, 8/21/2024, pp 23, 25 & n.5.) The Secretary does not contend with this, or that he has hundreds of days to complete the EPM process if he starts early in the odd-numbered year or in the previous even-numbered year. Instead, he offhand-waives at "hopeless conflicts," "impossibilities," and inconveniences. Just because a statute makes officials do work they would prefer to avoid is no justification to jettison the law.

3. ***No substantial compliance.*** Intervenors add that, even if the APA applies to the EPM, the Secretary "substantially complied" with the APA's rulemaking process. (DNC AB, 10/1/2024 pp 19–23; VL AB, 9/30/2024 pp 22–21.) Not so. *First*, the Secretary failed to provide the required opportunity for public comment: he allowed 15 days when the APA requires at least thirty. A.R.S. § 41-1023(B). *Second*, even if the Secretary's provision of half of the minimum public comment period qualifies as *substantial* compliance with subsection 1023(B), his failure to attempt compliance with other mandatory provisions cannot be excused as

substantial compliance. Some of the mandatory provisions include providing notice of the proposed rulemaking, following the statutorily prescribed format, and publishing the notice in the register, § 41-1022(A); holding an oral proceeding, if requested § 41-1023(C); and maintaining an official rulemaking record, § 41-1029(A). *Third*, the Secretary added *15 pages* of new rules in consultation with the governor and attorney general that the public never saw until they were released on Saturday, December 30, 2023. To claim such a process furthers the APA's purpose "to ensure that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures," *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 895 P.2d 133, 138 (Ariz. App. 1994), makes a mockery of the APA.

Of course, Intervenors cite no authority holding that an agency may at once ignore the APA—and maintain the APA does not apply—yet still show substantial compliance with it. And to his credit, the Secretary does not advance this argument, which is reason enough for the Court to reject it.

4. ***The remedy is invalidation.*** The APA states the remedy for failure to comply with its rulemaking process: a judicial declaration invalidating the offending rule. A.R.S. §§ 41-1030(A), -1034. Despite this, the Voto Latino Intervenors ask the Court to go beyond the defined remedy, leave the 2023 EPM in place, and "remand [presumably to the Secretary] without vacatur." (VL AB, 9/30/2024 p 24 (citing federal caselaw interpreting the federal APA).) The Voto Latino Intervenors cite no caselaw sanctioning this practice under the Arizona APA, and there is none. It is also understandable why federal caselaw is different:

the federal APA affords rulemaking agencies more flexibility to eschew public notice-and-comment processes. *See, e.g.*, 5 U.S.C. § 553(b)(4)(B). The Arizona APA does not permit rulemaking without compliance with the full process for public input outside of an emergency. A.R.S. § 41-1030(A).

5. ***Waiver and laches.*** Intervenors lastly argue waiver (VL AB, 9/30/2024 p 21), and laches (DNC AB, 10/1/2024 p 24). As to waiver, the Voto Latino Intervenors rely on A.R.S. § 41-1004, but cite no case support for the proposition that a person affected by a rule waives its right to seek a declaratory judgment under subsection 1034(A), by waiting for the rule to be released by the promulgating agency. Plaintiffs' prompt prosecution of their claims—within a weeks of the 2023 EPM's release—cannot support an argument that they waived any rights.

The same goes for laches. The DNC Intervenors argue Plaintiffs' lawsuit, filed less than six weeks after the Secretary issued the 2023 EPM, and five months before the primary election and 10 months before the general election, is too late. To invoke the equitable doctrine of laches, a defendant must not only prove that a plaintiff's delay prejudiced the defendant, the court, or the public, but also that the plaintiff acted unreasonably in waiting to file the case. *Mathieu v. Mahoney*, 851 P.2d 81, 84, 86 (Ariz. 1993). Plaintiffs did not delay—let alone unreasonably. Plaintiff filed their APA claim challenging hundreds of pages of rules in the EPM within weeks of its issuance. The DNC Intervenors respond that Plaintiffs could have filed their claim *before* the Secretary issued the EPM. (DNC AB, 10/1/2024 pp 25–26.) That's wrong. There was no "final" rule to challenge under the APA

until the Secretary issued the EPM. *See* A.R.S. §§ 41-1031(A), -1034(A). As soon as he did, Plaintiffs promptly analyzed the EPM, including pages of new provisions never seen by the public, and filed their lawsuit inside of six weeks.[3] Nor was mandamus an option. (*See* DNC AB, 10/1/2024 pp 26–27.) There is "a plain, adequate and speedy remedy at law," A.R.S. § 12-2021, under the APA. *See* § 41-1034(A).

II. Alternatively, Eight Provisions in the 2023 EPM Are Invalid.

If the Court deviates from the APA and declines to invalidate the 2023 EPM in its entirety, it must analyze Plaintiffs' challenges to eight individual provisions of the EPM. Each provision either conflicts with Arizona statute or exceeds the Secretary's authority.

1. ***Plaintiffs prevail on Count II.*** The Secretary maintains that subsection 16-165(A)(10) of the A.R.S., which provides "[t]he county recorder *shall cancel* a registration ... when the county recorder receives a summary report from the jury commissioner or jury manager ... indicating that a person who is registered to vote has stated that the person is not a United States citizen" (emphasis added), is not contradicted by Chapter 1, Section IX, Subsection C(2)(b) of the 2023 EPM, which permits county recorders to eschew the cancellation process if prior-submitted

[3] The DNC Intervenors accuse Plaintiffs in a footnote of delay in prosecuting this appeal. (DNC AB, 10/1/2024 p 27 n.7.) This is disingenuous. The lower court entered final judgment on July 8, 2024 (ROA 54 ep 1); Plaintiffs appealed the same day. On August 6, Division One transferred this appeal to this Division, which certified the record on appeal as complete and, on August 12, assigned the appeal a case number. Within one week of obtaining a case number, Plaintiffs filed both their opening brief and a motion for expedited briefing.

DPOC is found on file for the voter in question. (Sec'y AB, 9/30/2024 pp 29-34.)[4] The Secretary first argues that subsection 165(A)(10) cannot be applied to voters who were registered to vote before 2004 because the provision grandfathering these voters without DPOC (§ 16-166(G)) was adopted by citizen initiative and therefore cannot be altered by later legislative action without a supermajority vote. (Sec'y AB, 9/30/2024 pp 30–31.) But subsection 166(G) says nothing about a future sworn statement by a grandfathered registrant that they are not a U.S. citizen. And the entire purpose of section 165 is to impose on county recorders a duty to act on new information received from voters themselves. Subsection 166(G) does not immunize voters who had not submitted DPOC before its adoption in 2004 from a subsequent change in their eligibility. Hence, if a voter without DPOC on file later affirmatively declares himself to be a noncitizen—under oath—on a juror questionnaire, it is not an amendment of subsection 166(G) to require that voter to confirm his eligibility to vote in accordance with subsection 165(A)(10). To hold otherwise would be to find that subsection 166(G) renders all grandfathered registrants permanently incapable of becoming ineligible to vote.

Next, the Secretary argues the EPM provision is consistent with subsection 165(A)(10) because the subsection requires the county recorder to "confirm the person is not a citizen," meaning the county recorder must make this confirmation before sending the letter requesting DPOC from the voter. (Sec'y AB, 9/30/2024

[4] Intervenors largely adopt and incorporate by reference the Secretary's arguments defending the challenged EPM provisions. Hence, this reply will cite only to the Secretary's brief, except where a different argument is advanced by Intervenors.

pp 31-32.) But this ignores the obvious structure of subsection 165(A)(10): the confirmation mechanism under subsection 165(A)(10) is a letter requiring submission of new DPOC. (*See* OB, 8/21/2024 pp 28–29.) The phrase "confirms that the registered person is not United States citizen" unmistakably refers to the confirmation process provided in the very next sentence of the statute. The Secretary's handwaving at the summary nature of the jury commissioner's report gives away the game: nothing prevents county recorders from requesting the actual jury questionnaire from the voter at issue. Under the current EPM provision, however, even with this sworn declaration of non-citizenship in hand, the Secretary would force the county recorder to look for DPOC submitted before the date of the juror questionnaire. Assuming that DPOC is present (or even if it is wholly absent in the case of pre-2004 voters), the county recorder is instructed that he shall ignore the juror questionnaire to the contrary and "shall not cancel the registration." This directly contradicts subsection 165(A)(10).

Finally, the Secretary argues that Plaintiffs' argument based on section 165's structure "ignores" that other voter eligibility requirements (like residence or status as a convicted felon) "are far more fluid than citizenship." (Sec'y AB, 9/30/2024 pp 32–33.) This is a non-sequitur. The point of subsection 165(A)(10) is to deal with the—admittedly rare—situation where citizenship appears to have become "fluid" by virtue of a voter's own sworn statement. The Secretary's argument appears to suggest that citizenship, once established, is absolute. But this is simply not true: it can be lost or renounced, to say nothing of the fact that it could have been confirmed in error in the first place. *See* 8 U.S.C. § 1481.

Because the 2023 EPM conditions county recorders' duty to send the pre-cancellation letter required under subsection 165(A)(10) when a voter declares himself a noncitizen on a sworn juror questionnaire, the lower court erred in finding no conflict between the EPM and the statute.

2. ***Plaintiffs prevail on Counts III and IV.*** The Secretary confirms that his only authority for EPM provisions allowing federal-only voters to vote in presidential elections in contravention of A.R.S. §§ 12-1831 and 16-127, and allowing federal-only voters to vote by mail in contravention of A.R.S. §§ 12-1831, 16-127, and 16-166, is the ruling of the federal district court in *Mi Familia Vota v. Fontes*, Case No. 2:22-cv-00509 (final order entered Feb. 29. 2024).[5] (Sec'y AB, 9/30/2024 p 34.) In the event the district court's order in *Mi Familia* is reversed, these provisions of the EPM are necessarily inoperative on their own terms and the Court should declare as much.[6]

3. ***Plaintiffs prevail on Count V.*** Subsection 16-121.01(D) of the A.R.S. requires that when a county recorder receives a federal-form registration absent evidence of citizenship (as opposed to a state-form registration, which requires DPOC under A.R.S. § 16-166), "the county recorder or other officer in charge of elections *shall use all available resources* to verify the citizenship status of the applicant." (Emphasis added.) Chapter 1, Section II, Subsection A(8)(a) of the

[5] *Mi Familia Vota v. Fontes*, --- F. Supp. 3d ----, 2024 WL 862406 (D. Ariz. Feb. 29, 2024).

[6] The Voto Latino Intervenors argue that no injunction should issue on these counts because Plaintiffs did not request an injunction below. Consistent with their position below, Plaintiffs are not seeking an injunction on these counts, only a declaratory judgment.

2023 EPM declares that "County Recorders *currently have no obligation to check*" databases expressly stated in the statute. (2023 EPM at 13 (ep 57) (emphasis added) (footnote omitted).) Among the databases the Secretary writes out of the statute are "the Social Security Administration database, the USCIS SAVE program, and the National Association for Public Health Statistics and Information Systems (NAPHSIS) electronic verification of vital events system." (*See id.*).

The Secretary argues that the EPM rules excusing county recorders from checking the databases listed at A.R.S. §§ 16-121.01(D) and 16-165(H), (I) and (K) are consistent with statute because they are either directly enjoined by *Mi Familia Vota*, or otherwise impracticable because county recorders do not currently have access to these databases. (Sec'y AB, 9/30/2024 pp 36–37.)

Initially, the Secretary misstates the court's holding in *Mi Familia Vota*. As quoted in the opening brief, the court explicitly found that county recorders have access to the federal USCIS SAVE database and that checks required under subsections 121.01(D) and 165(I) are permissible for registered voters without DPOC where the recorder possesses information allowing such a check. *See Mi Familia Vota*, 2024 WL 862406 at 57 ("Arizona may not conduct SAVE checks on any registered voter whom county recorders have reason to believe are a non-citizen. *But Arizona may conduct SAVE checks on registered voters who have not provided DPOC*." (emphasis added)).

As to the other databases (Social Security Administration and NAPHSIS), the Secretary does not contradict Plaintiffs' argument that access to these databases is a matter of making a request for access for list maintenance purposes. They

instead argue that because the *Mi Familia Vota* court found it impracticable for county clerks to access these databases for the purposes of citizenship verification at the time of its decision, the Secretary had the right to relieve clerks of the obligation to check these databases for any purpose, including, presumably, information regarding voters' deaths. Because county clerks can currently access the SAVE database, and because county clerks could easily request access to the Social Security Administration and NAPHSIS databases, the challenged EPM provision must give way.

4. ***Plaintiffs prevail on Count VI.*** Subsection 16-168(F) of the A.R.S. generally protects voters' signatures from public disclosure, but provides these signatures may be accessed by "[1] the voter, [2] by an authorized government official in the scope of the official's duties, [3] for any purpose by an entity designated by the secretary of state as a voter registration agency ... , [4] for signature verification on petitions and candidate filings, [5] for election purposes and [6] for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station or [7] pursuant to a court order." *Id.*

Chapter 1, Section XI, Subsection (C)(1) of the 2023 EPM states that signatures may only be accessed "for purposes of verifying signatures on a candidate, initiative, referendum, recall, new party, or other petition or for purposes of verifying candidate filings." (2023 EPM at 53 (ep 97).) While A.R.S. § 16-168(F) states that a registrant's signature may be accessed or reproduced "for signature verification on petitions and candidate filings, for election purposes and

for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work," the EPM reads out multiple permissible uses of registrants' signatures, most critically uses "for election purposes" (*id.*).

The Secretary gamely argues that the lack of an oxford comma between "for election purposes" and "for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work" means these two distinct reasons should be read as one: signatures may be released to members of the media for election purposes. (Sec'y AB, 9/30/2024 p 39.) This is absurd. As noted in the opening brief, and referring to the lower court's interpretation of subsection 168(F), "for election purposes" and "for news gathering purposes" are separated by "and," indicating that they are separate exceptions. (OB, 8/21/2024 p 37.) Again, it is difficult to imagine how a person engaged in "newspaper, radio, television, or reportorial work," or "connected with or employed by a newspaper, radio, or television station" would ever have need to seek access to signatures for "election purposes" rather than "news gathering purposes." (*Id.*) The Secretary's adoption of this tortured reading exposes the problem: whatever "election purposes" means in subsection 168(F), it is an independent basis for access to voter records, including signatures. The Secretary may not read it out of the statute.

5. ***Plaintiffs prevail on Count VII.*** Subsection 16-544(B) of the A.R.S. prohibits non-UOCAVA voters from "list[ing] a mailing address that is outside of this state *for the purpose of the active early voting list*." (Emphasis added.) Chapter 2, Section I, Subsection B(1) of the 2023 EPM provides that "an AEVL voter may make one-time requests to have their ballot mailed to an address outside of

Arizona." (2023 EPM at 59 (ep 103) (citing A.R.S. § 16-544(B).) Thus, Chapter 2, Section I, Subsection B(1) directly conflicts with subsection 544(B).

The Secretary argues that because A.R.S. §§16-542(E) and (F) permit ballots to be sent to a voter's "temporary address," the EPM may permit AEVL voters to make one-time requests to have their early ballots mailed out of state. The Secretary maintains that to hold otherwise would endorse a "cramped interpretation" of subsection 544(B). (Sec'y AB, 9/30/2024 pp 43–44.) But Plaintiffs argue only that AEVL voters desiring to receive a ballot outside of Arizona must do what the law obviously requires: make a one-time request for a ballot to be mailed to their out-of-state address inside the 93-day window prescribed by A.R.S. § 16-542(A).

The Secretary's argument, like the reasoning of the lower court, fails because it ignores the absurdity of a voter already on the AEVL list—someone who has thereby already requested an early ballot for every election in which they are eligible—making a "verbal or signed request ... for an official early ballot." A.R.S. § 16-542(A). This is telling, and likely why the Secretary simply ignores Plaintiffs' observation that the challenged EPM provision directly conflicts with subsection 542(A) because it does not require one-time requests for out-of-state AEVL ballots to follow that subsection's procedures. Because subsection 544(B) does not permit the use of a mailing address outside of Arizona for the purposes of the active early voting list, the EPM provision must give way.

6. ***Plaintiffs prevail on Count VIII.*** Subsection 16-552(D), allowing party-appointed observers to challenge mail ballots, explains that "challenges shall be

made in writing with a brief statement of the grounds *before the early ballot is placed in the ballot box*." (Emphasis added.) Chapter 2, Section V, Subsection A of the 2023 EPM narrows the time to challenge early ballots. Per the EPM, "[c]hallenges to early ballots must be submitted in writing *after* an early ballot is returned to the County Recorder and *prior to* the opening of the early ballot affidavit envelope." (2023 EPM at 79 (ep 123).) The Secretary argues that this narrowing is permitted as a gap-filling exercise because of changes in how absentee/mail ballots are processed. Similar to their position below, the Secretary maintains a ballot cannot be challenged until it is "physically present" to the challenger. (Sec'y AB, 9/30/2024 pp 46–47; DNC AB, 10/1/2024 pp 32–34). The Secretary points to A.R.S. § 15-522 to support this "physical presence" requirement, but section 552 does not require the physical presence of a challenger. It addresses only their right to be present for the processing of early ballots. *See* A.R.S. § 16-552(C). The DNC Intervenors elaborate on this position, arguing that because early election boards resolve timely challenges to early ballots, the ballot must be in the possession of the county recorder—for forwarding to the early election board—before a challenge can be received. (DNC AB, 10/1/2024 pp 33–34.) But section 552 doesn't say this. A challenge to an early ballot not yet received could easily be held and forwarded to the early election board upon the county recorder's receipt of the ballot. Because the temporal limitation in the EPM provision directly conflicts with the temporal limitation in subsection 552(D) and exceeds the Secretary's authority, it must be set aside.

7. ***Plaintiffs prevail on Count IX.*** Plaintiffs challenged Chapter 9, Section

VI, Subsection B(1)(f) and Chapter 8, Section VIII, Subsection B of the 2023 EPM because these together operate to impose on counties utilizing precinct-based voting a duty to supply out-of-precinct voters with a provisional ballot in the ballot style for their proper precinct and to count these votes in contravention of A.R.S. § 16-122, which requires voters in precinct-based counties to vote in their proper precincts. The Secretary responds that section 122 does not require precinct-based voting, and thanks to advances in technology, operates to force Arizona's counties that continue to prefer precinct-based voting to abandon it. (Sec'y AB, 9/30/2024 pp 50–52.) As an initial matter, this directly conflicts with A.R.S. § 16-411(4), which grants exclusive authority to abandon precinct-based voting to the county boards of supervisors. The Secretary also does not meaningfully engage with Plaintiffs' argument: that forcing precinct-based counties to have bespoke provisional ballots for every precinct on-demand at every other precinct eliminates the benefits of precinct-based voting, including the distribution of voters more evenly among polling places and resulting reduction in wait times for voters resulting in more orderly administration of elections. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 681 (2021). Because the EPM rule directly conflicts with section 122's requirement that voters appear in their own precinct, the lower court erred in finding no conflict.

III. Plaintiffs Have Standing to Challenge the 2023 EPM.

The Secretary (Sec'y AB, 9/30/2024 pp 25–29) and the Voto Latino Interventors (VL AB, 9/30/2024 pp 6–13) also argue Plaintiffs lack standing. The Secretary challenges only Plaintiffs' standing to litigate the individual EPM

provisions, while the Voto Latino Interventors appears to continue to challenge Plaintiffs' standing across the board. The lower court did not rule on standing. The Court need not spend much time with these arguments.

Because Arizona's Constitution does not contain a "case or controversy" requirement, standing in Arizona is broader than standing under Article III of the U.S. Constitution. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. In Ariz.*, 712 P.2d 914, 919 (Ariz. 1985). So, the question of standing in Arizona is not a constitutional mandate; it is one of prudence or judicial restraint. *Id.* (citing *State v. B Bar Enters.*, 649 P.2d 980 n.2 (Ariz. 1982)). Arizona's courts exercise this restraint to ensure that they do not issue advisory opinions, the case is not moot, and the issues will be fully developed by true adversaries. *Id.*

Plaintiffs—the national and state committees of the Republican party, along with a county Republican party—meet this burden. The Republican Party is the largest political party in Arizona. Voter Registration Statistics, Arizona Secretary of State, https://bit.ly/3TMW0UD. Each level of the party—that is to say, Plaintiffs—promotes the election of Republican candidates to office in Arizona and necessarily expends resources doing so. (ROA 1 ep 3–4.) Elections in Arizona, and the conduct of persons campaigning, voting, observing, administering, and reporting on elections is governed by the EPM, and failure to follow the EPM is a crime. A.R.S. § 16-452(C). No doubt the EPM affects Plaintiffs, their candidates, and volunteers.

This is more than enough for standing in this case, which primarily seeks a declaration that the 2023 EPM is invalid under A.R.S. § 41-1034(A), because it

was not issued in accordance with the APA. The statute expressly allows "any person who *is or may be* affected by a rule" to seek a declaratory judgment as to the rule's validity. § 41-1034(A) (emphasis added). *See also Arizona Pub. Integrity All. v. Fontes (AZPIA)*, 475 P.3d 303, 307 (2020) ("Plaintiffs, as Arizona citizens and voters, seek to compel the Recorder to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law. Thus, we conclude that they have shown a sufficient beneficial interest to establish standing.").

Further, while Arizona's concept of standing is not cabined by Article III of the U.S. Constitution, the Arizona Supreme Court is often "informed" by federal jurisprudence. To this end, federal courts in the Ninth Circuit, like federal courts across the country recognize a broad interest of political parties against being forced to compete in an illegally structured environment. *Mecinas v. Hobbs*, 20 F.4th 890, 898 (9th Cir. 2022) (citing *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005)). Plaintiffs have alleged facts sufficient to confer standing under *Mecinas* both for their APA-based claim and for their challenges to each of the individual EPM provisions.

IV. The Court Should Enter an Injunction in Favor of Plaintiffs.

If the Court rules in Plaintiffs' favor on the merits, it should enjoin the Secretary from conducting elections under the unlawful rules. The thrust of the Secretary's and Intervenors' rejoinder to Plaintiffs' request for injunctive relief is, despite Plaintiffs suing 10 months before the 2024 general election and within weeks of the issuance of the 2023 EPM, it's simply too late in the process to award relief. But this argument misses a critical point: the EPM is *only* supposed to

reflect Arizona's election statutes (which the Court's ruling will not change), and that the *2019* EPM has been used to administer multiple elections in this state in the last five years, including the 2020 presidential election.

1. The Secretary first disputes the Arizona Supreme Court's recognition that a plaintiff "need not satisfy the standard for injunctive relief," if it shows "[the defendant] has acted unlawfully and exceeded his constitutional and statutory authority." *AZPIA*, 475 P.3d 303, 307 (2020). The Secretary argues *AZPIA* only "announced a rule for mandamus actions, not injunctive relief." (Sec'y AB, 9/30/2024 p 53.) The Supreme Court adopted no such limitation. Nor is it consistent with the very case the Court cited for the proposition, *Burton v. Celentano*, 658 P.2d 247, 249 (Ariz. App. 1982). *Burton* was not a mandamus action; it was a private dispute between two landowners. *See id.* at 247. It would be strange for the Supreme Court to silently adopt a mandamus-action limitation by citing a non-mandamus case.

2. But even if Plaintiffs had to show irreparable injury and that the balance of the equities and public interest tip in their favor, the verified statements in Plaintiffs' complaint carry that burden. Again, *AZPIA* decides this issue. (*See* OB, 8/21/2024 p 44.) Plaintiffs, the national and state committees of the Republican party, which expend significant resources promoting Republican candidates and which have an interest in a legally structured competitive environment, "establish the requisite 'injury' by showing they are 'beneficially interested' in compelling the [Secretary] to perform his legal duty" in lawfully adopting rules that govern elections. *See id.* at 309–10.

The Secretary also has no answer for the financial and resource-based burdens Plaintiffs are, and will, continue to incur, other than to dismiss this harm out of hand as "monetary damages" presumably recoverable on remand from this Court. (*See* Sec'y AB, 9/30/2024 p 54.) But, as Plaintiffs explained, monetary relief is not available under the APA, which is why financial injury in APA actions is considered irreparable. (OB, 8/21/2024 p 45 (collecting cases).)

3. Lastly, the Secretary and Intervenors overreact by claiming that granting the relief the law requires would "wreak havoc on Arizona's elections process" (DNC AB, 10/1/2024 p 35), by "throwing out the rulebook in the middle of an election" (VL AB, 9/30/2024 p 29). But the change would only require elections officials to use the same EPM they have used in the last two general election cycles. To the extent there is confusion among election administrators and voters, it comes from an overhauled 2023 EPM that adds pages and pages of new rules and content in direct violation of Arizona statute—not the 2019 EPM. Not only that, but the Secretary can—and regularly does—supplement the EPM with additional guidance to election administrators in the weeks and days leading up to an election. He can easily provide additional guidance with the 2019 EPM—and, more importantly, Arizona election statutes—as the necessary backdrop.

Nor is the *Purcell*[7] principle a concern, as the DNC Intervenors claim. (*See* DNC AB, 10/1/2024 pp 38–40.) Tellingly, the Secretary does not invoke or cite *Purcell*. The reason is plain: *Purcell* does not apply because any "change" to the EPM would be a reversion to the 2019 EPM (and Arizona statute), an EPM that the

[7] *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curium).

Secretary and election administrators across the state are familiar with after having used it the last four years.

CONCLUSION

Plaintiffs urge the Court to reverse the lower court, declare the 2023 EPM void, and enjoin the Secretary from administering elections under it.

DATED this 17th day of October 2024.

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