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**IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF YAVAPAI**

ARIZONA FREE ENTERPRISE CLUB, an  
Arizona nonprofit corporation; *et al.*,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as  
the Secretary of State of Arizona, *et al.*,

Defendants.

No. S-1300-CV-202300202

**PLAINTIFFS' RESPONSE TO  
DEFENDANT SECRETARY OF  
STATE'S MOTION TO STRIKE**

(Assigned to the Hon. John Napper)

The Plaintiffs respectfully submit this response to the Secretary of State's motion to strike Plaintiffs' notice of supplemental authority.<sup>1</sup> The vehemence of the Secretary's curious insistence that the Court must not consider binding precedents relevant to issues pending before it doesn't obscure the untenability of his arguments.

First, the Secretary's motion is barred by principles of waiver. The Secretary's then-counsel expressly stated on the record at the hearing held on July 7, 2023 that the Secretary did **not** join Intervenor Mi Familia Vota's ("MFV") ripeness/mootness argument. Having abjured that defense, the Secretary cannot belatedly seek to obstruct further briefing or

<sup>1</sup> The Secretary's contention that the Rules of Civil Procedure do not expressly contemplate notices of supplemental authority evades the irony that his own motion to strike finds no explicit textual authorization, either. *Contrast* Ariz. R. Civ. P. 12(f) (allowing motions to strike certain content only in "pleadings," as defined in Rule 7).

1 arguments on the issue. *See Jones v. Cochise Cnty.*, 218 Ariz. 372, 379, ¶ 22 (App. 2008)  
 2 (“Waiver is either the express, voluntary, intentional relinquishment of a known right or  
 3 such conduct as warrants an inference of such an intentional relinquishment.”) (citation  
 4 omitted); *Bennigno R. v. Arizona Dept. of Econ. Sec.*, 233 Ariz. 345, 349–50, ¶ 19 (App.  
 5 2013) (finding waiver of other defenses where party had expressly limited its arguments to  
 6 a specific issue during hearing).

7 Second, the fulcrum of MFV’s mootness/ripeness argument—*i.e.*, that the Secretary  
 8 has issued a draft 2024 Elections Procedures Manual (“EPM”) that contains revised  
 9 directives concerning early ballot signature verification—was not raised until MFV’s reply  
 10 brief, which cited a news article published on June 27. *See* MFV Reply at 2. While MFV’s  
 11 opening motion alluded to the conceptual possibility of a 2024 EPM, it did not cite or  
 12 reference any reified draft of that document, presumably because it had not been published.  
 13 Similarly, at the time the Plaintiffs filed their consolidated response to the motions to  
 14 dismiss on June 16, the draft 2024 EPM had not (at least to the undersigned’s knowledge)  
 15 been made available to the public, and certainly had not been disclosed by the Secretary to  
 16 the Plaintiffs. Consequently, the Plaintiffs had no prior opportunity to address in their  
 17 response the ostensible significance of the draft 2024 EPM in its current form.<sup>2</sup>  
 18 Accordingly, although Plaintiffs believed (evidently incorrectly, judging from the fevered  
 19 responses it has elicited) that a notice of supplemental authority was a more efficient and  
 20 less argumentative vehicle for presenting relevant caselaw to the Court, a full sur-reply  
 21 would have been warranted in these circumstances.

22 Third, the Secretary’s captious cavil that the Plaintiffs’ consolidated response  
 23 addressed only “ripeness” and not “mootness” elides that the appropriate characterization  
 24 of the same argument has itself been a point of enduring disagreement. MFV has framed  
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26 <sup>2</sup> Indeed, the draft 2024 EPM still is not in the record, and should not be considered at  
 27 all in assessing the facial sufficiency of the Amended Complaint. *See Cullen v. Auto-*  
 28 *Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008) (“When adjudicating a Rule  
 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the  
 well-pled factual allegations contained therein.”).

1 the question as one of “ripeness,” arguing that the Plaintiffs’ claims must await the issuance  
 2 of a hypothetical 2024 EPM, which may or may not go into effect prior to the 2024  
 3 elections. By contrast, the Plaintiffs’ position, as set forth in their consolidated response  
 4 and reiterated during oral argument, is that the dispute is live because the 2019 EPM  
 5 inarguably remains in legal force and effect at the present time, and will remain so unless  
 6 and until a new EPM displaces it. *See Leibsohn v. Hobbs*, 254 Ariz. 1, ¶ 25 n.3 (2022).  
 7 Thus, the prospect of a 2024 EPM is relevant, if at all, only to the extent that its approval  
 8 by the Secretary, Governor and Attorney General (if and when that occurs) could,  
 9 depending on the contents of the adopted version, give rise to a question of whether the  
 10 Plaintiffs’ claims have become moot; hence, the salience of the cited supplemental  
 11 authorities.<sup>3</sup>

12 In sum, even assuming *arguendo* that the Secretary had not waived any right to  
 13 controvert the Plaintiffs’ position on MFV’s ripeness/mootness theory, Plaintiffs timely and  
 14 substantively addressed this defense in their consolidated response. The cases cited in the  
 15 notice of supplemental authority merely relate to a facet of that argument—namely, the  
 16 relevance of the draft 2024 EPM, which had not been released until after the Plaintiffs had  
 17 filed their consolidated response—that could not have been addressed in the response  
 18 because the document was not available to the Plaintiffs at the time.

19 **CONCLUSION**

20 For the foregoing reasons, the Court should deny the Secretary’s motion to strike.  
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26 <sup>3</sup> The nomenclature may be immaterial for present purposes because voluntary cessation  
 27 analysis applies in either event. *See Pierce v. Ducey*, No. 1 CA-CV 22-0007, 2022 WL  
 28 14206376, at \*3 (Ariz. App. Oct. 25, 2022) (noting the trial court’s request for briefing on  
 both ripeness and mootness, and relying on the voluntary cessation doctrine regardless of  
 “[w]hether [the issue is] framed as a question of mootness or ripeness.”).

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RESPECTFULLY SUBMITTED this 17th day of July, 2023.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 17, 2023, I electronically transmitted the attached  
3 document to the Clerk's Office using the TurboCourt System for filing and transmittal of  
4 a Notice of Electronic Filing to the following TurboCourt registrants:

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