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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WARREN PETERSEN, in his official capacity as the President of the Arizona State Senate; and BEN TOMA, in his official capacity as the Speaker if the Arizona House of Representatives, Plaintiffs, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant.	No. CV2024-001942 **SECRETARY OF STATE'S MOTION TO DISMISS**

Pursuant to Ariz. R. Civ. P. 12(b)(1) and (6), defendant Secretary of State Adrian Fontes moves to dismiss the Verified Special Action Complaint for Declaratory and Injunctive Relief filed by plaintiffs Senate President Warren Petersen and Speaker of the House Ben Toma ("Plaintiffs"). This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Following a trio of recent cases in which the Arizona Supreme Court has considered whether a particular provision of the Arizona Elections Procedures Manual (the "EPM") should guide the court's resolution of a legal issue properly before the court, litigation over the EPM has exploded.[1] *See, e.g., Leibsohn v. Hobbs*, 254 Ariz. 1 (2022); *Leach v. Hobbs,* 250 Ariz. 572 (2021); *McKenna v. Soto*, 250 Ariz. 469 (2021). Plaintiffs in this case and the several others currently pending have taken the foregoing cases as an open invitation to challenge portions of the EPM with which they disagree. But Arizona's "rigorous standing requirement" requires more than a belief that the EPM is not consistent with state law to seek relief from this Court. *Fernandez v. Takata Seat Belts, Inc*., 210 Ariz. 138, 140, ¶ 6 (2005). Indeed, Plaintiffs must allege "a distinct and palpable injury." *Id.* And to obtain the declaratory relief they seek, Plaintiffs must allege sufficient facts to establish that there is a justiciable controversy." *See Town of Wickenburg v. State*, 115 Ariz. 465, 468 (App. 1977). Plaintiffs have done neither.

In this case, Plaintiffs seek to invalidate six specific provisions in the EPM, which provide guidance concerning: (1) the steps a county recorder should take after receiving a report from the jury commissioner regarding non-residency of registered voters,

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[1] This case is one of five pending cases against the Secretary of State that seek to have provisions of the EPM declared void and unenforceable. *See Ariz. Free Enterprise Club v. Fontes*, No. S-1300-CV-202300202 (Ariz. Super. Ct. Yavapai Cnty.); *Ariz. Free Enterprise Club v. Fontes*, No. S-1300-CV-202300872 (Ariz. Super. Ct. Yavapai Cnty.); *Republican Nat'l Comm. v. Fontes*, No. CV2024-050553(Ariz. Super. Ct. Maricopa Cnty.); *Ariz. Free Enterprise Club v. Fontes*, No. CV2024-002760 (Ariz. Super. Ct. Maricopa Cnty.).

(2) when county recorders must investigate the citizenship status of voters who are already registered, (3) the date on or after which county recorders must begin to send notices to voters regarding removal from the Active Early Voting List ("AEVL") for not casting early ballots, (4) the effect of mistaken or incorrect information on a registered petition circulator's registration, (5) county boards of supervisors' duty to canvass election results, and (6) the Secretary's ability to timely conduct the statewide canvass, even without results from one or more counties. (*See* Compl. ¶¶ 34, 37, 42, 45, 48, 52). In addition, Plaintiffs complain that the EPM adopts some non-final court rulings in ongoing litigation, but not others, and that it makes such rulings binding and abrogates the appellate rights of the parties. (*See id*., at ¶¶ 110, 116).

As explained more fully below, Plaintiffs lack standing to maintain this action on behalf of the Arizona Legislature because disagreement with the Secretary's interpretation of law is not an institutional injury to the Legislature. Nor have Plaintiffs shown that the Legislature has authorized them to institute this litigation on its behalf.

Moreover, each of the challenged EPM provisions is within the Secretary's authority to promulgate and none of them contravenes the laws they help to implement. *See Leach*, 250 Ariz. at 576, ¶ 21; *see also* A.R.S. § 16-452 (directing the creation of the EPM). The Legislature has delegated to the Secretary, the State's chief election officer, the authority to issue the EPM to fill the gaps that it would be impractical to include in statute. In doing so, the Legislature gave county election officials, the Governor, and the Attorney General a role in the creation of the EPM. A.R.S. § 16-452(A)-(B). The Legislature did not, however, give itself such a role. If it would like to be part of the process of creating the EPM, the Legislature's recourse is through the legislative process, not through this Court. *See, e.g., Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017) (recognizing that "the proper role of the judiciary" is to "apply, not amend, the work of the People's representatives"); *Tucson Unified Sch. Dist. v. Borek*, 234 Ariz. 364, 368 ¶ 11 (App. 2014) ("We are not at liberty to rewrite a statute under the guise of

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judicial interpretation.") (cleaned up). Simply put, this Court should not accept Plaintiffs' invitation to give the Legislature a veto over any provision of the EPM with which it disagrees.

<u>Argument</u>

Plaintiffs' Complaint should be dismissed pursuant to Ariz. R. Civ. P. 12(b)(1) and (6). Rule 12(b)(1) "allows a trial court to dismiss an action for lack of subject matter jurisdiction." *Falcone Brothers & Assoc., Inc. v. City of Tucson*, 240 Ariz. 482, 487, ¶ 10 (App. 2016). Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate when the plaintiff is not, under any interpretation of the facts that can be proven, entitled to relief. *Silverman v. Ariz. Health Care Cost Containment Sys.*, 255 Ariz. 387, ¶ 9 (App. 2023). But the court must evaluate only well-pled facts, "mere conclusory statements are insufficient to state a claim upon which relief can be granted." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). "Legal conclusions, without any supporting factual allegations, do[ ] not satisfy" the pleading standard. *Id.*

I. Plaintiffs Lack Standing to Maintain this Declaratory Judgment Action.

Arizona courts have "a rigorous standing requirement" that requires a plaintiff to "allege a distinct and palpable injury" before a case may be heard. *Fernandez*, 210 Ariz. at 140, ¶ 6 (citation omitted). An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998)) (citing *Warth v. Seldin*, 422 U.S. 490, 499, 501 (1975)). Although standing raises only "questions of prudential or judicial restraint," courts consider cases "without such an injury 'only in exceptional circumstances.'" *Id*. at 71, ¶ 25 (citation omitted). Enforcing standing requirements "sharpens the legal issues presented by ensuring that true adversaries are before the court and thereby assures that our courts do not issue mere advisory opinions." *Id.* at 71, ¶ 24. Importantly, "concern over standing is particularly acute" when courts are asked to "resolv[e] political disputes," such as when "legislators challenge [executive branch] actions," as they do

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here. *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486, ¶ 12 (2006) (citation omitted).

Moreover, a declaratory judgment is not available to any person who simply thinks a government official has misinterpreted a law or acted beyond the official's authority. Instead, when a person's "rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise," that person "may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832. "[A] declaratory judgment must be based on an actual controversy which must be real and not theoretical. To vest the court with jurisdiction to render a judgment in a declaratory judgment action, the complaint must set forth sufficient facts to establish that there is a justiciable controversy." *Town of Wickenburg*, 115 Ariz. at 468 (cleaned up) (holding that plaintiffs could not maintain declaratory judgment action challenging a statute that required Arizona cities to adopt financial disclosure rules for public officers).

For a case to be justiciable, a plaintiff must be "seeking judicial relief from actual or threatened injuries." *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 420, ¶ 11 (2022). When a plaintiff has not already incurred a "distinct and palpable" injury, the standing question is "whether an actual controversy [otherwise] exists" because the plaintiff has a "real and present need" to resolve the case to avoid imminent harm. *Id*. at 424-25, ¶¶ 29-30. A "speculative fear" does not merit declaratory relief. *See Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986). In this case, Plaintiffs have identified no actual or threatened injury. Their alleged harm boils down to differing interpretations of the law.

A. <u>The Injury Plaintiffs Allege Is Insufficient to Establish Standing.</u>

Legislative standing is quite narrow. "Merely alleging an institutional injury is not enough" when legislators assert standing on behalf of a legislature. *State ex rel. Tenn.*

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1 *Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 512 (6th Cir. 2019). An actual and
2 "concrete institutional injury" is required, which can include "interference with a
3 legislative body's specific powers, such as its ability to subpoena witnesses, or a
4 constitutionally assigned power," *id*., or vote nullification. *E.g., Raines v. Byrd*, 521 U.S.
5 811, 824-26 (1997) (discussing vote nullification that conferred standing in prior case);
6 *cf. Biggs v. Cooper*, 236 Ariz. 415, 419-20, ¶¶ 16, 19 (2014) (minority voting bloc
7 "alleged [their] votes were effectively nullified" by improper application of supermajority
8 requirement). Legislative standing, therefore, requires injury to the legislature's
9 processes, not merely a disagreement over statutory interpretation.
10 But a non-justiciable political disagreement is all that Plaintiffs allege here. They
11 claim that the Legislature "has institutional interests in defending the proper scope of
12 authority delegated to . . . the Secretary" and that "[b]y acting in excess of his statutory
13 authority or acting in conflict with statutory provisions," the Secretary's promulgation of
14 the challenged EPM provisions "causes the Legislature institutional injury because it
15 impedes the implementation of a validly enacted law." (Compl. ¶¶ 8-9). These are not
16 institutional injuries to the Legislature—the Legislature doesn't implement laws; the
17 executive branch does.
18 Plaintiffs' exceptionally broad conception of institutional injury would essentially
19 eliminate the standing requirement any time the Legislature can articulate some
20 disagreement with an executive branch implementation of a statute. If that were the case,
21 the Legislature would be able to impose on the courts to settle every dispute over the
22 meaning of the laws it enacts even absent a true injury to the institutional interests of the
23 body. To do so would give the Legislature access to the courts unavailable to any other
24 litigant. While the Legislature may have the power to enact such a law, it has not done so.
25 *Cf.* A.R.S. § 12-1841(A) (affording legislative leadership the opportunity to be heard
26 when a party alleges that a statute is unconstitutional). As such, it must demonstrate
27 more than the harm it alleges here.
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Indeed, because none of the challenged EPM provisions apply to or affect the Legislature, they also cannot injure the Legislature. Consistent with the EPM's purpose—to guide county and other local elections officials across the state in consistently carrying out their duties—four of the six challenged provisions relate to duties exclusively within county officials' purview—maintenance of voter rolls and canvassing election results. (*See id.* at ¶¶ 34, 37, 42, 48). The other two challenged provisions relate to petition circulators and the Secretary himself. (*See id.* at ¶¶ 45, 52). The challenged EPM provisions do not regulate how the Legislature carries out its constitutional duties. As such, this case is categorically different from the few cases in which courts have recognized legislative standing.

B. Plaintiffs Have Not Demonstrated that They Are Authorized to Act on Behalf of the Legislature as a Body.

Even if Plaintiffs were able to allege an injury to the Legislature sufficient to afford legislative standing in this case, they must also show that the Legislature has authorized them to bring this case on its behalf. *See Bennett v. Napolitano*, 206 Ariz. 520, 525-27, ¶¶ 21-29 (2003); *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 122, ¶ 10 (2013) (stating that "the legislators [in Bennett] had not alleged a particularized injury and had not been authorized to act on behalf of their respective chambers"). Plaintiffs do not allege any specific authorization for this action. Instead they rely on broadly-worded House and Senate Rules that purport to sidestep the cases that require approval of the body to act and allow Plaintiffs Toma and Petersen to "bring or assert in any forum on behalf of the [Legislature] any claim or right arising out of any injury to the [Legislature's] powers or duties under the Constitution or Laws of this state." (Compl. ¶ 10).

As explained above, Plaintiffs have not alleged an injury to the Legislature's powers or duties. Nor have they alleged that the Legislature authorized Plaintiffs to sue and "obtain relief on [its] behalf" *in this case*. *Bennett*, 206 Ariz. at 527, ¶ 29; *see Biggs*, 236 Ariz. at 419, ¶ 16 (observing same). The general, open-ended authorization in the

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cited rules does not conform with the cases in which courts have recognized legislative standing. Instead, those cases demonstrate that legislator-plaintiffs must obtain approval for a *particular* action. *See Bennett*, 206 Ariz. at 527, ¶ 29 (plaintiffs had "not been authorized by their respective chamber to maintain this action"); *Forty-Seventh Legislature*, 213 Ariz. at 487, ¶ 16 ("*Bennett* [held] that four . . . legislators could not bring an action . . . 'without the benefit of legislative authorization'"); *Raines*, 521 U.S. at 829 (plaintiffs had "not been authorized to represent their respective Houses of Congress in this action").

The broad House and Senate rules tell the court nothing about the Legislature's position in this case. Only a specific authorization directing the respective leaders of each chamber to file this lawsuit confirms that, consistent with general standing principles, the court truly has the Legislature before it, and not just individual legislators purporting to represent the Legislature's interests. *See Bennett*, 206 Ariz. at 527, ¶ 29. Otherwise, "a single legislator, perceiving a 'separation-of-powers injury' to the legislature as a whole," could bring such an action even if "the majority of the legislature . . . perceives no injury at all." *Morrow v. Bentley*, 261 So.3d 278, 294 (Ala. 2017). Moreover, requiring the Legislature to approve specific litigation asserted on its behalf imposes no real burden; indeed, the Legislature has done so before. *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (citing the "authorizing votes in both [legislative] chambers"). In sum, without any sort of specific vote, the boundless rules render the authorization requirement meaningless. Plaintiffs should not be able to proceed without the Court, the parties, and the public knowing that the Legislature in fact wants to pursue this novel case.

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II. Each Challenged EPM Provision Is Consistent with the Law and Within the Secretary's Authority.

A. The EPM Properly Recognizes that to the Extent A.R.S. § 16-165(A)(9) Is Inconsistent with NVRA, It Is Preempted.

Plaintiffs' Count I relates to the steps that county recorders must take when they

receive a summary report from a jury commissioner indicating that a voter is not a resident of the county. (Compl. ¶¶ 56-60). The crux of the challenge is that the EPM directs county recorders to notify certain voters that their registrations may be "put into *inactive* status," which "may ultimately lead to cancelation of their voter registration," while A.R.S. § 16-165(A)(9) provides that county recorders must inform such voters that the recorder "shall *cancel* the person's registration." (*Id.* ¶¶ 56-57) (emphases added); 2023 EPM, at 41.[2] Because immediately canceling a voter's registration pursuant to A.R.S. § 16-165(A)(9) without any notice or inactive period as Plaintiffs demand violates the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501-20511, the challenged EPM provision properly harmonizes county recorders' duties under federal and state law.

"[W]hen federal and state law conflict, federal law prevails and state law is preempted." *Knox v. Brnovich*, 907 F.3d 1167, 1173 (9th Cir. 2018) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471 (2018)). This is particularly important when Congress acts under the Elections Clause, "which empowers Congress to 'make or alter' state election regulations." *See Ariz. All. for Retired Ams. v. Hobbs*, 630 F. Supp. 3d 1180, 1193 (D. Ariz. 2022) (citing U.S. Const. Art. I, § 4, cl. 1 and quoting *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013)). In addition, A.R.S. § 16-168(J) expressly provides that the Secretary shall administer the statewide voter registration database, "including provisions regarding removal of ineligible voters" in a manner "consistent with the [NVRA]." Accordingly, the EPM's guidance regarding the steps to take after receiving information from the jury commissioner that a voter does not live in the county properly implements the procedures required by the NVRA and the Legislature's own directive in A.R.S. § 16-168(J).

In particular, the NVRA directs that "[a] State shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has

[2] Citations to "2023 EPM" are to the Elections Procedures Manual, issued on December 30, 2023 and published on the Secretary's website at: https://apps.azsos.gov/election/files/epm/2023/20231230_EPM_Final_Edits_406_PM.pdf

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changed residence unless the registrant . . . *confirms in writing* that the registrant has changed residence to a place outside the registrar's jurisdiction." 52 U.S.C. § 20507(d)(1)(A) (emphasis added). The Secretary correctly applied this written confirmation requirement to mean written confirmation *from the registrant*, not the jury commissioner. Indeed, the summary report from the jury commissioner is, as its name suggests, a summary. The report does not include copies of juror questionnaire responses written by voters; rather, it is "derived from juror questionnaire data" and "shall only contain the information that is necessary for the county recorder to accurately identify" the voter. A.R.S. § 21-314(F). The statutory text implicitly acknowledges that the summary report is not direct confirmation of non-residency, but merely "indicates" non-residency. *Id.*; *see also* A.R.S. § 16-165(A)(9) (describing summary report as "indicating" that voter stated he or she is a non-resident). In other words, the summary report is an indirect compilation of what voters wrote in response to questions from non-election officials in a non-election context. It is insufficient to constitute the written confirmation from the voter necessary to meet the requirements in 52 U.S.C. § 20507(d)(1)(A). *See Ariz. All. for Retired Ams.*, 630 F. Supp. 3d at 1193 (requiring "that the confirmation must unequivocally come *from the voter*") (emphasis in original).

In view of this interpretation of the NVRA, the EPM appropriately provides guidance that upon receipt of information from the jury commissioner that a voter no longer lives within the county, county recorders should follow the procedures for removing voters from voting rolls set forth in 52 U.S.C. § 20507(d)(1)(B). Under that provision, the county recorder sends a notice as provided in 52 U.S.C. § 20507(d)(2). If the voter does not act on the notice, the voter's registration may be placed in inactive status and will be canceled only if the voter "has not voted or appeared to vote . . . in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice." 52 U.S.C. § 20507(d)(1)(B)(ii).

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B. Plaintiffs Misread the Provision Concerning Third-Party Information Regarding Citizenship Status, and this Claim Is Now Moot.

A.R.S. § 16-165 sets forth the reasons for cancelling voter registrations and directs county recorders to investigate registered voters "who the county recorder has reason to believe are not United States citizens," but only "[t]o the extent practicable." A.R.S. § 16-165(I). The EPM provides that "third-party allegations of non-citizenship are not enough to initiate" the process of investigating whether a voter is not a United States citizen. 2023 EPM, at 42. Plaintiffs allege that the plain language of A.R.S. § 16-165(I) "does not exclude third-party allegations [of non-citizenship] if the allegation provides the county recorder with a reason to believe the applicant is not a U.S. citizen." (Compl. ¶ 39).

This claim is subject to dismissal for several reasons. First, on February 29, 2024, the Arizona district court held that A.R.S. § 16-165(I) is unenforceable because it violates 52 U.S.C. § 10101. *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *38 (D. Ariz. Feb. 29, 2024). In particular, after a bench trial, the court recognized that A.R.S. § 16-165(I) can be used to check the citizenship status of only naturalized citizens, because the database the statute directs county recorders to consult includes only those individuals with an immigration number. *Id.* Accordingly, the court concluded that "[n]aturalized citizens will always be at risk of county recorders' subjective decision to further investigate these voters' citizenship status, whereas the [A.R.S. § 16-165(I)] will never apply to native-born citizens. This violates [52 U.S.C. § 10101(a)(2)(A)]." *Id.* In view of the unenforceability of A.R.S. § 16-165(I) following the district court's order, no county recorder will have the need to implement the EPM guidance regarding third-party allegations of non-citizenship.

Second, the claim does not present a live controversy because the specific investigative process set forth in § 16-165(I) is a check of the USCIS SAVE database, "to the extent practicable." And as the EPM explains: "under the terms of the current USCIS [Memorandum of Agreement], SAVE shall not be used for list maintenance

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purposes, i.e. to cancel an existing registration. Thus, a comparison with SAVE for this purpose is *not* currently practicable." 2023 EPM at 43, n.28 (emphasis added).[3] In other words, there is no "real and present need," *Mills*, 253 Ariz. at 425, ¶ 30, for this court to decide what constitutes a "reason to believe" for an investigation process that is not currently "practicable," A.R.S. § 16-165(I).

Third, Plaintiffs' claim rests on a misunderstanding of the challenged provision. Both the statutory text and the EPM require something more than a bare allegation of non-citizenship. This requirement is important because it clarifies when county recorders must dedicate resources to investigating a registered voter's citizenship.[4] For example, if a third party makes an allegation of non-citizenship *and* provides supporting credible documentation that gives a recorder reason to believe that a person is a non-citizen, a county recorder would not violate the EPM by conducting an investigation on that basis. The challenged EPM provision is wholly consistent with the statute.

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C. The EPM's Date for the First AEVL Removal Notices Avoids Improper Retroactive Application of Statute.

In 2021, the Legislature enacted Senate Bill 1485 and amended A.R.S. § 16-544 to provide that if a voter does not vote an early ballot for two two-year election cycles, the county recorder shall send a notice that "shall inform the voter that if the voter wishes to remain on [AEVL], the voter shall" (1) "[c]onfirm in writing the voter's desire to remain

[3] Plaintiffs did not challenge footnote 28. Indeed, in *Mi Familia Vota*, they asserted in their Proposed Findings of Fact and Conclusions of Law that "use of SAVE for post-registration citizenship review is not currently practicable." *Mi Familia Vota*, No. CV-22-00509-PHX-SRB, Doc. 676, at 74, ¶ 353 (D. Ariz. Dec. 12, 2023)..

[4] Third parties often make unfounded allegations about noncompliance with election law. For example, employees of the Arizona Attorney General's office spent more than 10,000 hours reviewing allegations about the 2020 election and concluded that information alleged "was speculative in many instances and when investigated by our agents and support staff, was found to be inaccurate." *See* "Arizona Attorney General's Office Releases Documents Related to 2020 Election Investigations," available at https://www.azag.gov/press-release/arizona-attorney-generals-office-releases-documents-related-2020-election-0. In deciding this Motion to Dismiss, this Court may consider public records concerning matters referenced in the Complaint. *See AUDIT-USA v. Maricopa Cnty.*, 254 Ariz. 536, 538, ¶ 6 (App. 2023).

on" AEVL and (2) "[r]eturn the completed notice to the county recorder . . . within ninety days after the notice is sent to the voter." A.R.S. § 16-544(L). In a footnote, the EPM explains that "the first two full election cycles after S.B. 1485's effective date are the 2024 and 2026 election cycles." EPM, at 61, n.34. Accordingly, the EPM states that "the first AEVL removal notices must be sent out by January 15, 2027." *Id*. In their Complaint, Plaintiffs allege that, even though S.B. 1485 took effect on September 29, 2021, nine months into the 2022 election cycle, that the 2022 election cycle must be considered and the first AEVL removal notices must be sent in January 2025. (*See* Compl. ¶ 80).

An "'election cycle' means the two-year period beginning on January 1 in the year after a statewide general election." A.R.S. § 16-544(S). General elections occur in even-numbered years. A.R.S. § 16-211. Accordingly, the 2022 election cycle began on January 1, 2021. For notices to be required to go out in January 2025, the statute would have to apply beginning with the 2022 election cycle. This is because, to trigger the notice requirement, a voter must fail to vote using an early ballot for two full consecutive election cycles. *See* A.R.S. § 16-544(K)(2). But because S.B. 1485 went into effect on September 29, 2021, the 2022 election cycle had already begun. Although the first federal election in the cycle did not occur until August 2022, the statute also provides that an election cycle encompasses a "city or town candidate primary or first election." A.R.S. § 16-544(K)(2)(a)-(b). Such elections could have occurred in March, May, and August 2021, before S.B. 1485's effective date. A.R.S. § 16-204(B).

But, "[n]o statute is retroactive unless expressly declared therein." A.R.S. § 1-244. The Legislature did not purport to apply S.B. 1485 retroactively. Nor could it have, as only a "statute that is merely procedural may be applied retroactively." *San Carlos Apache Tribe v. Superior Ct.*, 193 Ariz. 195, 205 (1999). Application of a statute is retroactive if it "attaches new legal consequences to events completed before its enactment." *Id*. (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269–70 (1994)).

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Applying §16-544 to require that notices be sent out in January 2025 would be a retroactive application imposing new legal consequences to a voter's failure to vote in any election that was held between January 1 and September 29, 2021. Accordingly, the EPM's instruction that AEVL removal notices should not be sent until 2027 is consistent with A.R.S. §§ 1-244 and 16-544.

D. The Circulator Registration Guidance Is Consistent With Arizona Law.

Plaintiffs assert that a footnote in the EPM section relating to petition circulators conflicts with A.R.S. § 19-118. (*See* Compl. ¶¶ 85-88). Specifically, A.R.S. § 19-118(A) requires certain petition circulators to register with the Secretary and requires that the signatures they collect be disqualified if the circulator is not properly registered at the time the petitions are circulated. Section 19-118(A) further provides that the Secretary "shall establish in the [EPM] a procedure for registering circulators." The referenced footnote provides that "[t]he requirement to list certain information on the circulator portal does not mean that a circulator's signatures shall be disqualified if the circulator makes a mistake or inconsistency in listing that information." This is well within the Secretary's authority set forth in A.R.S. § 19-118(A).

Plaintiffs rely on the requirement of strict compliance set forth in A.R.S. § 19-102.01(A) and that the circulator registration application requires the "circulator's full name, residence address, telephone number and email address" and an attestation that "the information provided is correct to the best of my knowledge." A.R.S. § 19-118(B)(1), (5). But no statutory provision states that a circulator is not properly registered if they make a mistake or inconsistency in some of the information they list on their form. *Cf. Leibsohn*, 254 Ariz. at 5, ¶ 11 (concluding that "a unit number is not required as part of a 'residence address.'"). Thus, there is no statutory basis for disqualifying such signatures gathered by a circulator whose registration includes a typographical error.

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1 E. The Canvassing Guidance Is Consistent With Arizona Law.

2 Plaintiffs argue that canvassing of election returns "is not a topic that the Secretary 3 is statutorily authorized to include in the EPM." (Compl. ¶ 94). But the official canvass 4 of election results is a compilation of both the counting and tabulating ballots.[5] *See* 5 *Campbell v. Hunt*, 18 Ariz. 442, 452 (describing an election canvass as is adding up the 6 returns and declaring the result of the voting). Both of those topics are expressly 7 included within A.R.S. § 16-452, and it is thus appropriate for the EPM to provide 8 guidance on them.

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10 1. *The County Canvassing Provision Does Not Improperly Constrain Boards of Supervisors.*

11 The EPM provides that "[t]he Board of Supervisors has a non-discretionary duty 12 to canvass the returns as provided by the County Recorder or other officer in charge of 13 elections and has no authority to change vote totals, reject the election results, or delay 14 certifying the results without express statutory authority or a court order." (Compl. ¶ 92). 15 Plaintiffs argue that this provision "conflicts with the plain language of Arizona law," 16 which permits a board of supervisors to "determin[e] the vote of the county." (Compl. ¶ 17 100). Nothing in that statute, however, permits a board of supervisors to alter the returns 18 from which the board of supervisors must determine the vote of the county. *See* A.R.S. § 19 16-643; *cf.* A.R.S. § 16-602(C) (providing that electronic tabulation results for a race that 20 is subject to the hand count audit "constitute the official count for that race" if the 21 difference, if any, between the hand count audit and the electronic tabulation is within the 22 designated margin). But to the extent that statutory authority for a board of supervisors to 23 alter results exists, the EPM provision at issue identifies "express statutory authority" as 24 an exception to its direction that a board of supervisors may not change vote totals. 25 (Compl. ¶ 92).

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27 [5] *See, e.g.,* Maricopa County November General Election Canvass, which includes both the number of ballots counted and the number of votes tabulated for each candidate or issue. Available at: https://elections.maricopa.gov/asset/jcr:7bd36c75-477c-43d0-83db-80b2761ca698/11-08-2022-0%20Canvass%20BOS%20SUMMARY%20CANVASS.pdf.
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2. *Plaintiffs' Objection to the State Canvassing Provision Is Mooted by HB2785.*

With respect to the Secretary's duty to conduct the statewide canvass of a primary or general election, Plaintiffs object to the EPM's instruction that "[i]f the official canvass of any county has not been received by th[e statutory] deadline [to conduct the canvass], the Secretary of State must proceed with the state canvass without including the votes of the missing county." For this argument, Plaintiffs rely solely on A.R.S. § 16-648(C), which formerly permitted the extension of the deadline to canvass until thirty days after the election if the official canvass of a county had not been received.

However, on February 9, 2024, Governor Hobbs signed House Bill 2785, which passed with more than a two-thirds majority and became immediately effective. 2024 Ariz. Sess. Laws, ch. 1, § 23 (56th Leg. 2d Reg. Sess.). The bill deleted A.R.S. §16-648(C) from the statute. *Id.* § 16. House Bill 2785 was enacted to address concerns about not meeting certain election deadlines, including those related to the Uniformed and Overseas Citizens Absentee Voting Act and the Electoral Count Reform Act. The amended statutes give the Secretary a mandatory statutory deadline to canvass, and nothing in the law authorizes him to wait because a county has not submitted its canvass by that date. *See* A.R.S. § 16-648(A). As such, the EPM provision regarding the Secretary's duty to canvass is wholly consistent with Arizona law.

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F. The Secretary Appropriately Informed EPM Users of Ongoing Litigation and Court Rulings.

As explained above in Section II.A, in crafting the EPM as a guide for election officials to assist carrying out their duties with "the maximum degree of correctness, impartiality, uniformity and efficiency," the Secretary must do more than parrot the words of the statutes in Title 16 and 19. A.R.S. § 16-452(A). Instead, the EPM takes into account other sources of law, including the decisions of courts that directly impact the statutes that election officials must carry out. "The EPM serves a 'gap-filling function' to address election matters not specifically addressed by statute." *Mi Familia Vota*, 2024 WL 862406, at *4. The Secretary's authority to issue the EPM gives him

discretion to do his best to harmonize federal and state law, including court rulings.

Because the EPM is a static document, issued once every two years, the Secretary may not unilaterally update it whenever the law changes. *See* A.R.S. § 16-452(B). This is true both for statutory changes (*see, e.g.,* Section II.E.2, *supra*), and binding court determinations (*see, e.g.,* Section II.B, *supra*). Throughout the EPM, the Secretary has identified provisions of the law that were at the time of its issuance subject to litigation, so that that the county and local election officials using the EPM are aware that the information regarding the proper implementation of the law might change, and that the election officials should confirm the continued validity of the provisions at issue. Accordingly, references to ongoing litigation in the EPM do not, as Plaintiffs allege, "invalidate or amend statutory requirement," nor do they abrogate any appellate rights of the litigants in the referenced litigation." (*Id.* at 115).

Plaintiffs further assert that the Secretary improperly cherry-picked court decisions to incorporate into the EPM's guidance, while leaving out others. (*Id.* at 110). But this argument ignores the different procedural posture of the two cited cases. In particular, on September 1, 2023, the Yavapai County Superior Court denied a motion to dismiss in *Arizona Free Enterprise Club v. Fontes*, No. S1300CV202300202. While the court explained its understanding of A.R.S. § 16-550 in that ruling, the procedural posture of the case at the time required no change to the implementation of the statute by the county recorders who are not parties to that litigation. Since the issuance of the EPM, the superior court in *Arizona Free Enterprise Club* has taken cross-motions for summary judgment under advisement. Those motions for summary judgment address the exact same legal issue discussed in the motion to dismiss ruling. Therefore, county recorders are appropriately on notice that they may need to seek the advice of their counsel regarding what effect, if any, an eventual ruling by that court may have on their duties.

In contrast, on September 14, 2023, the federal district court issued an order on multiple motions for summary judgment in *Mi Familia Vota v. Fontes*, No. CV-22-

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00509-PHX-SRB, 2023 WL 8181307 (D. Ariz. Sep. 14, 2023), a case in which the Secretary and each of the 15 county recorders is a party. In December 2023, as the EPM was being finalized, the issues not resolved by the September 14, 2023 summary judgment ruling were tried to the Court. And just a few days ago, the district court issued an order resolving the issues that were tried. *See Mi Familia Vota*, 2024 WL 862406. Unlike in *Arizona Free Enterprise Club,* between September 14 and December 30, 2023, none of the parties to the case had asked the court to revisit the rulings contained in the September 14 summary judgment order. And that order, in turn, affirmed the continued viability of a 2018 consent decree, to which the Secretary is a party and by which he is bound. *See id.* at *12. As such, the EPM appropriately incorporated the *Mi Familia Vota* court's September 14, 2023 order in its guidance. Contrary to Plaintiffs' allegations in paragraph 33 of the Complaint, the EPM's references to the *Mi Familia* order is not intended to and does not strip any parties of appellate rights. If any parts of the order are reversed in a final appellate decision, then of course those parts of the order will have no legal effect, and the EPM does not purport to enshrine them in stone.

<u>Conclusion</u>

For the foregoing reasons, the Court should dismiss the Complaint and award the Secretary costs and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and -348.01.

RESPECTFULLY SUBMITTED this 4th day of March, 2024:

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Certificate of Good Faith Consultation

Pursuant to Ariz. R. Civ. P. 7.1(h) and 12(j), undersigned counsel hereby certifies that on March 1, 2024, counsel for Secretary of State Adrian Fontes participated in a videoconference with counsel for Plaintiffs and counsel for Proposed Intervenors Arizona Alliance for Retired Americans and Voto Latino. During the videoconference, the parties discussed whether the issues identified in the foregoing Motion to Dismiss could be resolved by an amendment to the Complaint. The parties were unable to come to an agreement during the conference.

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