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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA, LLC, and YAVAPAI COUNTY REPUBLICAN PARTY, Plaintiffs, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant.	No. CV2024-050553 **INTERVENORS–DEFENDANTS DEMOCRATIC NATIONAL COMMITTEE AND ARIZONA DEMOCRATIC PARTY'S REPLY IN SUPPORT OF MOTION TO DISMISS** (Assigned to Hon. Frank Moskowitz)

Plaintiffs' Response fails to demonstrate why their Complaint states a claim upon which relief can be granted. Their APA claims fail because the EPM statute, A.R.S. § 16-452, "otherwise provide[s] by law" the procedures by which the EPM's rules are to be adopted. A.R.S. § 41-1030(A). By its terms, the statute expressly provides the conditions sufficient for the EPM to take effect. None of these involve compliance with the APA, and indeed, it would be near impossible to satisfy both. And none of Plaintiffs' alternative claims can proceed; each is foreclosed by the plain terms of the statute on which it is based. The Complaint must be dismissed as a matter of law.

Argument

I. Plaintiffs' attempt to invalidate the entire EPM (Count I) fails as a matter of law.

A. The APA's general notice-and-comment procedures do not apply.

The process for adopting the EPM is governed by the provisions the legislature prescribed in A.R.S. § 16-452—not by the general APA. Plaintiffs fail to show the contrary.

1. The APA does not govern because the EPM process is "otherwise provided by law." A.R.S. § 41-1030(A). Every two years, the Secretary must prepare a manual. A.R.S. § 16-452(A)–(B). The Secretary must "consult[] with" elections officials, prescribe the election procedures, and submit this manual by October 1. *Id.* Then the governor and attorney general must "approve" the EPM before the Secretary issues the final EPM no later than "December 31" of that year. A.R.S. § 16-452(B). By establishing this process, the legislature has "otherwise provided by law" how the Secretary must adopt the EPM. *See, e.g.*, *May v. Ellis*, 208 Ariz. 229, 231 ¶ 11 (2004) ("[The statute] . . . begins with a critical phrase: 'Except as otherwise provided by law.' Thus, [the statute] . . . only applies when there is no other 'law' to the contrary.").

In response, Plaintiffs assert (at 7) that the DNC and ADP "misunderstand[] the function of section 41-1030." They contend (*id.*) that section 41-1030 "merely prescribes the default

standard of review for rules under the APA" "unless another test for validity has been 'provided by law.'" But that is not what the statute says; nor do Plaintiffs identify any opinion to support their interpretation. Section 41-1030 falls within the article on "rulemaking" and establishes that a rule must be "*made and approved* in substantial compliance with [APA rulemaking requirements], *unless otherwise provided by law*." A.R.S. § 41-1030(A) (emphasis added). That section is meant to carve out rules that are "made and approved" as provided by other laws. *Id.*[1]

Plaintiffs further suggest (at 7), that the EPM statute is not "a procedure 'otherwise provided by law' under subsection 41-1030(A)" because "the exemption must be express" and "[n]o express exemption . . . appears in section 16-452." In doing so, they attempt to graft an additional "expressly exempted" requirement onto A.R.S. § 41-1030(A) that does not appear in the text. This "express[] exempt[ion]" requirement appears only in A.R.S. § 41-1002(A).[2]

2. Nonetheless, the EPM statute also governs because, by adopting a specific promulgation process, the legislature *has* "expressly exempted" the EPM from the APA. As the APA provides, "articles [1] through 5 of [Title 41, Chapter 6] apply to all agencies and all proceedings not expressly exempted." A.R.S. § 41-1002(A). In interpreting this provision, courts have declined to find an express exemption when a statute "says nothing about rulemaking." *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 252 ¶ 23 (App. 2015). Here, by comparison, the EPM statute not only says something about rulemaking, but also

[1] Plaintiffs also argue (at 7) that the DNC and ADP "selective[ly] quote[d]" A.R.S. § 41-1030 to omit that it also requires a rule to "be substantively within the scope of the statute granting rulemaking authority." But the EPM *is* a set of rules within the scope of the statute granting its rulemaking authority: the EPM statute, A.R.S. § 16-452.

[2] Beyond being contrary to the plain language of the statute, Plaintiffs' reading would violate the surplusage canon: If section 41-1002(A)'s express-exemption requirement applies to section 41-1030 such that an otherwise-provided-by-law "exemption must be express," as Plaintiffs contend (at 7), then section 41-1030's "unless otherwise provided by law" carveout would be entirely superfluous. And courts generally decline to give a provision "an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

explicitly details the process for it. This statute thus expressly exempts the EPM from the APA. In response, Plaintiffs argue (at 6) that the only way for the legislature to create an express exemption is for "the exempting statute [to] in fact reference *the APA*." Plaintiffs cite no case for this proposition. They instead rely on generic dictionary definitions of "express." While Plaintiffs identify one way for the legislature to create an express exemption, it is not the only way. *Cf. Ariz. State Tax Comm'n v. Phelps Dodge Corp.*, 116 Ariz. 175, 177 (1977) (finding a conflict between the APA's requirement for "findings of fact and conclusions of law" and a separate statute and holding that the specific statute controlled).

3. Finally, "[t]he Administrative Procedure Act, if it is in direct or inferential conflict with the specific legislative provision enacted to control [certain proceedings], has no application. Special statutes govern over general statutes." *Id.* Here, the EPM statute conflicts with the APA in two ways: (1) the mechanism for approving the EPM, and (2) the timeline for doing so. Mot. 6–10.

Tellingly, Plaintiffs nowhere address this first, critical conflict. *See* Resp. at 10–11. A.R.S. § 16-452(B) provides the only mechanism for approving the EPM: "the manual shall be approved by the governor and the attorney general" and can be promulgated only "[a]fter consultation with" election officials, A.R.S. § 16-452(A). The APA, on the other hand, expressly exempts the Secretary from seeking gubernatorial approval for the Secretary's rules and includes numerous additional steps. *See* A.R.S. § 41-1057(A)(1); Mot. at 6–7. Based on this conflict, the more recent, specific EPM statute controls over the older, more general APA. *See* Mot. 8–9.

Beyond that, the APA's rulemaking provisions require a process and timeline that conflict with the process and timeline that the EPM statute mandates. *See id.* at 6–8. Plaintiffs' response (at 10–11) is that it might be possible to comply with both the EPM statute and the APA's

provisions, if the Secretary starts the process earlier.[3] In challenging whether a conflict exists, however, Plaintiffs ignore *State v. Arizona Board of Regents*. *See* Mot. at 6, 8–9. There, the Arizona Supreme Court considered whether a one-year or five-year statute of limitations governed certain causes of action by the attorney general. 253 Ariz. 6, 12 ¶ 22 (2022). It found a conflict between the two statutes, even though the attorney general technically could comply with *both* statutes by simply suing earlier. *Id.* at 13 ¶ 29. But the Court did not require the attorney general to do so. The Court thus applied the statute that "was added . . . twenty-five years after [the other statute] was enacted" and "[wa]s specific to [the type of] claims brought by the Attorney General." *Id.* at 14 ¶ 29. The same reasoning should control here. The EPM statute and the APA establish two distinct, contradictory timelines. *See* Mot. at 6–9. The Secretary need not begin the EPM process on an entirely different schedule when the legislature has created a specific timeline—that the Secretary must follow every two years—for adopting the EPM.

B. The Secretary substantially complied with the APA.

Finally, Plaintiffs are wrong (at 11) that the Secretary did not substantially comply with the APA. APA rulemaking is aimed at "ensur[ing] 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.*, 182 Ariz. 221, 226 (App. 1994). The process here satisfied that purpose. *Cf. State v. Galvez*, 214 Ariz. 154, 157 ¶ 19 (App. 2006) ("'Substantial compliance' generally means that the information provided has satisfied the purpose of the relevant statute.").

Election officials, the governor, and the attorney general commented on the EPM. A.R.S.

[3] Plaintiffs propose (at 10) that the Secretary "complete the rulemaking process and then submit the manual to the governor" for approval. After completing the APA rulemaking process, though, a rule "becomes effective sixty days" later. A.R.S. § 41-1032(A). That effective date is automatic and is not conditioned on any further approvals, as the EPM statute requires. *See* A.R.S. § 16-452(B). The APA and EPM statutes thus do not permit Plaintiffs' proposed process.

§ 16-452. And so did the public. Compl. ¶ 24. Plaintiffs fail to explain why neither their own 52-page comment on the draft nor the 1,530 comments from 620 others was insufficient to ensure adequate notice. *See* Mot. at 10–11. While Plaintiffs allege that the Secretary added some unspecified number of provisions to the draft EPM after the public comment period closed, Compl. ¶ 27, they do not identify why a lack of comment on those specific provisions requires invalidating the EPM as a whole; at most, this would suggest invalidating the specific provisions.[4]

C. Count I is barred by laches.

In all events, laches bars this claim because Plaintiffs' "unreasonable delay" in bringing this claim "prejudices the opposing part[ies]" and "the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006).

First, as set forth in the Motion (at 12–13), "the extent of plaintiff[s'] advance knowledge of the basis for challenge" makes Plaintiffs' delay unreasonable. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 16 (1998). In response, Plaintiffs misapprehend when they could have initiated a challenge to the process for promulgating the EPM. It was not, as they claim (at 15–16), only when the 2023 EPM was final at the end of December 2023. In support, Plaintiffs argue that only final rules are subject to challenge under an APA statute permitting "a judicial declaration of the validity of [a] rule." A.R.S. § 41-1034(A). But their own complaint confirms that this statute is

[4] Plaintiffs' laundry list (at 11) of other perceived APA violations similarly are not a barrier to finding substantial compliance. Again, the purpose of the statute was satisfied as set forth above. Plaintiffs argue (*id.*) that the Secretary failed to provide notice of the rulemaking, in the right format, and in the right place. But, again, the Secretary *did* invite public comment on the draft EPM. Plaintiffs and others had notice of it, by their own admission. Compl. ¶ 24. Similarly, Plaintiffs never allege that they or anyone else requested, or were denied, a public hearing. Finally, Plaintiffs' complaints about the lack of a rulemaking record, *see* A.R.S. § 41-1029, are not grounds to invalidate the entire EPM. The Secretary made publicly available much of what constitutes the rulemaking record, including: the final EPM, *see* A.R.S. § 41-1029(B)(7), Compl. ¶ 27; and all submitted public comments, *see* Ariz. Sec'y of State, *Election Procedures Manual – Public Comment*, https://apps.azsos.gov/election/files/epm/epm_public_comments_2023_august.pdf (last visited Apr. 19, 2024), A.R.S. § 41-1029(B)(4).

not the only mechanism by which Plaintiffs could have sought review. *See* Compl. at Demand for Relief, A.1 (requesting declaration under the declaratory judgment act). Plaintiffs have long had an "actual or real interest" sufficient to seek review. *Ariz. Sch. Bds. Ass'n v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (quoting *Podol v. Jacobs*, 65 Ariz. 50, 54 (1946)). This interest existed at least when Plaintiffs "object[ed] to the artificially short period for public comment" in August 2023. Compl. ¶ 24. In short, Plaintiffs had many months, at least,[5] to challenge this process and did not do so until after the statutory deadline for the Secretary to adopt the EPM.

Next, Plaintiffs (at 16) have little response to the fact that declaring the entire 2023 EPM invalid well into an election year would be prejudicial, Mot. at 13–15. Plaintiffs do not deny (at 16) that the remedy they seek will create an election law whiplash. Some elections in 2024 will have proceeded under the 2023 EPM, but some will have not. Mot at 13–14. Plaintiffs' only response (at 19) is that there will be "ample time," before June 15, "for the Secretary and county boards of supervisors to revert to the 2019 EPM with which they are all familiar." Even assuming this case will be resolved before June 15, the pernicious effects of this changing legal landscape will be felt long before June; early voting began April 19, there is an election in May, and other ongoing issues of election administration will be affected long before the election. *See id.* at 14. Further, Plaintiffs have no response (at 16) to the argument that their delay will force courts to hurry their analysis on an important issue. In the end, laches bars Plaintiffs' first claim.

II. Plaintiffs remaining claims (II through IX) also fail as a matter of law.

1. Claim II (voter cancellation). A.R.S. § 16-165(A)(10) provides that the county recorder shall cancel a registration "[w]hen the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen," including

[5] Beyond this, the same process has governed EPM promulgation for years, including in 2019. Even assuming they needed to await a final version of an EPM to bring suit (they did not), they could have brought this claim challenging any one of the prior EPMs.

through the receipt of juror reports. Plaintiffs argue (at 17–18) that the means by which the county recorder must "confirm[] that the person registered is not a United States citizen" is by sending the 35-day notice letter referenced next in the statute. But the statute directs the recorder to send the letter "[b]efore the county recorder cancels a registration pursuant to this paragraph." A.R.S. § 16-165(A)(10). The letter is simply the ultimate step before cancellation. Properly read, the statute contemplates several steps before cancelation: (1) receipt of information of non-citizenship, (2) confirmation that the person registered is not a U.S. citizen, and (3) sending the 35-day notice letter. Only once these steps are complete may the county recorder cancel the registration. *Id.* Plaintiffs' effort to collapse steps (2) and (3) fails.

As to step (2), the EPM instructs county recorders to check for the absence of documentary proof of citizenship ("DPOC") or the voter's name in certain databases as a means of confirming non-citizenship before sending the 35-day notice letter. Contrary to Plaintiffs' argument (at 18), prior submission of DPOC *is* satisfactory proof of citizenship. *See* A.R.S. § 16-166(F) (listing forms of DPOC that constitute "satisfactory evidence of United States citizenship"). If the county recorder confirms that the voter has previously provided DPOC, it follows that the recorder *cannot* "confirm[] that the person registered is not a United States citizen," A.R.S. § 16-165(A)(10), ending the inquiry. Plaintiffs argue (at 18–19) that it would be "absurd[]" to request DPOC of a voter who has "confirmed" non-citizenship on a juror questionnaire. But if the questionnaire response were conclusive, requiring recorders even to send the 35-day notice letter would be absurd, too: the letter gives the person 35 days to provide the very DPOC sufficient to end the inquiry under the EPM rule. *See* A.R.S. § 16-165(A)(10) (35-day notice states that registration will be canceled "unless the person provides satisfactory evidence of United States citizenship pursuant to § 16-166"). Even the person who has improbably renounced their citizenship (itself an absurd hypothetical for which Plaintiffs offer no support) would have such DPOC.

2. Count III (federal-only voters and the PPE). A.R.S. § 16-127(A), which prohibits federal-only voters from voting in presidential elections, is preempted by the National Voter Registration Act. *See Mi Familia Vota v. Fontes*, --- F. Supp. 3d ---, 2023 WL 8181307, at *6–7 (D. Ariz. Sept. 14, 2023). Congress may regulate both primaries and presidential elections. *See Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976); *United States v. Classic*, 313 U.S. 299 (1941); *Burroughs v. United States*, 290 U.S. 534 (1934).

Plaintiffs respond (at 20–21) that the presidential *preference* election is not a "presidential election" to which the *Mi Familia Vota* ruling or the NVRA constitutionally can extend. But the NVRA extends specifically to presidential preference elections. *See* 52 U.S.C. § 30101(1)(D) (an "election," for NVRA purposes, includes "a primary election held for the expression of a preference for the nomination of individuals for election to the office of President."). Plaintiffs say that the Electors Clause, U.S. Const. art. II, § 1, cl. 2, does not allow Congress to regulate presidential primaries at which electors are not chosen. Resp. at 20. But no case supports this proposition. Instead, the Electors Clause "has been interpreted to grant Congress power over Presidential *elections* coextensive with that which Article I section 4 grants it over congressional elections." *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (emphasis added). Plaintiffs' only cited case held only that a *state* may not bind a national party to the results of its open preference primary election. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981). The case said nothing about *Congress's* power to regulate presidential preference elections. Regardless, Plaintiffs have not challenged the constitutionality of the NVRA or the scope of Congress's power under the Electors Clause. The question is merely whether the Secretary is bound to apply the *Mi Familia Vota* ruling to the presidential preference election. Because the presidential preference election is an "election" to which the NVRA applies, 52 U.S.C. § 30101(1)(D), he is.

3. Count IV (federal-only voters and early voting). Plaintiffs acknowledge (at 21 n.8) "that the *Mi Familia Vota* decision affects Count IV, which challenges the 2023 EPM's rule permitting federal-only voters to vote by mail in contravention of [A.R.S. §] 16-127" and do not otherwise defend this claim. It should be dismissed.

4. Count V (SAVE database checks). The EPM correctly notes that county recorders "currently have no obligation to check [certain] databases" against voter registration records. EPM at 13, 43. These databases are currently not available to the county recorders, and the statute requires such checks only "[t]o the extent practicable" or "if accessible" or "provided the county has access." *See* A.R.S. §§ 16-165(H)–(K), -121.01(D). A federal court has enjoined checking one of the databases at all. Mot. at 23–24. Accordingly, no conflict exists.

Plaintiffs argue (at 23) "[i]f the databases become available to county recorders while the 2023 EPM is effective, the EPM would nevertheless continue to tell county recorders they have no duty under the statute." But they do not allege that these databases are *currently* available; any claim as to a potential conflict that might arise in the future is unripe. And besides, nothing prevents the Secretary from issuing addenda to the EPM when the law or practical realities have changed; indeed, the Secretary has done so in the past.[6] The EPM as written is an accurate reflection of what the law requires. This count should be dismissed.

5. Count VI (registrant signatures). Whatever "election purposes" Plaintiffs cite to justify their right to access signatures under A.R.S. § 16-168(F), the "election purposes" cannot be to "verify signatures on mail-ballot affidavits" as Plaintiffs advance. Mot. for PI at 11–12. This role belongs exclusively to the county recorders; the public plays no role in early ballot signature verification. *See* A.R.S. § 16-550.01(A). Plaintiffs cannot rely on A.R.S. § 16-168(F)

[6] *See* Ariz. Sec'y of State, *Electronic Adjudication Addendum to the 2019 Elections Procedures Manual* (Feb. 28, 2020), https://azsos.gov/sites/default/files/2023-11/electronic_adjudication_addendum_to_the_2019_elections_procedures_manual.pdf.

to manufacture a conflict with the EPM's limitation, which accurately restates the purposes for which the public may request to view a voter's signature.

If a signature is accessible, there is no dispute that the requestor would not be limited to a single signature. But there is still no conflict on which to award relief: the EPM simply states the conditions under which "[a] registrant's signature may be viewed or accessed by a member of the public," EPM at 53, not how many signatures are accessible.

6. Count VII (one-time ballot requests). Plaintiffs advance no argument in response to the DNC and ADP's Motion. Resp. at 25. Indeed, they fail to rebut the DNC and ADP's correct point that requesting to be on the Active Early Voter List under A.R.S. § 16-544, for which a voter generally cannot list an out-of-state address at which to automatically receive their early ballot, is different from one-time requests from voters to be send their ballot under A.R.S. § 16-542(A), which has no such address limitation. The EPM properly incorporates both statutes.

7. Count VIII (procedure for ballot challenges). Here too, Plaintiffs cherry-pick individual statutes they believe conflict with the EPM without acknowledging the greater statutory scheme in which they exist. They posit that A.R.S. § 16-552(D)'s language requiring challenges to early ballots to be made "before the early ballot is placed in the ballot box," is the only relevant language. Subsection D, which allows for early ballot challenges, itself says that if an early ballot is not allowed, "it shall be handled pursuant to subsection G." Subsection G, in turn, commands that if the vote is not allowed "the early ballot shall not be opened." A.R.S. § 16-552(G).

Thus, the EPM limiting early ballot challenges to when the early ballot is opened is not just a practical necessity, but a statutory one. EPM at 79. Reading the entire statutory section to the end makes this clear: opening an early ballot envelope marks the point at which the time for a challenge has passed because the procedures in A.R.S. § 16-552(G) can no longer be followed.

Limiting early ballot challenges to after the recorder has received the early ballot is also

statutorily required. Subsection (D) allows for early ballot challenges "on any grounds set forth in [§] 16-591." The grounds in A.R.S. § 16-591 are limited to "challeng[ing] a person offering to vote as not qualified under [§] 16-121.01 or on the ground that the person has voted before at that election." Until the county recorder receives an early ballot, neither challenge under A.R.S. § 16-591 is possible because the person has not yet "offer[ed] to vote" or attempted to allegedly vote multiple times. Plaintiffs' claim again ignores relevant statutory language and thus fails.

8. Count IX (out-of-precinct voting). A.R.S. § 16-122 provides that "[n]o person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register or list of the precinct and election districts or proposed election districts in which such person resides, except as provided in sections 16-125, 16-135 and 16-584." There is no requirement that the voter's name also appear in the precinct register of the precinct where the person *presents* to vote. *Brnovich v. Democratic National Committee* was about whether restrictions on out-of-precinct voting violate the Voting Rights Act and the Fifteenth Amendment; its statements about out-of-precinct voting were dicta and relied on different language from a prior EPM. *See* 141 S.Ct. 2321, 2334–36 (2021). *Pacuilla v. Cochise Cnty. Bd. of Supervisors* was about "whether registered voters in Cochise County, who have moved their residences within the county but have failed to re-register at their new addresses, are qualified electors for the purpose of signing a nomination petition." 186 Ariz. 367, 367–68 (1996). The "interests" precinct-based voting "advances" (Resp. at 27) are irrelevant; the text controls. The text requires only that the person's name appear on the county register and the precinct register of the precinct where the person resides, not that it also appear on the list of the precinct where the person presents to vote.

Conclusion

For the foregoing reasons, the Court should grant the Motion to Dismiss.

Dated: April 22, 2024

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