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**Admitted Pro Hac Vice*

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

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

and

ARIZONA ALLIANCE FOR RETIRED AMERICANS, VOTO LATINO, DEMOCRATIC NATIONAL COMMITTEE, and ARIZONA DEMOCRATIC PARTY

Intervenor-Defendants

INTRODUCTION

Plaintiffs fail to explain why in fifty-two years *no one* has suggested that the Arizona Administrative Procedure Act ("APA") applies to the EPM—not the Legislature, which created a separate statute governing the EPM's enactment and has repeatedly amended that statute without addressing any purported failure to follow the APA; not the nearly three dozen Secretaries of State, Attorneys General, and Governors who have signed off on previous versions of the EPM; not the hundreds of local elections officials who rely on the Secretary's guidance; not the courts of this State, which have frequently been called on to resolve EPM-related disputes; and not Plaintiffs themselves, *who participated in the public comment period for the 2023 EPM without ever even mentioning the APA*. Yet Plaintiffs now claim—without meaningful support—that scores of Arizona elections have been conducted under the guidance of invalid EPMs because, all along, the Secretary was required to follow the APA. This is wrong. And, even *if* the EPM were subject to the APA, Plaintiffs fail to prove that the purported technical deviations from the APA process that result from the Secretary following the statutory procedure specifically created by the Legislature for enactment of the EPM require throwing out the 2023 EPM in its entirety. Nor do they allege any way in which the procedures used across five decades of consistent practice to adopt EPMs have prejudiced Plaintiffs or anyone else. Only underscoring how illogical Plaintiffs' claims are, as a remedy, they demand reinstatement of a previous version of the EPM that was enacted under the same allegedly illegal process. That demand makes clear: Plaintiffs simply do not like this version of the EPM and seek to return to the previous version by any means necessary. But Plaintiffs' policy preference for a former EPM is not

sufficient even to confer standing, let alone to upend the settled understanding that A.R.S. Section 16-452 alone establishes the process for issuing the EPM.

As for their remaining eight counts (II through IX) challenging individual EPM provisions, Plaintiffs do not even respond to arguments that they lack standing to assert those claims; the Court should dismiss these counts on that basis alone. Plaintiffs' arguments on the merits fare no better. Across contexts ranging from early ballot challenges to citizenship verification procedures to access to confidential voter signatures, Plaintiffs challenge election rules they dislike on grounds foreclosed by the statutes themselves, U.S. Supreme Court precedent, preemptive federal statutes, other provisions of Arizona law, or common sense, and, in response to the motions to dismiss, largely double down on their bare assertions of illegality without more. Plaintiffs repeatedly fall short of the high bar required to invalidate EPM provisions, never identifying a conflict between the EPM and statute (but for a lone instance where a statute is preempted by federal law).

Because Plaintiffs lack standing and fail to state a claim upon which the sweeping and unprecedented relief they seek may be granted, the Court should dismiss the case.

ARGUMENT

I. Plaintiffs lack standing.

As explained in Intervenors Arizona Alliance for Retired Americans and Voto Latino's ("Civic Organization Intervenors") motion to dismiss, Plaintiffs' lawsuit fails at the outset, because they identify no injury to any plaintiff, much less a "distinct and palpable injury" sufficient for standing. *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998). Plaintiffs gloss over this fatal issue, claiming "the Court need not spend much time" determining whether Plaintiffs have standing to completely upend Arizona election administration. Pls.' Consol. Reply in Supp. of Mot. for Prelim. Inj. & Resp. in Opp'n to Def. Sec'y of State's & Intervenor-Defs.' Mots. to Dismiss ("Opp.") at 28. Not so. Standing is a "rigorous" threshold requirement that must be satisfied before the Court can reach the merits. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005); *see also Sears*, 192 Ariz. at 68 ¶ 9. It is precisely because, as Plaintiffs point out, Opp. at 28, the Arizona

Constitution "does not contain a 'case or controversy' provision analogous to that of the federal constitution," that the injury "requirement is important" for standing, *Burks v. City of Maricopa*, No. 2 CA-CV 2017-0177, 2018 WL 3455691, at *2 (Ariz. Ct. App. July 16, 2018) (first quoting *Sears*, 192 Ariz. 65 ¶ 24; and then citing *Bennett v. Napolitano*, 206 Ariz. 520, 525–26 ¶¶ 17–19 (2003)). Simply put, because Plaintiffs identify no injury to them stemming from how the EPM was enacted or any of the individual challenged provisions, their claims must be dismissed.

As for Count I, Plaintiffs premise their standing on the mere fact that they are political entities that promote Republican candidates and represent registered voters in Arizona. Opp. at 29. Plaintiffs' theory is that, simply by being political entities, they may challenge the EPM because it regulates elections, asserting that nothing more is required. *Id.* But Plaintiffs must show that they suffered an injury "caused *by the complained-of conduct*." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 ¶ 8 (App. 2008) (emphasis added); *see Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224 ¶ 18 (2022) (noting it is not sufficient for standing to "merely assert[] an interest" in a policy). In other words, Plaintiffs must have been affected by the purportedly unlawful procedure by which the EPM was enacted—but they allege no such thing. Nor do they ever suggest the EPM would have been different with a longer comment period or even that they would have submitted additional comments. *See* Civic Organization Intervenors' Consol. Mot. to Dismiss & Opp. to Mot. Prelim. Inj. ("MTD") at 6.[1]

At bottom, Plaintiffs' claim that the EPM "was not issued in accordance with the APA," Opp. at 29, is a textbook generalized grievance that is "not sufficient to confer standing," *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88 ¶ 11 (App. 2023) (quoting *Sears*, 192 Ariz. at 69 ¶ 16); *cf. Lance v. Coffman*, 549 U.S. 437,

[1] Plaintiffs' passing citation to *Arizona Public Integrity Alliance v. Fontes*, Opp. at 29, is misplaced because *AZPIA* was a mandamus action, which requires a "more relaxed standard for standing" under Arizona law. *See* 250 Ariz. 58, 62 ¶ 11 (2020) ("*AZPIA*"). Because Plaintiffs did not (and could not) bring a mandamus action, that relaxed standard does not apply and *AZPIA* is inapposite.

442 (2007) (noting "that the law . . . has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that cannot confer standing). And contrary to Plaintiffs' claim otherwise, Opp. at 29, *Mecinas v. Hobbs* does not support Plaintiffs here because it is not enough to assert a "broad interest" against an allegedly "illegally structured competitive environment." 30 F.4th 890, 897 (2022) (cleaned up). To sufficiently allege competitive standing under federal law, Plaintiffs must show that "allegedly unlawful election regulation *makes the competitive landscape worse* for [their] party[.]" *Id.* at 898 (emphasis added). Plaintiffs have alleged nothing of the sort, much less any other injury stemming from the EPM's enactment process or any of the specific challenged provisions. The Court should thus dismiss Count I for lack of standing.

As for Counts II and IX, Plaintiffs do not contest Civic Organization Intervenors' arguments that they have not been injured by any of the individual EPM provisions challenged there. S*ee* Opp. at 29 ("[T]his case [] primarily seeks a declaration that the 2023 EPM is invalid . . . because it was not issued in accordance with the APA."); *see generally* Opp. (identifying no injury or any effect on Plaintiffs from any of the individual challenged provisions). Accordingly, the Court may find that Plaintiffs have conceded any arguments on this point and dismiss Count II through IX. *See State v. Chopra*, 241 Ariz. 353, 354 ¶ 5 (App. 2016) (noting a party's failure to respond to an argument may be regarded as a concession to the proponent's claim); *see also Schuoler v. Napier*, No. 2 CA-CV 2017-0022, 2018 WL 1179447, at *4 n. 8 (Ariz. Ct. App. Mar. 6, 2018) (finding party conceded an issue by failing to respond to argument). In any event, Plaintiffs similarly fail to assert that they are injured or affected by any of the individual provisions challenged in Counts II through IX. Thus, for the same reasons Count I must be dismissed for lack of standing, so should the remaining Counts. MTD at 6.

II. Plaintiffs fail to state a claim upon which relief may be granted.

A. Count I should be dismissed.

In their response brief, Plaintiffs repeatedly fail to meaningfully respond to Civic Organization Intervenors' core APA arguments and instead either misrepresent or ignore

the multiple bases on which Count I should be dismissed. In the end, nothing in Plaintiffs' response provides reason to find that they have stated a cognizable claim. If the Court reaches the merits, Count I should be dismissed for failure to state a claim.

First, Plaintiffs fail to confront the fact that no one—including the Arizona Supreme Court and the Legislature—has ever even indicated that the EPM might be subject to the APA. Plaintiffs recount the history of the EPM and its promulgating statutes, Opp. at 3–5, but never explain why any of that supports Plaintiffs' novel theory that the EPM is invalid if not promulgated according to the APA. And Plaintiffs admit that, over the past several decades, the Legislature has "regularly expanded the scope of the secretary's rulemaking authority under the EPM statute" and "in other statutory provisions as well," Opp. at 4, without ever once suggesting that the enactment process consistently followed throughout this period was in any way improper. As the Arizona Supreme Court has explained, the "specific procedure" that the Secretary "must follow . . . in promulgating election rules," is enshrined in Section 16-452, and once that process is complete, "the EPM has the force of law." *AZPIA*, 250 Ariz. at 63 ¶ 16. Nothing more is required. *See* MTD at 8; *see also* A.R.S. § 41-1030(A) (rule is invalid "unless otherwise provided by law"). It is implausible that the Legislature intended the APA to govern the EPM's enactment but sat silent for generations while that requirement was ignored, despite repeatedly amending the EPM's governing statutes.

Second, Plaintiffs ignore Civic Organization Intervenors' argument that the statutory process in Section 16-452 substantially complies with the APA. *See* MTD at 8–10; Opp. at 11. Plaintiffs admit that "[a]ll that is surely required" for compliance is advance publication of the EPM and a 30-day comment period.[2] Opp. at 10 n.3. Section 16-452 does not require

[2] Plaintiffs acknowledge that an oral proceeding is necessary under the APA only when requested, *see* Opp. at 10 n.3, but have not alleged that they (or anyone else) requested such a proceeding. They also note that the APA may require a public rulemaking record, *id.* at 11, but they have not identified how that record would differ from the comprehensive information available on the Secretary's website. Similarly, they observe that rules subject to the APA are published in a specific register, *id.*, but they do not claim that publication

these *exact* procedures, but it does not need to: the APA does not mandate strict compliance for a rule to be valid; only "substantial compliance" is required. A.R.S. § 41-1030(A). As Civic Organization Intervenors explained, while there is no Arizona case law on what substantial compliance means for the APA, case law in analogous contexts indicates that the process followed for the EPM substantially complies with the APA because it satisfied "the purpose[s] of the [APA's] requirements," *Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶ 14 (2005), which is "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.*, 182 Ariz. 221, 226 (App. 1994). Plaintiffs offer no response or competing framework for evaluating substantial compliance. MTD at 11.

In fact, the EPM's enactment process contained sufficient equivalents to the APA procedures. A draft EPM was made publicly available by the Secretary five months before it was issued, providing a notice period far more generous than the APA's 30-day requirement. The draft reflected input from local election officials and was subject to two weeks of public comment, with all comments retained and available on the Secretary's website, substantially complying with the APA's public input and record-keeping requirement. And the EPM only went into effect after approval from both the Attorney General and the Governor, providing greater protection against administrative excess. Plaintiffs tellingly cite *no* authority suggesting that a rule adopted through a process designed by the Legislature that provides both election officials and the public with "adequate notice" and "the opportunity for input," *Carondelet Health Servs.*, 182 Ariz. at 226, satisfying the purposes of the APA, can still be struck down because it does not technically or strictly comply with every single provision of the APA. To the contrary, the case law is clear that "substantial compliance means that the [challenged action] fulfills the

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on the Secretary's publicly accessible government website was insufficient to provide notice to them or anyone else.

purposes of the relevant statutory or constitutional requirements, *despite* a lack of strict or technical compliance." *Feldmeier*, 211 Ariz. at 447 ¶ 14 (emphasis added).

Third, the source that Plaintiffs rely on to rebut the argument that the Governor's role in approving the EPM suggests legislative intent to keep the EPM outside of the APA process in fact shows that the framework in Section 16-452 is not subject to the APA. Opp. at 9–10. It is true that, in 1979, the then-Attorney General observed that the fact that some rules "are subject to the Governor's approval does not" in itself "excuse them from compliance with the APA." *Id.* at Ex. 1 at 7. But Plaintiffs' selective quoting of that Attorney General opinion omits the very next sentence: "[I]f the Legislature had intended to exempt these rules from the APA, *it would have done so specifically by establishing an alternative procedure*." *Id.* (emphasis added). That is precisely what the Legislature provided for the EPM—Section 16-452's comprehensive alternative procedure, which includes a robust role for the Governor, the Attorney General, and other key stakeholders like county election officials, demonstrates that the Legislature intended a separate statutory process not subject to the APA.

Fourth, Plaintiffs misconstrue Civic Organization Intervenors' waiver argument. Plaintiffs did not waive their APA claim by waiting until the EPM was finalized to file suit, Opp. at 16; Plaintiffs waived their APA claim by submitting public comments (including a request for the 30-day comment period they now claim is required by law) without asserting that the EPM was subject to the APA. They could have and should have raised this grievance during the EPM process itself, when the Secretary could have adjusted course if necessary. Instead, Plaintiffs lay in wait until they believed "it would be impossible for the Secretary to adopt the same, or substantially the same EPM on remand." Opp. at 13. *Cf.* Sec'y of State's Consol. Mot. to Dismiss and Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. at 11 ("The laches doctrine "seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." (quoting *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006))). Plaintiffs' failure to identify the EPM's purported APA deficiency in their comments is inconsistent with asserting such

a deficiency at this late date. *See* Mot. at 8 n.6; *cf. Appalachian Power Co. v. E.P.A.*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) ("It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue." (cleaned up)). It would be fundamentally unfair and prejudicial to election officials and the public alike to allow Plaintiffs to sow chaos in Arizona elections when they had the opportunity to raise any purported APA deficiencies during the public comment period and chose not to do so.

Finally, Plaintiffs provide no support for their contention that if the Court determines that the APA applies, the only remedy is to vacate the 2023 EPM and reinstate the 2019 EPM. Contrary to their claims, Opp. at 12–13, analogous federal caselaw applying remand without vacatur is not rooted in distinguishable federal APA's rulemaking standards; in fact, the federal APA, similar to Arizona's APA, directs courts to "hold unlawful and set aside agency action" that does not follow the proper procedures. 5 U.S.C. § 706(2). Yet federal courts have determined that remand without vacatur is an appropriate equitable remedy when non-compliance is minor and the potential for disruption is significant. *See Migrant Clinicians Network v. E.P.A.*, 88 F.4th 830, 847 (9th Cir. 2023) ("The traditional remedy for erroneous administrative decisions is vacatur, but we will leave invalid agency action in place when equity demands that we do so." (cleaned up)). This is just such a situation. Plaintiffs' APA complaint boils down to the claim that the Secretary provided public notice in the wrong way and allowed two weeks instead of four weeks for public comment. If those were errors at all, they were minor ones; so minor that Plaintiffs have been unable to articulate any way in which they prejudiced anyone. The disruptive consequences of throwing out the 2023 EPM—which has already been implemented—would be severe and would not address any APA violation; it would simply replace the allegedly procedurally invalid 2023 EPM with the procedurally equivalent 2019 EPM. Under these circumstances, the most reasonable remedy (if the Court determines that the EPM was promulgated in

violation of the APA) would be to keep the current EPM in place until a compliant EPM can be issued.[3]

B. Count II should be dismissed.

Plaintiffs' Count II asserts that the EPM unlawfully requires county recorders to confirm lack of citizenship before initiating registration cancellation procedures because the voter is not a United States citizen. Opp. at 17. But because the plain text of the statute requires exactly this multi-step process, and the EPM instructs recorders on *how* to confirm lack of citizenship, Plaintiffs have identified no cognizable conflict. Plaintiffs' arguments to the contrary would read the confirmation step out of the statute.

Plaintiffs erroneously claim that the request for documentary proof of citizenship ("DPOC") issued *after* a county recorder confirms lack of citizenship—a letter putting a voter on notice that unless they provide DPOC within 35 days, their registration will be cancelled—is the exclusive mechanism by which the statute envisions the first step of "confirm[ing] that the person registered is not a United States citizen." *See* Opp. at 17–18; A.R.S. § 16-165(A)(10). Even a cursory reading of the statute confirms that Plaintiffs' strained interpretation depends on striking the "confirm[ation]" step out of the statute. *See* MTD at 14–15. The immediately preceding subsection governing cancellations based on changes in county residence, Section 16-165(A)(9)(B), mandates an identical document request as part of cancellation *but does not* contain a separate instruction to "confirm" that the voter in question is not a resident of the county.

Because the Court is "required to give effect to all parts of a statute," *State v. Digeno*, 251 Ariz. 549, 553 ¶ 20 (App. 2021), the Legislature's inclusion of the words "and confirms

[3] Plaintiffs cite no support for the argument that the Court could not order a remedial EPM procedure because of statutory deadlines. The Arizona Supreme Court in fact has rejected a similar argument, holding that where an agency initially but unlawfully acted within a deadline, the remedy was to order a compliant procedure rather than to reinstate a prior decision. *See Horne v. Polk*, 242 Ariz. 226, 234 ¶ 29 (2017) ("Appellants argue that because there was no 'valid' decision by the agency head'" within the prescribed statutory deadline "we should reinstate [a prior] decision . . . We disagree. The agency head took action within the deadline.").

that the person registered is not a United States citizen" in Section 16-165(A)(10) requires some additional confirmation separate from sending a request for DPOC. *See also Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *20 (D. Ariz. Feb. 29, 2024) ("*Mi Familia Vota II*") (noting "only if a county recorder 'confirms' a voter is a non-citizen must that voter produce DPOC within 35 days to avoid having her registration cancelled"). While Plaintiffs may not like the method of confirmation used, Opp. at 18, they fail to carry their burden to establish any conflict between the EPM and statute that would compel invalidation of the EPM provision. *See* MTD at 15; A.R.S. § 16-452(A); *see also Mi Familia Vota II*, 2024 WL 862406, at *13 (noting Section 16-165 does "not specifically describe how county recorders are to 'obtain' or 'confirm' information that a voter is a non-citizen, but the 2023 EPM provides some additional guidance").

Plaintiffs next misread other parts of the statute, suggesting that it never requires confirmatory steps before cancellation in other contexts, Opp. at 18–19, but even a cursory reading again confirms that Section 16-165 repeatedly requires additional verifications prior to cancellation in other circumstances—particularly where information that a voter may be ineligible is not definitive. For instance, Plaintiffs are squarely wrong in claiming that cancellations for deceased voters are automatic, Opp. at 19 n.6; rather, when a county recorder "is informed" that a voter has died, the recorder must "confirm[]" that fact before cancellation. A.R.S. § 16-165(A)(2). Like with citizenship, the EPM again provides the confirmation mechanism. *See* 2023 EPM at 37 (describing matching procedure to confirm individual is deceased before removal). The same is true when a recorder receives information that a person has registered to vote in another Arizona county; in that case, "the county recorder shall confirm the person's voter registration with that other county" and cancel registration only "on confirmation." A.R.S. § 16-165(B). In contrast, where a voter's ineligibility is demonstrated definitively—for example, after a formal adjudication of incapacity, *id*. § 16-165(A)(3), criminal conviction, *id*. § 16-165 (A)(4), or court order, *id*. § 16-165 (A)(5)—the statute requires no further confirmatory steps. While Plaintiffs may consider it "absurd[]" that the Legislature required counties to confirm lack of citizenship

before initiating cancellations based on jury reports, Opp. at 19, that choice belongs to the Legislature. *See Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 515 ¶ 20 (2021) (holding that a court's "goal in statutory interpretation is to effectuate the legislature's intent").[4]

In sum, because Plaintiffs have identified no actual conflict between the EPM and Arizona statute, the Court should dismiss Count II. *Cf. Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022) (holding that EPM lacks force of law only where it "contradicts" state law).

C. Counts III and IV should be dismissed.

Counts III and IV should be dismissed because Plaintiffs concede that the statute they seek to enforce in both counts—Section 16-127—is preempted by the National Voter Registration Act (NVRA). Opp. at 19–20 (citing *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307 (D. Ariz. Sept. 14, 2023)). Indeed, Plaintiffs do not even suggest Count IV withstands Defendant and Intervenors' motions to dismiss. *See id.* at 21 n.8. The Court should dismiss both Counts on this basis alone.[5]

Plaintiffs claim, however, that *Mi Familia Vota* does not preclude Count III because that federal court order applies to only "presidential elections," which Plaintiffs contend

[4] Plaintiffs' hypothetical of a voter who has previously registered to vote and provided DPOC and then renounced their citizenship is a red herring. The odds of this scenario are vanishingly small: It would require a person who has obtained U.S. citizenship to make an in-person visit to a U.S. embassy abroad, undergo two interviews, submit extensive paperwork, pay a fee of $2,350, and obtain approval by the State Department to renounce their citizenship, only for that individual to then apply for and obtain a visa allowing their return to the United States and then be summoned for jury duty. *See* U.S. Dep't of State, *Relinquishing U.S. Nationality Abroad*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Relinquishing-US-Nationality-Abroad.html (last visited Apr. 22, 2024).

[5] Plaintiffs' arguments against Count III are further belied by their concession that *Mi Familiar Vota* forecloses Count IV. *See* Opp. at 21 n.8. Count IV challenges the mailing of ballots to federal only voters—without drawing any distinction between general federal elections and PPE. Plaintiffs do not, and cannot, explain how the NVRA could preempt conduct as to the PPE in that context but not when it comes to Count III. As such, Plaintiffs' admission that *Mi Familia Vota* and the NVRA forecloses Count IV also dooms Count III.

Arizona's presidential preference election ("PPE") is not.[6] Opp. at 20. Neither *Mi Familia Vota* nor the NVRA draw the distinction Plaintiffs wish they did. The NVRA, by its own terms, applies to primaries, including the PPE. The NVRA regulates "election[s]" for federal office, 52 U.S.C. § 20502(1), which the NVRA defines to include "a primary election held for the expression of a preference for the nomination of individuals for election to the office of President," *id*. § 30101(1)(D). The PPE is just such an election, so it too is governed by the NVRA; the law could not be clearer. Because the NVRA defines elections to include presidential primaries, it is unremarkable that *Mi Familia Vota* did not separately discuss the PPE. Indeed, the court made clear that "[t]he plain language of the NVRA reflects an intent to regulate *all* elections for '[f]ederal office,' including for 'President or Vice President.'" *Mi Familia Vota*, 2023 WL 8181307 at *6 (emphasis added) (alterations in original) (quoting 52 U.S.C. §§ 20507(a), 30101(3)). Both the plain language of the NVRA and *Mi Familia Vota* thus make clear Section 16-127 is preempted as to all presidential elections, including the PPE.

Faced with the NVRA's unambiguous definitions and federal court precedent, Plaintiffs resort to egregious misstatements of law, claiming that Congress lacks the constitutional authority to regulate presidential primaries. *See* Opp. at 20 ("[T]he NVRA, and any federal legislation for that matter, do not apply to presidential primaries because Congress has no authority to regulate the conduct of presidential primary elections."). But that argument has been foreclosed by the United States Supreme Court. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 90, 96 (1976) (per curiam) ("Congress has power to regulate Presidential elections and primaries[.]"); *see also Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) ("The broad power given to Congress over congressional elections has been extended to presidential elections."); *Fish v. Kobach*, 840 F.3d 710, 719 n.7 (10th Cir.

[6] Plaintiffs' argument on this point is self-defeating in another way. Section 16-127(A)(1), even if it were enforceable, purports to declare federal-only voters "not eligible to vote in presidential elections." If "presidential elections" do not encompass the PPE, as Plaintiffs claim, then the EPM's provisions concerning federal-only voting in the PPE cannot conflict with Section 16-127, which by Plaintiffs' logic cannot apply to that election.

2016) ("The NVRA, by relying on the definitions of federal campaign finance law, applies expressly to all federal general and primary elections, including presidential elections."); *Mi Familia Vota*, 2023 WL 8181307 at *6–7 (discussing Congressional power to regulate presidential elections). Because binding precedent establishes that Congress has the power to regulate presidential elections, Plaintiffs' constitutional challenge fails.

The Court should thus decline Plaintiffs' invitation to enforce a preempted statute and dismiss Counts III and IV.

D. Count V should be dismissed.

There appears to be no actual disagreement between the parties as to Count V, which challenges EPM guidance about which databases county recorders must review when conducting voter list maintenance. As Plaintiffs acknowledge, the statutory "duties" to verify certain databases apply only "to the extent practicable"—in other words, these duties are conditional, not absolute. Opp. at 21 (citing A.R.S. §§ 16-165, 16-121.01(D)). The EPM reflects this reality: those databases are not accessible, so checking them is not "practicable." *See* EPM at 43. Because the statutory duties in question are conditional, and all parties agree that the conditions for their implementation are not met, there is no statutory violation alleged in Count V, and it should be dismissed.

Plaintiffs attempt to manufacture a conflict where none exists, asserting that the EPM "convert[s] a conditional duty under statute into no duty at all" because the EPM purportedly does not account for the possibility that currently inaccessible databases might become available in the future. *See* Opp. at 23. The text of the challenged EPM provision negates Plaintiffs' obfuscation: it clearly explains that "because the obligation to check databases applies only when County recorders have access" there is "*currently* . . . no obligation to check these databases." EPM at 13 (emphasis added). Plaintiffs agree, conceding "the current unavailability of these databases to county recorders." Opp. at 21. Accordingly, the EPM by its plain terms reflects only "current" reality and does not purport to permanently excuse county recorders from any statutory duty. There is thus no conflict between the EPM and Arizona law, and Count V should be dismissed.

E. Count VI should be dismissed.

Plaintiffs' claim that Section 16-168(F) authorizes unfettered public access to voter signatures relies on grammatical sleight of hand. It is plain from the face of the statute that the term "election purposes" does not create a standalone right of access to the public as Plaintiffs posit but rather identifies one of two purposes for which *the media* can access voter signatures. A.R.S. § 16-168(F) (authorizing access to records containing voter signatures "for election purposes and for news gathering purposes by a person" engaged in the media). Plaintiffs' only counterargument misunderstands Civic Organization Intervenors' argument and basic rules of grammar, *see* MTD at 18–19, making much out of whether Oxford commas are customary in American English and noting that the statute does not contain one, Opp. at 24–25. This discussion is a distraction because Plaintiffs' interpretation does not turn on the presence or absence of an Oxford comma.

After listing several other exceptions to the general rule against disclosing signatures, Section 16-168 states that signatures may be accessed "for election purposes and for news gathering purposes by a person engaged in a newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station or pursuant to a court order." Oxford commas are used to separate the last item in a list. The comma that is required for the statute to read the way Plaintiffs want—"for election purposes**,** and for news gathering purposes"—would not be an Oxford comma, but just another comma that does not exist. Indeed, Plaintiffs' proposed interpretation is incongruous; if "election purposes" were the penultimate item in Section 16-168's list such that the lack of a comma could be excused then only reporters could access voter signatures pursuant to a court order. The lack of a comma after "for election purposes" is meaningful for the statute's interpretation because it indicates that reporters alone, rather than the public at large, can access voter signatures "for election purposes." *See Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309, 311 (App. 2013) ("The plain meaning of a statute 'will typically heed the commands of its punctuation.'" (cleaned up)).

Plaintiffs' proposed interpretation also contradicts the Legislature's narrowly

circumscribed access to voter signatures. Had the Legislature wanted to grant the public expansive access to private voter information, it would not have hidden its intention in this exceedingly narrow part of an already narrow statute. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (explaining that legislatures do not "hide elephants in mouseholes"). The better reading is to carry out the Legislature's intent to limit access to sensitive voter information and voter signatures specifically. *See Primary Consultants, L.L.C. v. Maricopa Cnty. Recorder*, 210 Ariz. 393, 396–97 ¶ 10(App. 2005) ("Even when access is available to voter registration information for authorized uses, the records must be redacted to preclude the disclosure of certain personal identifying information, such as social security numbers *and voter signatures*." (emphasis added)).[7]

Finally, contrary to Plaintiffs' assertion otherwise, Civic Organization Intervenors have not "concede[d]" anything concerning the EPM's use of the singular "signature." Opp. at 24. The EPM, like Section 16-168(F) and the rest of Arizona election law, uses the phrase "the registrant's signature" to refer to multiple documents that a voter has signed. *See, e.g.*, A.R.S. § 16-550(A); *see also* A.R.S. § 1-214(B) ("Words in the singular number include the plural."). That drafting choice has no substantive impact, and is neither an independent basis for denying access to a signature nor an argument for broadening such access like Plaintiffs seek. *See* MTD at 19. Accordingly, Count VI should be dismissed.

F. Count VII should be dismissed.

Plaintiffs offer no response, *see* Opp. at 25, to the several arguments against their spurious reading of Section 16-544(B), *see, e.g.*, MTD at 19–20, which claims that voters who are on the state's active early voting list ("AEVL") cannot receive ballots outside the state. But as Plaintiffs concede, that statute prohibits only permanently "list[ing]" an out-of-state mailing address "for the purpose of the active early voting list," Opp. at 25, which

[7] The conclusion that Arizona law does not currently provide public access to voter signatures is further evidenced by unsuccessful legislation to grant the broad public access to voter signatures Plaintiffs seek here. *See, e.g.*, H.B. 2469, 56th Leg., 2d Reg. Sess. (Ariz. 2024) (proposing to establish that "a voter's signature on the voter's registration record and a voter's signature on an early ballot affidavit are public records and may be requested by any candidate or other person").

allows voters to automatically receive an early ballot for every election in which they are eligible to vote. In line with statute, the EPM too forbids this. *See* EPM at 59 (voters "may not request that ballots be automatically sent to an out-of-state address for each election"). Instead, the EPM allows something the statute does not regulate and other Arizona law authorizes: Voters on the AEVL, like all other Arizonans, may make a one-off request that their ballot be sent out of state for a particular election. *See* A.R.S. § 16-542. Doing so creates no conflict with Section 16-544(B) for the simple reason that one-off requests are not "list[ing] a mailing address . . . for the purpose of the active early voting list" A.R.S. § 16-544(B). Plaintiffs also cannot support their absurd interpretation under which a voter who is *not* on the AEVL could request an early ballot be sent outside the state, but a voter who *is* on the AEVL could not. That result is not just "inconvenient," Opp. at 25, it is sufficiently illogical to prove that Plaintiffs' reading is wrong. *See State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 101 ¶ 13 (2014) ("Statutes should be construed sensibly to avoid reaching an absurd conclusion."). As Count VII identifies no conflict between statute and the EPM, it should be dismissed.

G. Count VIII should be dismissed.

In Count VIII, Plaintiffs demand the Court strike down the EPM's guidance on the timing of early ballot challenges by plucking a phrase out of context and proposing an interpretation that is both contradicted by the statute itself and practically impossible. Plaintiffs concede that Defendant and Intervenors' interpretation of the statute is "in keeping with the practical realities of challenging ballots," Opp. at 25, because such challenges cannot occur before a county recorder has custody of an early ballot. Instead, Plaintiffs make the unremarkable observation that Section 16-552 does not "expressly permit the denial of challenges" before a ballot has been submitted. *Id*. But the statute lacks such a statement for the obvious reason that there is no mechanism for such challenges at all. A.R.S. § 16-552(D); *see* MTD at 21. The statute details a procedure for early ballot challenges that can only occur after a ballot is in the possession of a county recorder. MTD at 21 (citing A.R.S. § 16-552(D), (F) and (G)). As just one example, if a ballot is not yet in

the county's possession, there is no way for it to "be set aside and retained in the possession of the early election board" while a challenge is adjudicated. A.R.S. § 16-552(D); *see Pinal Vista Properties, L.L.C. v. Turnbull*, 208 Ariz. 188, 190 ¶ 10 (App. 2004) ("[E]ach word or phrase of a statute must be given meaning so that no part is rendered void, superfluous, contradictory or insignificant."). Because the statute clearly provides no mechanism for challenges before counties conduct "early ballot processing," A.R.S. § 16-552(D), the Court should decline to create such a process out of whole cloth and adhere to the "basic principle that courts will not read into a statute something which is not . . . indicated by the statute itself." *Town of Scottsdale v. State ex rel. Pickrell*, 98 Ariz. 382, 386 (1965).

The same procedural impossibility occurs if the ballot has been opened—the statutory challenge process could not occur. *See* MTD at 22. Moreover, Plaintiffs' hypothetical, in which a ballot is challenged after it has been opened but before it has been separated, Opp. at 25–26, raises troubling implications about ballot secrecy: such a ballot would be adjudicated while it would be possible to determine the contents of the ballot before deciding whether to allow the vote, thereby jeopardizing the constitutional requirement "that secrecy in voting shall be preserved." Ariz. Const. art. 7, § 1.

Because Plaintiffs have identified no conflict between the EPM and statute, the Court should dismiss Count VIII.

H. Count IX should be dismissed.

In defending Count IX, Plaintiffs change the basis for their challenge, but to no avail; it must still be dismissed because Plaintiffs remain unable to identify a conflict between Arizona law and the EPM. In their complaint and motion for preliminary injunction, Plaintiffs argued that the EPM permits votes cast in the wrong precinct to be counted, in purported violation of A.R.S. Section 16-122. *See* Compl. ¶ 102; Mot. for Prelim. Inj. at 15-16. After Defendant and Intervenors pointed out that the plain text of Section 16-122 requires that a voter be listed on the register for the precinct "in which such person *resides*" for their vote to be counted—rather than the precinct in which the voter *votes*, as Plaintiffs would prefer, *see, e.g.*, MTD at 23 (emphasis added)—Plaintiffs transformed their claim,

now arguing that the EPM somehow "eliminate[s] precinct-based voting" because it requires that election officials provide voters who do not appear in a precinct register with a provisional ballot in the ballot style for their proper precinct. Opp. at 26–27. Under each of Plaintiffs' theories, their claim fails for the same reason: they identify no Arizona statute that conflicts with the Secretary's instruction that counties using a precinct model should provide voters with a provisional ballot in the correct style for that voter. *See id*. at 26–28. Because, as Plaintiffs concede, an EPM provision is "void" only if it "directly conflicts with the express and mandatory [statutory] provisions," *id*. at 26–27 (citing *Ariz. All. For Retired Ams., Inc. v. Crosby*, 537 P.3d 818, 823–24 (Ariz. App. 2023)), Count IX should be dismissed.

Ignoring the text of the statute, Plaintiffs claim that Section 16-122 is "well understood" to require voters to vote in their own precincts, which somehow means that the Secretary cannot instruct counties to provide voters with their correct ballot styles. Opp. at 27.[8] But none of the "prior interpretations" that Plaintiffs cite hold that Arizona law prohibits provision of the correct ballot to a voter who inadvertently arrive at the wrong precinct but is otherwise qualified to vote or mandates that these voters be provided with the wrong ballot. *See id*. at 26–27. Plaintiffs instead combat a strawman, arguing the Court should not allow the Secretary "to effect a sea change" by "eliminat[ing] precinct based voting." *Id*. at 27. But the EPM plainly does not eliminate precinct-based voting or force any county to adopt a voting center model. *See generally* EPM. Indeed, the challenged EPM provision itself requires voters casting a provisional ballot to sign an affidavit attesting to the statement "I understand that voting in the wrong ballot style in the wrong precinct means that my ballot will not be counted," EPM at 165—hardly an elimination of the precinct system or any of its claimed benefits, Opp. at 27.

Finally, Plaintiffs completely fail to address the fact that their requested relief would

[8] Plaintiffs fail to explain why the Court should adhere to settled understanding and prior interpretations that support their desired outcome to throw out votes purportedly cast in the wrong precinct but ignore those same considerations with respect to the settled process for promulgating the EPM itself, *see supra* II.A.

conflict with the federal Help America Vote Act (HAVA). As explained by Civic Organization Intervenors and the Secretary, *see, e.g.*, MTD at 23, rejecting ballots cast by eligible voters simply because a voter appeared at the wrong precinct would violate HAVA, which requires states to allow voters to have provisional ballots counted so long as they are "eligible under State law to vote." 52 U.S.C. § 21082(a)(4). Since nothing in Arizona law conditions voter eligibility on voting at a specific precinct, HAVA requires such votes to be counted. Federal law thus provides an additional basis for dismissing Count IX.

CONCLUSION

For these reasons, Defendant and Intervenors' motions to dismiss should be granted and the complaint dismissed with prejudice.

RESPECTFULLY SUBMITTED this 22nd day of April, 2024.

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