

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2024-050553

05/10/2024

HONORABLE FRANK W. MOSKOWITZ

CLERK OF THE COURT  
S. Motzer  
Deputy

REPUBLICAN NATIONAL COMMITTEE, et al. KURT MICHAEL ALTMAN

v.

ADRIAN FONTES

KAREN HARTMAN-TELLEZ

DAVID ANDREW GAONA  
ROY HERRERA  
JUDGE MOSKOWITZ

MINUTE ENTRY

Pending before the Court is Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Motion"). It is fully briefed. Also pending before the Court are the Motions to Dismiss filed by Defendant and the Intervenor Defendants (collectively "Defendants"). These Motions to Dismiss ("Defendants' Motions") are also fully briefed. Oral argument was held on May 3, 2024.

Plaintiffs seek "a preliminary injunction prohibiting the implementation or enforcement of the 2023 Elections Procedures Manual (2023 EPM) based on the Secretary of State's failure to substantially comply with the Arizona Administrative Procedure Act (APA)..." [Plaintiffs' Motion, at p. 2] Alternatively, Plaintiffs seek a preliminary injunction prohibiting the implementation or enforcement of certain provisions of the 2023 EPM to the extent they are contrary to statute. [*Id.* at pp. 2, 8-16]

Defendants argue that Plaintiffs lack standing and that their claims are barred by the laches doctrine. They also argue that the APA does not apply to the 2023 EPM, but even if it did, the Secretary substantially complied with the requirements of the APA. They also argue that the 2023 EPM does not contradict or directly conflict with statutory requirements. And last but not least, they argue that federal law preempts any challenge to the 2023 EPM with regard to federal only

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voters, and with regard to the Presidential Preference Election (“PPE”) that already took place in Arizona using the 2023 EPM, the federal only voters issue is moot.

**THE COURT FINDS AS FOLLOWS:**

The Court has concerns about whether Plaintiffs have standing for some or all of their claims, and whether some or all of their claims are barred by the laches doctrine. There is also a good argument that assuming the APA applies to the 2023 EPM, the Secretary substantially complied with the APA’s requirements by giving notice and receiving a substantial amount of public comment. In fact, by August 15, 2023, Plaintiffs had received notice and provided comments on the July 31 draft EPM. This somewhat belies their arguments on standing, laches, and substantial performance under the APA. It is also important to note that since August of 2023, the PPE was held here in Arizona using the 2023 EPM. There is a primary election coming up in July and the general election in November. Yet, Plaintiffs ask this Court to order that those elections be governed by the 2019 EPM, which they admit did not follow APA procedures. The 2019 EPA also contains several of the same provisions complained about below and does not address subsequent changes in state and federal election laws.

**The APA does not apply to the 2023 EPM.**

Assuming Plaintiffs have standing, and their claims are not barred by laches, the APA does not apply to the 2023 EPM. Plaintiffs argue that the APA does not expressly exempt the EPM process under A.R.S. § 41-1005. The APA, however, expressly provides that “[a] rule is invalid unless it is consistent with the statute, reasonably necessary to carry out the purpose of the statute and is made and approved in substantial compliance with §§ 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter, *unless otherwise provided by law.*” § 41-1030(A) (emphasis added).<sup>1</sup> Here, the Legislature has “otherwise provided by law” for the procedure to promulgate a valid EPM – A.R.S. § 16-452.<sup>2</sup>

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<sup>1</sup> The Court could not find, and the parties did not provide any case law construing the phrase “unless otherwise provided by law” found in § 41-1030(A).

<sup>2</sup> Plaintiffs argue that an express exemption requires language in the APA that expressly states that an EPM is exempt from the APA. Defendants argue that if an express exemption were so limited, the language in the APA “unless otherwise provided by law” would have no meaning. See *Arizona State Univ. Bd. of Regents v. Arizona State Ret. Sys.*, 242 Ariz. 387, 389 (App. 2017) (stating that “[w]e interpret statutes to avoid rendering ‘any of its language mere ‘surplusage,’ [and instead] give meaning to ‘each word, phrase, clause, and sentence ... so that no part of the statute will be void, inert, redundant, or trivial.’ ”) (citation omitted).

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Section 16-452 provides in pertinent part:

- A.** After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots. The secretary of state shall also adopt rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of requests for federal postcard applications prescribed by § 16-543.
- B.** The rules shall be prescribed in an official instructions and procedures manual to be issued not later than December 31 of each odd-numbered year immediately preceding the general election. Before its issuance, the manual shall be approved by the governor and the attorney general. The secretary of state shall submit the manual to the governor and the attorney general not later than October 1 of the year before each general election.

Also, “[w]hen there is conflict between two statutes, the more recent, specific statute governs over the older, more general statute.” *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 13, ¶ 29 (2022). Here, there is a conflict between § 16-452 and the APA. There are deadline related conflicts.<sup>3</sup> There is also a conflict in obtaining governor approval.<sup>4</sup> Section 16-452 is also more recent and specific to an EPM. It was amended as recently as 2019 when the Legislature changed the deadlines for certain procedures in connection with promulgating an EPM. In doing so, the Legislature was silent about how these new specific deadlines would need to work with or in addition to the general requirements of the APA.

The Court also respectfully disagrees with Plaintiffs’ argument that § 16-452 is superseded by the APA because § 16-452 “would diminish a right created or duty imposed by [the APA].” *See* 41-1002(B). The APA specifically recognizes that any “right created or duty imposed” under § 41-1030(A) comes with the caveat “unless otherwise provided by law.” Section 16-452 does not diminish any rights or duties under the APA. Rather, it is simply the “otherwise provided by law” expressly contemplated by the APA.

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<sup>3</sup> Compare § 16-452(B) with §§ 41-1022(A), (B), (D), (E), -1023(B), (C), and (D).

<sup>4</sup> Compare §16-452(B) with § 41-1039(B)-(D). The APA, however, does not require governor approval for a state agency that is headed by a single elected official. § 41-1039(E)(2). The Secretary of State is a single elected official.

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**The 2023 EPM does not contradict or directly conflict with statutory requirements.**

“Although the EPM must be ‘approved by the governor and the attorney general’ before release, § 16-452(B), an EPM regulation that either exceeds its statutory authority or contradicts statutory requirements ‘does not have the force of law.’” *Arizona All. for Retired Americans, Inc. v. Crosby*, 256 Ariz. 297 ¶ 18 (App. 2023) (stating “[b]ecause the EPM provision relied on by the County here directly conflicts with the express and mandatory procedures of A.R.S. § 16-602(F), it exceeds the scope of its statutory authorization, and is therefore void.”).<sup>5</sup> Here, and for the reasons set forth below, the 2023 EPM does not contradict or directly conflict with statutory requirements.

Plaintiffs argue that Chapter 1, Section 9, Subsection C(2)(b) of the 2023 EPM conflicts with A.R.S. § 16-165(A)(10) because the contested provision instructs county recorders not to request documentary proof of citizenship (“DPOC”) from a voter who has already provided DPOC that is on file with the recorder. Plaintiffs argue that this conflicts with the statutory requirement of sending a 35-day notice letter.

Section 16-165(A)(10) provides:

The county recorder shall cancel a registration:

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10. When the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen, including when the county recorder receives a summary report from the jury commissioner or jury manager pursuant to § 21-314 indicating that a person who is registered to vote has stated that the person is not a United States citizen. Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by forwardable mail that the person's registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship pursuant to § 16-166. The notice shall include a list of documents the person may provide and a postage prepaid preaddressed return envelope. If the person registered does not provide satisfactory evidence within thirty-five days, the county recorder shall cancel the registration and notify the county attorney and attorney general for possible investigation.

(emphasis added).

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<sup>5</sup> The Court of Appeals in *Crosby* did not state that an EPM must also comply with the APA.

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Plaintiffs' argument misconstrues the statute. The statute merely provides that the county recorder shall cancel a registration if it receives information, such as a summary report from a jury commissioner or jury manager indicating that a person who is registered to vote has stated that the person is not a U.S. citizen, and the county recorder confirms that the person is not a U.S. citizen. There is no requirement for a 35-day notice letter if the county recorder does not cancel the registration because the recorder confirms that the person is a U.S. citizen from DPOC the recorder already has on file. DPOC is satisfactory evidence of citizenship under § 16-666(F) (Verification of Registration). Thus, the contested provision in the 2023 EPM does not contradict or directly conflict with statutory requirements. If Plaintiffs believe that the county recorder should be required to send out a letter for updated DPOC upon receiving a summary report form a jury commissioner, regardless of any contrary DPOC already on file, then the Legislature will need to amend the statute.

Plaintiffs next argue that Chapter 1, Section 2 Subsections A(8)(a) and C(2)(a) of the 2023 EPM contradicts A.R.S. §§ 16-165 and 16-121.01(D) because it excuses county recorders from statutory duties to check certain federal databases if they become accessible. There is nothing contrary or in direct conflict between the 2023 EPM and these statutes. Section 16-165 merely requires the recorder to check certain federal databases "to the extent practicable" or "if accessible." Section 16-121.01(D) only requires the recorder to check certain federal databases "provided the county has access." Plaintiff RNC has admitted that use of these databases is not currently practicable. A federal court has also enjoined checking into one of the databases. That the 2023 EPM does not require checking these databases *if and when* they become accessible does not create a contradiction or direct conflict. Should it become practicable to check these databases, and should they become accessible, then there may exist a contradiction and direct conflict between the 2023 EPM and the statute.

Plaintiffs next argue that Chapter 1, Section 11, Subsection (C)(1) of the 2023 EPM contradicts A.R.S. § 16-168(F). The contested provision provides that "[a] registrant's signature may be viewed or accessed by a member of the public only for purposes of verifying signatures on a candidate, initiative, referendum, recall, new party, or other petition or for purposes of verifying candidate filings." Plaintiffs argue that this provision contradicts § 168(F)<sup>6</sup> simply

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<sup>6</sup> Section 16-168(F) provides:

Any person in possession of a precinct register or list, in whole or part, or any reproduction of a precinct register or list, shall not permit the register or list to be used, bought, sold or otherwise transferred for any purpose except for uses otherwise authorized by this section. A person in possession of information derived from voter registration forms or precinct registers shall not distribute, post or otherwise provide access to any portion of that information through the internet except as authorized by subsection I of this section. Nothing in this section shall preclude public inspection of voter registration records at the office of the county recorder for the purposes

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because it omits the language “for election purposes and for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work.” The 2023 EPM, however, includes this language in the paragraph immediately preceding the contested provision. [See 2023 EPM, at p. 53, attached as Exhibit 1 to Plaintiffs’ Complaint] Thus, the 2023 EPM does not contradict or directly conflict with statutory requirements.<sup>7</sup>

Plaintiffs next argue that Chapter 9, Section 6, Subdivision B(1)(f) of the 2023 EPM contradicts A.R.S. § 16-122 because it requires the counting of provisional ballots issued to out of precinct voters. Nothing in § 16-122 prohibits the counting of such a provisional ballot that is in the correct ballot style for the voter’s precinct and who is verified to be registered and eligible to vote in that precinct. The 2023 EPM contains consistent language. To the extent that Plaintiffs also challenge the 2023 EPM with regard to “one-time requests” providing a temporary address for a specific election, that provision is consistent with § 16-542(A). These contested provisions of the 2023 EPM do not contradict or directly conflict with statutory requirements.

Plaintiffs next argue that Chapter 2, Section 5, Subsection A of the 2023 EPM contradicts A.R.S. § 16-552(D). The contested provision states that “[c]hallenges to early ballots must be submitted in writing after an early ballot is returned to the County Recorder and prior to the opening of the early ballot affidavit envelope.” Section 16-552(D) provides that “[a]n early ballot may be challenged on any grounds set forth in § 16-591. All challenges shall be made in writing with a brief statement of the grounds before the early ballot is placed in the ballot box.” As explained by Defendants, and viewing the language in the context of § 16-552(B), (C), (D), and

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prescribed by this section, except that the month and day of birth date, the social security number or any portion thereof, the driver license number or nonoperating identification license number, the Indian census number, the father's name or mother's maiden name, the state or country of birth and the records containing a voter's signature and a voter's e-mail address shall not be accessible or reproduced by any person other than the voter, by an authorized government official in the scope of the official's duties, for any purpose by an entity designated by the secretary of state as a voter registration agency pursuant to the national voter registration act of 1993 (P.L. 103-31; 107 Stat. 77), for signature verification on petitions and candidate filings, for election purposes and for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station or pursuant to a court order. Notwithstanding any other law, a voter's e-mail address may not be released for any purpose. A person who violates this subsection or subsection E of this section is guilty of a class 6 felony.

<sup>7</sup> But even if that were not the case, the omitted language appears to be limited to “a person engaged in newspaper, radio, television, or reportorial work.” Plaintiffs are not such a person, let alone one that has been deprived access to voter signatures pursuant to § 16-168(F). Thus, it is not clear that Plaintiffs have standing on this issue.

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(F), and other relevant statutory provisions cited, the contested provision in the 2023 EPM does not contradict or directly conflict with statutory requirements.

**The federal only voters challenge is moot.**

Plaintiffs also raise concerns with the 2023 EPM's treatment of federal only voters. Plaintiffs argue that the 2023 EPM contradicts § 16-127 by permitting voters who have not provided DPOC to vote for president and by mail. A recent federal court decision struck down § 16-127 as preempted by federal law. Plaintiff recognizes this, but argues that the PPE is not an election for president and is not governed or preempted by federal law. Plaintiffs therefore request a ruling with regard to the next PPE here in Arizona, which is not until 2028. Plaintiffs recognize that the PPE in Arizona already took place in March of 2024 using the 2023 EPM. The issue is moot for now. The Court respectfully declines the invitation to give an advisory opinion on a challenge to an EPM that may or may not be in effect on December 31, 2025, let alone December 31, 2027. There may also be substantial changes in state and/or federal election laws regarding federal only voters between now and the next PPE in 2028.

**Plaintiffs' Complaint fails to state a claim upon which relief can be granted.**

For all of the reasons set forth above, Plaintiffs' Complaint fails to state a claim upon which relief can be granted. *See CVS Pharmacy, Inc. v. Bostwick in & for county of Pima*, 251 Ariz. 511, 515–16 (2021) (stating that “[d]ismissal is appropriate under Arizona Rule of Civil Procedure 12(b)(6) if, ‘as a matter of law ... plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.’”). Plaintiffs have not requested the opportunity to file an amended Complaint and, on this record, the Court cannot imagine that an Amended Complaint would cure the defects of the Complaint. *See Wigglesworth v. Mauldin*, 195 Ariz. 432, 439 (App. 1999) (stating “[b]efore the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects.”).

**IT IS THEREFORE ORDERED** denying Plaintiffs' Motion and granting Defendants' Motions.

**IT IS FURTHER ORDERED** that Defendants file a proposed form of Judgment by no later than **May 31, 2024**.