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ARIZONA COURT OF APPEALS
DIVISION TWO

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA, LLC; and YAVAPAI COUNTY REPUBLICAN PARTY, Plaintiff-Appellants, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant-Appellee, ARIZONA ALLIANCE FOR RETIRED AMERICANS, VOTO LATINO, DEMOCRATIC NATIONAL	No. CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553 **ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S ANSWERING BRIEF**

COMMITTEE, and ARIZONA DEMOCRATIC PARTY,

Intervenor-Defendant-Appellees.

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INTRODUCTION

For nearly six decades, Arizona's election processes have been governed by an Elections Procedures Manual ("EPM") issued by the Secretary of State and approved by the Attorney General and the Governor according to a statutorily-required process designed to ensure that the state conducts elections with "the maximum degree of correctness, impartiality, uniformity and efficiency." A.R.S. § 16-452(A). Though voting has started for the 2024 general election, Plaintiffs the Republican National Committee ("RNC"), the Republican Party of Arizona ("RPAZ"), and the Yavapai County Republican Party seek to throw out all 286 pages of guidance provided to Arizona election officials in the operative EPM. Plaintiffs' primary basis for this extraordinary and radical request is the unprecedented—and incorrect—argument that the EPM's approval process should have strictly adhered to Arizona's Administrative Procedure Act ("APA"), which has never been understood to apply to the EPM in its 58-year history.

Plaintiffs' claim has no legal basis: like countless EPMs before it, state officials adopted and approved the 2023 EPM under Section 16-452, which specifically governs the EPM drafting and approval process. And even if the APA applied, Plaintiffs identified no meaningful procedural defects that would justify a court order voiding the 2023 EPM in the middle of an election. Their primary argument is that the 2023 EPM was approved after a 15-day notice-and-comment period rather than the 30-day period

required by the APA. Plaintiffs do not claim that they were unable to offer comments before the 2023 EPM was approved—indeed, both the RNC and RPAZ *did* comment, to detailed effect, without ever mentioning the APA. Nor do they argue that the 2023 EPM would be any different had there been a 30-day notice-and-comment period. Instead, Plaintiffs complain about this immaterial difference to seize on any technicality that might allow them to argue in favor of their preferred election policies, injecting chaos into Arizona's elections along the way. Indeed, the absurdity of their argument is only underscored by the fact that—as a remedy—Plaintiffs demand reinstatement of a previous version of the EPM that was enacted *under the same process they now challenge*. *See* Opening Brief ("OB"), 8/21/2024, ep 36 (requesting "a reversion to the 2019 EPM").

The superior court correctly dismissed Plaintiffs' complaint, and this Court should affirm. At the outset, Plaintiffs lack standing to even challenge the EPM's promulgation process because they fail to identify any injury to them resulting from the purported failure to follow the APA. Plaintiffs' theory is just as unsuccessful on the merits: their claim that the APA governs the EPM process is simply wrong. The Legislature prescribed specific and exclusive procedures for the EPM's enactment, which state officials followed for decades without anyone suggesting the APA required something else. Further, even if the Court were to now find that the APA applies, Plaintiffs far overstate the effect of any minor deviations. In fact, the 2023 EPM process

substantially complied with the APA process, such that invalidation would not be the proper remedy. Finally, the equities also militate strongly against granting Plaintiffs relief that would upend the administration of Arizona's elections and disenfranchise lawful voters.

Plaintiffs' alternative challenges to eight individual provisions of the EPM also fail. Each of these provisions are fully supported by Arizona or federal law. But like Plaintiffs' APA claim, the Court need not even consider the merits of these individual challenges because Plaintiffs lack standing.

For all these reasons, this Court should affirm the superior court's ruling dismissing Plaintiffs' claims in full.[1]

STATEMENT OF THE CASE

Arizona law charges the Secretary with the biennial task of "prescrib[ing] rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting . . . in an official instructions and procedures manual" known as the EPM. A.R.S. § 16-452(A)–(B). The Secretary must consult local election officials during the drafting process, and the EPM must be "approved by the governor and the attorney general" before issuance. A.R.S. § 16-452(B). Once approved and issued, the EPM's regulations generally have the

[1] Intervenor-Defendant-Appellees the Arizona Alliance for Retired Americans and Voto Latino ("Intervenors") incorporate by reference the Secretary's Answering Brief with respect to Counts II through IX.

"force of law[.]" *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020) ("*AZPIA*").

While drafting the 2023 EPM, Secretary Adrian Fontes opened the draft to public comment from August 1 through August 15, 2023. Interested people and groups submitted hundreds of comments totaling 460 pages, all of which are available on the Secretary's website. Plaintiffs RNC and RPAZ were among those groups, and both submitted extensive comments. Despite claiming that the 15-day comment period was "unnecessarily restrictive," ROA 1 ep 8 ¶ 32, they submitted a four-page letter and a nearly 50-page redline of the EPM in which they described dozens of purported concerns, including nearly all their claims here. *See id.* ep 6 ¶ 25 & n.2. Yet their comments said nothing about their current assertion that the APA governs promulgation of the EPM.

After the public comment period and a "rigorous period of consultation with county and tribal officials, as well as legislators from both parties and voting rights advocates," Secretary Fontes—consistent with Section 16-452—submitted the draft 2023 EPM to Governor Katie Hobbs and Attorney General Kris Mayes. The Governor and Attorney General approved a final version of the 2023 EPM on December 30, 2023, after which it took effect. This marked the first time since 2019 that the Secretary, Governor, and Attorney General had agreed on a uniform set of rules to govern Arizona's elections.

The final 2023 EPM contains a comprehensive set of guidelines that address the various ways in which Arizona's election laws should be implemented to ensure that elections are administered lawfully and consistently across the state. The 2023 EPM has been in effect this entire year through multiple elections, and thousands of election officials and workers serving millions of voters are relying on it as we speak to conduct the ongoing general election.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have standing to bring any of their claims when they have not identified any injury or impact on them from either the process by which the EPM was enacted or the enforcement of any of the alternatively challenged EPM provisions.

2. Whether the superior court correctly concluded that the APA does not apply to the EPM, which was enacted pursuant to A.R.S. § 16-452.

3. Whether the superior court correctly concluded that the EPM provisions challenged in Counts II through IX do not conflict with governing state and federal law.

ARGUMENT

The superior court correctly denied Plaintiffs' request for a preliminary injunction and dismissed all of Plaintiffs' claims because they fail on every level: Plaintiffs lack standing; the claims fail on the merits; and every equitable factor relevant

to the question of whether to issue a preliminary injunction weighs against relief. Despite the 2024 election already having begun, Plaintiffs ask the Court to overturn the superior court's decision and immediately throw out the entire 2023 EPM or invalidate key provisions—drastic remedies that are not only unwarranted, but which would inject chaos into an ongoing election. The losers would be the voters who would be thrust into confusion and subject to disparate treatment across the state—with some even threatened with disenfranchisement. This is precisely what the EPM seeks to prevent.

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo," *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7 (2012), as are "issues [that] turn on statutory and rule interpretation," *Fitzgerald v. Myers*, 243 Ariz. 84, 88 ¶ 8 (2017). "A trial court's order denying a preliminary injunction is reviewed for an abuse of discretion. Unless the trial judge either made a mistake of law or clearly erred in finding the facts or applying them to the law for granting an injunction,[the Court] must affirm." *AZPIA*, 250 Ariz. at 62 ¶ 8 (cleaned up).

I. Plaintiffs lack standing to challenge the 2023 EPM.

Before reaching the merits, the Court can and should affirm dismissal because Plaintiffs lack standing. *See, e.g.*, *Sears v. Hull*, 192 Ariz. 65, 68 ¶ 9 (1998) ("Because we agree that the plaintiffs lack standing, we do not address the merits of their claims."). Although the superior court stated its "concerns about whether Plaintiffs have standing for some or all of their claims," ROA 50 ep 2, Plaintiffs make *no* attempt to meet

Arizona's "rigorous" threshold requirement of establishing standing, *Fernandez v. Takata Seat Belts, Inc*., 210 Ariz. 138, 140 ¶ 6 (2005), failing to explain how either the way the EPM was enacted or the enforcement of any of the individually challenged provisions harms—or even affects—them in any way.

A. Plaintiffs lack standing because they have not shown any particularized injury.

Arizona courts require standing "as a matter of sound judicial policy," *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003), to "avoid issuing advisory opinions, guard[] against mootness, and ensure[] the full development of the issues," *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 405 ¶ 7 (App. 2008). Declaratory judgment actions are no exception: courts lack "jurisdiction to render a judgment" unless the complaint "set[s] forth sufficient facts to establish that there is a justiciable controversy." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972); *see also Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986) (similar); *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980) (refusing to interpret Declaratory Judgments Act "to create standing where standing did not otherwise exist").

To establish standing, plaintiffs must show "a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome." *Paulsen*, 220 Ariz. at 406 ¶ 8. Generalized and boilerplate allegations are not enough; as the Arizona Supreme Court has held, a party cannot satisfy standing "by merely asserting an interest" in a government policy, as this would "eviscerate[e] the standing requirement[.]" *Ariz. Sch.*

Bds. Ass'n, Inc. v. State, 252 Ariz. 219, 224 ¶ 18 (2022). Instead, they must show that enforcement of the challenged policy would "affect[]" them in a meaningful way. *Id.* at 225 ¶ 20. Plaintiffs wholly fail to do so: they did not allege below and do not now identify any specific injury that either the enactment of the EPM or enforcement of any of its provisions inflicts upon them.

First, Plaintiffs cannot show injury resulting from the EPM's enactment process. In Count I, Plaintiffs seek to invalidate the entire EPM largely because the Secretary offered a 15-day public notice-and-comment period instead of the 30-day period Plaintiffs claim was required by the APA. OB, 8/21/2024, ep 18, 35–36. Plaintiffs, however, admit that they submitted extensive comments during that period, and do not even suggest that the 15-day comment period prevented them—or anyone else—from providing any purportedly "'critically important' feedback on the draft EPM." ROA 1 ep 8 ¶ 32. Nor do Plaintiffs allege that the EPM would have been different with a longer comment period, or even that they would have submitted any additional comments had the comment period been longer. They thus fail to show any injury from the 15-day comment period.

Plaintiffs' other procedural complaints similarly fail to identify any cognizable injury. They note that the APA requires an oral proceeding "if requested during the comment period," OB, 8/21/2024, ep 17 (citing A.R.S. § 41-1023(C)), but do not claim that they or anyone else requested one, *see* OB, 8/21/2024, ep 36. They complain that

the Secretary did not "maintain an official rulemaking record," but identify no substantive recordkeeping deficiency in the comprehensive record available on the Secretary's website. They observe that the APA requires notice of rulemaking, but do not suggest that they or anyone else lacked notice of the draft EPM. *Id.* In short, Plaintiffs failed to show any impact on them, let alone a cognizable injury, from the EPM's allegedly deficient enactment procedure. Their claim thus amounts to no more than a complaint that the Secretary did not follow the law as Plaintiffs see it—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, 442 (2007) (holding that claim "that the law . . . has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that cannot confer standing).

As best that Intervenors can discern, Plaintiffs' theory is that, because they are political entities that promote Republican candidates, they may challenge the EPM because it regulates elections based solely on a disagreement of the law. *See* OB, 8/21/2024, ep 54–55. But this does not satisfy any recognized theory of standing. Plaintiffs' claim that they "have an interest in protecting against being forced to compete in an illegally structured competitive environment," *id.*, misunderstands the theory of competitive standing. In those cases, the plaintiffs have been able to show that

the "allegedly unlawful election regulation makes the competitive landscape *worse for [their] party*[.]" *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022) (emphasis added). Plaintiffs do not—and cannot—make any such showing here.

This is because the EPM—which has general and uniform applicability to Arizona's elections and the voters and candidates who participate in them, regardless of political party affiliation—does not advantage or disadvantage any party or candidate (and Plaintiffs do not suggest otherwise). Plaintiffs' bald assertion that they have suffered some unspecified "financial and resource-based harm," OB, 8/21/2024, ep 55, is also insufficient for standing purposes. Indeed, they entirely fail to explain how the EPM has imposed any financial harm on them, or even what that financial harm is. Such conclusory allegations cannot establish standing. *See Cullen v. Auto-Owners Ins.*, 218 Ariz. 417, 419 ¶ 7 (2008) ("[M]ere conclusory statements are insufficient to state a claim upon which relief can be granted.").

Second, Plaintiffs fail to explain how the enforcement of any of the individually challenged provisions (Counts II – IX) injures them at all. Counts II and V challenge EPM voter registration list maintenance provisions, but Plaintiffs fail to explain how either a prohibition on disenfranchising voters who previously submitted documentary proof of citizenship (Count II) or directing county officials that they do not need to search databases to which they lack access for citizenship information (Count V) harms them in any way. *See* OB, 8/21/2024, ep 37–44. Counts III and IV challenge the EPM's

explanation that federal-only voters may vote by mail and in the Presidential Preference Election; Plaintiffs, again, do not explain how qualified voters casting ballots causes them any harm. *See id.* ep 41–42. Count VI challenges an EPM provision limiting public access to voter signatures; Plaintiffs do not (and cannot) claim any role in conducting signature verification, argue that they have been deprived access to voter signatures, or identify any other harm resulting from the enforcement of that provision. *See id.* ep 45–48; ROA 1 ep 18–20 ¶¶ 79–84; *see also* ROA 50 ep 6 n.7 (superior court noting "it is not clear that Plaintiffs have standing on this issue"). Count VII challenges a provision confirming that voters can make one-time requests to have early ballots sent to a temporary out-of-state address, but (yet again) Plaintiffs do not allege that they will be harmed if qualified voters temporarily out of state can cast their ballots as Arizona law permits. *See* OB, 8/21/2024, ep 48–49; ROA 1 ep 20–21 ¶¶ 85–90. Count VIII alleges that the EPM restricts the times when early ballots may be challenged, but Plaintiffs do not allege any harm to them resulting from such restriction. *See* OB, 8/21/2024, ep 50–51; ROA 1 ep 21–22 ¶¶ 91–96. Finally, Count IX seeks to prohibit counting the ballots of eligible voters who appear at the wrong precinct, but again, Plaintiffs do not explain how they are injured when qualified voters vote. *See* OB, 8/21/2024, ep 51–53; ROA 1 ep 22–24 ¶¶ 97–104. The closest they come is broadly alleging that "precinct-based voting advances many interests," but they do not claim

that they suffer any injury even if those interests are compromised by the challenged provision (they are not). OB, 8/21/2024, ep 53.

To try and circumvent Arizona's standing requirement, Plaintiffs claim that they are "'beneficially interested' in compelling the Secretary to perform his legal duty consistent with statute." *Id.* ep 54–55 (quoting *AZPIA*, 250 Ariz. at 64–65 ¶ 27). But the Arizona Supreme Court has been clear that this "more relaxed standard" is "for standing in mandamus actions." *AZPIA*, 250 Ariz. at 62 ¶ 11 (emphasis added); *see also id.* at 64–65 ¶ 27 (applying 'beneficial interest' standard "in the context of their mandamus action"). Because Plaintiffs do not bring a mandamus action, this standard is irrelevant. Nor could they have brought such a claim: they "seek not to compel the [Secretary] to perform an act specifically imposed as a duty but rather to prevent" the Secretary from implementing the EPM, which is "injunctive relief . . . not available through an action for mandamus[.]" *Sears*, 192 Ariz. at 69 ¶ 12; *see also* OB, 8/21/2024, ep 56 (asking the Court to "preliminarily enjoin the Secretary from implementing or enforcing the 2023 EPM" or "the eight identified rules"); ROA 1 ep 24–25 (seeking "[a] preliminary and permanent injunction" against the Secretary).

The Court should not overlook its "important" standing requirement. *Sears*, 192 Ariz. at 71 ¶ 24. Plaintiffs seek to invalidate Arizona's election procedures despite failing to identify *any* injury they have suffered because of how the EPM was enacted or from any of the challenged provisions. "[A]s a matter of sound judicial policy," and

to avoid "inevitably open[ing] the door to multiple actions asserting all manner of claims against the government," the Court should dismiss Plaintiffs' claims for lack of standing. *Bennett*, 206 Ariz. at 524 ¶ 16.

II. The EPM enactment process complied with applicable law.

Consistent with longstanding practice, the EPM's promulgation followed specific statutory requirements involving close coordination between county election officials, the Secretary of State, the Attorney General, and the Governor. *See* A.R.S. § 16-452. Plaintiffs do not dispute that the EPM's enactment complied with Section 16-452's specific requirements for the EPM; instead, they claim that the EPM should be tossed out because its enactment process purportedly failed to comply with the APA. OB, 8/21/2024, ep 24–36. This entirely novel argument is reliant on a strained interpretation of the APA that the superior court correctly rejected. The APA does not apply to the EPM under the APA's plain language, well-established canons of statutory construction, legislative history, or Arizona Supreme Court precedent. *See* ROA 50 ep 2–3.

Until Plaintiffs filed this case, *no one* suggested that the APA applies to the EPM—not the Legislature, which created a separate statute governing the EPM's enactment and has repeatedly amended that statute (most recently in 2019) without addressing any purported failure to follow the APA; not the dozens of Secretaries of State, Attorneys General, and Governors of both parties 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 often 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 ask the Court to throw out the EPM, and conclude that scores of Arizona elections have been conducted under the guidance of invalid EPMs, because, all along, the Secretary had to follow the APA. Plaintiffs' argument is implausible in all respects and was properly dismissed below.

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

The superior court correctly started with the APA's statutory text: under the APA, "[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 sections 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter, *unless otherwise provided by law.*" A.R.S. § 41-1030(A) (emphasis added). The superior court found: "Here, the Legislature has 'otherwise provided by law' for the procedure to promulgate a valid EPM – A.R.S. § 16-452." ROA 50 ep 2. As recognized by the Arizona Supreme Court, "[t]he Secretary must follow a specific procedure in promulgating election rules," which is enshrined in Section 452, and once that process is complete, "the EPM has the force of law." *AZPIA*, 250 Ariz. at 63 ¶ 16. That procedure consists of four steps: consulting local election officials;

compiling the rules into a manual; timely issuing the manual; and, "finally," obtaining approval from the Attorney General and the Governor. *Id.* The Supreme Court did not suggest that any other procedural steps are required, to say nothing of complying with the APA. *Id.*

Plaintiffs repeat their argument (rejected below) that the APA's separate procedural requirements apply to the EPM because neither the APA nor the EPM statute expressly states otherwise, citing A.R.S. § 41-1002(A). OB, 8/21/2024, ep 25–31. Basic canons of statutory construction disprove Plaintiffs' argument, which would render Section 41-1030(A)'s "unless otherwise provided by law" language meaningless surplusage. *See Ariz. State Univ. Bd. of Regents v. Ariz. State Ret. Sys.*, 242 Ariz. 387, 389 ¶ 7 (App. 2017) ("We 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." (cleaned up)). Plaintiffs argue that "unless otherwise provided by law" in Section 41-1030(A) means only that a rule is not invalid for failure to comply with the APA when there is an "express exemption" from rulemaking requirements under Section 41-1002(A). OB, 8/21/2024, ep 27–29. But that would render the phrase redundant; of course a rule is not invalid for failure to comply with a statute that expressly does not apply. This Court should instead interpret the statute to avoid redundancy, *see Ariz. State Univ.*, 242 Ariz. at 389 ¶ 7, and must "assume that when the legislature

uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language." *Tucson Unified Sch. Dist. v. Borek ex rel. Cnty. of Pima*, 234 Ariz. 364, 367 ¶ 7 (App. 2014) (quoting *Parker v. City of Tucson*, 233 Ariz. 422, 428 ¶ 12 (App. 2013)).

The superior court's interpretation is correct for another reason: the APA expressly exempts rulemaking involving the Governor, whose direct approval is required to enact the EPM under Section 16-452(B), from the APA. While the APA states that it applies to "all agencies," A.R.S. § 41-1002(A), the APA's definition of "Agency" excludes "the legislature, the courts or the governor." A.R.S. § 41-1001(1). The Legislature's decision to specifically involve the Governor in the EPM's promulgation process thus suggests it intended this process to fall outside the APA. *See* A.R.S. § 16-452(B) (requiring Governor and Attorney General approval for EPM to issue).[2]

[2] The APA recently has been amended to require approval from the Governor before any rule is promulgated. *See* A.R.S. § 41-1039. That approval, however, occurs *within* the APA process; when a rule's organic statute instead makes a rule conditional on the Governor's approval, the APA process does not apply at all. *See* A.R.S. § 41-1001(1). And as the superior court noted, the APA expressly exempts "[a] state agency that is headed by a single elected state official" like the Secretary of State from its requirement to obtain prior written approval from the Governor. ROA 50 ep 3 & n.4; A.R.S. § 41-1039(E)(2)(a); *see also* A.R.S. § 41-1057(A)(1) (exempting the same from review by the Governor's Regulatory Review Council). This creates an obvious "conflict in obtaining governor approval" as required under Section 16-452. ROA 50 ep 3; *see* A.R.S. § 16-452(B).

None of the authorities Plaintiffs cite supports their argument that the EPM is subject to the APA because none involved separate, mandatory statutory rulemaking procedures like the EPM's promulgating statute. *See, e.g.*, OB, 8/21/2024, ep 16, 26, 29–30, 32 (citing *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 247 ¶ 1 (App. 2015); *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 225 (App. 1994); *Legacy Educ. Grp. v. Ariz. State Bd. for Charter Schs.*, No. 1-CA-CV 17-0023, 2018 WL 2107482, at *1 ¶ 1, *5 ¶ 17 n.14 (App. May 8, 2018)). In all three cases, the primary issue—which as Plaintiffs admit is irrelevant here, OB, 8/21/2024, ep 24–25—was whether the defendant-agencies were engaged in rulemaking at all. These cases do not compel the outcome Plaintiffs seek because none of them considered whether the APA applies when a separate statute sets out the specific procedures by which a rule must be adopted, let alone a separate procedure requiring the Governor's participation. *Thompson v. Tucson Airport Authority* is likewise inapposite; there, the court simply recognized that the APA "excludes local governmental units" and therefore did not apply to "an agency of the City of Tucson." 163 Ariz. 173, 173–74 (App. 1989). And in *City of Phoenix v. 3613 Ltd.* (cited at OB, 8/21/2024, ep 32), the court did not hold that the APA always displaces alternate statutory procedures; instead, it recognized that the existence of some alternate statutory procedures does not automatically mean that the APA does not apply, before examining the relevant

statutes to determine whether the APA applied. 191 Ariz. 58, 61 (App. 1997). The superior court here followed the same approach, and based on the relevant statutes, properly found that the APA did not apply. ROA 50 ep 2–3.

Plaintiffs' misrepresentation of a prior Attorney General's opinion likewise does not support their argument that the APA applies to the EPM. Indeed, that opinion confirms that the Legislature intended the EPM to be enacted only according to Section 452's procedures. OB, 8/21/2024, ep 34; *see also* ROA 39 ep 9–10. 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." OB, 8/21/2024, ep 34 (quoting (ROA 39 ep 43)). But Plaintiffs' selective quotation of that opinion omits the very next clause in that 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.*" ROA 39 ep 43 (emphasis added). That is precisely what the Legislature did with the EPM—it enacted 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. Thus, under even the authority that Plaintiffs cite, the only reasonable conclusion is that the Legislature did in fact intend that the approval of the EPM would be done in accordance with a separate statutory process, and not subject to the APA.

Plaintiffs also claim that the legislative history of Section 41-1030 supports their argument. OB, 8/21/2024, ep 30–31. But Plaintiffs ignore the extensive legislative history of the EPM and more than half a century of consistent practice under which the EPM was always issued according to the statutory requirements that were followed for the 2023 EPM, and has never been found to require notice-and-comment rulemaking under the APA. *See, e.g.*, 1979 Ariz. Sess. Laws, ch. 209, § 3 (reflecting similar process). Plaintiffs admit that "[t]he substance of [the] EPM has significantly expanded over the years, from a limited set of guidelines to a comprehensive set of rules," and that the Legislature has regularly "expanded the scope of the secretary's rulemaking authority under the EPM Statute" and "in other statutory provisions as well." OB, 8/21/2024, ep 13–16. Yet they never once claim that the enactment process consistently followed for decades was ever deemed improper in any way—or that anyone ever even suggested as much.

It is implausible that the Legislature intended the APA to govern the EPM's enactment but sat silent for generations while state officials ignored that requirement, all-the-while repeatedly amending the EPM's governing statutes by expanding the EPM's scope. *See Jenney v. Ariz. Express, Inc.*, 89 Ariz. 343, 346 (1961) ("Where the legislature re-enacts a statute . . . after uniform construction by the officers required to act under it, the presumption is that the legislature knew of such construction and adopted it in re-enacting the statute. . . . [W]e see no reason to

depart from the presumption of legislative acquiescence in administrative interpretation."); *Mummert v. Thunderbird Lanes, Inc.*, 107 Ariz. 244, 245 (1971) (rejecting appellant's new proposed statutory interpretation when "[t]he record indicates that for over thirty-seven years the statute in question was applied in a manner contrary" to the proposed interpretation"). And that Plaintiffs demand reinstatement of a previous version of the EPM that was enacted *under the same process they now challenge* makes clear that, rather than having an actual legal objection, Plaintiffs simply dislike this version of the EPM. *See* OB, 8/21/2024, ep 36 (requesting "a reversion to the 2019 EPM"). Plaintiffs' policy preference for a former EPM is insufficient even to confer standing, let alone to upend the settled understanding that Section 16-452 alone establishes the process for issuing the EPM.

B. Even if the APA applies to the EPM, the EPM is not invalid.

Even if, all along everyone has been wrong, and the specific statutory process the Legislature enacted to govern the creation of the EPM were in fact meant to be ignored in favor of the APA, there remains a long road to travel from Plaintiffs' premise—that the APA applies at all—to their conclusion: that the Court should invalidate all 286 pages of the 2023 EPM. Along that road, Plaintiffs hit several dead ends: first, they have waived such arguments; second, even if the APA applied, the Secretary's process for enacting the EPM substantially complied with APA requirements; and, third, if the APA applied and the EPM's enactment process fell

short, doing away with the entirety of the 2023 EPM is not the proper remedy. Plaintiffs' paltry arguments to the contrary fail. OB, 8/21/2024, ep 35–36.

First, Plaintiffs waived their APA arguments. The APA specifies that "a person may waive any right conferred on that person by this chapter," A.R.S. § 41-1004, and waiver may be "established by evidence of acts inconsistent with an intent to assert the right," *Am. Cont'l Life Ins. v. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980). Here, Plaintiffs waived their APA claim (including a request for the 30-day comment period they now claim is required by law) by submitting public comments without asserting that the EPM was subject to the APA at all or that any specific procedures fell short of the APA. That waived arguments they seek to make now. *Cf. Appalachian Power Co. v. EPA*, 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 patently unfair and prejudicial to election officials and the public alike to allow Plaintiffs to sow chaos in Arizona elections after lying in wait to raise any purported APA deficiencies when they had the opportunity to do so during the public comment period and chose not to.

Second, even if the APA applied, the EPM remains valid because it was "made and approved in substantial compliance" with the APA's procedural rulemaking requirements, A.R.S. § 41-1030(A)—a point that Plaintiffs do not address. Although

the statute does not define "substantial compliance," case law from analogous contexts indicates that rulemaking substantially complies with the APA so long as it furthers "the purpose of the [APA's] requirements," *Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶ 14 (2005); namely, "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.*, 182 Ariz. at 226 (App. 1994).

The Legislature's prescribed process for the EPM's enactment in Section 16-452 meets this standard. While drafting the EPM, the Secretary must consult "with each county board of supervisors or other officer in charge of elections." A.R.S. § 16-452(A). This ensures that the EPM reflects input from "those affected" by the EPM—local election officials—as well as the Arizonans they are democratically elected to represent and to whom they are accountable. *See* A.R.S. § 11-211. The statute further requires the Secretary to submit the EPM to the Governor and the Attorney General by October 1, kicking off a period of review that lasts more than two months. A.R.S. § 16-452(B). The Governor and the Attorney General are also accountable to the public—and each has unilateral authority to demand changes or prevent the EPM from going into effect, as occurred in 2021. *Id.*; *see Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 25 n.3 (2022). The EPM adoption procedures thus ensure "that those affected by a rule have adequate notice" and "the opportunity for input into the consideration of those procedures" before promulgation, *Carondelet Health Servs.*, 182 Ariz. at 226, which "guards against

administrative excess," ROA 1 ep. 9–10 ¶ 41. Because the 2023 EPM was issued according to this legislatively-prescribed process, it "substantial[ly] compl[ies]" with the APA and cannot be struck down on procedural grounds even if the APA applies. A.R.S. § 41-1030(A).

In fact, the Secretary went further than what was required under Section 16-452 by providing a draft of the 2023 EPM to the public *five months* before the final EPM was issued—a notice period far more generous than the 30 days the APA requires—and by providing an additional, 15-day opportunity for direct public input. Plaintiffs object that the Secretary did not publish notice of rulemaking in the register and that the public comment period lasted 15 days instead of the 30 days the APA contemplates. *See* OB, 8/21/2024, ep 35–36. But the notice and comment procedures implemented clearly sufficed for "substantial compliance" with the APA—hundreds of public comments were submitted, including from Plaintiffs. Plaintiffs do not suggest that they or anyone else had insufficient time to submit comments or that they would have offered anything further than they did. And Plaintiffs make no effort to explain how the comprehensive record on the Secretary's website does not substantially comply with the APA's "official rule making record" requirement. *See* A.R.S. § 41-1029(A).

Third, even if Plaintiffs' unprecedented, incorrect, and waived argument had legs, the remedy would not be to throw out the entire EPM. Briefing in this appeal will conclude only two weeks before Election Day, with voting underway. *See* Ariz. R. Civ.

App. P. 15(a)(3); Election Calendar 2023–2024, ARIZ. SEC'Y OF STATE (May 24, 2024), *available at* https://apps.azsos.gov/election/2024/2024_Election_Calendar.pdf. Changing scores of election procedures before the general election fully concludes is a recipe for chaos. And such chaos is particularly unwarranted because Plaintiffs concede that by their logic, "the 2019 EPM was adopted in a similarly improper manner." OB, 8/21/2024, ep 36 n.6. Given the "extraordinary disruptive consequences that would accompany vacatur"—eliminating critical guidance that ensures the "correctness, impartiality, uniformity and efficiency" of all aspects of Arizona's elections—the proper remedy if this Court concludes that the APA process should have been followed would be to "remand without vacatur," keeping the current EPM in place while the APA process moves forward. *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 969 (9th Cir. 2023); A.R.S. § 16-452(A). And at the least, preliminary injunctive relief is not appropriate at this late date; if this Court determines that Plaintiffs' claims should not have been dismissed, the appropriate remedy would be to remand to the trial court for consideration on the merits.

III. The superior court did not err in dismissing Counts II through IX.[3]

Most of Plaintiffs' alternative claims fail for the same fundamental reason: for each claim, the challenged provision does not actually conflict with state law or exceed

[3] As noted, Intervenors incorporate the Secretary's arguments on Counts II through IX and offer a brief summary of why those claims fail here.

the scope of the Secretary's broad statutory authority to prescribe rules related to voter registration and elections. *See* A.R.S. § 16-452; *AZPIA*, 250 Ariz. at 62 ¶ 15 (noting "[t]he Legislature has expressly delegated to the Secretary the authority to promulgate" voting-related rules); *Leibsohn*, 254 Ariz. at 7 ¶ 22; *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021). The mere fact that the EPM "fill[s] in the details" of statutory election legislation, is not sufficient for a conflict. *Griffith Energy, LLC v. Ariz. Dep't of Revenue*, 210 Ariz. 132, 137 ¶ 23 (App. 2005) (quoting *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971)). Instead, to be unlawful, the EPM provision must "directly conflict[] with the [statute's] express and mandatory procedures[.]" *Ariz. All. for Retired Ams., Inc. v. Crosby*, 256 Ariz. 297 ¶ 18 (App. 2023).

The superior court correctly dismissed all of Plaintiffs' eight individual counts, because they failed to identify a "direct conflict" between the EPM and current Arizona law: Count II fails because both Section 16-165(A)(10) and the EPM require that county recorders confirm that a voter is not a citizen before beginning removal procedures. *See* ROA 50 ep 4–5. Counts III and IV fail because the statute that Plaintiffs claim conflicts with these provisions of the EPM, A.R.S. § 16-127, is no longer enforceable as a matter of law. *See, e.g.*, *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 2244338, at *1 (D. Ariz. May 2, 2024) (declaring that A.R.S. 16-127(A) is preempted by Section 6 of the National Voter Registration Act and permanently enjoining its

enforcement).[4] Count V fails because the relevant statutes only require county recorders to verify certain voter information using specific databases if those databases are accessible or available, or when verification is practicable. *See* A.R.S. §§ 16-165(H)-(K), -121.01(D). The EPM confirms this and notes that recorders do not currently have access to some databases listed in Section 16-165. *See* ROA 1 ep 56. Count VI fails because both Section 16-168(F) and the EPM allow only the same limited public access to typically confidential voter signatures. *See* ROA 1 ep 96. Count VII fails because Arizona law allows all voters—including those on the AEVL—to request that their early ballot be mailed to a "temporary address," which is not required to be in-state. A.R.S. § 16-542(E). The EPM does not contradict this. *See, e.g.*, ROA 1 ep 99. Count VIII fails because, when read in context, Section 16-552(D) does not contemplate challenges to early ballots before they are returned to counties or after they are removed from the affidavit envelope. The EPM is consistent with that and thus does not restrict

[4] Plaintiffs' arguments for a preliminary injunction for Counts IV and V, *e.g.* OB, 8/21/2024, ep 41–44, fail for an additional reason: Plaintiffs never moved for a preliminary injunction on those Counts in the superior court. *See* OB, 8/21/2024, ep 20 (admitting "Plaintiffs moved for a preliminary injunction on their APA claim and six of the eight alternative claims challenging various rules in the EPM."); ROA 8 ep 10–11 (omitting Counts IV and V). There is thus no superior court preliminary injunction ruling on those Counts to appeal, and Plaintiffs cannot obtain a preliminary injunction on those counts from this Court. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils.*, 227 Ariz. 382, 386 ¶ 12 (App. 2011) ("The general law in Arizona is that legal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits. If the argument is not raised below so as to allow the trial court such an opportunity, it is waived on appeal." (citation omitted)).

the time when early ballot challenges may be made any more than the statute itself does. *See* ROA 1 ep 122. And Count IX fails because Section 16-122 requires that provisional ballots cast by an eligible voter be counted, without restriction as to where a person appears to vote. The EPM confirms that county recorders must count such ballots. *See* ROA 2 ep 18. In sum, nowhere across Counts II through IX do Plaintiffs identify a conflict between current state law and the EPM, and each Count fails. *See Leibsohn*, 254 Ariz. at 7 ¶ 22; *Leach*, 250 Ariz. at 576 ¶ 21.

For these reasons, as well as the reasons in the Secretary of State's brief, the superior court correctly dismissed Counts II through IX and this Court should affirm.

IV. Plaintiffs are not entitled to a preliminary injunction.

Plaintiffs fail to demonstrate that any of the requirements to obtain injunctive relief are met. As explained above, they are not likely to succeed on the merits of their claims; Plaintiffs will not suffer irreparable harm in the absence of preliminary relief; and the balance of equities tips against them. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) ("The third and fourth factors of the preliminary-injunction test—balance of equities and public interest—merge into one inquiry when the government opposes a preliminary injunction.").

Plaintiffs do not even try to explain any purported irreparable harm caused by the EPM's promulgation process or the challenged provisions. *Supra* Part I. They offer

only cursory boilerplate allegations that they "have an interest in protecting against being forced to compete in an illegally structured competitive environment" and have "suffered financial and resource-based harm," with no other details. OB, 8/21/2024, ep 55; *see also* ROA 1 ep 3–4 ¶¶ 6–8. But such "conclusory statements are insufficient to state a claim upon which relief can be granted." *Cullen*, 218 Ariz. at 419 ¶ 7, much less to show irreparable injury. Plaintiffs' desire to return to the 2019 EPM gives away the ploy. Plaintiffs fail to show how invalidating the 2023 EPM and replacing it with the 2019 EPM would prevent any "harm" at all. The fact that Plaintiffs' requested relief would only reinstate a previous EPM enacted by the same purportedly unlawful process betrays that an injunction is unnecessary to prevent any irreparable harm.

Plaintiffs claim that they are exempt from showing irreparable harm because they allege a statutory violation. OB, 8/21/2024, ep 53–54. But Plaintiffs rely on dicta in *AZPIA*, 250 Ariz. at 64 ¶ 26, as well as the "beneficial interest" standard for mandamus actions. *See* OB, 8/21/2024, ep 54–55. As discussed *supra* Part I, the "beneficial interest" standard does not apply because this is not a mandamus action. And as this Court recently clarified, if the challenged act has not previously been declared unlawful before a court's ruling on a preliminary injunction, then a "failure to show irreparable harm is dispositive." *City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 13–14 ¶ 24 (App. 2023).

Finally, the balance of equities also weighs fully against Plaintiffs. Before issuing preliminary injunctions in election-related matters, courts must "consider fairness not only to those who challenge [election rules], but also to . . . the election officials[] and the voters of Arizona." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000). It is simply too late for the Court to toss out the 2023 EPM or invalidate any of the individually challenged provisions for the 2024 general election. OB, 8/21/2024, ep 53–56. Voting has begun and the election is being administered under the 2023 EPM.

It is absurd to suggest that throwing out the rulebook in the middle of an election would cause only "negligible disruption" for voters and election officials. OB, 8/21/2024, ep 36. The EPM is a 286-page document containing thousands of election administration procedures and rules to ensure that election officials lawfully and uniformly implement Arizona election law and that voters are not subject to arbitrary and disparate treatment. *See* A.R.S. § 16-452(A). Changing those procedures in the middle of an election would be a recipe for chaos. Consider the timeline: mail voting has begun for servicemembers and citizens living abroad, and by the time Plaintiffs' reply brief will be due on October 21, 2024 (not even considering potential oral argument or the time the Court will need to issue its decision), early voting will have been ongoing for nearly two weeks—and Election Day itself will be just over two weeks away. *See* Ariz. R. Civ. App. P. 15(a)(3). It is Plaintiffs' claim that it would not "be disruptive to the electoral process" to change hundreds of election procedures—

after using those procedures in two primary elections and now during the general election—that is the "false front." OB, 8/21/2024, ep 56.

Changing those rules now would also risk subjecting voters to different rules during the same election and thwart the EPM's purpose of ensuring "the maximum degree of . . . uniformity" for election procedures, A.R.S. § 16-452(A), creating possible equal protection violations, *see, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." (collecting cases)). Take Count VI, which seeks to prevent voters on the AEVL from making one-off requests to have their mail ballots be sent out of state. Some of these voters will have already made such requests, received their ballots out of state, and even returned them. If the Court were to change the law before the 2024 election concludes, others could be prohibited from doing the same.[5]

Moreover, as RPAZ recently explained in other litigation, it is too late as a matter of law to meaningfully implement the relief sought in Counts II and V, which seek processes to identify and remove voters from the rolls for the 2024 election; systematic list maintenance programs must conclude "not later than 90 days prior to the date of a . . . general election for Federal office," 52 U.S.C. § 20507(c)(2)(A), and adopting

[5] On August 29, 2024, this Court wisely denied Plaintiffs' Motion for Expedited Briefing Schedule after Defendants raised these points. The same arguments apply with even greater force now against issuing injunctive relief even later in the election cycle.

Plaintiffs' interpretation of the underlying statutes suggests that county officials should perform "unlawful" "removals during the NVRA Blackout Period." *See* Br. of Republican Party as Amicus Curiae at 3, *Richer v. Fontes*, No. CV-24-221 (Ariz. Sept. 18, 2024); *id.* at 2 ("the NVRA prohibits voter list maintenance at certain times—specifically including now until the November election"). The balance of equities weighs heavily against the requested relief.

Since relief cannot issue for the 2024 general election, there is no need for a preliminary injunction at all. Should the Court reverse the dismissal of any of Plaintiffs' claims, the proper course would be to remand any remaining claims to the superior court to move forward to a final judgment on the merits.

CONCLUSION

For these reasons, this Court should affirm the superior court's ruling denying Plaintiffs' motion for preliminary injunction and dismissing Plaintiffs' claims in their entirety.

DATED this 30th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(a)(5), Ariz. R. Civ. App. P., the undersigned counsel certifies that Intervenor-Defendant-Appellees Arizona Alliance for Retired Americans and Voto Latino's Answering Brief uses proportionately spaced typeface, Times New Roman 14 point, is double-spaced, and contains 7,961 words (according to the word count feature of counsel's word processing system), excluding the Table of Contents and Table of Citations, and thus complies with the requirements of Rule 14.

/s/ *D. Andrew Gaona*

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, Intervenor-Defendant-Appellees Arizona Alliance for Retired Americans and Voto Latino electronically filed their Answering Brief and served a copy of the same, via email on the following persons:

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