ARIZONA COURT OF APPEALS

DIVISION TWO

REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF ARIZONA, LLC, and YAVAPAI COUNTY REPUBLICAN PARTY,

Plaintiffs-Appellants,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State,

Defendant-Appellee,

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

Intervenors-Defendants-Appellees.

No. 2 CA-CV 2024-0241

Maricopa County Superior Court
No. CV2024-050553

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DEMOCRATIC NATIONAL COMMITTEE AND ARIZONA DEMOCRATIC PARTY'S ANSWERING BRIEF

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Introduction

Just weeks before early voting begins for the general election and after ballots have been printed and mailed, Appellants the Republican National Committee, the Republican Party of Arizona, LLC, and the Yavapai County Republican Party seek to invalidate the entire 268-page Elections Procedures Manual ("EPM") that prescribes the rules and procedures for Arizona's upcoming (and ongoing) elections. Appellants seek this relief based primarily on their claim that, despite Defendant Secretary of State adopting, and the Governor and Attorney General approving, the EPM pursuant to the same statutory process that has been in place for decades, the current EPM (and, presumably, every EPM before it) failed to comply with the Administrative Procedure Act ("APA").

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The superior court correctly held that the process for adopting the EPM is governed by the specific statute that establishes the EPM—not the APA. Even if the APA governed, however, the Secretary substantially complied with it in promulgating the EPM. In all events, Appellants' claim comes too late. Appellants urge this Court to invalidate the long-standing process for promulgating the EPM—as well as the resultant EPM currently in force—after the EPM governed the March and July

2024 elections and while the November election is well under way. Doing so would cause chaos and confusion among election officials, as well as harm to voters.

Appellants alternatively challenge eight other provisions of the EPM. The superior court correctly denied these challenges, too.

This Court should affirm.

Statement of facts and case

I. Background

A. The Elections Procedures Manual

A.R.S. § 16-452 requires that, every two years, the Secretary prepare "an official instructions and procedures manual" designed 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." As the Secretary has emphasized, the EPM is "one of the most important documents to ensure consistent and efficient election administration across our state." [ROA 1 ep 2, ¶ 3].

Appellants acknowledge that the EPM "spans 268 pages of substance on a range of election topics, including voter registration, early voting, ballot-by-mail elections, voting equipment, accommodating voters

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with disabilities, regulation of petition circulators, presidential preference elections, pre-election procedures, conduct of elections and election day operations, central counting place procedures, hand count audits, postelection day procedures, certifying election results, and campaign finance." [ROA 1 ep 2, ¶ 2].

B. The Secretary adopts the EPM.

In addition to the required "consultation with each county board of supervisors or other officer in charge of elections," A.R.S. § 16-452(A), the Secretary posted a draft of the EPM for public comment on July 31, 2023, [ROA 1 ep 6, ¶ 23]. A.R.S. § 16-452 does not require any notice to and comment from the public; the Secretary allowed for public comment "in keeping with the good practice of the prior Administration." [ROA 1 ep 8, ¶ 33 & n.3]. He offered 15 days for public comment, from August 1 through August 15. [ROA 1 ep 6, ¶ 24]. On August 15, 2023, Appellants submitted a 52-page letter to Secretary Fontes commenting on the draft EPM. [ROA 1 ep 6, ¶ 25].

Following that comment period, on September 30, 2023, the Secretary transmitted a revised EPM to the Governor and Attorney General for their review as required by A.R.S. § 16-452. [ROA 1 ep 6, ¶

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26]. Then, on December 30, 2023, after consultation with and approval by the Governor and the Attorney General, the Secretary published the EPM. [ROA 1 ep 6, ¶ 27].

II. This dispute.

On February 9, 2024, more than a month after the Secretary published the EPM, Appellants filed their complaint in superior court. [ROA 1]. Appellants sought to invalidate the entire EPM. [ROA 1 ep 24, ¶ A(1)]. In the alternative, Appellants challenged certain individual provisions in the EPM, including cancellation of voter registrations (Counts II, V), the ability of federal-only voters to vote in presidential elections (Count III), access to mail ballots (Counts IV, VII), challenges to early ballots (Count VIII), access to voter signatures (Count VI), and voting by out-of-precinct voters (Count IX). On February 15, 2024, Appellants moved for a preliminary injunction. [ROA 8].

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Defendants, including the Intervenor-Defendants the Arizona Democratic Party and Democratic National Committee, moved to dismiss the complaint and opposed the motion for a preliminary injunction. [ROA 29; ROA 30; ROA 31]. On May 14, the superior court entered an order

dismissing the case in its entirety and denying the request for a preliminary injunction. [ROA 50 ep 1–2, 7].

Almost two months later, on July 3, 2024, Appellants filed their notice of appeal. [ROA 55]. Six weeks after that, on August 19, 2024, Appellants filed their opening brief.

Statement of the issues

This appeal raises the following issues and alternative issues:

1. Did the superior court correctly conclude that the Secretary did not violate the APA when promulgating the EPM because: (a) that process is governed by the specific procedures prescribed in A.R.S. § 16-452, not by the APA, (b) the Secretary substantially complied with the APA, or (c) Appellants' claims are barred by laches?

2. Did the superior court correctly reject Appellants' challenges to eight different EPM rules, arguing that those rules exceeded the Secretary's authority under the applicable statute?

3. Did the superior court correctly conclude that Appellants are not entitled to injunctive relief?

Standard of review

This Court reviews orders granting motions to dismiss for failure to state a claim de novo. *Abbott v. Banner Health Network*, 239 Ariz. 409,

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412 ¶ 7 (2016). It reviews the denial of a preliminary injunction for abuse of discretion. *Apache Produce Imps., LLC v. Malena Produce, Inc.*, 247 Ariz. 160, 164 ¶ 9 (App. 2019).

Argument

I. The APA does not apply to the EPM.

A. The process for adopting the EPM is governed by the specific procedures in A.R.S. § 16-452, not the APA.

As the Arizona Supreme Court has expressly held, "[t]he EPM is promulgated pursuant to A.R.S. § 16-452." *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021). The process by which the EPM is promulgated has remained substantially the same at least since 1979. *See* 1979 Ariz. Sess. Laws, ch. 209, § 3; *see* 1966 Ariz. Sess. Laws, ch. 92. (authorizing procedures manual). "Once adopted, the EPM has the force of law . . . ." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020) ("*AZPIA*") (citing A.R.S. § 16-452(C)). Notably, and unlike rules adopted by agencies under the APA, the EPM gains the force of law "once adopted"; no additional requirements must be satisfied.

Recognizing this consistent judicial and historical precedent, the superior court correctly concluded that "the APA does not apply to the

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2023 EPM." [ROA 50 ep 2]. Rather, the EPM statute governs the procedures by which the EPM is promulgated, for at least two reasons.

1. The APA recognizes that certain rules may be promulgated as "otherwise provided by law."

a. Under the APA, rules must be "made and approved" in either of two permissible ways: (1) "in substantial compliance with" the APA's rulemaking requirements or (2) as "otherwise provided by law." A.R.S. § 41-1030(A).[1] The superior court correctly concluded that the process for promulgating the rules in the EPM is established as "otherwise provided by law," A.R.S. § 41-1030(A), rather than under the generally applicable requirements of the APA.

As the superior court explained, "the Legislature has 'otherwise provided by law' for the procedure to promulgate a valid EPM – A.R.S. § 16-452." [ROA 50 ep 2 (emphasis omitted)]. Namely, this EPM statute details the "specific procedure" that must be followed "in promulgating election rules." *AZPIA*, 250 Ariz. at 63 ¶ 16. "After consultation with

[1] This subsection provides in full: "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." A.R.S. § 41-1030(A).

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[election officials]," for example, the Secretary must "submit the manual to the governor and the attorney general not later than October 1 of the year before each general election." A.R.S. § 16-452(A), (B). And the governor and attorney general then must approve the manual "not later than December 31 of each odd-numbered year immediately preceding the election." A.R.S. § 16-452(B). Through this legislatively customized process—and as the APA explicitly contemplates—the EPM is "made and approved" as "otherwise provided by law." A.R.S. § 41-1030(A); *see May v. Ellis*, 208 Ariz. 229, 231 ¶ 11 (2004) ("[The statute] . . . begins with a critical phrase: 'Except as otherwise provided by law.' Thus, [the statute] . . . only applies when there is no other 'law' to the contrary."). And A.R.S. 16-452(C) makes express that the EPM's rules are "adopted pursuant to this section" and carry criminal penalties. The EPM is adopted pursuant to the EPM statute, not the APA.

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b. Appellants disagree, arguing that section 41-1030(A) doesn't mean what it says and that it instead merely provides "the remedy for noncompliance with the APA" and not a separate mechanism by which to exempt agency processes from APA rulemaking. [Opening Brief ("OB"), 08/21/24 ep 27]. But Appellants advanced a different reading before the

superior court: They interpreted section 41-1030(A), instead, as "prescrib[ing] the default standard of review for rules under the APA," "unless another test for validity has been 'provided by law.'" [ROA 39 ep 7]. Appellants' shifting interpretations of this provision belie their insistence that their latest interpretation reflects "the plain meaning of" section 41-1030(A). *In re Drummond*, 543 P.3d 1022, 1025 ¶ 5 (Ariz. 2024) (citation omitted).

Moreover, Appellants' new interpretation fails. Appellants argue, [OB, 08/21/24 ep 25], that "[t]here is only one way for the legislature to exempt the EPM from the APA's rulemaking process" and that is an "express exemption" as authorized by a separate statute, A.R.S. § 41-1002.[2] As to section 41-1030(A), Appellants now contend that section 41-1030(A) should be read merely as "a recognition that rules are not categorically invalid because they did not go through the APA's rulemaking process." [OB, 08/21/24 ep 28–29]. "[A] rule is not invalid for failure to comply with the APA," Appellants assert, when "the legislature expressly exempted the rulemaking from the APA." [OB, 08/21/24 ep 29].

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[2] That statute provides that certain of the APA's key provisions, including rulemaking, "apply to all agencies and all proceedings not *expressly exempted*." A.R.S. § 41-1002 (emphasis added).

But Appellants' interpretation of section 41-1030(A) ignores its plain text. Again, the statute provides that rules are "made and approved" in either of two permissible ways: (1) "in substantial compliance with" the APA's rulemaking requirements or (2) as "otherwise provided by law." A.R.S. § 41-1030(A). The term "otherwise provided by law" is a broad catchall, meaning except as provided by "all other law including [other] statutes." *Ariz. State Bd. of Regents ex rel. Ariz. State Univ. v. Ariz. State Pers. Bd.*, 195 Ariz. 173, 175 ¶ 12 (1999).

The statute nowhere limits its application to rules made through processes "expressly exempted" from the APA by statute. A.R.S. § 41-1002(A). Had the legislature intended the carveout for rules that are made through a process "otherwise provided by law," A.R.S. § 41-1030(A), to mean only those rules made by processes and agencies "expressly exempted," A.R.S. § 41-1002, from the APA, it would have said so. Arizona courts have "consistently viewed different language in different constitutional and statutory provisions to have different meanings." *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 254 Ariz. 432, 439 ¶ 33 n.2 (2023) (Bolick, J., concurring). And section 41-1030(A) means that rules

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are valid not only if promulgated under the APA, but also if promulgated as "otherwise provided by law," as the EPM has been for decades. *Id.*

Appellants' interpretation also renders parts of section 41-1030(A) superfluous: If, as Appellants contend, section 41-1002(A)'s express-exemption requirement applies to section 41-1030(A), then section 41-1030's "unless otherwise provided by law" carveout would serve no purpose. If a rule is made pursuant to a process already "expressly exempted" from the APA, A.R.S. § 41-1002(A), then it is not necessary to consider whether it is "invalid" under the APA, *id.* § 41-1030(A). And courts generally decline to give a provision "an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* ("*Reading Law*") 174 (2012); *see also* [OB, 08/21/24 ep 29 (agreeing that statutory "[i]nterpretation should . . . avoid rendering 'any cause, sentence or word superfluous, void, contradictory, or insignificant'")].

For their part, Appellants assert that the trial court's "reliance on subsection [41-]1030(A) would violate multiple canons of statutory interpretation." [OB, 08/21/24 ep 29]. To support their assertion, though, Appellants rehash their prior argument that an exemption must be

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express and, so, the superior court "absolve[d] the Secretary" from complying with the APA. [OB, 08/21/24 ep 29]. Not so. The APA provides two separate carveouts from its provisions—one for "agencies" and "proceedings" to be "expressly exempted" from certain provisions of the APA, A.R.S. § 41-1002(A), and one for rules, like those included in the EPM, which can be validly promulgated consistent with either the APA's rulemaking processes or as "otherwise provided by law," *id.* § 41-1030.

As a final attempt to support their interpretation, Appellants cite "[t]he history of subsection [41-]1030(A)." [OB, 08/21/24 ep 30]. This legislative history, Appellants contend, "confirms" that the unless-otherwise-provided-by-law clause was added merely "for clarity": to make "clear that not all rules . . . are invalid for failure to comply with the APA; some rulemakings are expressly exempt." [OB, 08/21/24 ep 30–31]. But none of the legislative history that Appellants cite "confirms" this purported legislative purpose. In support, Appellants cite the text of the amendment itself and the legislative fact sheet. But nothing in that fact sheet mentions why "unless otherwise provided by law" was added to section 41-1030(A). In any event, "[l]egislative history is not a substitute for clear legislative language," and courts "do not consider such history

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unless the language is ambiguous." *In re McLauchlan*, 252 Ariz. 324, 326 ¶ 15 (2022). Here, it is not.

Based on the plain language of A.R.S. § 41-1030(A), the process for promulgating the EPM is governed by the EPM statute, not the APA.

2. The EPM is "expressly exempted" from the APA.

Nonetheless, the EPM is "expressly exempted" from the APA. A.R.S. § 41-1002(A). The rulemaking procedures of the APA "apply to all agencies and all proceedings not expressly exempted." *Id.*

Neither the APA nor Arizona case law supply a definition for what it means for a proceeding to be "expressly exempted." Though, in applying the statute, Arizona courts have held that the legislature can "expressly exempt" a proceeding by stating within a statute that a provision is exempt from the APA, either in the APA itself or elsewhere. *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 252 ¶ 23 (App. 2015). In contrast, they have declined to find an express exemption when a statute "says nothing about rulemaking." *Id.*

Here, however, the EPM statute prescribes the precise procedures for how "[t]he rules shall be prescribed in an official instructions and procedures manual." A.R.S. § 16-452(B). It says expressly that its rules

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are "adopted pursuant to this section." A.R.S. § 16-452(C). That would make no sense if the rules were in fact adopted under the APA. And the EPM statute would conflict with the APA in at least two respects, as the superior court recognized. [ROA 50 ep 3].

First, there is "a conflict in obtaining governor approval," as the superior court recognized. [ROA 50 ep 3 & n.4] (citing A.R.S. §§ 16-452, 41-1039(B)–(D)). The EPM statute *requires* the EPM to "be approved by the governor." A.R.S. § 16-452(B). The APA, by comparison, *exempts* the Secretary, as an agency headed by a single elected state official, from seeking approval either from the Governor or the Governor's Regulatory Review Council. A.R.S. § 41-1039(E)(2)(a); A.R.S. § 41-1057(A)(1). Because the EPM provision requires gubernatorial approval and the APA exempts it, these statutes conflict. [3]

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[3] In response, Appellants rely primarily, [OB, 08/21/24 ep 34], on a 1979 Arizona Attorney General opinion. [ROA 39 ep 37]. Appellants quote—in part—some language from this opinion: "The fact that the rules and regulations [under the relevant statute] are subject to the Governor's approval does not excuse them from compliance with the APA. This is merely one additional step in the rule-making process . . . ." [OB, 08/21/24 ep 34] (quoting [ROA 39 ep 43]). This opinion, however, does not address the cited statutes that exempt the Governor's involvement and pose a conflict. In any event, Appellants have omitted the end of this last sentence. As this sentence provides in full: "This is merely one additional

Additionally, as the trial court also correctly concluded, "[t]here are deadline related conflicts." [ROA 50 ep 3 & n.3] (citing A.R.S. §§ 16-452(B), 41-1022(A)–(B) & (D)–(E), 41-1023(B)–(D)). Specifically, the APA's notice-and-comment provisions require a lengthy, cumbersome process and timeline that is inconsistent with the timeline and process mandated by the EPM statute. *See* [ROA 29 ep 7–8] (detailing extensive number of steps required under the APA). Allowing for the full timelines that these statutes authorize would require hundreds of days. But the EPM statute does not permit such delay.

Indeed, the EPM statute mandates the opposite. As it provides, "[t]he 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." A.R.S. § 16-452(B). The governor and attorney general then must approve the manual "not later than December 31." A.R.S. § 16-452(B). And the Secretary must repeat this process "each odd-numbered year." A.R.S. § 16-452(B). All in all, the EPM statute contemplates a

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step in the rule-making process; if 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]. And that is precisely what the Legislature did here when establishing an alternative procedure for promulgating the EPM.

much shorter process—of around three months—that stands in stark contrast to the lengthy APA process. The timelines of the EPM statute and the APA thus conflict.

Appellants contend that this conflict is "imaginary" because it might be possible to comply with both the EPM statute and the APA if the Secretary simply starts the process earlier. [OB, 08/21/24 ep 33]. In challenging whether a conflict exists, though, Appellants ignore *State v. Arizona Board of Regents*, 253 Ariz. 6 (2022) ("*ABOR*"). There, the Arizona Supreme Court considered whether a one-year or five-year statute of limitations governed certain causes of action by the attorney general. *Id.* at 12 ¶ 22. The Court found a conflict between the two statutes, even though the attorney general technically could comply with *both* statutes by simply suing earlier. *Id.* at 13 ¶ 29. But the Court did not require the attorney general to do so—because the legislature had *authorized* a longer limitations period. The Court thus applied the statute that "was added . . . twenty-five years after [the other statute] was enacted" and was "specific to [the type of] claims brought by the Attorney General." *Id.* at 14 ¶ 29. The same reasoning controls here: Because the EPM statute and APA establish two distinct and

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contradictory timelines, the Secretary need not begin the EPM process on an entirely different schedule. That is especially true where the legislature has created a specific timeline, as in the EPM statute.

In the end, by providing a detailed, customized process for promulgating the EPM that, in some ways, conflicts with the APA, the legislature "expressly exempted" the EPM promulgation process from the APA. A.R.S. § 41-1002(A).[4]

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[4] Below, Appellees, and the superior court, relied on the general principle that "[w]hen there is conflict between two statutes, the more recent, specific statute governs over the older, more general statute." *ABOR*, 253 Ariz. at 13 ¶ 29. The Arizona Supreme Court has expressly so held in the context of the APA. *See Ariz. State Tax Comm'n v. Phelps Dodge Corp.*, 116 Ariz. 175, 177 (1977) (holding that "[t]he Administrative Procedure Act, if it is in direct or inferential conflict with the specific legislative provision enacted to control [certain proceedings], has no application. Special statutes govern over general statutes"). Appellants now argue, [OB, 08/21/24 ep 31–33], that these cases cannot be reconciled with the A.R.S. § 41-1002(B), which provides that "[t]o the extent that any other statute would diminish a right created or duty imposed by this chapter, the other statute is superseded by this chapter, unless the other statute expressly provides otherwise." *See also* [OB, 08/21/24 ep 32] (citing *City of Phoenix v. 3613 Ltd.,* 952 P.2d 296 (Ariz. App. 1997), which cast doubt on the continuing viability of the rule). This Court need not reach this issue, however, because by providing a detailed process for promulgating the EPM that is inconsistent with the APA, the EPM statute expressly exempts the EPM promulgation process from the APA. A.R.S.§ 41-1002(A); *id.* A.R.S.§ 41-1030; *see also id.* § 41-1002(B) ("[T]he other statute is superseded by this chapter, *unless the other statute expressly provides otherwise*." (emphasis added)).

Appellants respond, [OB, 08/21/24 ep 17, 27 n.4], that "there are two ways," only, to create an express exemption: by either calling out the EPM statute by name in the APA or calling out the APA by name in the EPM statute. That the legislature has done it this way in other statutes, however, does not limit how it may draw express exemptions in every instance. *See City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 143–44 ¶¶ 15–16 (2017) (explaining that although the legislature could have provided for an express exception in the same manner as it had previously done in another statute, it was not required to do so). Courts "do not require the legislature to 'employ magical passwords' to accomplish its manifest intent," including to create an "express[] exemption." *Id.* at 144 ¶¶ 16, 18 (citation omitted). So too here. Because the EPM is "made and approved . . . as otherwise provided by law" through the process detailed in the EPM statute, the EPM statute is expressly exempted from the APA. *See* [ROA 50 ep 3] ("Section 16-452 . . . is simply the 'otherwise provided by law' expressly contemplated by the APA.").

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As a result, the superior court was correct to hold that the long-standing process for promulgating the EPM in A.R.S. § 16-452 is exempt from the APA.

* * *

For all these reasons, the process for promulgating the EPM is governed by the EPM statute, A.R.S. § 16-452, not by the APA.

B. In all events, the Secretary substantially complied with the APA.

Even if the APA applies to the EPM, the Secretary "substantial[ly] compli[ed]" with those requirements. A.R.S. § 41-1030(A). While the superior court did not ultimately reach this issue, it correctly observed that there is "a good argument that . . . the Secretary substantially complied with the APA." [ROA 50 ep 2]. The Secretary's substantial compliance is an independent basis to sustain the superior court's judgment. *See Forszt v. Rodriguez*, 212 Ariz. 263, 265 ¶ 9 (App. 2006) ("[The Court of Appeals] may affirm the trial court's ruling if it is correct for any reason apparent in the record.").

The APA provides, as noted above, 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*

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compliance with [the APA rulemaking process], unless otherwise provided by law." A.R.S. § 41-1030(A) (emphasis added). This textual command is consistent with the Arizona Supreme Court's guidance that consideration of "the equitable doctrine of substantial compliance is appropriate when deciding whether statutory obligations have been met." *In re Drummond*, 543 P.3d at 1030 ¶ 32.

While the APA statute does not define substantial compliance, the Arizona Supreme Court has held in other contexts that "substantial compliance" is "a standard that . . . tolerates errors if the purpose of the relevant statutory requirements was nevertheless fulfilled." *In re Pima Cnty. Mental Health No. 20200860221*, 255 Ariz. 519, 524 ¶ 11 (2023); *see also Aesthetic Prop. Maint. Inc. v. Capitol Indem. Corp.*, 183 Ariz. 74, 77–78 (1995) (observing that "substantial compliance is adequate when it satisfies the general policy or purpose of the statute"); *Feldmeier v. Watson*, 211 Ariz. 444, 447 ¶ 14 (2005) (holding that "for initiatives, substantial compliance means that the petition as circulated fulfills the purpose of the relevant statutory or constitutional requirements, despite a lack of strict or technical compliance").

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APA rulemaking is aimed at "ensur[ing] that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures." *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 226 (App. 1994). The process followed in promulgating the EPM satisfied both purposes—providing "adequate notice" to "those affected by" the EPM and the "opportunity for input." *Id.*

To start, the Secretary is statutorily required to provide both notice and the opportunity for input to numerous affected parties. The Secretary prescribes rules only "[a]fter consultation with each county board of supervisors or other officer in charge of elections," and then the Secretary submits the manual to the governor and attorney general for review and approval. A.R.S. § 16-452(A)–(B).

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Beyond the statutory requirements, the process for the promulgation of the EPM in 2023 provided for additional notice and opportunity for input. As Appellants allege, the Secretary allowed for "15 days of public comment, from August 1 through August 15, 2023." [ROA 1 ep 6, ¶ 24]. In response, the Secretary received "over 1,530 comments from 620 groups or individuals" on the draft EPM. [ROA 29 ep 11–12];

see also [ROA 1 ep 8, ¶ 33 n.3]. Those public comments included a 52-page letter from Appellants. [ROA 1 ep 6, ¶ 25 & n.2]. The Secretary "carefully considered" those comments and, "where appropriate, incorporated [those] suggestions in [the EPM]." [ROA 29 ep 12] (record citation omitted).

Below, Appellants argued that the EPM did not substantially comply with the APA because the Secretary provided "15 days" for notice and the opportunity to comment "when the APA requires a minimum of 30." [ROA 39 ep 11] (citing A.R.S. § 41-1023(B)). But Appellants fail to explain why neither their own 52-page comment on the draft nor the 1,530 comments from 620 others was insufficient to ensure "adequate notice" and "opportunity for input" within the time provided. *Carondelet Health Servs., Inc.*, 182 Ariz. at 226.

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Appellants also argued that certain claimed technical violations prevent a finding of substantial compliance. They do not. First, Appellants took issue with the Secretary failing to "follow[] the statutorily prescribed format" for providing and publishing notice, A.R.S. § 41-1022(A). [ROA 39 ep 11]. But Appellants do not allege that they and others affected by the rule lacked notice; Appellants in fact had sufficient

notice to be able to submit a 52-page letter commenting on the EPM. [ROA 1 ep 6, ¶¶ 24–25]. Appellants also pointed to the Secretary's alleged failure to hold or allow the opportunity to request an oral hearing, A.R.S. § 41-1023(C). [ROA 39 ep 11]. But they do not allege that they or anyone else requested, or were denied, a public hearing—or that the lack of a hearing impeded them from advancing the comments they submitted in their letter. *See* [ROA 1]. Finally, Appellants argued that the Secretary did not substantially comply with the APA because he failed to "maintain an official rulemaking record," A.R.S. § 41-1029(A). [ROA 39 ep 11]. But the Secretary made publicly available much of what constitutes the rulemaking record, including the draft and final EPM. [ROA 1 ep 6–7, ¶¶ 23, 26–27]. Further, Appellants do not explain how the available record undermined any party's notice or ability to provide input.[5]

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Because the Secretary substantially complied with the APA, this Court should affirm the dismissal of Appellants' APA claim.

[5] While Appellants alleged that the Secretary added some unspecified number of provisions to the draft EPM after the public comment period closed, [ROA 1 ep 6, ¶ 27], they do not identify why a lack of comment on those specific provisions requires invalidating the EPM as a whole; at most, this would suggest invalidating the specific provisions.

C. This claim is barred by laches.

Even if Appellants' first claim to invalidate the entire EPM survived on the merits, Appellants brought it far too late to obtain relief. Here, too, the superior court rightfully had "concerns" that laches bars Appellants' claims. [ROA 50 ep 2]. Those concerns have only increased over the four months since the superior court's ruling. Because laches is a complete defense to Appellants' first claim, this court should affirm its dismissal. *See Forszt*, 212 Ariz. at 265 ¶ 9 ("[The Court of Appeals] may affirm the trial court's ruling if it is correct for any reason apparent in the record.").

"In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if" (1) "a party's unreasonable delay" (2) "prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006); *see also Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998) ("[i]n election matters, time is of the essence" because disputes "must be initiated and resolved" without interfering with important election deadlines).

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Appellants' delay in waiting to bring this suit until February 2024 was unreasonable. [ROA 1]. To determine whether the delay was unreasonable, "[Arizona courts] examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge." *Harris*, 193 Ariz. at 412 ¶ 16. At a minimum, Appellants have been on notice about the draft EPM since at least August 2023, over five months before filing their complaint, when they provided comments to the draft EPM, including to provisions they now challenge. [ROA 1 ep 6, ¶¶ 23–25].

Appellants argued to the superior court that they could have sued only once the EPM was final at the end of December 2023. [ROA 39 ep 15–16]. This is incorrect. In support of their argument below, (at *id.*), Appellants argued that their challenge was brought under an APA statute permitting "a judicial declaration of the validity of [a] rule." A.R.S. § 41-1034(A). Appellants then reasoned that a rule does not exist until it is final under the APA, and so Appellants argue that the EPM could not be challenged until it was final. [ROA 39 ep 15–16]. But Appellants mischaracterize the nature of their first claim. Appellants do not challenge any individual rule. Instead, Appellants advance the novel

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argument that the long-standing statutory process for promulgating the EPM, *see* A.R.S. § 16-452, was inadequate because it did not comply with the alternative procedure set forth in the APA. Appellants have long had an "actual or real interest" sufficient to seek declaratory judgment as to whether the APA governed the EPM promulgation process. *Ariz. Sch. Bds. Ass'n v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (quoting *Podol v. Jacobs*, 65 Ariz. 50, 54 (1946)). This interest existed at least when Appellants "object[ed] to the artificially short period for public comment" in August 2023. [ROA 1 ep 6, ¶ 25]. In short, Appellants had many months, at least,[6] to challenge this process and did not do so until after the statutory deadline for the Secretary to adopt the EPM.

Appellants similarly could have sued the Secretary under A.R.S. § 12-2021. This statute empowers the superior court to issue a "writ of mandamus" to "any person" who is "beneficially interested" "to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specifically imposes as a duty

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

resulting from an office." A.R.S. § 12-2021. Courts frequently issue writs of mandamus "to compel a public official to perform an act imposed by law," including in the election context. *AZPIA*, 250 Ariz. at 62 ¶ 11. Here, if the Secretary needed to comply with the APA's rulemaking requirements as Appellants contend, they could have sought a writ to compel him to do so. *See id.* ¶ 12 ("Plaintiffs, as Arizona citizens and voters, seek to compel the [county r]ecorder to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law. Thus, we conclude that they have shown a sufficient beneficial interest to establish standing [under § 12-2021].").

In the end, waiting months, or years, to bring their challenge in an election year was an unreasonable delay. *See Sotomayor v. Burns*, 199 Ariz. 81, 82–83 ¶¶ 5–7 (2000) (two-month delay between receiving a draft written analysis of a proposition for inclusion in the state's voter information pamphlet and filing a lawsuit was unreasonable).[7]

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[7] Beyond that, Appellants also delayed in prosecuting their appeal. *See Barr v. Petzhold*, 77 Ariz. 399, 406 (1954) ("The general rule is that a plaintiff must exercise diligence and avoid unreasonable delay in prosecuting an action."). Appellants filed their notice of appeal on July 3, 2024. [ROA 53; ROA 55]. They did not file their Opening Brief until August 19, 2024. In the interim, Appellants never used the time to, for

Appellants' delay in filing also "result[ed] in prejudice." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (Ariz. 2009) (citation omitted). Prejudice may be shown "either to the opposing party or to the administration of justice, which may be demonstrated by showing injury or a change in position as a result of delay." *Id.* (citation omitted). With respect to prejudice to the administration of justice, courts consider prejudice to election officials, Arizona voters, and Arizona courts. *See Sotomayor*, 199 Ariz. at 83 ¶ 9.

Appellants' delay has resulted in prejudice to the defendants in this action, including election officials, political party organizations, and civic engagement groups. *Martin*, 219 Ariz. at 558 ¶ 6. The last day to register to vote for the general election is October 7, seven days after the filing of this brief.[8] Early voting begins on October 9. A.R.S. § 16-542(C). The EPM addresses critical issues involving both voter registration, early

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example, seek an injunction pending appeal from this Court, or file a special action. *See, e.g.*, ARCAP 7(c). Waiting six weeks to seek expedited consideration from this court in the months prior to an election was also unreasonable.

[8] Arizona Secretary of State Election Calendar 2023-2024, Ariz. Sec'y of State, https://apps.azsos.gov/election/2024/2024_Election_Calendar.pdf (last visited Sept. 27, 2024).

balloting, and pre-election procedures. *See* [ROA 1 ep 2, ¶ 2]. Were Appellants to succeed on their challenge, election officials, parties, advocacy groups and, ultimately, voters would be forced to scramble to determine which rules apply to various aspects of election administration.

Appellants' relief would also likely result in election law whiplash. The EPM governed the March, May, and July elections. If Appellants succeed in invalidating the EPM before the general election, Appellants argue, [OB, 08/21/24 ep 35–36], that the result will be to revert to the 2019 EPM for general election. This means Arizona voters would vote for the same candidates in the same election cycle only months apart but under different election systems. The pendulum swings between different election law regimes within the same election cycle would particularly prejudice election officials, candidates, party organizations, and other advocacy groups spending more resources to educate those voters on the mid-cycle change in the law.

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Prejudice also exists to the courts. *See Sotomayor*, 199 Ariz. at 83 ¶ 9. Unreasonable delay can prejudice the administration of justice "by compelling the court to steamroll through delicate legal issues in order to

meet" election deadlines. *Lubin*, 213 Ariz. at 497–98 ¶ 10 (cleaned up). "Late filings 'deprive judges of the ability to fairly and reasonably process and consider the issues . . . and rush appellate review, leaving little time for reflection and wise decision making.'" *Sotomayor*, 199 Ariz. at 83 ¶ 9 (alteration in original) (citation omitted). That is precisely what is happening here. Appellants' delay will force this Court and the Arizona Supreme Court to hurry their analysis and rulings. *Id.* No court should have to rush through a question of first impression about the validity of a long-standing statutory process of such import because Appellants failed to timely pursue their claims. If Appellants wish to pursue their novel claim as to the process for promulgating the new EPM that must be issued next year and will be imminently underway, they are free to do so. *See* A.R.S. § 16-452 (B) (requiring EPM to be issued "each odd-numbered year"). But it is too late to invalidate the one that has governed this election cycle.

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II. The superior court correctly dismissed Appellants' alternative claims.

Each of Appellants' alternative challenges against various EPM provisions fails because none presents a conflict with the applicable statute. Intervenor-Defendants the Arizona Democratic Party and

Democratic National Committee join and incorporate by reference the Secretary's arguments as to Count II (confirming non-citizenship before cancellation), Counts III and IV (federal only voters), Count V (citizenship database checks), Count VII (one-time requests for out-of-state ballots by AEVL voters), and Count IX (out-of-precinct voting). *See* ARCAP 13(h). Intervenor-Defendants add their views as to Counts VI (access to voter signatures) and VIII (early ballot challenges).

Count VI (access to voter signatures). By statute, "records containing a voter's signature" may not be accessed by persons other than the voter, certain authorized officials, "for signature verification on petitions and candidate filings," "for election purposes," "for news gathering purposes" by journalists, or pursuant to a court order. A.R.S. § 16-168(F). The EPM 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." [ROA 1 ep 96] Appellants maintain, [OB, 08/21/24 ep 45–48], that "member[s] of the public," *id.*, are also entitled to these signatures "for election purposes." [ROA 1 ep 96]. But they nowhere specify what the

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"election purposes" are for which the general public needs signatures. Before the trial court, Appellants argued that the public needed the signatures "to verify signatures on mail-ballot affidavits." [ROA 8 ep 11–12]. Appellants appear to have abandoned this theory on appeal, perhaps recognizing that the public plays no role in signature verification of mail ballot affidavits. *See* A.R.S. §§ 16-550(A), 16-550.01(A). There is no conflict, because Appellants fail to identify any "election purpose" for which the public may request registrant signatures that the EPM forecloses.

Count VIII (early ballot challenges). Next, Appellants are incorrect that the EPM provision clarifying the time during which early ballots may be challenged conflicts with A.R.S. § 16-552(D). The EPM specifies the period during which early ballots may be challenged: after the early ballot's receipt by the county recorder but before the opening of the early ballot affidavit envelope. [ROA 1 ep 122]. This simply restates the sequence required by statute.

After conducting signature verification of early ballot affidavit envelopes, A.R.S. §§ 16-550(A), 16-550.01(A), the county recorder must deliver the *unopened* envelopes to the early election board for processing.

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See A.R.S. §§ 16-550(B)–(C), 16-551(C). Upon determining that the mail ballot affidavit is sufficient, the early election board separates the ballot from the envelope. A.R.S. § 16-552(B), (F). The board then transmits the valid, separated ballots to the central counting place for tabulation. [ROA 1 ep 129–30].

A qualified elector may submit a written challenge to an early ballot on certain grounds "before the early ballot is placed in the ballot box." A.R.S. § 16-552(D). The early election boards adjudicate early ballot challenges. *Id.* ("[T]he early election board shall hear the grounds for the challenge and shall decide what disposition shall be made of the early ballot by majority vote."). And the board must resolve the challenge *before* opening the ballot envelope: if the early election board sustains the challenge and does not allow the early ballot, it must handle the early ballot "pursuant to subsection G," which provides, in turn, that rejected early ballots "shall not be opened" but must instead be marked with the reason for the rejection. *Id.* § 16-552(D), (G).

It follows, then, that early ballot challenges must be submitted "after an early ballot is returned to the County Recorder and prior to the opening of the early ballot affidavit envelope." [ROA 1 ep 122]. Because

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early ballot challenges are directed to the early election boards, challenges necessarily must be submitted *after* the county recorder transmits the unopened envelopes to the boards, which logically must occur after the county recorder itself receives the envelopes. At the other end, because the early election board must resolve the challenge before opening the envelope, it again follows that the challenge must be submitted before opening. None of the grounds for challenging an early ballot—all of which focus on the eligibility of *the voter*—could have any bearing once the ballot separated from its affidavit envelope, as the ballot itself cannot identify the voter. *See* [ROA 1 ep 122–23] (listing challenge grounds); A.R.S. § 16-1018(8) (prohibiting non-UOCAVA voters from "plac[ing] a mark on the voter's ballot by which it can be identified as the one voted by the voter").

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Logically, then, "[c]hallenges received before the early ballot is returned or after the affidavit envelope containing the ballot has been opened must be summarily denied as untimely." [ROA 1 ep 122]. The EPM is fully consistent with the statute governing early ballot challenges.

III. The superior court correctly held that Appellants are not entitled to preliminary injunctive relief.

Finally, Appellants argue, [OB, 08/21/24 ep 53], that this Court should enter an injunction in their favor. It should not.

To obtain a preliminary injunction, a party must show, among other things, a "likelihood of success on the merits." *Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021). Because Appellants had no "likelihood of success on the merits" for the reasons set forth above, the superior court did not abuse its discretion in denying Appellants' motion. *Id.* at 432 ¶ 16; *see also* [ROA 50].

Even if Appellants had presented "serious questions" about the merits," however, "the balance of hardships," as well as "public policy," also support the superior court's denial of preliminary injunctive relief. *Fann*, 251 Ariz. at 432 ¶ 16; *see also Forszt*, 212 Ariz. at 265 ¶ 9 ("[The Court of Appeals] may affirm the trial court's ruling if it is correct for any reason apparent in the record.").

If the entire rulebook for Arizona elections were preliminarily enjoined before a presidential election, it would wreak havoc on Arizona's elections processes, all while undermining public confidence and trust in election administration, as explained above, (*see supra* p. 29). Indeed, if

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any of the challenged provisions were enjoined at this late hour, the Secretary and local election officials would be forced to scramble to determine how to adjust both ongoing and imminent elections procedures to comply with applicable laws. Additionally, and as also explained above, (*see supra* pp. 29–30), different rules would necessarily apply for the primary and general elections. The application of different rules to these elections further increases the likelihood of voter and poll worker confusion. *See In re Ga. Senate Bill 202*, 622 F. Supp. 3d 1312, 1344 (N.D. Ga. 2022) (refusing the requested relief where it would change the "mechanics of the [general] election by requiring a different set of rules than what was applicable during the primary elections that occurred just a few months ago").[9]

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[9] The prejudice from this mid-cycle switching is not mitigated by the fact that "[t]he change would only require elections officials to use" the previous version of the EPM, used in previous elections cycles including the 2022 and 2020 elections, as Appellants claim, [OB, 08/21/24 ep 56]. For one thing, many election officials have changed since then. *See* Jerod MacDonald-Evoy, *98% of Arizonans will have new elections officials in 2024, report finds*¸ Ariz. Mirror (Sept. 26, 2023), https://azmirror.com/briefs/98-of-arizonans-will-have-new-elections-officials-in-2024-report-finds/. That some may have once been familiar with the rules does not mitigate the confusion of election officials and voters.

The superior court's ruling aside, Appellants also seem to argue that this Court, [OB, 08/21/24 ep 53–54], in the first instance, should grant permanent injunctive relief. Appellants argue, [OB, 08/21/24 ep 20], that they asked the superior court to "consolidate the hearing on their motion for preliminary injunction with a trial on the merits under Ariz. R. Civ. P. 65(a)(2)(A)." But the superior court never consolidated the proceedings.[10] And this Court should not rule on Appellants' request in the first instance. *See Town of S. Tucson v. Bd. of Sup'rs*, 52 Ariz. 575, 581 (1938) (generally "questions not raised in the lower court may not be raised for the first time in an appellate tribunal"); *see also Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892, 909 n.19 (10th Cir. 2022) ("Consideration of the requirements for injunctive relief 'ordinarily must be performed by the district court in the first instance.'" (citation omitted)), *cert. denied sub nom. Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 143 S. Ct. 273 (2022). Even if this request were procedurally appropriate, it fails for the same reasons that Appellants'

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[10] In support of this assertion, Appellants cite, [OB, 08/21/24 ep 20], their reply to their motion for preliminary injunction in which they say "Plaintiffs will ask the Court for final relief under Ariz. R. Civ. P. 65(a)(2)(A)."

request for preliminary injunctive relief fails—Appellants' claims fail as a matter of law and the equities do not favor an injunction.

In all events, even if such a request were appropriate or warranted, this Court should not grant any injunctive relief to Appellants on any claim before the 2024 General Election, as they request, [OB, 08/21/24 ep 56]. Under the *Purcell* doctrine, courts generally should not alter election rules "in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam); *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) ("The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election.").

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The Arizona Supreme Court and other appellate courts have regularly barred disruptive changes to voting and election procedures proposed, as here, too close to elections. For instance, the Arizona Supreme Court recently applied *Purcell* and refused to change the registrations of thousands of voters affected by a clerical error "where

there is so little time remaining before the beginning of the 2024 General Election." Decision Order at 6–7, *Richer v. Fontes*, No. CV-24-0221-SA (Ariz. Sept. 20, 2024), https://www.azcourts.gov/Portals/201/ASC-CV240221%20-%209-20-2024%20-%20FILED%20-%20DECISION%20ORDER.pdf; *see also, e.g.*, *Robinson v. Callais*, 144 S. Ct. 1171, 1171 (2024) (granting stay in May in redistricting case nearly six months before general election); *Merrill*, 142 S. Ct. at 880, 888 (staying case in February even though the relevant elections were about four and nine months away); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (applying *Purcell* to grant stay when the district court issued an injunction less than four months away from an election and required other immediate action).

Indeed, in a different case, Appellant the Arizona Republican Party took the position that the *Purcell* window has already closed. *See* Brief of Arizona Republican Party as Amicus Curiae in Support of Respondent at 1–3, 10, *Richer v. Fontes*, No. CV-24-0221-SA (Ariz. Sept. 18, 2024), https://www.azcourts.gov/Portals/201/2024_09_18_05270831-0-0000-BriefOfArizonaRepublicanPartyA.PDF (arguing for application of *Purcell* where last-minute changes to voter registrations "would gravely

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and wantonly undermine . . . confidence" in elections). The Republican National Committee has taken a similar position. *See* Non-Party Brief of the Republican National Committee, *Priorities USA v. WEC*, No. 2024AP164 (Wis. May 3, 2024), https://perma.cc/3V4F-2ZLK (arguing that *Purcell* barred certain pre-election claims).

Here, Appellants are advocating for widespread changes that, under their theory, would have to be implemented on quite literally the eve of the 2024 General Election. On October 3, three days after the filing of this brief, early ballots must be printed and delivered to county recorders. A.R.S. §§ 16-503, 16-545. October 7 is the last day to register to vote for the general election. A.R.S. § 16-120(A). And early voting for the general election begins on October 9. A.R.S. § 16-542(C). Election Day itself is five weeks away. *Id.* Under these circumstances, the *Purcell* doctrine definitively bars last-minute changes and protects against the administrative chaos and voter confusion that would result from them.

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Conclusion

For the foregoing reasons, the superior court correctly dismissed each of Appellants' claims. The superior court's decision should be affirmed.

September 30, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Certificate of Compliance concerns a brief and is submitted pursuant to ARCAP 14(a)(5).

The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 7,427 words.

The brief to which this Certificate is attached does not exceed the word limit set by ARCAP 14(a)(1).

/s/ Daniel A. Arellano

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CERTIFICATE OF SERVICE

The undersigned certifies that original of the foregoing Democratic National Committee and Arizona Democratic Party's Answering Brief was e-filed with the Arizona Court of Appeals, Division Two via the Court's e-filing system on September 30, 2024 and that a copy will be served via email on this same date on the following:

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