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, VOTO LATINO; ARIZONA ALLIANCE FOR RETIRED AMERICANS; DEMOCRATIC NATIONAL COMMITTEE; and ARIZONA DEMOCRATIC PARTY, Intervenor-Defendants-Appellees.	No. 2 CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553

ARIZONA SECRETARY OF STATE'S ANSWERING BRIEF

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INTRODUCTION

More than fifty years after Arizona Secretary of State Wesley Bolin issued the first Elections Procedures Manual (the "EPM"), Plaintiffs-Appellants the Republican National Committee, the Republican Party of Arizona, LLC, and the Yavapai County Republican Party (collectively, "Plaintiffs") decided to challenge the EPM in its entirety. Plaintiffs' novel theory—one they had never previously offered even though they have been involved in Arizona elections continuously during the EPM's existence—was that Secretary of State Adrian Fontes failed to comply with the Arizona Administrative Procedure Act (the "APA") when issuing the 2023 EPM.

The superior court rightly rejected Plaintiffs' APA argument, concluding that the APA itself provides for exemptions from its rulemaking procedures when "otherwise provided by law." (Index of Record ("IR") 50, at 2). And A.R.S. § 16-452—the statute that mandates issuance of the EPM—is just that law. Moreover, the superior court recognized that the procedures for issuing the EPM are incompatible with the APA, and due to that conflict, the more specific and more recent statute, A.R.S. § 16-452, governs issuance of the EPM. (IR 50, at 3). This Court should do the same.

Plaintiffs also made several challenges to specific EPM provisions, arguing that they conflict with Arizona statutes. But while Plaintiffs wave away the conflict

between the APA and EPM procedures, they try to manufacture conflicts to strike down individual EPM provisions. They do so by narrowly viewing the statutes cited in the EPM and failing to interpret them in the broader context of the expansive and detailed state and federal statutory schemes governing elections. The superior court rejected each of the specific challenges, and this Court should do the same. As explained more fully below, this Court should affirm the superior court's dismissal of Plaintiffs' Complaint in its entirety.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

For more than fifty years, Arizona law has required the Secretary of State to promulgate the EPM, which guides county and other local election officials in carrying out Arizona elections. The EPM's purpose is to "achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" of election procedures across the state. A.R.S. § 16-452(A). As Arizona's population has grown and its elections and election law have increased in complexity, the Legislature has expanded what the EPM covers. Today, to provide meaningful guidance for election officials, the EPM cites governing state and federal law,

provides practical examples, and includes cautionary notations when litigation is pending that may result in changes to the law. *See* EPM, at 1-5.[1]

The law governing the issuance of the EPM sets forth specific procedures for how it must be issued. In particular, A.R.S. § 16-452(A) first directs the Secretary to consult with county election officials, who do the bulk of the day-to-day work of maintaining voter registration rolls and carrying out elections, in developing the EPM. The statute further directs that the Secretary obtain the approval of the Governor and Attorney General before issuing the EPM. A.R.S. § 16-452(B). And the law sets forth a time schedule—requiring the Secretary to submit a draft EPM to the Governor and Attorney General no later than October 1 of each odd-numbered (*i.e.,* non-statewide election) year. *Id.* The final version must be issued not later than December 31 of each odd-numbered year. *Id.*

The Secretary published the first draft of the 2023 EPM for public comment on July 31, 2023, two months before the October 1, 2023, statutory deadline for submission to the Governor and Attorney General for approval. A.R.S. § 16-452(B). Though not required by A.R.S. § 16-452, the Secretary accepted public comments

[1] The 2023 EPM is included in the trial court record as Exhibit 1 to Plaintiffs' Complaint. (*See* IR 1, Ex. 1). The Secretary publishes the EPM on his website in fully-searchable format. As such, in this Brief, the Secretary provides links to the EPM on the official Secretary of State website.

on the draft from August 1 through 15, 2023. On the last day to comment, Plaintiffs submitted a public comment "objecting to the artificially short period for public comment," but also provided comment on specific provisions of the draft EPM. (IR 1, ¶ 25). On September 30, 2023, the Secretary provided the draft EPM to the Governor and Attorney General. (IR 30, at 2). On December 30, 2023, the Governor and Attorney General approved the 2023 EPM, and the Secretary issued it. (*Id.*).

Several weeks after the Secretary issued the 2023 EPM, Plaintiffs filed this special action seeking declaratory and injunctive relief in Maricopa County Superior Court. (*See* IR 1). This action is one of six challenges to provisions of the EPM filed since 2023, but to the Secretary's knowledge, it is the first and only lawsuit to challenge the entire EPM under the APA in the more than half a century since an EPM was first issued.[2]

Like the statute directing the Secretary to issue the EPM, the APA has long been a part of Arizona law. Indeed, it predates the EPM statute by almost fifteen

[2] The other five cases are *Ariz. Free Enter. Club v. Fontes*, No. 1300CV202300202 (Ariz. Super. Ct. Yavapai Cnty.); *Ariz. Free Enter. Club v. Fontes*, No. 1300CV202300872 (Ariz. Super. Ct. Yavapai Cnty.); *Petersen v. Fontes*, No. CV2024-001942 (Ariz. Super. Ct. Maricopa Cnty.); *Ariz. Free Enter. Club v. Fontes*, No. CV2024-002760 (Ariz. Super. Ct. Maricopa Cnty.); *Am. Encore v. Fontes*, No. CV-24-01673-PHX-MTL (D. Ariz.). To date, Plaintiffs in those cases have been largely unsuccessful, obtaining only preliminary relief with respect to two of the dozens of challenged EPM provisions.

years. *See* 1952 Ariz. Sess. Laws, ch. 97 (20th Leg. 2d Reg. Sess.). The APA mandates the process state agencies must follow when promulgating rules, including notice and comment provisions. *See* A.R.S. §§ 41-1001, *et seq*. But the APA also recognizes that some rulemaking is exempt from its provisions. An agency is required to follow the APA when "[n]either [the enacting statute] nor the APA, exempt the [agency] from rulemaking." *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Retirement Sys.*, 237 Ariz. 246, 251, ¶ 24 (App. 2015) (internal citations omitted); A.R.S. § 41-1002(A) (agencies must follow the APA's process unless "expressly exempted"). An express exemption to APA rulemaking can be through explicit exemption in the section of the APA titled "exemptions."[3] A.R.S. § 41-1005. Or the exemption may come from statutes that provide specific procedures to be used in promulgating rules, as A.R.S. § 16-452 lays out the process for creating a valid and enforceable EPM. "A rule is invalid unless it is made and approved in substantial compliance with [the APA], *unless otherwise provided by law*." A.R.S.

[3] Plaintiffs assert that "there is no dispute that . . . neither the APA nor the EPM statute *expressly* exempts EPM rulemakings from the APA." (OB, at 12 (emphasis in original)). Not so. The Secretary repeatedly argued that the EPM is expressly exempt from the APA. (*See* IR 30, at 5-12; IR 41, at 3-6). The superior court agreed. (*See* IR 50, at 2-3).

§ 41-1030(A) (emphasis added); *accord* A.R.S. § 41-1001 (providing definitions for the APA "unless context otherwise requires").[4]

The main thrust of Plaintiffs' Complaint was that the Secretary was required to follow the APA when promulgating the 2023 EPM, and because the Secretary instead followed the specific procedures in A.R.S. § 16-452, the entire EPM is void and cannot be used to achieve its purpose of maintaining "the maximum degree of correctness, impartiality, uniformity and efficiency" in election procedures. (IR 1, ¶¶ 30-48). Failing that, Plaintiffs also set forth eight claims "in the alternative" that specific provisions of the EPM conflict with Arizona statutes, "do not carry the force of law," and are "void" and asked that those provisions be enjoined. (*Id.* ¶¶ 51-104).

The superior court rejected all of Plaintiffs' claims, concluding that the EPM was properly promulgated under Arizona law and none of the challenged specific provisions conflict with governing law. (IR 50, at 2, 4-7). Accordingly, the superior court dismissed the Complaint in its entirety. (*Id.* at 7). This appeal followed. On appeal, Plaintiffs ask not only for reversal of the dismissal of their Complaint, but

[4] Plaintiffs claim that "there is no dispute that . . . the Secretary did not comply with the APA in prescribing the rules in the . . . EPM." (Opening Br. ("OB"), at 12). But the superior court recognized that "[t]here is also a good argument that assuming the APA applies to the 2023 EPM, the Secretary substantially complied with the APA's requirements by giving notice and receiving a substantial amount of public comment." (IR 50, at 2).

for this Court to enter am injunction, even though Plaintiffs never offered any evidence to show that they were entitled to such extraordinary relief under the traditional four-factor test for injunctions. (*See* OB, at 46). As explained below, this Court should affirm the superior court in all respects.

STATEMENT OF THE ISSUES

1. Whether the superior court correctly concluded that the Administrative Procedure Act's rulemaking process—notice, a 30-day public-comment period, and the right to be heard in an oral proceeding, among other provisions—is inapplicable to the EPM, which "prescribe[s] rules" directing how local officials administer elections in the State of Arizona, A.R.S. § 16-452(A).

2. Whether Plaintiffs have standing to challenge the individual EPM provisions in Counts II through IX of the Complaint.

3. Whether the superior court correctly concluded that the specific EPM provisions challenged in Counts II through IX are consistent with governing federal and state statutes.

LEGAL ARGUMENT

I. Standard of Review.

The superior court granted the Defendants' Motions to Dismiss for failure to state a claim under Ariz. R. Civ. P. 12(b)(6). Review of that decision is *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). While the Defendants also

moved to dismiss under Ariz. R. Civ. P. 12(b)(1) for Plaintiffs' lack of standing, the Court expressed "concerns" about Plaintiffs' standing but did not decide the motions on that basis. This court reviews the superior court's denial of injunctive relief for "a clear abuse of discretion." *Dowling v. Stapley*, 218 Ariz. 80, 83, ¶ 4 (App. 2008).

II. The EPM Is Not Subject to the APA.

Despite several challenges to specific EPM provisions in recent years, not a single litigant has ever challenged the validity of the EPM *in toto*. By enacting A.R.S. § 16-452, the Legislature created the process that the Secretary (together with local election officials, the governor, and the attorney general) must follow to promulgate the EPM, and this Court should not override the plain intent of the Legislature to satisfy Plaintiffs' desire to scrap the entire manual. The superior court correctly held that the EPM is not subject to the APA, and this Court should affirm.

A. A.R.S. § 16-452, not the APA, Defines the Procedures Required to Promulgate the EPM.

Arizona law provides all the specifics for creating a comprehensive set of rules to govern elections in A.R.S. § 16-452. The superior court found this specific statutory procedure falls under the APA's recognition that a rule is not void for not following the APA process if "otherwise provided by law." (IR 50, at 3 (quoting A.R.S. § 41-1030(A)). Plaintiffs argue that "unless otherwise provided by law" in A.R.S. § 41-1030 does not save the EPM from being required to follow the precise

strictures of the APA. (*See* OB, at 17-21). But Plaintiffs cannot account for the fact that the EPM was promulgated pursuant to other specific and express requirements of Arizona law.

In an attempt to undermine the superior court's analysis, Plaintiffs argue that the second conditional phrase in A.R.S. § 41-1030(A)—"unless otherwise provided by law"—means that "a rule is not invalid for failure to comply with the APA if the legislature expressly exempted the rulemaking from the APA." (OB, at 19). If that were true, however, there would be no need to exempt a rule from the APA. This reading would unnecessarily duplicate the exemption, where a rule that is "expressly exempted," pursuant to A.R.S. § 41-1002, also does not have to abide by the statutes from which it was already expressly exempted. The superior court correctly noted that such a reading would render "unless otherwise provided by law" without any force or effect, in contravention of the rules of statutory construction, and therefore rejected that reading. (IR 50, at 2 n.2 (citing *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Retirement Sys.*, 242 Ariz. 387, 389 (App. 2017)).

Next, the Plaintiffs argue that the superior court's conclusion that the EPM was not subject to the APA is "against decisional law," on the theory that the superior court decided that statutory silence exempted the EPM from the APA. (OB, at 19). To support this position, Plaintiffs reach for an unpublished court of appeals case to stand for the authority that a "supplementary process in [the] implementing statute"

does not exempt a body from the APA. (OB, at 20).[5] But the "supplementary process" at issue in *Legacy*, was simply a requirement that the Arizona State Board for Charter Schools ("ASBCS") publish on the Board's website performance metrics by which it would measure charter schools. *Legacy Educ. Grp.,* 2018 WL 2107482, at *1, ¶ 3 (citing A.R.S. § 15-183(R)). Unlike A.R.S. § 16-452, the statute at issue in *Legacy* was *silent* as to the process for developing the metrics and did not require the input and approval of multiple, independent elected officials. In other words, the metrics that ASBCS published in *Legacy*, like the rates at issue in *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 228 (App. 1994), had no legislatively-created procedure for promulgating those rules. The statute under which the Secretary promulgates the EPM, in contrast, includes specific procedural requirements, and there is no dispute in this case that the Secretary followed those procedural requirements.

Finally, Plaintiffs dig into the legislative history of A.R.S. § 41-1030 to bolster their argument. But this court does "not consider legislative history when the correct

[5] Plaintiffs cite *Legacy Educ. Grp. v. Ariz. State Bd. for Charter Schs.*, No. 1 CA-CV 17-0023, 2018 WL 2107482 (Ariz. App. May 8, 2018). In doing so, Plaintiffs did not comply with Ariz. R. Sup. Ct. 111(c)(2)-(3). This is particularly important because the appellants in *Legacy* sought to have the decision published, to which the appellees objected due to its limited precedential value. It remains unpublished. *See id.* Order re: Amicus Curiae Br. and Mot. to Publish (Jul. 20, 2018).

legal interpretation can be determined from the plain statutory text and the context of related statutes." *AUDIT-USA v. Maricopa Cnty.*, 254 Ariz. 536, 539, ¶ 14 (App. 2023) (quoting *State v. Ewer*, 254 Ariz. 326, 331, ¶ 20 (2023)). The plain text of A.R.S. § 16-452 sets forth the detailed and exclusive procedures for issuing the EPM, and the legislative history of the oft-amended APA does not override that procedure.

B. The Rulemaking Procedures in the APA and the EPM Statute Conflict, thus the More Recent and Specific Statute, A.R.S. § 16-452, Controls.

In addition to ruling that A.R.S. § 41-1030(A) permitted the Secretary to follow A.R.S. § 16-452 and not the APA when issuing the EPM, the superior court properly concluded that the statutory procedures for promulgating the EPM hopelessly conflict with the APA procedures. The court recognized that "[w]hen there is a conflict between two statutes, the more recent, specific statute governs over the older, more general statute." (IR 50, at 3 (quoting *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 13, ¶ 29 (2022)).

The superior court highlighted a few of the more glaring conflicts in its order. (IR 50, at 3 & n.3-4)) (stating that A.R.S. § 16-452(B) conflicts with the APA's deadlines and gubernatorial approval requirements). But the requirements of A.R.S. § 16-452 conflict with the APA from stem to stern. Plaintiffs characterize the conflicts as "supplements to the APA's rulemaking process," but it is simply

impossible to meaningfully overlay the APA's requirements with the EPM's promulgating statute. (OB, at 21).

In addition to the conflicts that the superior court cited in its well-reasoned decision, the APA requires an agency to "establish and maintain a current, public rule making docket for each pending rule making proceeding." A.R.S. § 41-1021(A). Each rule making docket is required to include a laundry list of information for each rule. *See* A.R.S. § 41-1021(B)(1)-(12). Would the entire EPM be subject to a single rule making or would each provision, or each chapter, or each subsection be subject to its own rule making docket? Plaintiffs have provided no answer.

With respect to timing, there is an irreconcilable conflict between the APA and A.R.S. § 16-452. Under the APA, by December of 1 *each year*, an agency is required to "prepare and make available to the pubic the regulatory agenda that the agency expects to follow during the next calendar year." A.R.S. § 41-1021.02(A). This is incompatible with the requirements of A.R.S. §16-452(B) that the Secretary issue the EPM by December 31 of every *odd-numbered* year. Following the APA would require the Secretary to lay out the regulatory agenda for the EPM before the start of the legislative session. Moreover, in even-numbered years, it would require the Secretary to do so while carrying out the tasks associated with the primary and general elections. By requiring the EPM to be promulgated in odd-numbered

years—*i.e.,* when election officials are not engaged in carrying out major elections—this is clearly an outcome the Legislature sought to avoid. By trying to bring the entire EPM into the APA framework, Plaintiffs create an impossible-to-reconcile quagmire of conflicting requirements and deadlines. The Legislature could not have intended such an absurd result. *See State v. Green*, 248 Ariz. 133, 135, ¶ 8 (2020) ("An interpretation is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion").

The EPM statute further conflicts with the APA with respect to the parties involved in issuing it. The APA governs rulemaking conducted by a single agency, not the multi-agency process required by A.R.S. § 16-452. An agency is a single "board, commission, department, officer or other administrative unit of this state, including the agency head and one or more members of the agency head or agency employees . . . ." A.R.S. § 41-1001(1). Notably, while this definition includes multiple actors within the same agency, every noun in the definition is in the singular. *See id.* Likewise, rule is defined as a singular "agency statement of general applicability that implements . . . [the] requirements of an agency." A.R.S. § 41-1001(21). And required rule making applies to "each agency" individually. A.R.S. § 41-1003. Because the APA consistently applies only to single agencies, the multi-party endeavor contemplated by A.R.S. § 16-452 conflicts with the APA. Indeed, if

the EPM is not approved by the Attorney General and Governor, as happened in 2021, it is void and the prior EPM controls. *See* *Leibsohn v. Hobbs*, 254 Ariz. 1, 7, ¶ 21 n.3 (2022). But the Governor is exempt from the APA, and the Secretary, as a single elected official agency head, is not required to receive the Governor's approval of his rulemaking. *See* A.R.S. §§ 41-1001(1), -1039(E)(2). The requirements of A.R.S. § 16-452 and the APA cannot be reconciled.

Plaintiffs further argue that the superior court did not "contend with Plaintiffs' . . . proposed schedule," but not only was the Court not required to do so, Plaintiffs' facile proposed schedule is simply not workable. (OB, at 23). First, Plaintiffs argue that the deadlines in A.R.S. § 16-452 are of no moment because "there is no limitation on when the Secretary can *start* the rulemaking process." (OB, at 25). While there is no language in the EPM statute mandating a date certain for the commencement of the EPM drafting process, the language of the statute and the practicalities of issuing a comprehensive EPM that incorporates recent changes to Arizona election law guide when the promulgation process should occur.

The statute requires that the Secretary issue the EPM "not later than December 31 of each odd-numbered year immediately preceding the general election." A.R.S.

§16-452(B).[6] And the Secretary must submit it for the Governor's and Attorney General's review "not later than October 1 of the year before each general election." *Id.* Of course, Arizona election law changes every year. It would not be possible for the Secretary to provide useful guidance to ensure 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" if the Secretary includes outdated information because he is forced to draft the EPM before the year's legislative session ends to meet the APA timeline.

Instead, the process that A.R.S. § 16-452 mandates, and what has in fact happened since the Legislature amended it in 2019 to add the current deadlines, is that the Secretary consults with local election officials and begins drafting, includes relevant updates within the draft necessary due to law changes, submits it to the Governor and Attorney General for review after the Legislature adjourns *sine die*, and final EPM publication occurs before the year in which federal and statewide

[6] Until the 2019 amendment to A.R.S. § 16-452, the Secretary was required to issue the EPM "not later than thirty days prior to each election" and submit it to the Governor and Attorney General "not fewer than ninety days before each election." *See* 2019 Ariz. Sess. Laws, ch. 99, § 1 (54th Leg. 1st Reg. Sess.). Overlaying the APA requirements over that schedule would have been impossible and demonstrates that the conflict between the APA and A.R.S. § 16-452 has long existed.

elections take place. This ensures that county elections officials have time to implement any changes and train staff. It is a carefully coordinated balance, crafted by the Legislature and repeatedly re-affirmed, that would be entirely upended by forcing the APA onto it. Unlike so much of Title 16, this provision has been left relatively undisturbed over the last three decades, and the recent change was implemented to avoid the problems caused by using an increasingly out-of-date EPM when a previous Secretary did not issue a new EPM at all during her term.

Contrary to Plaintiffs' contention, A.R.S. § 16-452 does not merely "supplement" the APA, the APA would *supplant* the EPM statute and make compliance with its terms impossible. There is no way to meaningfully comply with the requirements to include comments on the rules, incorporate public comment, re-publish the amended rules, and then submit them for approval by the Governor and the Attorney General within the time constraints provided by the Legislature. Accordingly, the superior court properly ruled that A.R.S. § 16-452 provides the only procedures that the Secretary must follow when issuing the EPM.

III. The Trial Court's Rulings on the Alternative Counts Should Be Affirmed.

In addition to their APA claim that the entire EPM is void, Plaintiffs' Complaint contained eight additional counts "in the alternative" that specific provisions of the EPM cannot be enforced because they "directly conflict[ ] with the express and mandatory provisions of" Arizona statutes. (IR 1, at ¶¶ 54, 62, 69, 77,

83, 89, 95, 103 (quoting *Ariz. All. for Retired Ams. v. Crosby*, 537 P.3d 818, 823-24 (Ariz. App. 2023) ("*Crosby*")). The superior court found no such conflicts and dismissed all eight of the alternative counts. (IR 50, at 4 (concluding that "the 2023 EPM does not contradict or directly conflict with statutory requirements")).

Crosby and the Arizona Supreme Court cases on which it relies, *Leach* and *Leibsohn,* provide some guidance on when an EPM provision "directly conflicts" with the governing statutes. Guidance from these cases is supplemented by well-established preemption principles. "Conflict preemption occurs where compliance with both" a legislative enactment and a rule "is a physical impossibility, and where the challenged [rule] stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the legislative body. *Valenzuela v. Ducey*, 329 F. Supp. 3d 982, 993-94 (2018) (quoting *Arizona v. United States*, 567 U.S. 387, 399, (2012) (cleaned up)); *see also White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 241 Ariz. 230, 239-40, ¶¶ 31-33 (App. 2016). Similarly, an EPM provision directly conflicts with state or federal law when those governed by the provision cannot comply with the statute and the EPM provision at the same time and the EPM provision poses such an obstacle to realizing the purpose of the statute that it must yield. *See Crosby*, 537 P.3d at 823, ¶ 17 (holding that the statutory provision of a precise number of early ballots to be included in the hand count audit conflicted with EPM language that gave counties discretion to elect to include more ballots in the

hand count, and therefore the statute controlled); *see also* *Leibsohn*, 254 Ariz. at 9, ¶ 32 (explaining that circulator registration procedure established pursuant to the EPM "made it impossible for the Committee to comply with" the governing statute); *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021) (holding that EPM provision permitting petition circulators to de-register "would vitiate the statute's purpose to foster the integrity of the initiative process").

Here, as explained in detail below, none of the challenged EPM provisions make compliance with governing statutes impossible and vitiate the statutes' purposes. Accordingly, this Court should affirm dismissal of Counts II through IX.

A. Plaintiffs Lacked Standing to Challenge Any of the Specific EPM Provisions at Issue.

In the superior court, the Secretary argued that Plaintiffs lack standing to challenge the specific EPM provisions at issue because they have not alleged a cognizable harm they will suffer because of the challenged EPM provisions. While the superior court expressed "concerns about whether Plaintiffs have standing for some or all of their claims," the court did not rule on the standing issue. (IR 50, at 2, 6 n.7). But, for the reasons set forth below, Plaintiffs lack standing, and this Court can affirm on that basis. *See* *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9 (App. 2006) ("We may affirm the trial court's ruling if it is correct for any reason apparent in the record."); *see also* Ariz. R. Civ. App. P. 13(b)(2).

Plaintiffs' allegations of "harm" related to the specific EPM provisions are insufficient to confer standing. All Plaintiffs claim a general "interest in the administration of elections in Arizona and the competitive environment affecting Republican candidates in Arizona," and assert that their "resources will necessarily be diverted if election rules are not made consistent with Arizona law." (IR 1, ¶¶ 6-8). The Yavapai County Republican Party repeated these allegations and added that it also "routinely appoints poll observers and ballot challengers directly affected by the EPM." (*Id*. ¶ 8). But "[t]o gain standing to bring an action, a plaintiff must allege a distinct and palpable injury. An allegation of an "interest" in a matter or even "a generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). In this case, all that Plaintiffs alleged was a generalized harm—disagreement with the challenged provisions of the EPM. They offered no specifics about how any of the eight challenged EPM provisions would harm them uniquely.

Indeed, Plaintiffs' claims challenge rules governing election officials, not Plaintiffs. They failed to demonstrate how the conduct of county officials challenged in Counts II through IX harms the Plaintiffs at all or why their "resources will necessarily be diverted if election rules are not made consistent" with Plaintiffs' view of Arizona law. (IR 1, ¶¶ 6-8). Plaintiffs did not show that they have suffered an actual harm under these rules, nor can they show a potential harm—much less an

imminent one—as a result of the EPM. *See* *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 379, ¶¶ 19-20 (App. 2008).

Moreover, Plaintiffs' conclusory claims of diversion of resources do not satisfy Arizona's standing requirements. This state requires more from a plaintiff to confer standing than a claim that a "contested statute drained its resources and frustrated its mission." *Ariz. Sch. Bds Ass'n v. State* ("*ASBA*"), 252 Ariz. 219, 224, ¶ 18 (2022); *see also* *Ariz. All. for Retired Ams. v. Mayes*, No. 22-16490, 2024 WL 4246721, at *6-7 (9th Cir. Sep. 20, 2024) (taking the same approach to organizational standing as the *ASBA* court following the U.S. Supreme Court's decision in *Food & Drug. Admin. v. All. for Hippocratic Med.*, 602 U.S. 367 (2024)). This narrower approach to organizational standing was adopted to "prevent[] parties from eviscerating the standing requirement by merely asserting an interest." *ASBA*, 252 Ariz. at 224, ¶ 18. Here, Plaintiffs merely alleged that they will have to divert resources, without explaining what harm they are facing, how diverting resources would address that harm, what resources they would divert, or how they would divert them. As such, they failed to allege an interest sufficient to invalidate the specific EPM provisions challenged.

Indeed, Counts II through IX hinged on Plaintiffs' alleged interest in ensuring that the EPM conforms to their reading of state law, but it is "not enough to show that its members suffered the same kind of harm or interference as the general

public." *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88, 96, ¶ 29 (App. 2023). Assuming that the EPM procedures Plaintiffs challenge contradict the law, Plaintiffs cannot show how, for example, an answer on a juror questionnaire disclaiming citizenship—when the voter is actually confirmed to have met the requirements of Arizona law to demonstrate eligibility to register to vote—injures Plaintiffs in any way. *Cf. Election Integrity Project Ca., Inc. v. Weber*, No. 23-55726, 2024 WL 3819948, at * 10 (9th Cir. Aug. 15, 2024) (rejecting vote dilution as a cognizable claim arising from alleged inclusion of ineligible votes among total cast). To the extent that Plaintiffs are attempting to manufacture competitive standing, not cancelling the registration of a qualified voter cannot impose any harm upon Plaintiffs, even if every single voter at issue is not a member of Plaintiffs' political party. Moreover, to the extent some voters who would have been cancelled despite having proof of citizenship in their registration record are affiliated with Plaintiffs, the challenged procedure would advantage, not harm Plaintiffs.

In short, Plaintiffs failed to demonstrate a real or imminent threat of harm necessary to establish standing for Counts II through IX. The rules in the EPM control the conduct of election officials, and the mere allegation of diversion of resources to comply with rules governing elections that do not relate to political party involvement does not meet Arizona's requirements for standing. For these

reasons, this Court can affirm the superior court's dismissal of Counts II through IX due to Plaintiffs' lack of standing.

B. The Superior Court Correctly Concluded that the EPM Does Not Conflict with A.R.S. § 16-165(A)(10).

In their Complaint, Plaintiffs alleged that the EPM provision that guides county recorders in implementing A.R.S. § 16-165(A)(10) conflicts with the statute because it informs the recorders that they need not initiate the notice and cure provision of the statute if the recorder's records contain documentary proof of citizenship ("DPOC") for the voter. (*See* IR 1, at ¶ 53). The superior court disagreed with Plaintiffs' argument, finding that "Plaintiffs' argument misconstrues the statute" because the statute requires the recorder do two things before sending out notice that the registration will be cancelled if the voter does not provide DPOC within 35 days. (IR 50, at 5). In particular, the court stated that a "county recorder shall cancel a registration if it receives information, such as a summary report from a jury commissioner or jury manager indicating that a person who is registered to vote has stated that the person is not a U.S. citizen, **and** the county recorder confirms that the person is not a U.S. citizen." (*Id.* (emphasis added)). The trial court recognized that recorders may "confirm[ ] that the person is a U.S. citizen from DPOC the recorder already has on file." (*Id.*).

On appeal, Plaintiffs make three arguments. First, that the court ignored the registered voters for whom recorders do not have DPOC on file because they were registered to vote when A.R.S. § 16-166(F) took effect. (OB, at 28). This new argument, raised for the first time on appeal, ignores A.R.S. § 16-166(G), which applies to the 2.6 million Arizona voters who were registered on January 24, 2005 when A.R.S. § 16-166(F) was pre-cleared by the Department of Justice. Specifically, A.R.S. § 16-166(G) states that such voters were "deemed to have provided satisfactory evidence of citizenship and *shall not be required to resubmit evidence of citizenship* unless the person is changing voter registration from one county to another." (Emphasis added). To the extent that Plaintiffs are arguing that A.R.S. § 16-165(A)(10) modifies A.R.S. § 16-166(G), that argument fails because A.R.S. § 16-166(G) was adopted by initiative and cannot be amended "unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature . . . vote to amend such measure." Ariz. Const. art. IV, pt. 1, § 1(6)(C). A.R.S. § 16-165(A)(10) did not receive the required supermajority support.[7] Because the challenged EPM provision recognizes

[7] The relevant amendments to A.R.S. §16-165 were enacted by House Bill 2243 in 2022. That bill passed by a simple majority of 47 to 39, well below the three-fourths requirement. *See* https://apps.azleg.gov/BillStatus/BillOverview/76970.

the requirements of A.R.S. § 16-166(G) for those voters who were registered when A.R.S. § 16-166(F) took effect, it does not conflict with state law.

Second, Plaintiffs argue that A.R.S. § 16-165(A)(10) "provides the exclusive acceptable confirmation mechanism—a letter requiring submission of new DPOC." (OB, at 28). But this argument misreads the statute. County recorders must do two things *before* sending out the 35-day cancellation notice: (1) receive information calling a person's citizenship status into doubt, including the summary reports that the jury commissioner regularly sends to county recorders, and (2) confirm that the person registered is not a citizen. A.R.S. § 16-165(A)(10). Because previous provision of DPOC forecloses confirmation that the person registered is not a United States citizen, the EPM is consistent with statute.

Indeed, the statutory duty to "confirm" non-citizenship specifically requires reviewing "relevant city, town, county, state and federal databases to which the county recorder has access," to the extent practicable. A.R.S. § 16-165(K). This includes the statewide voter registration database, which contains a record of whether the voter has already provided DPOC. A.R.S. § 16-166(J). So, if a county recorder receives a summary report from a jury commissioner indicating that a registered voter reported being a noncitizen, but that same voter previously provided DPOC, the county recorder has not "confirmed" noncitizenship. To the extent the statute leaves a gap in defining what constitutes confirmation of noncitizenship, the

challenged EPM provision appropriately fills that gap. *See* *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406 at *4 (D. Ariz. Feb. 29. 2024) ("*MFV II*") ("The EPM serves a 'gap-filling function.'").

Moreover, a summary report from the jury commissioner, when contradicted by previously provided DPOC, is insufficient to confirm that a voter is not a United States citizen. The summary report is, as its name suggests, a summary. The report does not include copies of juror questionnaire responses written by voters; rather, it is "derived from juror questionnaire data" and "shall only contain the information that is necessary for the county recorder to accurately identify" the voter. A.R.S. § 21-314(F). The statutory text thus acknowledges that the summary report is not direct confirmation of noncitizen status. *Id.; see also* A.R.S. § 16-165(A)(10) (describing summary report as "indicating" that a voter has stated they are not a citizen). The summary report is an indirect compilation of voters' responses in a non-election context. Such summary information, when weighed against previously provided DPOC, is not confirmation of noncitizenship.

Third, Plaintiffs argue that the other provisions of A.R.S. § 16-165 support their interpretation because the other subsections of the statute "impose[ ] a duty on the county recorders to receive and monitor for new information that shows voters previously eligible are no longer eligible to vote and to cancel the registrations of these voters." (OB, at 30). But that argument ignores that the other eligibility

criteria are far more fluid than citizenship. With regularity, registered voters move in and out of the jurisdiction, get convicted of felonies, can be declared incapacitated, or die. But the record in this case does not reveal that an Arizona registered voter who was a United States citizen has ever lost citizenship status. Indeed, while Plaintiffs posit that "it is possible that a voter who previously was a citizen of the United States has since renounced that citizenship," they provided no evidence of that ever occurring. (*Id.*, at 29). Accordingly, it is wholly reasonable for the statute to treat confirmation of noncitizen status differently.

C. EPM Provisions Regarding Federal-Only Voters Accurately Reflect Governing Federal Law, Which Preempts A.R.S. § 16-127.

Counts III and IV of Plaintiffs' Complaint alleged that EPM provisions that confirm that those voters who are registered as "federal-only" are permitted to vote for presidential candidates (both in the Presidential Preference Election and the General Election) and vote by mail conflict with A.R.S. § 16-127. (IR 1, ¶¶ 57-58, 61, 65-66, 68). The superior court concluded that these two counts were moot because a federal court had struck down A.R.S. § 16-127 as preempted by federal law. (IR 50, at 7). On appeal, Plaintiffs ask this Court to issue a declaratory judgment that the challenged EPM provisions that conflict with A.R.S. § 16-127 "are inoperative on their own terms" in the event the federal district court's decision is

reversed on appeal. (OB, at 32). As did the court below, this court should decline to issue what amounts to an advisory opinion.

The district court's ruling in *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077 (D. Ariz. 2023) ("*MFV I*"), enjoining A.R.S. § 16-127–the sole basis for Counts III and IV–remains good law pending its appeal and is binding on the Secretary and Plaintiff Republican National Committee (the "RNC"), who are both parties to that action. *See Mi Familia Vota v. Fontes*, No. CV-22-05009-PHX-SRB, 2024 WL 2244338, Judgment, at *1 (D. Ariz. May 2, 2024) ("*MFV III*") (declaring that A.R.S. § 16-127(A) is preempted by Section 6 of the National Voter Registration Act [(the "NVRA")] and permanently enjoining its enforcement). Indeed, the RNC sought a stay of that portion of the district court's judgment from the Ninth Circuit and the Supreme Court, but both courts denied the relief sought. *See, e.g., Republican Nat'l Comm. v. Mi Familia Vota*, No. 24A164, 2024 WL 3893996, at *1 (U.S. Aug. 22, 2024) (denying application for stay as to A.R.S. § 16-127(A)); *Mi Familia Vota v. Fontes*, No. 24-3188, 2024 WL 3629418, at *1 (9th Cir. July 18, 2024), *vacated in part on other grounds*, 111 F.4th 976 (9th Cir. 2024) ("We conclude that appellants have failed to satisfy the standard for a stay pending appeal in all other respects."). Thus, the challenged EPM provisions accurately reflect that A.R.S. § 16-127 is preempted by federal law and may not be enforced. *See Hook v. Ariz.*, 907 F. Supp. 1326, 1335 (D. Ariz. 1995) ("A state statute that has the effect of thwarting a federal

court order enforcing federal rights 'cannot survive the command of the Supremacy Clause of the United States Constitution.'") (quoting *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979)).

Not only is A.R.S. § 16-127 preempted, the Secretary has a duty to uphold federal law and is statutorily required to oversee the state's compliance with the NVRA. A.R.S. § 16-142(A)(1). As such, state and federal law require the Secretary to adhere to the federal court's determination in *Mi Familia Vota*. This Court should not inject unnecessary confusion by allowing Plaintiffs to collaterally attack federal court rulings at every level that have so far affirmed that A.R.S. § 16-127 is preempted and enjoined its enforcement. Nor should this Court render any declaration conditioned upon some hypothetical future ruling by a federal court on appeal.

D. The EPM's Recognition that the Practicability of Checking Certain Databases Affects County Recorders' Duty to do so Does Not Conflict with Arizona Law.

In Count V, Plaintiffs alleged that EPM provisions related to implementation of A.R.S. §§ 16-121.01(D) and -165(H)-(K) conflict with Arizona law because they state that "County Recorders currently have no obligation to check [several federal databases]." (IR 1, ¶¶ 72-73). The superior court held that "[t]here is nothing contrary or in direct conflict between the 2023 EPM and these statutes. Section 16-165 merely requires the recorder to check certain federal databases 'to the extent

practicable' or 'if accessible.' Section 16-121.01(D) only requires the recorder to check certain federal databases 'provided the county has access.'" (IR 50, at 5).

On appeal, Plaintiffs attempt to obfuscate the issues by jumbling together their arguments about A.R.S. § 16-121.01(D) and A.R.S. § 16-165(H)-(K) and the separate EPM provisions related to each statute. (*See* OB, at 33). But they are distinct provisions that apply at different points in the voter registration process. In particular, A.R.S. § 16-121.01(D) applies when a person initially applies to become a registered voter, and directs recorders to check certain federal databases to locate DPOC for applicants who have not provided it with their application. While A.R.S. § 16-165(H)-(K) govern periodic checks of the records of already registered voters, commonly known as "list maintenance."

With respect to the USCIS SAVE database, it may only be used for the initial checks conducted pursuant to A.R.S. § 16-121.01(D) and not for later list maintenance activities. Contrary to Plaintiffs' contention that the district court blessed such database checks, in *MFV III*, the court permanently enjoined the Arizona from "conduct[ing] citizenship checks using USCIS's SAVE system on registered voters whom county recorders have reason to believe lack U.S. citizenship." *MFV III*, 2024 WL 2244338, at *2 (D. Ariz. May 2, 2024). As such, the EPM's inclusion of the SAVE database in those counties need not check when conducting list maintenance activities under A.R.S. § 16-165, but not in the

provision regarding initial voter registration confirmation under A.R.S. § 16-121.01(D) is wholly consistent with governing law.

With respect to the remaining databases, the *MFV* court's factual findings further illustrate the impracticability of checking the other databases. In particular, the court found "that it is impracticable for county recorders to obtain citizenship information from the SSA database . . . as the federal government does not allow access to this information." *MFV II*, 2024 WL 862406, at *7; *see* A.R.S. §§ 16-121.01(D)(2) and -165(H). And the court found that "Arizona's county recorders currently do not have access to [the National Association of Public Health Statistics Information and Systems ("NAPHSIS")], nor are county recorders familiar with the database." *MFV II*, 2024 WL 862406, at *7; *see* A.R.S. §§ 16-121.01(D)(4) and -165(J). Plaintiffs provide a link to a NAPHSIS web page and state that county access is "a matter of a recorder's request for the same." (OB, at 34). But nothing on the linked web page, which is not a part of the record on appeal, says that a county recorder can request access for the purpose of conducting citizenship investigations. Consequently, the challenged EPM provisions are consistent with *MFV*'s factual findings and simply reflect the current practicability of checking such databases. As such, they do not conflict with governing law.

E. The EPM Does Not Conflict with A.R.S. § 16-168(F).

In Count VI of the Complaint, Plaintiffs challenged the EPM provision stating 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." (IR 1, ¶ 80 (quoting EPM at 53)). They alleged that A.R.S. § 16-168(F) permits public access to signatures in registration records for the foregoing purposes, but also for "'election purposes,' which necessarily includes signature verification on mail ballots." (*Id.* ¶ 82). The superior court disagreed and found no conflict between the EPM and A.R.S. § 16-168(F).

On appeal, Plaintiffs again focus on the "election purposes" language in A.R.S. § 16-168(F), but have conspicuously dropped any attempt to define "election purposes" or include early ballot signature verification within the term as they did in the court below. (*See* OB, at 36-37). Abandoning this argument makes sense, because signature verification on mail ballots is done by county recorders and their employees. *See* A.R.S. §16-550(A). Members of the public do not have a statutory role in early ballot signature verification. Indeed, being in possession of early ballots by those who are not family, roommates, or caretakers of the voter is a felony in Arizona. A.R.S. § 16-1005(H).

Instead, on appeal, Plaintiffs argue that the superior court, in a footnote, misconstrued the statutory language to permit access to voter registration record signatures "for election purposes and for news gathering purposes" only by a person connected with the media. A.R.S. § 16-168(F); (*see* OB, at 37; IR 50, at 6 n.7). Plaintiffs appear to want this Court to rewrite the statute by inserting a comma after "election purposes" to create a right for all members of the public to access voter signatures for "election purposes," but a court's "goal in statutory interpretation is to effectuate the legislature's intent." *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 515, ¶ 20 (2021). And "[t]he best indicator of that intent is the statute's plain language." *SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477, 480, ¶ 8 (2018). If the Legislature intended for the public to be able to freely access signature records for any tangentially election-related purpose, it could have authorized such access by inserting a comma after the phrase "for election purposes," creating a separate category of public access. It did not, and this Court is bound by that legislative determination. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interp. of Legal Texts 141 (1st ed. 2012) ("Punctuation is a permissible indicator of meaning."); *Boyd v. State*, 256 Ariz. 414, 418 (App. 2023) (applying a modifier to two terms in a list "[b]ecause there is a conjunction rather than a comma between [them]"). Or, the Legislature could have not included voter signatures in the list of information that must be kept confidential, for voter privacy and the integrity of the

early voting system, outside of certain narrow situations. The Legislature, however, chose to include voter signatures to the information exempted from the otherwise broad categories of voter data that must be disclosed pursuant to A.R.S. § 16-168(F).

Plaintiffs have identified no "election purpose" for which they would like access to voter signatures, nor a general right of the public to obtain such signatures. Accordingly, they have not established that the superior court erroneously found no conflict between the EPM and A.R.S. § 16-168(F).

F. The EPM Provision Regarding AEVL Participants' One-Time Requests to Send a Ballot to a Temporary Out-of-State Address Is Wholly Consistent With Arizona Law.

In their Complaint, Plaintiffs alleged that the EPM provision that states that an active early voting list ("AEVL") voter "may make one-time requests to have their ballot mailed to an address outside of Arizona for specific elections" conflicts with A.R.S. § 16-544(B). (IR 1, ¶¶ 86-87 (citing EPM, at 59)).[8] The superior court dismissed this count of the Complaint because the one-time request provision "is consistent with A.R.S. § 16-542(A)" and "does not contradict or directly conflict with statutory requirements." (IR 50, at 6). On appeal, Plaintiffs continue to maintain that the challenged one-time request provision violates A.R.S. § 16-544(B),

[8] "Any voter" may join AEVL and receive an early ballot by mail for every election in which that voter is eligible to vote. A.R.S. § 16-544(B).

but seem to further refine their argument to add that because the EPM cites only A.R.S. § 16-544(B), and not A.R.S. § 16-542(A) or any other relevant statute, that the one-time request provision conflicts with Arizona law. (*See* OB, at 39).

This argument ignores well settled principles of statutory construction. In particular, "[i]n construing a specific provision, [courts] look to the statute as a whole and [they] may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017); *see also City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 183, ¶ 33 (App. 2008) (courts "consider the words, context, subject matter, effects and consequences, spirit and reason of the law, and other acts *in pari materia*" (quoting *Kahn v. Thompson*, 185 Ariz. 408, 412 (App. 1995))). As such, the superior court properly considered not solely the single subsection of A.R.S. § 16-544 that the EPM cites, but other related statutes regarding sending early ballots to temporary addresses.

Considering together all of the statutes that govern voters' temporary absence from the state, mailing of early ballots, and AEVL participation, it is clear that the superior court correctly interpreted the law when it dismissed the one-time request claim. First, Plaintiffs ignore the full context of the challenged portion of the EPM. They focus on the second sentence of the paragraph, but ignore that the first sentence reflects the statutory language at issue. *Compare* A.R.S. § 16-544(B) ("The voter

shall not list a mailing address that is outside of this state for the purpose of the active early voting list unless the voter is [a UOCAVA] voter.") *with* EPM, at 59 ("A voter enrolled in the AEVL may not request that ballots be automatically sent to an out-of-state address for each election unless the voter is also a UOCAVA voter."). Simply reviewing the language of the EPM surrounding the challenged provision shows that there is no conflict.

Second, the superior court correctly synthesized other related statutes when it dismissed the one-time request count. Indeed, Plaintiffs' position elides the difference between eligibility to be an Arizona registered voter, voting by early ballot, and participating in AEVL. When all of these are considered, it is clear that the one-time request provision in the EPM does not conflict with Arizona law.

Specifically, residence within the state of Arizona is a requirement to register to vote. A.R.S. § 16-101(A)(3), (B) (defining residence to mean "actual physical presence within the state . . . combined with an intent to remain"). But "temporary absence does not result in a loss of residence if the individual has an intent to return following his absence." A.R.S. § 16-101(B). Joining AEVL does not change this foundational rule of voter eligibility.

To shift the focus away from state law's allowance for temporary absence from the state, Plaintiffs refer to the ballots cast by participants in AEVL as "AEVL ballots." (OB, at 39). But there is no such thing. There are early ballots, A.R.S.

§ 16-541(A), which voters may request be mailed to them, A.R.S. § 16-542. And there is a list of voters who have asked to receive an early ballot by mail for every election in which that voter is eligible to vote. A.R.S. § 16-544(A). As such, A.R.S. § 16-544(B) contains no explicit prohibition on sending an "AEVL ballot" to a mailing address out of state. The prohibition is simply on using an out-of-state address for the purpose of joining AEVL and automatically receiving a ballot by mail for every election at that out-of-state address.

The purpose of this restriction is obvious. A voter who asks to have every ballot mailed to an out-of-state address is very likely to no longer be a resident of Arizona—*i.e.*, their absence from the state is not temporary. Conversely, a person whose mailing address for purposes of AEVL participation is within Arizona, but who requests once that a ballot be mailed to a temporary location, is highly likely to meet the definition of resident in A.R.S. § 16-101(B).

Plaintiffs acknowledge that A.R.S. § 16-542 permits counties to mail ballots to a voter's temporary address. (OB, at 39, citing A.R.S. § 16-542(E), (F)). But they argue that A.R.S. § 16-542(E) and (F)'s "silence" about out of state addresses "cannot usurp" the direction in A.R.S. § 16-544(B) that the address used to sign up for AEVL must be an Arizona address. But Plaintiffs completely ignore the basic fact that temporary absence from the state does not make a person ineligible to vote by early ballot. Moreover, their position leads to an absurd result, treating a voter

who participates in AEVL differently from all other Arizona voters when it comes to one-time requests to send a ballot to a temporary address out of state. Simply put, Arizona law favors giving eligible voters every opportunity to receive and cast a ballot, and Plaintiffs' cramped interpretation of the requirements of A.R.S. § 16-544(B) are at odds with that principle, recognized by A.R.S. §§ 16-101(B) and -542, that those temporarily absent from the state maintain their eligibility to vote and do so by early ballot. Accordingly, the challenged EPM language does not violate state law.

G. The Superior Court Properly Found No Conflict Between the EPM and Statutes Governing Early Ballot Challenges.

In Count VII of their Complaint, Plaintiffs alleged that the EPM provision that states that "[c]hallenges to early ballots must be submitted in writing after an early ballot is returned to the County Recorder and prior to the opening of the early ballot affidavit envelope. Challenges received before the early ballot is returned or after the affidavit envelope containing the ballot has been opened must be summarily denied as untimely." (IR 1, ¶ 92 (quoting EPM, at 79)). Plaintiffs argued that the temporal limits in this EPM provision conflict with A.R.S. § 16-552(D) to the extent that they bar early ballot challenges before the county recorder receives a completed early ballot packet from a voter and after the early ballot envelope is opened. (IR 1, ¶ 96). The superior court concluded that "viewing the [EPM] language in the context

of § 16-552(B), (C), (D), and (F), and other relevant statutory provisions cited, the contested provision . . . does not contradict or directly conflict with statutory requirements." (IR 50, at 6-7). On appeal, Plaintiffs argue that by recognizing the full context of how ballot challenges occur and filling gaps with time limits that are consistent with that procedure, the EPM "conflicts with subsection 552(D)'s timing." But there is no conflict and Plaintiffs' interpretation of the statute leads to absurd results, permitting both premature challenges and ones that would violate the constitutional right to a secret ballot.

Plaintiffs' position seems to be that because A.R.S. § 16-552(D) contains only one time limitation—"before the early ballot is placed in the ballot box—any other time limit in the EPM conflicts with Arizona law. But Plaintiffs provide no authority for this position. And it ignores the purpose of the EPM, to serve "a 'gap-filling function' to address election matters not specifically addressed by statute." *MFV II*, 2024 WL 862406, at *4. This gap-filling is necessary because the statutory requirement that early ballots be challenged before "being placed in the ballot box" has been in A.R.S. § 16-552(D) since at least 1979, when absentee ballots were minimal and were processed at polling places. *See* 1979 Ariz. Sess. Laws, ch. 209, § 3 (34th Leg. 1st Reg. Sess.). But today, more than 80 percent of Arizona voters vote by early ballot, the vast majority of which are placed in drop boxes or returned by mail to county recorders and are never placed in a ballot box at all. *See* A.R.S. §

16-608(A) (describing ballot boxes as something used at a polling place on election day). And those early ballots that are voted in person at early voting locations or dropped at polling places are placed in a secure container at a polling location—*i.e.,* a ballot box—but placement of the early ballot packet, which still requires signature verification, in the ballot box does not cut off the challenge period. Consequently, under Plaintiffs' view of the law, the vast majority of early ballots can be challenged at any time—even after tabulation. But those dropped into a secure container at a polling place can never be challenged. The time limits in the EPM avoid that absurd and unwarranted result. *See Green*, 248 Ariz. at 135, ¶ 8 (2020) (concluding that the plain meaning of statutory text controls unless it leads to an absurd result or constitutional violation).

A.R.S. § 16-552 addresses challenges to early ballots within the broader context of processing those ballots. Once early ballot packets successfully pass the signature verification process set forth in A.R.S. §§ 16-550 and -550.01, they are sent to early election boards, which must verify the voter's affidavit on the ballot envelope. A.R.S. § 16-552(B). Then, while the packets are still sealed, challengers designated by the political parties—who are "present" where the ballots are being processed—may challenge individual ballots in writing "with a brief statement of the grounds." A.R.S. § 16-552(C), (D). Once a challenge is made, that early ballot packet must be "set aside" (instead of being sent immediately for counting) until

such time as the early election board can decide the disposition of the ballot. A.R.S. § 16-552(D). If the vote is not challenged, or survives a challenge, then the election board opens the envelope pursuant to A.R.S. § 16-552(F), separates the ballot from the envelope, and sends the ballot to be tabulated.

This process is analogous to the process for challenges to in-person votes cast at a voting location. For challenges to in-person votes, the challenger is physically present at the voting location and makes a challenge after the voter provides identification and is given a ballot, but before the voter fills out the ballot and places it in the tabulator or the ballot box. *See* A.R.S. §§ 16-579(A), -580 (B), (C), -590(B), (C), -591, -592(A).

Contrary to Plaintiffs' characterization of A.R.S. § 16-552, the statute does not allow challenges to early ballots to be submitted before the county recorder receives the early ballot. When read in conjunction with the rest of A.R.S. § 16-552, it is clear that both the challenged ballot and the challenger must be physically present at the time the challenge is raised (similar to when the elector presents in person at the voting location). Allowing a challenger to submit a challenge to a ballot before the county receives it would be an absurd reading of the statute, because a particular ballot may never be returned, but the ballot challenge provisions contemplate a challenge to an attempt to *cast* a ballot, not to a registered voter's receipt of an early ballot. *See* A.R.S. §§ 16-552, -590, -591, -592. This distinction

is important because if a county must process challenges to potential early ballots that have not yet been returned, election officials will be forced to waste their limited time and resources evaluating challenges to ballots that may never even be returned.

Similarly, because the statutory grounds to challenge an early ballot are based on the qualifications of the voter, the challenge must occur before the early ballot envelope has been opened and the ballot separated from the envelope. The Arizona Constitution guarantees the right to a secret ballot. Ariz. Const. art. VII, § 1. As such, ballots are designed to prevent tying a particular ballot to a particular voter. And A.R.S. § 16-552(E) requires that the voter whose ballot is challenged be notified of the challenge and provided an opportunity to defend against that challenge to void their vote. Accordingly, an early ballot challenge must be made before the anonymous ballot is separated from the envelope that identifies the voter, before that envelope is opened revealing the voter's choices. Reading A.R.S. § 16-552(D) to allow a challenge after the envelope is opened would thus lead to an unconstitutional result. *See Green*, 248 Ariz. at 135, ¶ 8.

H. Permitting Voters in Precinct-Based Counties to Vote Provisional Ballots with the Correct Races Does Not Violate Arizona Law.

Arizona law provides for two types of polling places—precinct polling places or vote centers. A.R.S. § 16-411(B). At vote centers, any voter in the county may vote, regardless of their precinct of residence because all of the ballot styles for the

county are made available at the vote center, generally through ballot on-demand printing. For the elections in 2024, thirteen of Arizona's counties are using vote centers. The remaining two counties continue to use the precinct model, where voters are assigned to a polling place in (or near) their precinct of residence, and pre-printed ballots with the races for that precinct are available to the voter.

Arizona law also requires that each polling place be equipped with an accessible voting device ("AVD"). The AVDs in use in Arizona are ballot marking devices that display the voter's options and selections on a screen, then print a paper ballot that is tabulated with optical scan equipment like all other Arizona ballots. *See* Ariz. Sec. of State 2024 Election Cycle Voting Equipment. All of the AVDs in use throughout the state are capable of being programmed with all of the ballot styles in use in a county.

Plaintiffs challenged two EPM provisions relating to provisional ballots cast in the wrong precinct in precinct-based counties: (a) the attestation on provisional ballot envelopes that states that the voter "understand[s] that voting the wrong ballot style in the wrong precinct means that [the] ballot will not be counted," (EPM, at 165), and (b) the provision stating that "[i]f the voter's name does not appear on that precinct's signature roster because the voter resides in another precinct," election workers shall:

> Permit the voter to vote a provisional ballot (in the correct ballot style for the voter's assigned precinct) using an accessible voting device that is programmed to contain all ballot styles, and inform the voter that their provisional ballot will be counted after it is processed and if it is confirmed the voter is otherwise eligible to vote and did not vote early or at another voting location and had that other ballot counted.

(EPM, at 190). They asserted that this provision conflicts with A.R.S. § 16-122, which provides: "No person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register or list of the precinct and election districts or proposed election districts in which such person resides, except as provided in sections 16-125, 16-135 and 16-584."

The challenged EPM provisions do not conflict with this law. Indeed, Plaintiffs' argument ignores the plain language of A.R.S. § 16-122, provisional ballot requirements set forth in the Help America Vote Act, A.R.S. § 16-584, and advances in technology in the three decades since A.R.S. § 16-122 was last amended. Specifically, A.R.S. § 16-122 provides that a voter shall be permitted to vote if it is established that the voter's "name appears as a qualified elector" on both the county register and the register for the precinct in which the voter "reside[s]"—it does not say the voter may only vote if the voter appears on the list for the precinct in which the polling place is located. A voter who comes to a polling place that is not designated for the voter's precinct still qualifies to vote a provisional ballot for their

own precinct under § 16-584(B), which provides, in part, that "[a] qualified elector whose name is not on the precinct register . . . on signing an affirmation that states that the elector is a registered voter in that jurisdiction and is eligible to vote in that jurisdiction, shall be allowed to vote a provisional ballot." Thus, the plain language of the statute does not prohibit a voter who arrives at a polling location outside their own precinct, but within their county of residence, from voting a provisional ballot for their own precinct if they present appropriate identification.

The procedures for processing provisional ballots set forth in the EPM further demonstrate that there is no conflict with A.R.S. § 16-122. The EPM directs poll workers to note on the provisional ballot envelope the precinct number "for the voter's assigned precinct/ballot style." (EPM, at 166). For the provisional ballot to be counted, the county recorder must, among other things, verify the voter's registration and that "the voter is eligible to vote in the precinct" (*i.e.*, that the voter's name appears in his precinct register) and "[c]onfirm that the voter voted in the correct polling place or voting location or *cast the ballot for the correct precinct*." (*Id.* at 212-13 (emphasis added)). Accordingly, the superior court correctly concluded that "[n]othing in § 16-122 prohibits the counting of such a provisional ballot that is in the correct ballot style for the voter's precinct and who is verified to be registered and eligible to vote in that precinct. The 2023 EPM contains consistent language." (IR 50, at 6).

Nor do the cases on which Plaintiffs rely demonstrate a conflict. The county recorder must verify that the person's name appears in both the county and precinct register before the vote is counted, precisely as the statute requires. *See* *Pacuilla v. Cochise Cnty. Bd. of Supervisors*, 186 Ariz. 367, 369 (1996) (noting that A.R.S. § 16-122 "forbids a person from voting unless his name appears in both the county and precinct register"). And the Supreme Court's statement in *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 661 (2021), that "[v]oters who choose to vote in person on election day in a county that uses the precinct system must vote in their assigned precincts," is dicta that reflected that the policies at the time required poll workers to "direct the voter to the right location," if a voter appeared at the wrong polling place. Precinct-based polling locations now have the ability to generate the correct ballot style for the voter's assigned precinct anywhere in the county. Doing so is not prohibited by A.R.S. § 16-122 as long as the voter's name appears in the county and precinct register for the precinct in which the voter resides.

IV. Plaintiffs Did Not Establish the Factors Warranting Injunctive Relief, and this Court Should Not Enjoin Use of the EPM or any of the Challenged Provisions.

Plaintiffs argue that this Court should enjoin the use of the 2023 EPM, which "will cause negligible disruption: all that will happen is a reversion to the 2019 EPM." (OB, at 26). Plaintiffs make this odd request to permit the use of the 2019 EPM even though it, too, suffers from what Plaintiffs think is a fatal flaw, because

the Secretary did not follow the APA when issuing what was at the time the first new EPM in five years. But the harm to the Secretary, election officials around the state, and voters far outweighs any harm to Plaintiffs, and this Court should not enjoin the use of the 2023 EPM.

Plaintiffs are entitled to injunctive relief only if they can show: (1) "success on the merits," (2) they will suffer irreparable harm without the injunction, (3) the balance of hardships weighs in their favor, and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1991). Plaintiffs attempt to short-circuit the four-factor test for injunctive relief by relying on *Ariz. Pub. Integrity All. v. Fontes* ("*AZPIA*"), 250 Ariz. 58, 64, ¶ 26 (2020). (OB, at 44-46). But *AZPIA* announced a rule for mandamus actions, not injunctive relief in a declaratory judgment action such as this. 250 Ariz. at 62, ¶ 11. Mandamus relief is narrow; it does not include instances when an official is exercising his statutorily authorized discretion. *Sears*, 192 Ariz. at 68, ¶ 11. Moreover, it is clear that the Arizona Supreme Court intended to limit the *AZPIA* test to mandamus actions, as more recent decisions continue to apply the familiar four-factor test adopted in *Shoen*. *See Fann v. State*, 251 Ariz. 425, 432, ¶ 16 (2021) (quoting *Shoen*, 167 Ariz. at 63). Because the trial court did not conclude that Plaintiffs were entitled to any relief, it did not reach the evidence necessary to determine whether an injunction is appropriate. This Court should not accept Plaintiffs' invitation to do so in the first instance.

Plaintiffs' allegations of irreparable harm are paper thin—and they are merely allegations. There is no evidence in the record that they are "being forced to compete in an illegally structured competitive environment" or that they have "suffered financial and resource-based harm." (OB, at 45). Monetary damages, of course, are not irreparable harm. *City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, ¶ 17 (App. 2023). Moreover, none of the specific challenged provisions, save one, govern anyone who is not an election official. Plaintiffs do not need to spend resources training their volunteers and party apparatus to check databases for citizenship, or not produce certain sections of the voter file, or mail early ballots out of state. And Plaintiffs' opponents in elections are competing in the same environment that they are. But even if such harms could be irreparable, the Plaintiffs should be required to present evidence supporting these allegations to the trial court.

Plaintiffs have also not provided evidence to support the remaining factors for injunctive relief. Instead, they simply revert to their reliance on *AZPIA*. (OB, at 46) and argue that the Secretary will not be harmed because the injunctive relief Plaintiffs' seek "would only require elections officials to use the same EPM—the 2019 EPM—they have used in the last four [*sic*] election cycles." (*Id.*). The Secretary, the election officials involved in promulgating the EPM, and voters all have a significant interest in ensuring elections are administered with the "maximum degree of correctness, impartiality, uniformity and efficiency," and that the rules are

not changed in the middle of an election. A.R.S. § 16-452(A), Early voting will begin nine days after this Brief is filed, and election-related tasks governed by the EPM will be carried out through the end of 2024. Using an outdated manual that does not incorporate changes to the law in the last five years will harm those who carry out Arizona elections without question.

CONCLUSION

For the foregoing reasons, this Court should affirm the superior court's dismissal of Plaintiffs' Complaint and should not enjoin the EPM as a whole, nor any of the eight EPM provisions that Plaintiffs challenged.

RESPECTFULLY SUBMITTED this 30th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Arizona Secretary of State's Answering Brief uses type of at least 14 points, is double-spaced, and averages no more than 280 words per page. Pursuant to Ariz. R. Civ. App. P. 14(a)(1), and according to the word count of the word processing system used to prepare this Brief, it contains 11,826 words.

RESPECTFULLY SUBMITTED this 30th day of September, 2024.

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Undersigned counsel hereby certifies that on September 30, 2024, Defendant/Appellee Arizona Secretary of State Adrian Fontes' Answering Brief was electronically filed with the Court of Appeals, Division Two, and pursuant to ARCAP 4(f), copies of the same were e-served via AZTurboCourt, and emailed, to the following:

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