ARIZONA COURT OF APPEALS
DIVISION TWO

ARIZONA FREE ENTERPRISE CLUB, *et al.*, Plaintiffs/Appellants, v. ADRIAN FONTES, in his official capacity as the Secretary of State, Defendant/Appellee, and ARIZONA ALLIANCE OF RETIRED AMERICANS, *et al.*, Intervenors/Appellees.	No. 2 CA-CV 2024-0221 Yavapai County Superior Court No. S1300CV202300202

OPENING BRIEF OF PLAINTIFFS/APPELLANTS

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Plaintiffs/Appellants Arizona Free Enterprise Club, Restoring Integrity and Trust in Elections, Republican Party of Arizona, LLC, and Dwight Kadar respectfully submit this Opening Brief.

INTRODUCTION

Arizona law generally permits any qualified elector to vote prior to Election Day by casting an "early ballot" either by mail or in person. *See* A.R.S. § 16-542(A). Every early ballot must be submitted in an envelope bearing a statutorily prescribed affidavit that the voter must sign. *See id.* § 16-547. The county recorder then validates the voter's identity and eligibility by "compar[ing] the signature [on the envelope] with the signature of the elector on the elector's ***registration record***." *Id.* § 16-550(A) (emphasis added). The Elections Procedures Manual promulgated by the Secretary of State, however, defines the term "registration record" to include polling location "signature rosters, [and] prior early ballot affidavits." Ariz. Sec'y of State, 2023 ELECTIONS PROCEDURES MANUAL (Dec. 2023) at 83, *available at* https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf ("EPM").

The EPM's deviation from the governing statute is palpable; signature rosters and prior early ballot envelopes cannot, as a matter of fact or law, effectuate or amend a voter's registration. They accordingly are not—and could not be—"registration records," within the meaning of A.R.S. § 16-550(A). To its credit, the

Superior Court initially embraced this unavoidable truth. Denying the Secretary and Intervenors' motions to dismiss, it recognized that a "registration record" denotes "documents the putative voter used to register" [ROA 43 ep 3]. From this unassailable premise, it concluded that the EPM "contains an incorrect definition of registration record," *id*.

The Superior Court's subsequent self-reversal was precipitated not by any new facts (the parties had agreed that discovery was unnecessary) or new theory advanced by the parties (the Superior Court altered course *sua sponte*) or by any change in the controlling statutory language. Rather, the Superior Court ultimately reversed itself, without prompting by the parties, because it reasoned that by ***not*** expressly nullifying the EPM's definition of "registration record" when amending ***different*** provisions of A.R.S. § 16-550(A), *see* 2024 Ariz. Laws. ch. 1, § 2 (H.B. 2785) (adjusting the deadlines for "curing" deficient early ballot signatures), the Legislature somehow tacitly endorsed what the Superior Court itself had already indicated was a defective construction of the statute.

That reasoning is as untenable as it sounds. The Superior Court's struggle to extrude affirmative approval from legislative silence not only collides with the Arizona Supreme Court's repeated admonitions against such inferences, but makes little sense. At the time H.B. 2785 was enacted, the Superior Court had already ruled (albeit preliminarily) that the EPM provision conflicted with A.R.S. § 16-550(A).

So the Legislature would have had no reason (particularly when regulating a distinct issue) to re-repudiate an EPM provision that the Superior Court had declared itself poised to invalidate.

The Superior Court had it right the first time. Documents that have no legal nexus to registering to vote—such as precinct registers and prior early ballot affidavits—are not "registration records" as a matter of law. And "an EPM regulation that contradicts statutory requirements does not have the force of law." *Leibsohn v. Hobbs*, 254 Ariz. 1, 7, ¶ 22 (2022). This Court accordingly should reverse the trial court's judgment.

STATEMENT OF THE CASE

On March 7, 2023, Plaintiffs Arizona Free Enterprise Club, Dwight Kadar, and Restoring Integrity and Trust in Elections filed the Complaint in this action, seeking declaratory, injunctive, and special action relief on the grounds that the 2019 EPM improperly authorized the verification of early ballot affidavit signatures using documents that are not "registration records," within the meaning of A.R.S. § 16-550(A).[1] [ROA 1]. The Complaint was amended on April 17, 2023 to add the Republican Party of Arizona as a plaintiff. [ROA 16]. The trial court permitted Mi

[1] The 2023 EPM, which became effective on December 31, 2023, readopted the challenged provision in substantively identical form.

Familia Vota and the Arizona Alliance for Retired Americans to intervene as defendants on April 21, 2023. [ROA 21].

After extensive briefing and oral arguments, the Superior Court on September 1, 2023, denied the Secretary and Intervenors' motions to dismiss. Deeming the term "registration record" in A.R.S. § 16-550(A) "clear and unambiguous," the Superior Court concluded that it confined signature exemplars to "documents the putative voter used to register." [ROA 43 ep 3]. Given that the EPM "contains an incorrect definition of registration record," *id.*, the Superior Court found that the Plaintiffs' Amended Complaint stated a valid claim.[2]

Agreeing that discovery was unnecessary, the parties filed and briefed cross-motions for summary judgment. [ROA 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60]. The material facts were undisputed.[3] After hearing oral arguments, the Superior Court requested, and the parties provided, additional stipulated facts concerning the mechanics of early ballot affidavit signature verification. [ROA 62].

On April 25, 2024, the Superior Court issued an order denying the Plaintiffs' motion for summary judgment and granting the Secretary and Intervenors' motions

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[2] The Superior Court denied from the bench the Intervenors' motions to dismiss on standing and laches grounds. [ROA 33].

[3]The Plaintiffs objected to several of the Secretary's proposed factual representations as being immaterial, hearsay, and/or improperly argumentative. [ROA 60]. The Superior Court did not cite or otherwise rely upon any of these statements in its subsequent summary judgment ruling.

for summary judgment. The Superior Court justified its tergiversation by refencing the Legislature's amendment to other aspects of A.R.S. § 16-550 in H.B. 2785. According to the Superior Court, by not expressly repudiating the EPM's (mis)construction of the term "registration record" in H.B. 2785, the Legislature ostensibly "intended to adopt the EPM's use of prior ballot envelopes to verify signatures." [ROA 69 ep 3]. In addition, the Superior Court cited A.R.S. § 16-544(H)(2), which provides for a "convoluted" multi-year removal process under narrow circumstances when voters on the Active Early Voting List fail to cast an early ballot in several consecutive election cycles, change their address, and do not respond to follow-up notices from the county recorders, which the Superior Court acknowledged was "not conclusive" but nevertheless offered in support of its re-construction of "registration record." [ROA 69 ep 3-4].

The Superior Court entered final judgment pursuant to Arizona Rule of Civil Procedure 54(c) on May 22, 2024. [ROA 73]. Plaintiffs timely appealed. [ROA 75]. This Court has jurisdiction pursuant to Article VI, Section 9 of the Arizona Constitution and A.R.S. § 12-120.21.

STATEMENT OF THE ISSUES

Did the trial court err in holding that documents that undisputedly cannot be used to register to vote or to amend a voter's registration (namely, precinct registers

and early ballot envelopes) are "registration records," within the meaning of A.R.S. § 16-550(A)?

STANDARD OF REVIEW

Appellate courts "review questions of statutory interpretation de novo." *Am. Civil Liberties Union of Arizona v. Arizona Dep't of Child Safety*, 251 Ariz. 458, 461, ¶ 11 (2021); *see also State ex rel. Arizona Structural Pest Control Comm'n v. Taylor*, 223 Ariz. 486, 488, ¶ 7 (App. 2010). When, as here, the Superior Court resolved claims in the posture of cross-motions for summary judgment, the appellate court must "consider questions of law *de novo* but review the facts in a light most favorable to the party against whom summary judgment was granted." *Matter of Estate of Podgorski*, 249 Ariz. 482, 484, ¶ 8 (App. 2020); *see also Beck v. Neville*, 256 Ariz. 361, ¶ 10 (2024).

ARGUMENT

I. The Challenged EPM Provision Conflicts with A.R.S. § 16-550(A) Because It Defines "Registration Record" to Include Documents That Are Unrelated to Registering to Vote

Because it authorizes the verification of early ballot affidavit signatures by reference to documents that cannot effectuate or amend a voter registration—in particular, polling place signature rosters and early ballot affidavits from prior elections—the EPM is, in relevant part, invalid and inoperative.

"When interpreting a statute, our goal is to find and give effect to legislative intent." *Mountainside MAR, LLC v. City of Flagstaff*, 253 Ariz. 448, 450, ¶ 9 (App. 2022). And "the best and most reliable" manifestation of that intent "is the plain text of the statute." *State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003). Rather than parse specific words or phrases in hermetic isolation, courts "interpret statutes 'in view of the entire text, considering the context and related statutes on the same subject.'" *Planned Parenthood of Ariz., Inc. v. Mayes*, 257 Ariz. 110, ¶ 15 (2024) (citations omitted); *see also State ex rel. DES v. Pandola*, 243 Ariz. 418, 419, ¶ 6 (2018) ("When 'statutes relate to the same subject or have the same general purpose . . . they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law.'" (citation omitted)).

Importantly, Arizona courts ""do not defer to [an] agency's interpretation of a rule or statute." *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364, ¶ 10 (2020); *see also Marsh v. Atkins*, 256 Ariz. 233, ¶ 10 (App. 2023) ("'Any legal issues addressed by the agency or the superior court' are reviewed *de novo* or without deference to the agency's interpretation of the law." (citation omitted)). While so-called *Chevron* deference—*i.e.*, the notion that courts should accede to agencies' resolutions of ambiguities in the statutes they apply—previously found some traction in Arizona courts, the Legislature repudiated it categorically in 2018. *See* A.R.S. § 12-910(F), as amended by 2018 Ariz. Laws ch. 180. With the enactment of that

statute, "*Chevron* deference . . . died under Arizona law." *Indus. Comm'n of Ariz. Labor Dept v. Indus. Comm'n of Ariz.*, 253 Ariz. 425, 427, ¶ 10 (App. 2022).[4]

This maxim carries particular resonance in the context of the EPM. Underscoring the inviolability of judicially interpreted statutory strictures—and the Secretary's chronic indifference to them—Arizona's appellate courts have invalidated or curtailed four EPM provisions in as many years. *See Leibsohn*, 254 Ariz. at 7, ¶¶ 22–23 (voiding EPM provision that excused petition circulators from submitting new notarized affidavits when updating their registrations); *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021) (EPM provisions governing petition circulator "de-registration" could not affect those circulators' statutory obligations); *McKenna v. Soto*, 250 Ariz. 469, 473, ¶ 20 (2021) (EPM had no statutory basis for regulating nomination petition signatures); *Ariz. All. for Retired Ams., Inc. v. Crosby*, 256 Ariz. 297, ¶ 18 (App. 2023) (finding that EPM provision relating to ballot hand count audits "exceeds the scope of its statutory authorization, and is therefore void").

Enlisting these interpretive principles in this case supplies an easy resolution; a "registration record" is a document used to qualify an individual to vote in Arizona elections. No uncertainty inheres in the term "registration record." *See Stambaugh v. Killian*, 242 Ariz. 508, 510, ¶¶ 9–10 (2017) ("disagree[ing]" that statute was

[4] The *Chevron* doctrine recently met its demise in the federal judiciary as well. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

ambiguous merely because the relevant phrase wasn't explicitly defined). In the absence of a bespoke, codified definition, the court simply "use[s] the common meaning of th[e] words," *id.*, and "may consider dictionary definitions," *Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 515, ¶ 20 (2021). Here, the Legislature strictly cabined "record" with the qualifier "registration." In other words, not just any "record" in the county recorder's custody can be utilized to verify an early ballot affidavit signature; only a "registration" record is suitable for that purpose. In its most elementary formulation, "registration" is "[t]he act of recording or enrolling". BLACK'S LAW DICTIONARY (11th ed. 2019). Recurring textual and structural attributes of Arizona's Title 16 corroborate that "registration," as used in those statutes, denotes the written process of qualifying oneself to vote in Arizona elections. *See, e.g.*, A.R.S. §§ 16-101 ("Qualifications of registrant"), 16-112 ("Driver license voter registration"), 16-121.01 ("Requirements for proper registration"), 16-131 ("Registration of electors"), 16-132 ("Voter registration assistance"), 16-138 ("Voter registration database"). It follows that a "registration record" is a document used to qualify an individual to vote in Arizona elections.

What, then, are those documents? The term "registration record" certainly includes a voter's initial registration form—*i.e.*, the document designated by federal or state law to establish his or her eligibility to participate in Arizona elections. *See* 52 U.S.C. § 20508(b); A.R.S. §§ 16-121.01, 16-152, 16-166(F). For a period of

time, this "registration form" was the sole statutorily authorized reference point for validating early ballot affidavit signatures. In 2019, though, the Legislature amended A.R.S. § 16-550(A) to authorize the use of any signature in the voter's "registration record" as an exemplar for early ballot verification. *See* 2019 Ariz. Laws ch. 39 § 2. The Appellants agree that this legislation augmented the pool of potential signature specimens to encompass all documents that Arizona law recognizes as mechanisms for updating a voter's registration—and not merely the voter's initial registration form—namely:

(1) a newly completed federal voter registration form or state-specific Arizona voter registration form, *see* 52 U.S.C. § 20505(a), A.R.S. § 16-121.01(A);

(2) an amendment submitted through the Motor Vehicles Division, *see* 52 U.S.C. § 20504(c)(2); A.R.S. §§ 16-112, 16-121.01, 16-136;

(3) a formal early ballot request or response to an Active Early Voting List Notification, A.R.S. §§ 16-135(E), 16-542(F); and

(4) a provisional ballot submission envelope, *see id.* §§ 16-137, 16-584(C), (D).

By contrast, signature rosters at polling locations and historical early ballot envelopes are not "registration" records because those documents cannot be, and are not, used to enroll an individual to vote in Arizona elections. The Superior Court itself initially recognized this obvious textual and conceptual bifurcation. Observing

that "[n]o English speaker would linguistically confuse the act of signing up to participate in an event with the act of participating in the event," the Superior Court embraced the ineluctable conclusion that "[r]egistering to vote is not the same as voting." [ROA 43 ep 3]. It was, on this point, exactly right.

The logical unsustainability of the EPM's contrary interpretation is most aptly illuminated by its designation of early envelopes submitted in prior elections as "registration records." A "registration record" inarguably is the document to which an early ballot envelope signature is compared. *See* A.R.S. § 16-550(A). The envelope is not—and, by definition, cannot be—*itself* a "registration record." To posit, as the EPM does, that an early ballot envelope from a prior election can serve as a signature exemplar necessarily implies that the document mutates from something that is extrinsic to a "registration record" into an actual "registration record" through some kind of extra-statutory osmosis. This curious construction is untethered from A.R.S. § 16-550(A)'s text, the larger infrastructure of Title 16's voter registration provisions, and common sense.

Confining the verification of early ballot affidavit signatures to actual "registration records"—*i.e.*, documents used to register to vote—also makes eminent practical sense. To be sure, "it is for the legislature, not this court, to weigh the policy considerations and determine whether any statutory change is appropriate or necessary." *Mitchell v. Gamble*, 207 Ariz. 364, 373, ¶ 34 (App. 2004). But it bears

noting that confining early ballot signature verification only to exemplars in the "*registration* record"—rather than any and every document in the county recorder's possession—encapsulates a sensible equilibrium between flexibility and integrity in the signature verification process. If historical early ballot envelopes were proper signature exemplar referents, the erroneous validation of any given early ballot affidavit converts what would be an isolated mistake into a systematic distortion; the incorrectly verified affidavit signature is now elevated to a signature exemplar in all future elections.

And a signature validation process that relies exclusively on actual "registration" records still affords ample safeguards to voters. A facial mismatch between an early ballot affidavit signature and the signature in the corresponding "registration record" does not consign the ballot to disqualification. Rather, the county recorder will promptly contact the voter, who can—simply by responding to a phone call, text message or email—confirm the signature's authenticity at any time up to five calendar days *after* the election. *See* A.R.S. § 16-550(A); 2024 Ariz. Laws ch. 1, § 22. In coupling a rigorous signature verification regime that relies exclusively on formal registration records with accommodating signature curing mechanisms, the Legislature devised a carefully calibrated balance that protects the rights of qualified electors while safeguarding the integrity of the early voting process.

In sum, the term "registration record" encompasses only those documents that can, by law, effectuate or amend a voter's "registration," *i.e.*, eligibility to vote in Arizona elections. Because polling location signature rosters and historical early ballot envelopes are not mechanisms for qualifying an individual to vote, they are not "registration records," as a matter of law. "If this is believed to be a serious omission [in the statute], then it is up to the legislature to cure the defect." *Mecham Recall Comm., Inc. v. Corbin*, 155 Ariz. 203, 205–06 (1987). The EPM cannot, under the pretense of implementation, modify the plain meaning of statutory terms.

II. The Legislature's Adoption of H.B. 2785 Did Not and Could Not Excuse the EPM's Non-Statutory Definition of "Registration Record"

By enacting H.B. 2785, the Legislature did not retrospectively cure the EPM's contravention of A.R.S. § 16-550(A). H.B. 2785 tweaked numerous facets of Arizona's election administration infrastructure—ranging from the issuance of sample ballots to deadlines for completing the post-election canvass—to streamline the impending 2024 general election. The bill amended A.R.S. § 16-550 to allow signature curing during the weekend following an election, and to ensure that political parties can receive daily lists of early voters whose defective early ballot affidavit signatures have not been cured. Finally, it incorporated, by cross-referencing a new statute (A.R.S. § 16-550.01), certain handwriting matching criteria formulated by the Secretary of State. *See* 2024 Ariz. Laws ch. 1 §§ 6, 7. It

did not, however, change the operative clause in A.R.S. 16-550(A) requiring county recorders to verify an early ballot affidavit signature by comparing it "with the signature of the elector on the elector's registration record."

The Superior Court declared that, by not amending A.R.S. § 16-550(A) in any relevant respect, the Legislature impliedly endorsed what the Superior Court itself had previously found was the EPM's defiance of the statutory text. [ROA 69 ep 3]. This reasoning—which effectively inverts the "fundamental . . . presumption that what the Legislature means, it will say," *Padilla v. Indus. Comm'n.*, 113 Ariz. 104, 106 (1976)—is incorrect for at least two reasons.

First, the Superior Court misstated the law. Far from construing legislative silence as implicit approbation, Arizona courts do ***not*** "presume . . . that the legislature is aware of all the regulations adopted by the numerous state regulatory agencies and tacitly approves them if it does not take contrary action." *Roberts v. State*, 253 Ariz. 259, 270, ¶ 42 (2022).[5] Rather, a party attempting to ascribe to the

[5] To the extent it purports to demarcate a different rule, the Superior Court's primary authority, *State ex rel. Arizona Department of Revenue v. Short*, 192 Ariz. 322 (App. 1998), is no longer good law. *See generally Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*, 229 Ariz. 412, 418, ¶ 14 n.3 (App. 2012) ("This court, as an intermediate appellate court, has 'no authority to overrule, modify, or disregard' the decisions of our supreme court." (citation omitted)). Additionally, *Short* is inapposite because it (a) concerned the legislative "re-enact[ment]" of the controlling language in a statute rather than new legislation concerning a distinct topic and (b) did not involve legislative action occurring after a judicial repudiation of the disputed agency interpretation.

Legislature an administrative agency's interpretation of a statute must adduce "some indication that the legislature deliberately did not change the law in response" to the agency action (or judicial opinion, as the case may be). *Id.*; *see also Twin City Fire Ins. Co. v. Leija*, 244 Ariz. 493, 502, ¶¶ 49–50 (2018) (even though "the legislature subsequently changed an unrelated part of the statute . . . 'we do not presume legislative intent when a statute is amended in ways unrelated to the judicial construction at issue absent some affirmative indication the legislature considered and approved our construction'" (citations omitted)); *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 133, ¶ 21 (2021) (discounting notion that subsequently enacted statutes implicitly endorsed prior judicial opinion, reasoning that "[w]e are reluctant to presume that legislative silence as to the specific provision at issue is an expression of legislative approval"); *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313–14, ¶¶ 23–24 (2017) (rejecting legislative acquiescence argument where "none of the subject amendments concern" the specific provision construed in prior court ruling). Here, nothing in H.B. 2785's text or the underlying legislative record evinces any awareness of—let alone support for—the EPM's extra-statutory construction of the term "registration record."

More fundamentally, the Superior Court's misconception of the narrow legislative acquiescence doctrine is both constitutionally dubious and empirically unsound. The Legislature is the locus of sovereign authority in state government,

and "the legislative power is inalienable." *Roberts*, 253 Ariz. at 270, ¶ 43. This axiom is embodied in the bicameralism and presentment process—*i.e.*, the principle that all legislative action must originate in the legislative branch, subject to gubernatorial approval or veto. *See* Ariz. Const. art. IV, pt. 2, § 1; art. V, § 7. The Superior Court's reasoning effectively inverts this constitutional schema; it postulates that the executive branch can freely flout a statutory provision, and if the Legislature thereafter touches ***any*** word or phrase in the same statutory scheme, it will be deemed to have conceded the error unless it can muster the necessary majority (and potentially veto-proof supermajority) to correct it. Stated another way, the Superior Court's reasoning would essentially place a prescriptive legislative authority in executive hands and relegate the Legislature to merely a reactive role. That notion is dissonant with the foundations of constitutional government.

Second, the Superior Court's argument proves too much. If anything, the Legislature's decision to leave the phrase "registration record" intact in H.B. 2785 signaled its agreement with the Superior Court's correction of the EPM's errant interpretation. The Superior Court preliminarily held on September 1, 2023 that the EPM "contains an incorrect definition of registration record." [ROA 43 ep 4]. The 2023 EPM, which was released on December 31, 2023, readopted the disputed definition but explicitly acknowledged the pendency of this proceeding in an accompanying footnote. H.B. 2785 was thereafter introduced on February 5, 2024,

and signed into law on February 9, 2024. The so-called legislative acquiescence doctrine—when it applies at all—extends in equal measure to judicial opinions. *See Ariz. Bd. of Regents*, 250 Ariz. at 133, ¶ 21. The most temporally proximate interpretation to which the Legislature could have been reacting was the Superior Court's rejection of the disputed EPM provision. It follows that, if anything, H.B. 2785 ratified the Superior Court's assessment. At the very least, the divergent administrative and judicial constructions underscore the necessity of affirmative evidence of "deliberate[]" legislative inaction, 253 Ariz. at 270, ¶ 42—a showing entirely lacking in H.B. 2785.

The Superior Court's detour into H.B. 2785 hence leads back to where the inquiry began—and where it should end: the plain text of A.R.S. § 16-550(A). As the Superior Court itself found, precinct registers and historical early ballot envelopes are not, and never have been, "registration records" because they have nothing to do with registering to vote. It was the Superior Court's obligation, not the Legislature's, to remedy the EPM's departure from the statute. To the extent it communicates anything, the Legislature's silence in H.B. 2785 conveyed its approval of the Superior Court's initial effort to do just that.

III. A Voter's Decision Not to Vote Does Not Transform Her Prior Early Ballot Envelopes into a "Registration Record"

The envelope in which a voter returns her early ballot cannot cause her to become registered to vote or amend the content of her voter registration. It

accordingly is not a "registration record" as a matter of law or logic. Citing an alternative rationale for entering summary judgment in the Secretary's favor, the Superior Court pointed to a multiyear and multistep process for removing inactive early voters from the rolls, from which it extracted the extraordinary—and demonstrably incorrect—conclusion that "[i]n Arizona, early voting is simultaneously registering." [ROA 69 ep 4].

The Superior Court's statement is objectively erroneous. An individual cannot register to vote by returning an early ballot. To the contrary, one may lawfully receive and submit an early ballot only if she ***already*** has a valid registration record on file with the county recorder. *See* A.R.S. § 16-542. Any registered voter may sign-up for the Active Early Voting List ("AEVL," and formerly known as the Permanent Early Voting List), which entitles them to automatically receive an early ballot by mail in every election in which they are eligible to participate. *See* A.R.S. § 16-544(A), (F). To safeguard election security and reduce posting and printing costs, the Legislature in 2021 created a mechanism to remove from the AEVL those enrollees who did not use it. *See* 2021 Ariz. Laws ch. 359 (S.B. 1485). Specifically, if an AEVL member does not return an early ballot in any election over the course of two election cycles (four calendar years), the county recorder must send him a notice asking whether he would like to remain on the AEVL. If the voter either

answers in the negative or does not respond to the notice within 90 days, he will be removed from the AEVL. *See* A.R.S. § 16-544(L), (M).

Alluding to this process, the Superior Court held that "a person that requests to vote by early ballot must actually do so or they will be removed from the early voting rolls." [ROA 69 ep 3]. That is simply not accurate; an AEVL voter may remain on the list simply by responding to the county recorder's notice, without ever casting an early ballot. And, more fundamentally, the AEVL list maintenance protocol is irrelevant to the voter's *registration*. An enrollee who is removed from AEVL remains a qualified elector in all respects. She may vote either early or on Election Day in every election, and may re-join the AEVL at any time. *See* A.R.S. § 16-544(E).

Perhaps recognizing that removal from the AEVL has no effect whatsoever on a voter's registration, the Secretary and Mi Famila Vota Intervenors floated a more convoluted version of the same hypothetical. [ROA 50 ep 2; ROA 51 ep 11]. In their iteration, an AEVL voter changes her residence address, does not respond to later requests by the county recorder to update her residence location, is moved to inactive status, does not vote in any Arizona election over the course of four calendar years, and then, finally, has her registration canceled. While this scenario at least bears factual fidelity to Arizona's voter list maintenance processes, it still fails to

articulate any coherent legal nexus between an early ballot envelope and the act of registering to vote. In this vein, three points merit emphasis.

First, it is worth pausing to deconstruct the sheer breadth of the attenuated chain of conditionals that separates an early ballot envelope from a voter's actual "registration" under this theory. If a notice mailed to an AEVL voter is returned by the Postal Service as undeliverable, the county recorder must initiate a second mailing to the voter at whatever address the Postal Service indicates the voter now resides and request confirmation of the voter's residence location. If the voter does not respond within 35 days, he is moved to "inactive" status. *See* A.R.S. §§ 16-544(E), 16-166(A), (C), (E). An "inactive" voter remains registered, however, and is free to cast a ballot and restore an "active" status. *See id.* § 16-583. If an inactive voter does not participate in any election for two consecutive election cycles and does not otherwise update his voter registration during that period, his registration eventually will be canceled. *See id.* § 16-166(E).

The Secretary and Mi Familia Vota's hypothesis that some subset of early ballot envelopes might eventually affect a voter's registration thus relies on a dizzyingly extended concatenation of events whereby: ***if*** the voter is enrolled in the AEVL, and ***if*** the voter changes his or her address without notifying the county recorder, and ***if*** the voter fails to cast an early ballot in any election over the course of four years, and ***if*** a notice sent to the voter is then returned as undeliverable, and

if the voter does not respond within 35 days to a second notice sent to the most current address available, and ***if*** the voter does not subsequently update his registration over the next four years, and ***if*** the voter does not, while in inactive status, cast a ballot in any election over the next four years—***then***, after all these contingencies have come to pass, the voter's registration will be canceled. If such an implausibly expansive temporal and conceptual nexus between an early ballot envelope and later cancellation qualifies the envelope as a "registration record," then the word "registration" is denuded of any definitional parameters, and any piece of paper associated with the voter or the list maintenance process (including, for example, any postcard issued by the county recorder or returned by the voter in the course of correspondence concerning the voter's eligibility) is transformed—at least with respect to some voters—into a "registration" record. If the Legislature actually envisaged such a "convoluted," [ROA 69 ep 3-4], and obscure conception of "registration," it likely would have said so.[6]

[6] The Superior Court puzzlingly faulted the Appellants for not supplying any "factual record" that the Legislature did ***not*** envision this incomprehensibly byzantine interpretation of the term "registration record." [ROA 69 ep 4]. But the Legislature's intent is a question of law, not fact. *See generally Minjares v. State*, 223 Ariz. 54, 61, ¶ 33 (App. 2009). And to discern it, courts will not "inflate, expand, stretch, or extend" statutory language "to matters not falling within is express provisions." *Hiskett v. Lambert in and for Cnty. of Maricopa*, 247 Ariz. 432, 435, ¶ 12 (App. 2019) (citations omitted). Absent any textual indication to the contrary, they accord statutory words simply "their natural and obvious meanings." *State v. Rogers*, 227 Ariz. 55, 56, ¶ 2 (App. 2010) (citation omitted).

Second, this theory untenably implies that an early ballot envelope's status as a "registration record" varies from voter to voter depending on events that may (not) happen several years after that envelope is submitted. Voters can—and many do—cast early ballots by making a one-time request by mail or by presenting in-person at an early voting location established by the county recorder, rather than by enrolling in the AEVL. *See* A.R.S. §§ 16-542(A), (E). The premise of the Secretary and Intervenors' argument—*i.e.*, that failure to vote and the issuance of an AEVL notice returned as undeliverable spawns a four-year process that only under an attenuated and improbable combination of circumstances would culminate in a registration cancelation—is wholly inapplicable to early ballots cast by these individuals. There hence is no textual basis at all (even under the Secretary and Intervenors' reasoning) for qualifying their early ballot envelopes as "registration records."

Third, this theory is unable to link any *content* on an early ballot envelope to the legal attributes of a valid voter registration. The crux of the Secretary and Intervenors' argument on this point is merely that a sustained and continuous silence by certain voters can—over a period of several years and multiple election cycles—result in the eventual cancelation of their voter registration. The Secretary and Intervenors do not (and cannot) posit that any content on an early ballot envelope effectuates or maintains a voter registration; rather, the county recorders' receipt of

an early ballot envelope is one of several types of responsive communications that may keep a voter's registration active, but this effect follows from the envelope's receipt by the county recorder rather than the envelope's content. At most, and only assuming that a "registration record" includes records of *de*-registration, the absence of an early ballot envelope can set in motion a series of events that ultimately creates a "registration record"—but the envelope as such does not document and has no independent or necessary effect on the voter's registration. This point illuminates the recurring and irreducible debility in all the Appellees' defenses: an early ballot envelope simply is not—definitionally, legally or logically—a registration record because it does not enable an eligible individual to register to vote. To the contrary, one can lawfully receive, complete and return an early ballot only if one is lawfully registered in the first place, and this antecedent "registration record" is, in turn, the document ***to which*** an early ballot envelope is compared. *See* A.R.S. § 16-550(A). The Superior Court's reliance on the statutory process for maintaining the AEVL to inform its construction of "registration record" induced a conclusion that is both factually unfounded and legally unsound.

ARCAP 21(a) REQUEST

Appellants request an award of reasonable costs pursuant to A.R.S. § 12-341 and an award of reasonable attorneys' fees pursuant to A.R.S. § 12-348 and/or the private attorney general doctrine. "Fees are permissible under the private attorney

general doctrine for a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance." *Ansley v. Banner Health Network*, 248 Ariz. 143, 153, ¶ 39 (2020). Litigation to challenge executive branch overreach that undermines election integrity safeguards duly enacted through the legislative process vindicates diffuse public interests of the highest order. *See, e.g.*, *Ariz. Sch. Bds. Ass'n., Inc. v. State*, 252 Ariz. 219, 229, ¶ 44 (2022) (awarding fees to plaintiff that successfully challenged the constitutionality of budget bills); *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 353, ¶ 33-36 (App. 2013) (awarding fees to plaintiffs who successfully enforced school finance statutes); *Ariz. Ctr. for Law in Public Interest v. Hassell*, 172 Ariz. 356, 371 (1991) (fees award to plaintiffs who successfully challenged law relinquishing state interests in riverbed lands).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

RESPECTFULLY SUBMITTED this 23rd day of September, 2024.

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