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ARIZONA COURT OF APPEALS
DIVISION TWO

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA, LLC, and YAVAPAI COUNTY REPUBLICAN PARTY, Plaintiff-Appellants, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant-Appellee, VOTO LATINO, ARIZONA ALLIANCE FOR RETIRED AMERICANS, DEMOCRATIC NATIONAL COMMITTEE, and ARIZONA DEMOCRATIC PARTY, Intervenor-Defendant-Appellees.	No. 2 CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553

PLAINTIFF-APPELLANTS' OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Did the lower court err by ruling that the Administrative Procedure Act's rulemaking process—notice, a 30-day public-comment period, the right to be heard in an oral proceeding, among other provisions—is inapplicable to the secretary of state's 2023 Elections Procedures Manual, which "prescribe[s] rules" directing how local officials administer elections in the State of Arizona, A.R.S. § 16-452(A), a violation of which is subject to criminal prosecution, § 16-452(C)?

2. [Alternative Issue] Did the lower court err by concluding that eight identified rules in the 2023 Elections Procedures Manual are not inconsistent with state statute and the secretary of state's delegated rulemaking authority?

STATEMENT OF THE CASE

Every other year, the secretary of state is tasked with the statutory responsibility of "prescrib[ing] rules" consistent with statutory law for administering federal and state elections in the Elections Procedures Manual (EPM). Considering the import of this document, one would expect maximum notice and public participation in its drafting and adoption, and for the Secretary to hew closely to the authority the legislature delegated to his office. He did neither, however, in issuing the 2023 version of the EPM.

The Secretary ignored the process required under Arizona's Administrative Procedure Act (APA) for promulgating the EPM's rules, which carry the force of law. Indeed, critical portions of the 2023 EPM were not disclosed to the public until the final version was released on December 30, 2023. The lower court held that the Secretary was entitled to ignore the APA because, despite the APA's

requirement that any exemption from its provisions be *express*, the statute authorizing the EPM creates an *implied* exemption. Hence, the court essentially held that any public participation in the creation of the EPM is gratuitous. This was error and should be reversed by this Court. Because the 2023 EPM was adopted in violation of the APA, it is necessarily void. This Court should say so.

Even if the EPM were somehow exempt from the APA—and it is not—individual provisions of the 2023 EPM are invalid because they exceed, and in some cases directly contradict, statutory law. The lower court erred by dismissing these claims. This Court need not address these individual provisions unless it determines the Secretary's promulgation of the EPM is impliedly exempt from the APA, however it should strike these provisions individually if it permits the 2023 EPM to govern the 2024 general election.

I. Statutory Background and History of Elections Procedures Manuals.

The Elections Procedures Manual (EPM) Statute and History. Every other year, the chief election officer for the State of Arizona, the secretary of state, is responsible for "prescrib[ing] rules" consistent with law "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures" for administering federal and state elections in the state. *See generally* A.R.S. § 16-452 (EPM Statute). The EPM Statute directs the Secretary to "prescribe[]" the "rules" "in an official instructions and procedures manual" (the EPM) to be "approved by the governor and attorney general" no later than "December 31 of each odd-numbered year immediately preceding the general election." § 16-452(B). Violation of any rule adopted in an EPM is subject to

criminal prosecution. § 16-452(C).

The substance of EPM has significantly expanded over the years, from a limited set of guidelines to a comprehensive set of rules. The EPM Statute originated in A.R.S. § 16-1038 (1966). *See* 1966 Ariz. Sess. Laws, ch. 93, p. 187 (codified at A.R.S. § 16-1038). That statute delegated to the secretary limited "power to issue supplementary instructions and procedures" for the "use of electronic voting systems," A.R.S. § 16-1038 (1966), but the supplementary instructions and procedures only applied in counties that approved electronic voting, *see* § 16-1021. Further, the power was supplementary to the county board of supervisors' authority. § 16-1038 (reserving to boards of supervisors primary authority "to make all necessary and desirable provisions for the conduct of elections with approved electronic voting systems").

In 1972, section 1038 was overhauled to something close to its current form. *See* 1972 Ariz. Sess. Laws, ch. 218, p. 1537 (codified at A.R.S. § 16-1038). That statute provided: "[T]he secretary of state in concert with each county board of supervisors … shall prescribe rules and regulations … on the procedures of voting, and of collecting, counting, tabulating and recording votes" in an "instructions and procedures manual." A.R.S. § 16-1038(A), (B) (1972). The 1972 revision defined "instructions and procedures manual" to mean "the manual prepared for use *as a guide* for the conduct of elections by an approved electronic voting system" to include "instructions for the performance of each task relating to the collection of ballots and the counting of votes." § 16-1022 (emphasis added).

While the 1972 revision expanded the secretary's authority, it still checked it

by requiring the secretary to prescribe rules and regulations "in concert with" the boards. § 16-1038(A). In practice, this meant the secretary had to work with the boards to jointly prescribe the rules in the EPM.[1] *See* Regular Meeting Minutes, Mohave County Board of Supervisors (July 5, 1988), at 2, https://bit.ly/4aNaWJl (board approving "Electronic Voting Systems Instructions and Procedures Manual" presented by then-Secretary of State Jim Shumway). The 1972 revision also added the provision requiring approval by the governor and attorney general. A.R.S. § 16-1038(B) (1972).

A 1973 amendment added criminal liability for violation of the EPM, 1973 Ariz. Sess. Laws, ch. 183, p. 1861 (codified as A.R.S. § 16-1038(C)), and a 1979 amendment recodified the statute to A.R.S. § 16-452, 1979 Sess. Laws, ch. 292, p. 898. In substance, the statute remained unchanged from 1973 to 1993.

In 1993, the legislature amended the statute to remove the county board of supervisors' role as joint issuers of the EPM. Rather than require the secretary to prescribe the rules and regulations "in concert with" each of the 15 county boards, the amendment reduced the boards' role to that of "consultation." *See* 1993 Ariz. Sess. Laws, ch. 98, § 31 (codified in A.R.S. § 16-452(A)). At the same time, the legislature expanded the scope of the secretary's rulemaking authority under the EPM Statute, *id.*, and further expanded it in 2003, *see* 2003 Ariz. Sess. Laws, ch. 38, § 1. The legislature has expanded the scope of the secretary's EPM rulemaking power in other statutory provisions as well. *See, e.g.*, A.R.S. §§ 16-118(A), -168(I),

[1] Boards of supervisors are exempt from the APA as administrative units of political subdivisions of the state. A.R.S. § 41-1001(1).

-246(G), -341(H), -411(B)(5)(b), -449(B), -542(A), -543(C), -544(B), -579(A)(2), -602(B), -621(A), -926(A), -938(B), 19-121(A)(5), and -205.01(A).

With the EPM Statute's evolution to minimize the county boards of supervisors' authority while expanding the secretary's authority, the EPM has systematically, if predictably, grown in volume and complexity. Take the 1996 EPM. That manual was 95 pages excluding the definitions, election calendar, and form sections (it was only 143 pages with those sections). Electronic Voting System Instructions and Procedures Manual, Ariz. Sec'y of State (Aug. 1996), https://bit.ly/3TTsaxR (1996 EPM). The 2023 EPM by comparison is 268 pages. (ROA 1 ep 31 (2023 EPM).) One example illustrative of the change in the EPM's function today is the expansion of the sections on voter registration. The voter registration provisions in the 1996 EPM spanned five pages, were written in plain English, and each explanatory paragraph was followed by a statutory reference. *See* 1996 EPM at 15–20. In contrast, the 2023 EPM's voter registration provisions span 55 pages; have 12 subchapters and 40 sub-subchapters; and include paragraphs and paragraphs of rules, discussions of pending litigation and attorney general opinions, and interpretations and explanations of how the statute and decisional law should be read and applied. (*See* 2023 EPM at 1–55.)

The Secretary acknowledged this historical trend and vowed "to include only the rules he believes county officials must legally follow, shortening the rulebook considerably as he removes what he describes as 'opinion' from his predecessor, now-Gov. Katie Hobbs." Jen Field, *Arizona Elections Would Have Fewer Rules Under Secretary of State Adrian Fontes' New Manual*, Votebeat.com

(Jun. 27, 2023), https://bit.ly/3x4ZXw0 (paraphrasing the Secretary). Indeed, in an early draft of the 2023 EPM, the Secretary removed portions he thought "either surpassed his rulemaking authority and therefore didn't really have the force of law, unnecessarily repeated rules already in state law, or [that] could be seen as conflicting with state law." *Id.* That is why he started with the 2014 EPM and not the 2019 EPM, or the unimplemented 2021 EPM, as prescribed by Secretary (now Governor) Hobbs; "he felt chunks of the more recent versions were guidance, not law." *Id.* (paraphrasing Secretary Fontes). Unfortunately, the Secretary's expressed intention to reset the EPM to an "efficient and user-friendly" guide for county election officials proved aspirational, as this litigation reflects.

The Administrative Procedure Act's Rulemaking Process. The APA applies to state "agencies," broadly defined as "any board, commission, *department*, officer or other administrative unit of this state, *including the agency head* ... whether created under the Constitution of Arizona or by enactment of the legislature." A.R.S. § 41-1001(1) (emphasis added). This definition thus encompasses the Department of the Secretary of State and the Secretary.

State agencies are required to comply with the APA's process for rulemaking, unless "expressly exempted" by statute. A.R.S. § 41-1002(A); *Ariz. State Univ. ex rel. Ariz. Bd. of Regents*, 349 P3d 220, 224 (Ariz. App. 2015) ("The rulemaking procedure of the APA 'appl[ies] to all agencies and all proceedings not expressly exempted.'"). The rulemaking process includes: preparing and making available to the public a regulatory agenda, § 41-1021.02(A); providing notice of the proposed rulemaking in a statutorily prescribed format, and publishing such

notice in the register maintained by the Secretary, § 41-1022(A); providing at least 30 days after publication for the public to comment on the proposed rulemaking, § 41-1023(B); holding an oral proceeding on the proposed rule if requested during the comment period, § 41-1023(C); in most circumstances, submitting the proposed rule to the governor's regulatory review council or the attorney general for approval, § 41-1024(B)(1); and maintaining an official record, § 41-1029(A).

The APA defines "rulemaking" as "the process to make a new *rule* or amend, repeal or renumber a rule." § 41-1001(22) (emphasis added). And a "rule" is defined as "an agency statement of general applicability that implements, interprets *or prescribes law* or policy, or describes the procedure or practice requirements of an agency." § 41-1001(21) (emphasis added).

Relevant here, there are two ways the legislature "expressly exempt[s]" an agency (or a subset of an agency's rules) from the APA. *First*, the legislature can make an exemption express by incorporating the exemption in the APA itself. Subsection 41-1005(A) enumerates dozens of exemptions relevant to various rulemakings. *Second*, the legislature can expressly state an exemption in an implementing statute. There are many examples of express exemptions in other statutes, including in title 16. *See* § 16-974(D) (stating Citizens Clean Elections Commission's rules "are exempt from title 41, chapters 6").

II. Factual Background.

The Secretary released his 259-page draft EPM on July 31, 2023. (ROA 1 ep 6.) Throughout the draft EPM, the Secretary purported to exercise delegated authority under various state statutes, most prominently, the delegation in the EPM

Statute. (*See generally id.* ep 31.) Despite the breadth of this rulemaking, the Secretary allowed only 15 days for the public to review the hundreds of rules and provide comment. The Secretary made clear his opinion that this brief public-engagement period was gratuitous and "[i]n keeping with the good practice of the prior Administration." (*See id.* ep 8 (quoting the Secretary's transmittal letter to the governor and attorney general).)

Multiple interested individuals and stakeholders, including Plaintiffs Republican National Committee (RNC) and Republican Party of Arizona (RPAZ), raised with the Secretary the insufficiently short time for their review and comment on the 259-page EPM. (*Id.*) The Secretary turned away requests to extend the comment period and engage in further dialogue on what he described as "one of the most important documents to ensure consistent and efficient election administration across our state." (*Id.* ep 2, 8 (quoting the Secretary's transmittal letter to the governor and attorney general).) Still, the Secretary waited two months to submit a revised proposed EPM to the governor and attorney general for their review, which he did on September 30, 2023. (*Id.* ep 8.) The September 30 proposed EPM was 253 pages. (*Id.*)

Another three months had passed when, on Saturday, December 30, 2023, the Secretary announced the final 2023 EPM without additional public input. (*Id.*) This version expanded to 268 pages of rules and procedures governing the administration of elections in the state, including 15 pages of new rules the Secretary added in consultation with the governor and attorney general that the public never reviewed and never had the opportunity to comment on. (*Id.*)

III. Procedural Background.

Shortly after the Secretary issued the 2023 EPM, Plaintiffs RNC, RPAZ, and Yavapai County Republican Party filed their verified special action complaint for declaratory and injunctive relief. (*See generally id.* ep 1.) Plaintiffs alleged nine counts. Count I challenged the 2023 EPM as "rule" subject to the APA's rulemaking process. (*Id.* ep 7–11.) Because the Secretary failed to comply with the APA, Plaintiffs sought a declaration that the EPM is invalid and an injunction prohibiting its enforcement and implementation. (*Id.* ep 24.) Counts II through IX challenged, in the alternative, specific rules in the EPM, including:

> ***Count II:*** challenging the rule permitting the use of previously submitted documentary proof of citizenship (DPOC) to avoid application of juror non-residency law;
>
> ***Count III:*** challenging the rule permitting federal-only voters without DPOC to vote in presidential elections;
>
> ***Count IV:*** challenging the rule permitting federal-only voters without DPOC to vote by mail;
>
> ***Count V:*** challenging the rule excusing county recorders from their statutory duty to check alternative databases to identify non-citizen registrants;
>
> ***Count VI:*** challenging the rule limiting public access to registrant signatures;
>
> ***Count VII:*** challenging the rule permitting active early voting list (AVEL) ballot mailing out of state;
>
> ***Count VIII:*** challenging the rule barring early-ballot challenges received before the early ballot is returned and after the affidavit envelope is opening, but before the ballot is placed in the ballot box; and
>
> ***Count IX:*** challenging the rule authorizing out-of-precinct voting in precinct-based counties.

(*Id.* ep 11–24.) On these alternative counts, Plaintiffs sought a declaration that the specific rules are void, and an injunction prohibiting their enforcement and

implementation. (*Id.* at 24–25.)

Days after filing their complaint, Plaintiffs moved for a preliminary injunction on their APA claim and six of the eight alternative claims challenging various rules in the EPM. (ROA 8 ep 2.) This was well before when the state's primary election and early voting was scheduled to commence for 2024. Plaintiffs sought "a preliminary injunction prohibiting the implementation or enforcement" of the 2023 EPM based on the APA violation, or, alternatively, "a preliminary injunction prohibiting the implementation or enforcement of" the specific rules. The Secretary and Intervenors opposed. The Secretary and Intervenors also moved to dismiss Plaintiffs' complaint under Rule 12(b)(1) and (6).

Given the absence of any factual dispute and the expedited nature of the case, Plaintiffs asked the lower court to consolidate the hearing on their motion for preliminary injunction with a trial on the merits under Ariz. R. Civ. P. 65(a)(2)(A). (ROA 39 ep 30–31.) The lower court heard oral argument on the motions on May 3, 2024, and issued its dismissal order on May 14, 2024 (ROA 50 (Order) ep 1).[2]

First, the lower court held the APA's rulemaking process does not apply to the EPM. Relying on A.R.S. § 41-1030(A), which defines the remedy for rulemaking violations as invalidation of the offending rule (*see* Order at 2 (citing A.R.S. § 41-1030(A)), the court concluded the qualifying phrase "unless provided by law" in that provision created a second form of exemption from the APA. That is, even though the EPM Statute does not mention the APA or an express

[2] Although the lower court issued its final order on May 14, 2024, it waited until July 8 to enter its final judgment. (ROA 54 ep 1.)

exemption, as required by subsection 1002(A), the EPM rulemaking may still be exempt from compliance with the APA under subsection 1030(A). Having judicially expanded the only way to exempt an agency rulemaking from the APA—i.e., through express exemption by the legislature—the court declared a "conflict" between the APA's rulemaking process and the additional requirements imposed by the EPM Statute. In the court's view, there are "deadline related conflicts" and "a conflict in obtaining governor approval." (*Id.* (footnotes omitted).) But the court failed to explain how the provisions are contradictory. Nor did it contend with Plaintiffs' explanation and authority to the contrary. Rather, ignoring that any exemption from the APA must be "express," the court deduced from these self-identified conflicts that the EPM was, in effect, *impliedly* exempt from the APA's rulemaking process. (*Id.* at 3.)

Second, the lower court rejected Plaintiffs' alternative claims, finding the challenged rules in the 2023 EPM "d[id] not contradict or directly conflict with statutory requirements." (*Id.* at 4.) The court therefore dismissed the complaint under Rule 12(b)(6) for failure to state a claim, concluding the legal grounds on which it ruled could not be cured by amendment. (*Id.* at 7.)

This appeal immediately followed.

SUMMARY OF THE ARGUMENT

Over the years, the EPM has grown from a concise compilation of statutory provisions guiding the administration of elections in Arizona, to a behemoth rulebook spanning over 260 pages—a violation of which is subject to criminal prosecution. True, during this time, the legislature has delegated more and more

rulemaking authority to the secretary of state. Also true: the legislature's continued regulation in this area has further complicated the administration of elections. While these realities may explain the expansion of the EPM's scope, they do not excuse the Secretary from clear legislative commands. This case is about holding the Secretary to those commands.

I. The Arizona APA outlines the requirements agencies must follow in prescribing rules consistent with their delegated authority. The requirements include notice, a 30-day public-comment period, the right to be heard in an oral proceeding, among other provisions. Recognizing the APA must interact with many other statutes, like the statutes delegating authority to covered agencies, the APA defines its applicability and relation to other law. In plain terms, section 1002 of APA states that the APA's rulemaking process applies to "all agencies" and "all proceedings," and that any conflicting statute is "superseded," unless the agency or the rulemaking is "expressly exempted." So, absent an express exemption, the APA's rulemaking process applies to agency rulemakings.

Here, there is no dispute that (1) the Department and the Secretary are agencies subject to the APA; (2) the 2023 EPM is a statement of general applicability that prescribes law or policy—the APA's definition of a rule; (3) neither the APA nor the EPM Statute *expressly* exempts EPM rulemakings from the APA; and (4) the Secretary did not comply with the APA in prescribing the rules in the 2023 EPM. That should end the matter, and the APA's defined remedy for rules that violate the APA is invalidation. *See* A.R.S. § 41-1030(A). The lower court erred in finding otherwise through a flawed *implied* exemption analysis.

II. Alternatively, the Secretary exceeded his delegated authority in prescribing rules that directly conflict with statute. These rules govern the use of documentary proof of citizenship; county recorders and their duty to check databases to identify non-citizens; the public's access to registrants' signatures; out-of-state voting by registrants on the active early voting list; challenges to early ballots; and out-of-precinct voting in precinct-based counties. Each challenged rule conflicts with a specified Arizona statute; and therefore each must be declared void. The lower court erred in finding otherwise.

III. A merits ruling in Plaintiffs' favor requires an injunction against the Secretary from implementing or enforcing the 2023 EPM, or, alternatively, the challenged rules. The Secretary's unlawful action on its own satisfies the standard for injunctive relief. *See Ariz. Pub. Integrity All. ("AZPIA") v. Fontes*, 475 P.3d 303, 309 (2020). But, even if Plaintiffs must show irreparable injury and that the balance of the equities and public interest tip in their favor, they have done so. The Court should therefore preliminarily enjoin the Secretary from implementing or enforcing the 2023 EPM, or, alternatively, the challenged rules.

STANDARD OF REVIEW

Plaintiffs appeal the lower court's order granting the Secretary's motion to dismiss under Rule 12(b)(6) and denying Plaintiffs' motion for a preliminary injunction. "Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo." *Coleman v. City of Mesa*, 284 P.3d 863, 866 (Ariz. 2012). Dismissal is appropriate "only if as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id.* (quoting *Fid. Sec. Life Ins. Co.*

v. State Dep't of Ins., 954 P.2d 580, 582 (Ariz. 1998)). Further, while the denial of a motion for preliminary injunction is reviewed for abuse of discretion, a "mistake of law" is an abuse of discretion. *Shoen v. Shoen*, 804 P.2d 787, 791 (Ariz. App. 1990). In reviewing orders on preliminary injunctions, appellate courts "review issues construing statutes and rules [like the 2023 EPM] de novo." *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 306 (2020).

ARGUMENT

I. The 2023 EPM Is Subject to the APA's Rulemaking Process; the Lower Court Erred in Ruling Otherwise.

While the power to make law in Arizona lies with the legislative branch, the legislature may delegate authority to implement legislative policy decisions to executive agencies. *Roberts v. State*, 512 P.3d 1007, 1016 (Ariz. 2022) (citing *Facilitec, Inc. v. Hibbs*, 80 P.3d 765, 767 (Ariz. 2003)). When the legislature delegates authority to an executive agency to implement legislative policy by prescribing rules of general application, the agency must follow the APA, unless an exemption applies. A.R.S. §§ 41-1002(A), 1005. The APA outlines the administrative rulemaking process, elevating public participation "to ensure that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures." *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 895 P.2d 133, 138 (Ariz. App. 1994). Unless a rulemaking is "expressly exempted" from the APA, any "rule" adopted in violation of the APA is invalid. A.R.S. §§ 1002(A), 1030(A).

Unlike most APA litigation, here there is no dispute that the 2023 EPM is a

"statement of general applicability that … prescribes law or policy"—the APA's definition of a "rule." *See* A.R.S. § 41-1001(21). Nor is it disputed that the Department and the Secretary are "agencies" subject to the APA. *See* § 41-1001(1). Rather, the applicability of the APA's rulemaking process to the 2023 EPM—and, by extension, the EPM's validity and enforceability—turns on whether EPM rulemaking is exempt from the APA. The answer is no.

A. Subsection 41-1030(A) is a remedies provision that does not exempt the EPM from the APA.

1. There is only one way for the legislature to exempt the EPM from the APA's rulemaking process: by express exemption. A.R.S. § 1002(A). The APA is organized into several articles, including articles on the publication of agency rules (Article 2), rulemaking (Article 3), review by the attorney general (Article 4), and review by the governor's regulatory review council (Article 5).[3] Article 1 outlines the APA's "General Provisions." Chief among the general provisions is a provision on the APA's "[a]pplicability and [its] [r]elation to other law." *See* A.R.S. § 41-1002. Subsection 1002(A) sets forth a straightforward rule of applicability: "This article and articles 2 through 5 of this chapter apply to all agencies and all proceedings not expressly exempted." Subsection 1002(B) adds, "To the extent that any other statute would diminish a right created or duty imposed by this chapter, the other statute is superseded by this chapter, unless the other statute expressly provides otherwise." Section 1002 therefore mandates that the

[3] Other APA articles are inapplicable here, including articles on adjudications (Article 6), military administrative relief (Article 7), the delegation of power (Article 8), substantive policy statements (Article 9), administrative hearing procedures (Article 10), and occupational regulations (Article 11).

rulemaking process in Article 3 applies to "all agencies" and "all proceedings," and that any conflicting statute is "superseded," unless the agency or the rulemaking is "expressly exempted," which can occur through the APA itself or through the implementing statute.

In *Arizona State University ex rel. Arizona Board of Regents v. Arizona State Retirement System*, the Court described this mandate as "unambiguous language" that "cannot [be] ignore[d]." 349 P.3d 220, 226 (Ariz. App. 2015). "Section 41-1002 provides that in the absence of an express exemption, agencies must comply with the APA." *Id.* And the APA and implementing statutes are replete with examples of express exemptions. *Cf. id.* (looking to the APA and implementing statute for express exemption and stating "[n]either A.R.S. § 38-749 nor the APA exempt the System from rulemaking; therefore, rulemaking is required before the Policy can be given effect" (citation omitted).).

Take section 1005 of the APA, titled "Exemptions." The section lists nearly 40 exemptions, from subject-matter specific exemptions, § 1005(A)(1) (exempting rules related to "use of public works"), (A)(3) (exempting rules regulating "motor vehicle operation"), to exemptions for certain agencies, § 1005(D) (exempting the board of regents), (F) (exempting the state board of education), to program specific exemptions, § 1005(A)(35) (exempting rules related to the livestock operator fire and flood assistance grant program), (A)(29) (exempting administration of public assistance program monies related to disaster declarations).

The legislature regularly includes express exemptions from the APA's

rulemaking process in implementing statutes as well.[4] *See, e.g.*, §§ 3-109.03(C) (stating department of agriculture "is exempt from title 41, chapter 6" [i.e., the APA] for purposes of rules on the livestock operator fire and flood assistance grant program (footnote omitted)); 17-255.01(D) (stating director of Game and Fish Department "is exempt from title 41, chapter 6, article 3" for orders on invasive species in the state (footnote omitted)); 20-1241.09(B) (stating department of insurance and financial institutions "is exempt from title 41, chapter 6, articles 3 and 5" for the purposes of rules on consumer notices and disclosures (footnote omitted)); 36-736(A) (stating orders of local health officers "are exempt from title 41, chapter 6"). These express exemptions are readily identifiable by their use of "is exempt" language and direct reference to the APA's rulemaking provisions.

2. The lower court did not identify an express exemption in the APA or EPM Statute exempting the Secretary's EPM rulemaking from the APA—because there is none. Instead, the court relied on subsection 1030(A) of the APA, which defines the remedy for noncompliance with the APA.

Subsection 1030(A)'s text, structure, and history make plain the lower court's error. This subsection provides, "A rule is invalid unless it is consistent with the statute, reasonably necessary to carry out the purpose of the statute and is made and approved in substantial compliance with [the APA rulemaking process], unless otherwise provided by law." In two sentences, the court elevated

[4] Contrary to the lower court's statement, Plaintiffs did not argue "that an express exemption requires language *in the APA* that expressly states that an EPM is exempt from the APA." (Order at 2, n.2 (emphasis added).) Plaintiffs were clear the express exemption may be in the APA *or* the implementing statute; they cited the same implementing statutes they do here. (*Compare* ROA 39 ep 6–7.)

the phrase "unless otherwise provided by law" to bypass subsection 1002's express-exemption mandate. To the court, because "the Legislature has 'otherwise provided by law' ... the procedure to promulgate a valid EPM," the 2023 EPM is not subject to the APA. (Order at 2 (citing § 1030(A).) This was error.

The text of subsection 1030(A) does not support the lower court's interpretation. Subsection 1030(A) begins with a general statement—"[a] rule is invalid"—and is followed by two conditional phrases signified by words "unless":

> A rule is invalid *unless* it is consistent with the statute, reasonably necessary to carry out the purpose of the statute and is made and approved in substantial compliance with [the APA's rulemaking process], *unless* otherwise provided by law.

(Emphases added.) The first conditional provides that a rule is invalid *unless* the rule satisfies three prerequisites: the rule must (1) be consistent with the implementing statute, (2) be reasonably necessary to carry out the purpose of the implementing statute, and (3) made in substantial compliance with the APA. § 1030(A). These conditions are requirements for a valid rule.

The second conditional—"unless otherwise provided by law"—is preceded by a comma and could be read in one of two ways. *First*, that a rule is invalid unless the law provides for a different remedy, e.g., remand to the agency without invalidating or vacating the rule. The lower court did not adopt this reading, and no party has argued the EPM Statute provides an alternative remedy for violation of the APA. *Second*, that a rule is invalid unless it is prescribed in substantial compliance with the APA's rulemaking process, unless otherwise provided by law. That is, a recognition that rules are not categorically invalid because they did not

go through the APA's rulemaking process. This is undoubtably true, because some agency rulemakings are *expressly exempt* from the APA's rulemaking process. Thus, a rule is not invalid for failure to comply with the APA if the legislature expressly exempted the rulemaking from the APA.

Adopting the lower court's reliance on subsection 1030(A) would violate multiple canons of statutory interpretation. "In construing a specific provision, [courts] look to the statute as a whole" to determine its meaning, *Glazer v. State*, 423 P.3d 993, 995 (Ariz. 2018), adopting the "meaning which best harmonizes with the context," *Rotter v. Coconino Cnty.*, 805 P.2d 1031, 1036 (Ariz. App. 1990). Interpretation should also avoid rendering "any clause, sentence or word 'superfluous, void, contradictory or insignificant.'" *State v. Cid*, 892 P.2d 216, 219 (Ariz. App. 1995) (citations omitted). Again, the provision defining the APA's applicability and its relation to other laws broadly states that agency rulemakings are subject to the APA unless expressly exempted. A.R.S. § 41-1002(A). Yet, despite no express exemption in the EPM Statute, the lower court found that the supplementary processes in the Statute are "otherwise provided by law" and therefore absolve the Secretary from complying with the APA. This reading is in direct conflict with subsection 1002(A). That subsection requires an express exemption; the lower court's interpretation of subsection 1030(A) permitted an implied exemption not anywhere expressed.

Unsurprisingly, the lower court's interpretation is also against decisional law. An implementing "statute's silence does not exempt the [agency] from the APA's rulemaking procedure." *Ariz. State Univ.*, 349 P.3d at 226; *see also*

Carondelet Health Servs., 895 P.2d at 140 (first stating "[a]ll agencies are subject to the APA unless they are expressly exempted," and then concluding "had the legislature intended that [the agency] be exempt from the APA when administering the session law, it would have so stated"). But that is what the lower court did here: it found an exemption despite the EPM Statute's silence on the APA. While the EPM Statute says nothing about the APA, the court inferred an exemption through the Statute's supplementary process requiring the governor and attorney general to approve the EPM. Subsection 1030(A), however, does not mean that any statute including processes preempts the APA. As the Court has recognized before, supplementary processes are no substitute for an express exemption. *See Legacy Educ. Grp. v. Ariz. State Bd. for Charter Sch.*, No. 1 CA-CV 17-0023, 2018 WL 2107482, at *6 (Ariz. App. May 8, 2018) (holding despite supplementary process in implementing statute "no statute has expressly exempted the Board from the APA's rulemaking provisions" and therefore "the Board must follow the APA's rulemaking provisions in promulgating [the framework rules]").

The history of subsection 1030(A) confirms Plaintiffs' read. The legislature added the phrase "unless otherwise provided by law" to subsection 1030(A) in House Bill 2578 (1992). That legislation generally aimed "[t]o modify provisions of the [APA] to give more notice and public input prior to rules being reviewed by the Governor's Regulatory Review Council." Ariz. Senate, Fact Sheet on H.B. 2578 – Final Revised, H.B. 2578, 40th Leg., 2d Sess. (Ariz. 1992) (H.B. 2578 Fact Sheet), https://bit.ly/3zBwr2h (ep 21). While H.B. 2578 initially left subsection 1030(A) unchanged, Senator Furman proposed to expand the suite of notice-

enhancing measures by requiring all rules, even those promulgated through exempt rulemakings, to be published in the state's code of regulations. *See* Ariz. Senate, Furman Amendment, 40th Leg., 2d Sess. (Ariz. 1992) (Furman Amendment), https://bit.ly/3zBwr2h (ep 27, 31); H.B. 2578 Fact Sheet (ep 22). Before H.B. 2578, only those rules approved by the attorney general and filed with the secretary of state were published in the code. Because H.B. 2578 required the Secretary to publish in the code *all* rules, the Furman Amendment also amended subsection 1030(A) for clarity. *See* Furman Amendment, § 8 (ep 31) ("A rule is invalid unless adopted and certified in substantial compliance with [the APA's rulemaking process] UNLESS OTHERWISE PROVIDED BY LAW."). As amended, the statute made clear that not all rules—now published in the code—are invalid for failure to comply with the APA; some rulemakings are expressly exempt.

The text, structure, and history of subsection 1030(A) of the APA overwhelmingly support Plaintiffs' argument that this subsection cannot be used to avoid subsection 1002(A)'s clear requirement for an express exemption from the APA. The lower court erred in ruling otherwise.

B. The EPM Statute only supplements the APA's rulemaking process and, therefore, does not conflict with it.

Nor does the lower court's finding of a "conflict" between the APA and EPM Statute change the outcome. (*See* Order at 3.) There is no conflict; and even if there were, the APA supersedes the conflicting provision.

First, the plain language of subsection 1002(B) of the APA resolves this issue. Pointing to a purported conflict between the APA and EPM Statute, the lower court used the later-in-time canon of statutory interpretation to defer to the

EPM Statute. (*See id.* (quoting *State v. Ariz. Bd. of Regents*, 507 P.3d 500, 507 (Ariz. 2022).) But "a secondary principle of statutory interpretation" cannot displace "unambiguous" statutory text. *Ariz. State Univ.*, 349 P.3d at 226 (relying on subsection 1002 to reject application of the negative-implication canon). And subsection 1002(B) unambiguously states, "[t]o the extent that any other statute would diminish a right created or duty imposed by this chapter, *the other statute is superseded by this chapter* ... ." (Emphasis added.) In other words, if a right or duty created by the APA conflicts with another statute, the APA prevails, always, absent an express exemption by the legislature. Subsection 1002(B) thus overrides the later-in-time canon's applicability.

The Court recognized this concept in *Thompson v. Tucson Airport Authority*, Inc., 786 P.2d 1024 (Ariz. App. 1989). There, the plaintiff argued that the Tucson Airport Authority was an "agency" subject to the APA, relying on the Authority's implementing statute that described it "as an agency or instrumentality of the city and state." *Id.* at 1025 (quoting A.R.S. § 2-312). The Court swiftly rejected the plaintiff's reliance on the implementing statute over the APA's definition of agency. Subsection 1002(B) "demonstrates a legislative intent that the provisions of the [APA] should prevail over other statutory rules." *Id.* The Court reached the same conclusion in *City of Phoenix v. 3613 Ltd.* related to alternative hearing procedures before the liquor board. 952 P.2d 296 (Ariz. App. 1997). "In view of section 41-1002(B), it is no longer valid to conclude that because the liquor control statutes contain provisions regarding hearing procedures for hearings before the liquor board, the provisions of the [APA] are not applicable." *Id.*

Nor does the lower court's reliance on the qualifying phrase "unless the other statute *expressly* provides otherwise" in subsection 1002(B) avoid this conclusion. (*See* Order at 3 (emphasis added) (quoting A.R.S. § 1002(B)).) The phrase makes clear that any exemption or departure from what the APA otherwise requires must be express. This express-exemption reminder is both pervasive and consistent throughout the APA. Such an approach is common for complex statutory schemes, particularly those subject to regular amendment.

Second, in any event, there is no conflict between the APA and the EPM Statute. Plaintiffs briefed this very issue (ROA 39 ep 7–8, 10–11), yet the lower court did not contend with Plaintiffs' arguments or proposed schedule for how the Secretary could have complied with the processes in both the APA and the EPM Statute (*compare* Order at 3). Rather, the court summarily concluded "[t]here are deadline related conflicts" and "[t]here is also a conflict in obtaining governor approval," noting the supposed conflict in two footnotes. (*Id.* at 3, nn. 3–4.) These conflicts are imaginary.

As to the governor's approval, the lower court cited A.R.S. § 41-1039(B)–(D) as the claimed conflict. But those APA provisions are no obstacle to complying with the EPM Statute's requirement that the Secretary submit the manual to the governor "not later than October 1 of the year before each general election" and that the governor approve the EPM. § 16-452(B). Subsection 41-1039(B) establishes the governor's approval as a prerequisite to review by the governor's regulatory review council (that's no conflict); subsection 41-1039(C) requires agencies to recommend "for consideration ... at least three existing rules to

eliminate for every additional rule requested by the state agency" (that's no conflict); and subsection 41-1039(D) limits the publicization of "directives, policy statements, documents or forms" unless authorized by statute or rule (that's no conflict). None of these provisions in any way impedes the Secretary's ability to submit the EPM to the governor by October 1. None, for example, call for any action to be undertaken after that date.

Indeed, Plaintiffs' read is the same as the attorney general's earlier view. (ROA 39 ep 37 (attaching Arizona Attorney General Opinion, dated Oct. 19, 1979).) The attorney general previously reviewed A.R.S. § 35-192(G), which required "the director of the division of emergency management" to "develop rules for administering the monies authorized for liabilities" for disaster declarations, "subject to approval by the governor." (*Id.* ep 43.) Responding to the director of the division of emergency management's questions on the application of the APA to subsection 192(G), the attorney general concluded: "The fact that the rules and regulations [authorized under subsection 192(G)] are subject to the Governor's approval does not excuse them from compliance with the APA. This is merely one additional step in the rule-making process." (*Id.*) That is precisely Plaintiffs' point; there is no conflict.

As to conflicting deadlines, the lower court cited the APA's provision on the required notice of a proposed rulemaking (§ 41-1022(A), (B), (D), and (E)), and the provision on the public-comment period and oral-proceeding requirement (§ 41-1023(B), (C), and (D)). (Order at 3, n.3.) The EPM Statute does not address any of these topics, so it's unclear how these APA requirements could present a

conflict with non-existing provisions in the EPM Statute. Nor does the general theory of a "deadline conflict" even hold up to scrutiny. As Plaintiffs explained below, there is no limitation on when the Secretary can *start* the rulemaking process. The EPM Statute only requires that the Secretary prescribe the rules required under subsection 452(A) "in an official instructions and procedures manual" that must be issued "not later than December 31 of each odd-numbered year immediately preceding the general election." § 16-452(B). While the EPM must be submitted to the governor and attorney general by October 1 of odd-numbered years, *id.*, the Secretary is free to complete the rulemaking process and then submit the manual to the governor before this date. There is ample time to comply with even the longest version of the rulemaking process if it were initiated early in the odd-numbered year or even in the previous even-numbered year.[5] The APA thus discourages procrastination by officials in the development and promulgation of an important governing documents like the EPM.

C. The remedy for noncompliance with the APA's rulemaking process is invalidation of the 2023 EPM.

Under the APA, "[a] rule is invalid" if not "made and approved in substantial compliance with [sections] 41-1021 through 41-1029." A.R.S. § 41-1030(A). Here, the Secretary failed to provide notice of the proposed rulemaking,

[5] In truth, all that is required is 30 days advance publication in the register, A.R.S. § 41-1013(A), and a 30-day comment period, § 41-1023(B). Absent an oral proceeding (which could be held on 30 days' notice), § 41-1023(D), the Secretary would be free to submit the rule to the attorney general and the governor. Of course, it is true that the attorney general or governor could force a restart of this process by rejecting the proposed EPM. §§ 41-1044(E), 16-452(B).

follow the statutorily prescribed format, and publish the notice in the register, A.R.S. § 41-1022(A); he did not provide the public 30 days to comment on the proposed rulemaking after publication, § 41-1023(B); he did not hold an oral proceeding on the proposed rule, nor did he give the public an opportunity to request one, § 41-1023(C); and he did not maintain an official rulemaking record, § 41-1029(A). And given the passage of the December 31, 2023 deadline for the issuance of a new EPM, it would be impossible for the Secretary to adopt the same, or substantially the same EPM on remand. § 16-452(B).

To be clear, invalidating the 2023 EPM will cause negligible disruption: all that will happen is a reversion to the 2019 EPM, which has governed Arizona elections for four years, including its most recent statewide general election.[6]

* * *

In sum, the APA applies to the 2023 EPM. Because the Secretary did not comply with the APA in prescribing the rules in the EPM, the only remedy available is a declaratory judgment that the 2023 EPM is invalid.

II. Alternatively, Eight Provisions of the 2023 EPM Are Invalid Because They Conflict with Statute or Exceed the Secretary's Authority.

A declaratory judgment invalidating the 2023 EPM for the Secretary's failure to promulgate it in accordance with the APA resolves this case in its entirety. But, in the event the Court does not invalidate the EPM, the Court must review the lower court's dismissal of Plaintiffs' claims that specific provisions of

[6] While the 2019 EPM was adopted in a similarly improper manner, the 2019 EPM is beyond legal challenge because the one-year statute of limitations applicable to actions under the APA has passed. *See* A.R.S. § 12-541(5).

the 2023 EPM are contrary to or in excess of statute.

A. Count II: The rule that permits the use of previously submitted DPOC to avoid application of juror non-residency law conflicts with A.R.S. § 16-165(A)(10).

Subsection 16-165(A)(10) of the A.R.S. provides "[t]he county recorder *shall cancel* a registration ... [w]hen the county recorder obtains information ... and confirms that the person registered is not a United States citizen." (Emphasis added.) This includes "when the county recorder receives a summary report from the jury commissioner or jury manager ... indicating that a person who is registered to vote has stated that the person is not a United States citizen." *Id.* Before the recorder cancels a registration based on a person's self-declaration of non-citizenship on a juror questionnaire, the recorder must send the person "by forwardable mail" notice that his or her "registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship." *Id.* "If the person registered does not provide satisfactory evidence within thirty-five days" of citizenship, "the county recorder *shall cancel* the registration." *Id.* (emphasis added).

Chapter 1, Section IX, Subsection C(2)(b) of the 2023 EPM directly countermands this statute. It states that upon reviewing the summary report of juror questionnaires and identifying a true match between a juror who declared themselves a noncitizen and a registered voter, "the County Recorder shall determine whether the voter has previously provided [Documentary Proof of Citizenship under A.R.S. § 16-166 ("DPOC")] or was registered to vote before the DPOC requirement was adopted in 2004. If the person has previously provided

DPOC [or was registered to vote at the time the DPOC requirement went into effect in 2004], the County Recorder *shall not cancel the registration*." (2023 EPM at 43 (ep 87) (emphasis added).)

The lower court, adopting the Secretary's argument whole, held that "[t]here is no requirement for a 35-day notice letter if the county recorder does not cancel the registration because the recorder confirms that the person is a U.S. citizen from DPOC the recorder already has on file." So, according to the court, the EPM does not "contradict or directly conflict with statutory requirements."

The lower court's analysis fails for at least three reasons.

First, the court ignored the circumstance of a voter for whom no DPOC is on file because they registered to vote before the 2004 adoption of A.R.S. § 16-166. The 2023 EPM lumps this group of voters together with those voters who have submitted DPOC. But this makes no sense. The entire purpose of A.R.S. § 16-165 is to impose on county recorders a duty to act on new information received from the registrants themselves. There is no conceivable reason not to require DPOC from voters who were never required to submit it when these same voters—under oath—asserted that they are not U.S. citizens.

Second, for all voters, the court ignored that subsection 165(A)(10) provides the exclusive acceptable confirmation mechanism—a letter requiring submission of new DPOC. The statute provides, "The county recorder *shall cancel* a registration ... [w]hen the county recorder obtains information ... and confirms that the person registered is not a United States citizen." § 16-165(A)(10) (emphasis added.) This includes "when the county recorder receives a summary report from

the jury commissioner or jury manager pursuant to § 21-314 indicating that a person who is registered to vote has stated that the person is not a United States citizen." *Id.* The phrase "confirms that the registered person is not United States citizen" unmistakably refers to the confirmation process provided in the very next sentence of the statute. That is, before canceling a registration based on information in a summary report from the jury commissioner, "the county recorder shall send the person notice by forwardable mail that the person's registration will be canceled in thirty-five days unless the person provides evidence of United States citizenship pursuant to section 16-166." *Id.* If this information is not provided, the voter's non-citizenship—as self-reported under oath on the juror questionnaire—is confirmed, and the county recorder "shall cancel the registration" *Id.*

The lower court adopted the Secretary's argument that a voter's prior submission of DPOC (or, apparently, status as grandfathered under the law) confirms the citizenship of someone who has—since submitting that DPOC—declared themselves to be a noncitizen. This makes no sense. To take just one example, it is possible that a voter who previously was a citizen of the United States has since renounced that citizenship. In such a circumstance, previously submitted DPOC (which was valid when submitted) would be on file, but the person's declaration of non-citizenship on a juror questionnaire would also be truthful. Only the confirmation requirement in subsection 165(A)(10)—a letter requiring the submission of new DPOC—can provide evidence that a voter who declared themselves to be a noncitizen is actually a citizen and qualified to vote. There are other possibilities as well. For example, the DPOC on file may not be

accurate or legitimate. The entire point of the statute is to direct the counties to *investigate* the registrant's own, fresh claim of non-citizenship, not to ignore it.

Indeed, the lower court's holding inserts language into the statute that is not there. This can be seen from two angles. Under the district court's reading, the statute instructs counties to send a 35-day notice *unless DPOC* is on file. But that exception is a judicial creation. Next, as a practical matter, the only registrants who will not have DPOC on file and who are not grandfathered in per the EPM will be those who register by mail using the federal form, as opposed to those who register by mail using the state's form or at a state agency. Here again, however, nothing in the statute indicates that its reach is limited to federal form voters. Indeed, the entire point of the statute is to direct counties to investigate discrepancies arising out of *a registrant's own statements*, not, as the lower court would have it, to ignore those discrepancies if the already necessarily complete file appears to remain complete. In short, as the statute makes clear, the registrant having made statements under oath calling into question her own file is a reason to ask the voter to address the inconsistency between her declaration and her file, not to blindly rely on the file and pretend the voter hasn't made the statement under oath.

Third, the lower court's analysis conflicts with the clear structure of subsection 165(A). The statute imposes a duty on 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. Each provision in subsection 165(A) is a situation when a county clerk and recorder "shall cancel a registration." Each subdivision of the statute details the circumstances under which

the cancellation must be made. *See, e.g.*, § 16-165(A)(2) (requiring cancellation of a voter's registration on receipt of information of a voter's death and confirmation of the same).[7] Here, the cancellation process begins with the receipt of the summary jury report showing a voter declared themselves a non-citizen. Cancellation can only be avoided in one circumstance: where the voter who so declared themselves submits new DPOC in response to the 35-day letter mandated by the statute.

Because the 2023 EPM conditions county recorders' duty to send the pre-cancellation letter required under subsection 165(A)(10) when a voter declares themselves a noncitizen on a sworn juror questionnaire on the absence of DPOC submitted before the juror questionnaire was completed, the lower court erred in finding no conflict between the EPM and the statute.

B. Counts III and IV: The rules that permit federal-only voters to vote in presidential elections and by mail conflict with statute.

Plaintiffs prevail on Count III (challenging EPM provisions allowing federal-only voters to vote in presidential elections, including Arizona's presidential primary (the Presidential Preference Election or PPE) in contravention of A.R.S. §§ 12-1831 and 16-127) and Count IV (challenging EPM provisions allowing federal-only voters to vote by mail in contravention of sections 12-1831, 16-127, and 16-166) for the same reason: both provisions are, by their own terms,

[7] In contrast to its treatment of voters' self-declaration of non-citizenship on a juror questionnaire, the 2023 EPM provides that any person listed on the Arizona Department of Health Services monthly list of recently deceased Arizona residents that matches voter registration records is to be "automatically placed in 'canceled' status." (2023 EPM at 37 (ep 81).)

contrary to statute. The Secretary's only authority for these provisions is a ruling of the U.S. District Court for the District of Arizona in *Mi Familia Vota v. Fontes*, Case No. 2:22-cv-00509 (final order entered Feb. 29. 2024).[8] This ruling has been appealed to the U.S. Court of Appeals for the Ninth Circuit Court. In the event the district court's order in *Mi Familia* is reversed, these provisions of the EPM are necessarily inoperative on their own terms and the Court should, at a minimum, declare as much. In any event, because Arizona law unambiguously forbids federal-only voters from voting in presidential elections and from voting by mail in any election, this Court should reverse the lower court's dismissal.

C. Count V: The rule excusing county recorders from checking voter registrations against certain national databases conflicts with statute.

Subsection 16-121.01(D) of the A.R.S. requires that when a county recorder receives a federal-form registration absent evidence of citizenship (as opposed to a state-form registration, which necessarily requires DPOC under A.R.S. § 16-166), "the county recorder or other officer in charge of elections *shall use all available resources* to verify the citizenship status of the applicant." (Emphasis added.) "[A]t a minimum," the county recorder "shall compare the information available on the application for registration" to certain available databases, including:

> 1. The department of transportation databases of Arizona driver licenses or nonoperating identification licenses.
>
> 2. The social security administration databases.
>
> 3. The United States citizenship and immigration services systematic

[8] *Mi Familia Vota v. Fontes*, --- F. Supp. 3d ----, 2024 WL 862406 (D. Ariz. Feb. 29, 2024).

> alien verification for entitlements program, if practicable.
>
> 4. A national association for public health statistics and information systems electronic verification of vital events system.
>
> 5. Any other state, city, town, county or federal database and any other database relating to voter registration to which the county recorder or officer in charge of elections has access, including an electronic registration information center database.

Id.

Contrary to this statutory duty, Chapter 1, Section II, Subsection A(8)(a) of the 2023 EPM declares that "County Recorders *currently have no obligation to check*" databases expressly stated in the statute. (2023 EPM at 13 (ep 57) (emphasis added) (footnote omitted).) Among the databases the Secretary writes out of the statute are "the Social Security Administration database, the USCIS SAVE program, and the National Association for Public Health Statistics and Information Systems (NAPHSIS) electronic verification of vital events system." (*See id.*) Chapter 1, Section II, Subsection C(2)(a) similarly excuses county recorders' duties to check the same databases when they confirm continued voter eligibility under A.R.S. § 16-165. (*Id.* at 43 (ep 87) ("County Recorders currently have no obligation to check these databases [the Social Security Administration database, the National Association for Public Health Statistics Information and Systems (NAPHSIS) electronic verification of vital events system, and the Electronic Registration Information Center (ERIC) database].").)

The lower court at once waved away and acknowledged the contradiction between the EPM and statute. At first, it excused the EPM's language on the ground that the statutory duties are conditioned on the accessibility of the

databases or the practicability of checking them.[9] (Order at 5.) At the same time, it acknowledged that the EPM eliminates this duty: "Should it become practicable to check these databases, and should they become accessible, then there may exist a contradiction and direct conflict between the 2023 EPM and the statute."

That contradiction exists now. As expressly found by the federal court in *Mi Familia*, county recorders have access to the federal USCIS SAVE database and the checks required under A.R.S. § 16-165(I) are permissible for voters without DPOC under section 16-166 where the recorder possesses information allowing such a check. *See* 2024 WL 862406 at 57 ("Arizona may not conduct SAVE checks on any registered voter whom county recorders have reason to believe are a non-citizen. *But Arizona may conduct SAVE checks on registered voters who have not provided DPOC*." (emphasis added)). Moreover, access to other databases, like the Social Security Administration database (A.R.S. 16-165(H)) and NAPHSIS (A.R.S. 16-165(J)) is a matter of a recorder's request for the same. *See, e.g.*, NAPHSIS, Vital Records on Demand: Get Fast Secure Access to Birth and Death Information, https://bit.ly/4c9TG0M. The lower court erred in finding the contradiction between the 2023 EPM and the statutory requirements is somehow conditional or contingent on future events. Because the contradiction exists now, the EPM provision must give way.

[9] The lower court asserted that Plaintiff RNC has conceded that conducting the database checks is not practicable. This is not the case—the RNC conceded only that to the extent any of the databases are not accessible to a county recorder, it would, obviously, be impracticable to check them.

D. Count VI: The rule limiting public access to registrant signatures conflicts with A.R.S. § 16-168(F).

Subsection 16-168(F) of the A.R.S. clarifies that "[n]othing in this section shall preclude public inspection of voter registration records at the office of the county recorder," except that certain information in registration records are protected as confidential. Protected information includes: "[1] the month and day of birth date, [2] the social security number or any portion thereof, [3] the driver license number or nonoperating identification license number, [4] the Indian census number, [5] the father's name or [6] mother's maiden name, [7] the state or country of birth and the records containing [8] a voter's signature and [9] a voter's e-mail address." A.R.S. § 16-168(F). While the statute generally protects this information from disclosure, it *may* be accessed or reproduced by "[1] the voter, [2] by an authorized government official in the scope of the official's duties, [3] for any purpose by an entity designated by the secretary of state as a voter registration agency ... , [4] for signature verification on petitions and candidate filings, [5] for election purposes and [6] for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station or [7] pursuant to a court order." *Id.*

To be sure, the first two paragraphs of Chapter 1, Section XI, Subsection (C)(1) of the 2023 EPM outline and restate A.R.S. § 16-168(F). The first paragraph lists the "components of a registrant's record" that are "confidential and may not be viewed, accessed, reproduced, or disclosed to a member of the public." (2023 EPM at 52–53 (ep 96–97).) And the second paragraph follows by outlining the

statutory exceptions to the general confidentiality rule.

Where the 2023 EPM goes wrong, however, is in the third and final paragraph, which *further* narrows when "[a] registrant's signature may be viewed or accessed by a member of the public." (*Id.* at 53 (ep 97).) The rule states that signatures may only be accessed "for purposes of verifying signatures on a candidate, initiative, referendum, recall, new party, or other petition or for purposes of verifying candidate filings." (*Id.*) While A.R.S. § 16-168(F) states that a registrant's signature may be accessed or reproduced "for signature verification on petitions and candidate filings, for election purposes and for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work." The EPM rule reads out multiple permissible uses of registrants' signatures, most critically uses "for election purposes" (*see id.* at 53 (ep 97)).

The lower court excused paragraph three's restrictions on the public's access to signatures by relying on the second paragraph instead. This misses the point. The third paragraph adopts an *additional* limitation on the use of signatures in direct conflict with A.R.S. § 16-168(F)'s permissible uses. The statute says signatures may be accessed for "election purposes," among other uses; and the rule says signatures may accessed "only for purposes of verifying signatures on a candidate, initiative, referendum, recall, new party, or other petition or for purposes of verifying candidate filings." (*Id.* at 53 (ep 97).) Indeed, if the lower court were right that the second paragraph captures Plaintiffs' concern, the third paragraph would be unnecessary and have no effect. But that is not how the Secretary drafted the rule; rather, it works as an additional limitation, which,

notably, the Secretary has never disclaimed.

Lastly, in a footnote, the lower court speculated that "the omitted language [i.e., for election purposes] appears to be limited to 'a person engaged in newspaper, radio, television, or reportorial work.'" (Order at 6 n.7.) The court misinterprets the statute. Subsection 168(F) recognizes seven exceptions to the general confidentiality rule. The first two exceptions relate to certain individuals: "the voter" and "authorized government official[s] in the scope of [their] duties." A.R.S. § 16-168(F). The next four exceptions relate to certain permissible uses: "for any purpose by an entity designated by the secretary of state as a voter registration agency" under the National Voter Registration Act; "for signature verification on petitions and candidate filings"; "for election purposes"; and "for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work." *Id.* And the last exception concerns access by "court order." *Id.*

Nor does the lower court's reading make much sense. "[F]or election purposes" and "for news gathering purposes" are separated by "and," indicating that they are separate exceptions. Further, it is unclear why a person engaged in "newspaper, radio, television, or reportorial work," or "connected with or employed by a newspaper, radio, or television station" would ever have need to seek access to signatures for "election purposes" rather than "news gathering purposes." Granting them access for "election purposes" in addition to "news gathering purposes" adds nothing to the statute.

Because the 2023 EPM eliminates uses of signatures in a voters' registration records beyond the permitted uses in subsection 168(F), the lower court erred in

finding no conflict between the rule and the statute.

E. Count VII: The rule permitting county recorders to mail AEVL ballots to out-of-state addresses conflicts with A.R.S. § 16-544(B).

By statute, "[a]ny voter may request to be included on a list of voters to receive an early ballot by mail for any election for which the county voter registration roll is used to prepare the election register." A.R.S. § 16-544(A). To be on this active early voting list (or AEVL), the voter "shall make a written request" and include "the voter's name, residence address, mailing address in the voter's county of residence, date of birth[,] and signature," and "shall ... attest[] that the voter is a registered voter who is eligible to vote in the county of residence." § 16-544(B). The AEVL statute prohibits voters from "list[ing] a mailing address that is *outside of this state* for the purpose of the active early voting list," except for military servicemembers and other expatriates protected by the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). *Id.* (emphasis added).

Notwithstanding subsection 544(B) prohibiting use of out-of-state mailing addresses, Chapter 2, Section I, Subsection B(1) of the 2023 EPM provides that "an AEVL voter may make one-time requests to have their ballot mailed to an address outside of Arizona." (2023 EPM at 59 (ep 103) (citing A.R.S. § 16-544(B).) Nowhere in subsection 544(B), the authority invoked by the Secretary in the EPM, does it allow voters to make "one-time requests to have their ballot mailed to an address outside of Arizona." In fact, subsection 544(B) says the opposite: "The voter shall not list a mailing address that is outside of this state for the purpose of the active early voting list ... ." Thus, Chapter 2, Section I, Subsection B(1) directly conflicts with subsection 544(B) and must yield.

The lower court avoided this conflict by crediting a different statute on early ballots. (Order at 6 (citing A.R.S. § 16-542(A).) Subsection 542(A) allows voters "[w]ithin ninety-three days before any election" to make "a verbal or signed request ... for an official early ballot." A.R.S. § 16-542(A). The voter must provide his or her name, address, date of birth, and state or country or birth, along with other identifying information to "confirm the identity of the elector." *Id.* Subsection 542(A) says nothing else about a voter's address. For their part, subsections 542(E) and (F) introduce the phrase "temporary address," clarifying "that an early ballot ... mailed to the elector's residence or temporary address must include all of the information prescribed by subsection A" and that, "[u]nless an elector specifies that the address to which an early ballot is to be sent is a temporary address, the recorder may use the information from an early ballot request form to update voter registration records." Neither subsection approves the use of out-of-state addresses, and subsections 542(E) and (F)'s silence surely cannot usurp subsection 544(B)'s clear text that a voter on the AEVL "shall not list a mailing address that is outside of this state."

Even assuming section 542 could be read to permit one-time requests for AEVL ballots to be sent to temporary out-of-state addresses, the challenged EPM provision still conflicts with statute. The EPM cites subsection 544(B) (instead of section 542) and does not require these one-time requests for out-of-state AEVL ballots to follow the procedure—including the 90-day outer limit for making "one-time" requests for ballots to be sent to temporary addresses—of section 542.

F. Count VIII: The rule barring early ballot challenges received before the early ballot is returned conflicts with A.R.S. § 16-552(D).

Subsection 16-552(D) of the A.R.S. grants persons designed by political parties the right to challenge early ballots based on the grounds specified in section 591. The subsection further explains that "challenges shall be made in writing with a brief statement of the grounds *before the early ballot is placed in the ballot box*." A.R.S. § 16-552(D) (emphasis added). For context, a ballot box is a secure box where ballots are placed before processing and tabulation. § 16-608(A).

Chapter 2, Section V, Subsection A of the 2023 EPM narrows the time to challenge early ballots. Per the EPM, "[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." (2023 EPM at 79 (ep 123).) Before the lower court, the Secretary defended his narrowing of the statutory period based on the practicalities of early ballot processing, which the lower court credited without analysis. (*See* Order at 6–7.) Relevant here, the Secretary claimed a challenge cannot be made before an early ballot is returned to the recorder because "both the challenged ballot and the challenger must be physically present at the time the challenge is raised." (ROA 30 ep 54.) In other words, the claimed physical presence requirement made any challenge to an early ballot before the ballot is returned to the recorder impossible.

But section 552 does not require a challenger to be physically present at time of challenge. Specifically, subsection 552(C) states that party-appointed challengers may be present for processing early ballots; it says nothing about when

a challenge must be lodged. *See* A.R.S. § 16-552(C) ("The county chairman of each political party ... may designate party representatives ... to act as early ballot challengers for the party. No party may have more than the number of such representatives or alternates that were mutually agreed on by each political party to be present at one time."). To be clear, the only temporal limitation in section 552 is in subsection (D): challenges must be made "before the early ballot is placed in the ballot box." Because the EPM rule directly conflicts with subsection 552(D)'s timing, the lower court erred in finding no conflict.

G. Count IX: The rule authorizing out-of-precinct voting in precinct-based counties conflicts with A.R.S. § 16-122.

Section 16-122 of the A.R.S. 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."[10] Last amended in 1995, this law functions to require that in precinct-based counties, voters appear to vote in their own precincts. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2334 (2021) ("Voters who chose to vote in person on election day in a county that uses

[10] Nothing in sections 16-125 (dealing with electors who move precincts during the 29 day period preceding an election), 16-135 (allowing a voter who moved inside a county to vote in the correct precinct for his new address upon presentation of identification including the voter's residence address), or 16-584 (generally requiring voters to vote in their precinct of residence but allowing a voter who moved to a new county to correct voting records for purposed of voting in future elections at the appropriate polling place for his new address) permit a voter in a precinct-based county to vote in a different precinct.

the precinct system must vote in their assigned precincts."); *Pacuilla v. Cochise Cnty. Bd. of Supervisors*, 923 P.2d 833 (Ariz. 1996) (noting that A.R.S. § 16-122 forbids a person from voting unless his name "appears in both the county and the precinct register"). That section 122 requires voters in precinct-based counties to vote in their own precinct is so well understood that it has spawned numerous unsuccessful legal challenges by litigants like Intervenor DNC who wish to do away with precinct-based voting. *Democratic Nat'l Comm.*, 141 S. Ct. at 2330.

Plaintiffs challenged Chapter 9, Section VI, Subsection B(1)(f) and Chapter 8, Section VIII, Subsection B of the 2023 EPM because these together operate to impose on counties utilizing precinct-based voting a duty to supply out-of-precinct voters with a provisional ballot in the ballot style for their proper precinct and to count these votes in contravention of A.R.S. § 16-122. This essentially eliminates section 122's requirement that voters in precinct-based counties appear to vote in their own precincts because under these EPM provisions any voter, so long as he is registered *somewhere* in a county, will be able to insist that any precinct in that county provide him with a bespoke ballot—one that would have been waiting for him if he had reported to the proper polling place as required under section 122.

The lower court held that these EPM provisions[11] merely require "the counting of provisional ballots issued to out of precinct voters" provided such provisional ballots are "in the correct ballot style for the voter's precinct. ..." (Order at 6.) This analysis, which is essentially that advanced by the Secretary,

[11] The lower court only expressly addressed Chapter 9, Section VI, Subsection B(1)(f) of the 2023 EPM.

breezes past the core issue: the EPM's requirement that precinct-based counties provide provisional ballots in all possible ballot styles to accommodate out of precinct voters directly renders precinct-based voting as required by section 122 a nullity. As recognized by the U.S. Supreme Court, precinct-based voting advances many interests. It helps to distribute voters more evenly among polling places and thus reduces wait times. It can help put polling places closer to voter residences than would a more centralized voting-center model. In addition, precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections. *Democratic Nat'l Comm.*, 141 S. Ct. at 2345. These benefits are eliminated for precinct-based counties by the challenged EPM provisions.

Because the EPM rule directly conflicts with section 122's requirement that voters appear in their own precinct, the lower court erred in finding no conflict.

III. The Court Should Enter an Injunction in Favor of Plaintiffs.

1. A ruling in Plaintiffs' favor on the merits requires an injunction against the Secretary from enforcing or implementing the 2023 EPM, or, alternatively, the challenged rules. A preliminary injunction typically requires a showing of "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief." *Fann v. State*, 493 P.3d 246, 253 (Ariz. 2021); *Shoen v. Shoen*, 804 P.2d 787, 792 (Ariz. App. 1990). The only difference between a preliminary and permanent injunction

is a showing actual success, as opposed to "likely success," on the merits. When, as here, a government official "act[s] unlawfully and exceed[s] his constitutional and statutory authority," the Arizona Supreme Court has instructed that "[plaintiffs] need not satisfy the standard for injunctive relief." *AZPIA*, 475 P.3d 309. The official's unlawful act itself is sufficient for injunctive relief.

Because Plaintiffs have proven the Secretary acted unlawfully either by failing to comply with the APA in promulgating the 2023 EPM, or by prescribing rules in direct conflict with Arizona statute, Plaintiffs "need not" separately "satisfy the standard for injunctive relief." *See id*. The Court therefore should grant relief and enjoin the Secretary from enforcing or implementing the 2023 EPM, or, alternatively, the individual rules. *Id.* at 310.

2. Even if Plaintiffs had to show irreparable injury and that the balance of the equities and public interest tip in their favor, the same result follows. *First*, *AZPIA* forecloses any dispute against Plaintiffs' irreparable injury. There, Arizona citizens and voters challenged Maricopa County Recorder Fontes' instruction on counting overvotes as contrary to the 2019 EPM. *Id.* at 305–06. In rejecting Recorder Fontes' challenge to the plaintiffs' standing, the Supreme Court held that, because the plaintiffs sought "to compel the Recorder to perform his nondiscretionary duty to provide ballot instructions that comply with Arizona law," they showed "a sufficient beneficial interest to establish standing." *Id.* at 307. Further, rejecting Recorder Fontes' argument that the plaintiffs failed to show irreparable injury, the Supreme Court held the plaintiffs "established the requisite 'injury' by showing they are 'beneficially interested' in compelling the Recorder to

perform his legal duty." *Id.* at 309–10. Like in *AZPIA*, Plaintiffs are "beneficially interested" in compelling the Secretary to perform his legal duty consistent with statute. Plaintiffs are the national and state committees of the Republican party; they promote the election of Republican candidates to office in Arizona and expend significant resources doing so; and they have an interest in protecting against being forced to compete in an illegally structured competitive environment. Plaintiffs' interests, and the concomitant injury to those interests from the Secretary's unlawful actions, require injunctive relief.

Plaintiffs have also suffered financial and resource-based harm. Courts in APA actions have credited economic harm as irreparable because the plaintiff is unable to recover monetary damages. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (crediting "economic harm" as irreparable in APA challenge); *D.C. v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 34 (D.D.C. 2020) (same and collecting cases). At least for their claim under the APA, Plaintiffs are limited in the relief available for a violation of the APA. *See* A.R.S. §§ 41-1034(A) ("Any person who is or may be affected by a rule may obtain a judicial declaration of the validity of the rule by filing an action for declaratory relief … ."; 12-820.01(A) (restating the state's absolute immunity); *see also Ryan v. State*, No. 1 CA-CV 08-0761, 2010 WL 1781862, at *5 (Ariz. Ct. App. May 4, 2010) (unpublished) (agreeing "with the State that any violation by the Board of the APA did not give rise to a private right of action for damages"). Thus, the Secretary cannot avoid the irreparable harm Plaintiffs will incur absent injunctive relief by simply arguing that any financial burden may be remediated later.

Second, "because [the Secretary's] action does not comply with Arizona law, public policy and the public interest are served by enjoining his unlawful action." *See AZPIA*, 475 P.3d at 309. Like below, Plaintiffs anticipate the Secretary and Intervenors will argue that "changing" the rules in the middle of an election will be disruptive to the electoral process. This is a false front. The change would only require elections officials to use the same EPM—the 2019 EPM—they have used in the last four election cycles, two of which were general elections and one of which was a presidential election. To the extent there is confusion among election administrators and voters, it comes in the form of an overhauled 2023 EPM that adds pages and pages of new rules and content in direct violation of Arizona statute—not the 2019 EPM.

CONCLUSION

Plaintiffs first ask the Court to reverse the lower court's order dismissing their APA claim. Because the Secretary failed to comply with the APA's rulemaking process in prescribing the rules in the 2023 EPM, the EPM is invalid under A.R.S. § 41-1030(A). Additionally, Plaintiffs ask the Court to preliminarily enjoin the Secretary from implementing or enforcing the 2023 EPM, including in the upcoming 2024 general election. In doing so, the Court should clarify that the Secretary is not prohibited from relying on the 2019 EPM, which the Secretary has used in the last four election cycles. Alternatively, Plaintiffs ask the Court to reverse the lower court's order dismissing their claims challenging specific rules in the 2023 EPM and to preliminary enjoin the Secretary from implementing or enforcing the eight identified rules because they directly conflict with statute.

DATED this 19th day of August 2024.

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