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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, *et al.*, Plaintiffs, v. ADRIAN FONTES, *et al.*, Defendants.	No. S-1300-CV-202300202 **PLAINTIFFS' CONSOLIDATED RESPONSE TO THE MOTIONS TO DISMISS** (Assigned to the Hon. John Napper)

Plaintiffs Arizona Free Enterprise Club, Restoring Integrity and Trust in Elections ("RITE"), Republican Party of Arizona, LLC ("RPAZ"), and Dwight Kadar respectfully submit this consolidated response to the motions to dismiss of Defendant Secretary of State, Intervenor-Defendant the Arizona Alliance for Retired Americans ("AARA"), and Intervenor-Defendant Mi Familia Vota ("MFV").

INTRODUCTION

The First Amended Complaint pleads valid and cognizable claims that the Secretary of State failed to discharge a non-discretionary duty and exceeded his statutory authority to the extent the 2019 Elections Procedures Manual ("EPM") purports to authorize the

validation of signatures on early ballot affidavits by reference to documents that are not a "registration record," within the meaning of A.R.S. § 16-550(A).

Plaintiffs have standing and this case is timely. AARA and MFV collectively lob a scattershot of justiciability and timeliness defenses; all miss their mark. When, as here, an elections official fails to conform to mandatory legal strictures, any individual voter or other interested person has standing to seek special action and injunctive remedies. *See Ariz. Pub. Integrity All.* ["*AZPIA*"] *v. Fontes*, 250 Ariz. 58 (2020). Additionally, because the lawful verification of early ballot affidavits is integral to the RPAZ's explicitly and singularly electoral organizational objectives, it is undoubtedly "affected" by the *ultra vires* implementation of A.R.S. § 16-550(A) in the EPM. It thus has standing to seek declaratory relief. A.R.S. § 12-1832. Further, because the 2019 EPM is still in effect and Plaintiffs have sought only prospective relief well in advance of the next statewide election, this action is timely.

Additionally, Plaintiffs have adequately pled a plausible claim upon which relief can be granted. The Secretary's arguments for dismissal on the merits compound a misconstruction of the Plaintiffs' claims with a foundational error of law. He first labors to distinguish a "record" from a "form," but this merely combats a strawman. The Plaintiffs agree that the Secretary may, through the EPM, countenance signature verifications by reference to documents other than the voter's initial registration "form." *See* Am. Compl. ¶¶ 22–24, 37, 47. The dispute here arises not because the Secretary has authorized the use of records other than the initial registration form to verify signatures. Rather, it is about the Secretary's authority to authorize the verification of signatures using records other than those that can, as a matter of law, effectuate or amend a voter's registration. Plaintiffs contend that the use of such records is unlawful because whatever type of records they may be, they are not "***registration*** record[s]," A.R.S. § 16-550(A). Defendants, on the other hand, contend that this Court should defer to the broader interpretation of "registration records" the Secretary has embedded in the EPM. This argument, however, collides with both the text of the law in question and the Arizona Supreme Court's admonition that

conclusions and interpretations of law in the EPM receive no judicial deference. *Leibsohn v. Hobbs*, 254 Ariz. 1, 517 P.3d 45, 51, ¶ 22 (2022).

ARGUMENT

I. The Plaintiffs' Claims Are Justiciable

A. Plaintiffs Have Standing to Seek Special Action and Injunctive Relief

Any person has standing to seek judicial redress when an election official exceeds his statutory authority or fails to effectuate a non-discretionary legal duty. This controlling maxim finds its most apt and authoritative encapsulation in *Arizona Public Integrity Alliance* ["AZPIA"] *v. Fontes*, 250 Ariz. 58 (2020). There, the then-Maricopa County Recorder enclosed with early ballots an illegal instruction for correcting certain ballot errors that was inconsistent with controlling law, to wit, valid provisions of the EPM. An individual voter and a non-profit organization filed suit, seeking mandamus and injunctive relief. Reversing the trial court's conclusion that those plaintiffs lacked standing, the Supreme Court countered that "a more relaxed standard for standing" controls in such cases. *Id.* at 62, ¶ 11. It reasoned that the plaintiffs, "as Arizona citizens and voters, seek to compel the Recorder to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law," and thus had "shown a sufficient beneficial interest to establish standing" within the meaning of A.R.S. § 12-2021. *Id.* ¶ 12. The Court added that, with respect to the plaintiffs' alternative claim for injunctive relief, it sufficed that they had "shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority." *Id.* at 64, ¶ 26. In such instances, the Court held that plaintiffs "need not satisfy the standard for injunctive relief," including the "irreparable injury" facet of the canonical four-factor test. *Id.*

AZPIA controls in this case. Just as the plaintiffs in *AZPIA*, Plaintiffs here—including an Arizona voter, an Arizona nonprofit organization, and a political party committee—have a beneficial interest in ensuring that directives governing the administration of Arizona's elections align with superseding law. In the same way the voter and non-profit organization were beneficiaries of valid provisions of the EPM in *AZPIA*, so

too (and all the more so) the Plaintiffs here are beneficiaries here of valid statutory provisions. And just as they were entitled to sue to conform regulatory interpretations to valid provisions of the EPM, so too are the Plaintiffs here entitled to sue to conform the EPM's signature verification regime for early ballot envelopes to the controlling statute. The Recorder has no discretion to issue instructions that exceed the limits of the EPM, and the Secretary has no discretion to augment the EPM beyond its statutory limits. The beneficial interest Plaintiffs have in ensuring that Arizona's elections are conducted in accordance with the law is more than adequate to sustain their standing to seek mandamus (and injunctive) relief against the Secretary. *AZPIA*, 250 Ariz. at 62, ¶ 12; *see also Armer v. Superior Court of Arizona, In & For Pima Cnty.*, 112 Ariz. 478, 480 (1975) (holding that "respondents, as members of the public for whose benefit the financial disclosure law was enacted, have standing to bring an action in the nature of mandamus to require disclosure.").

The AARA's efforts to distinguish *AZPIA* are all lacking. It erroneously contends that this action does not feature an actual mandamus claim because "the relief that Plaintiffs request is not the *performance* of an act but the *prohibition* of one" and because "the Secretary has discretion within his statutory authority" under A.R.S. § 16-452. AARA Mot. at 6. For at least three reasons, however, these arguments fail under scrutiny.

First, AARA's position is simply irreconcilable with *AZPIA*. The contours of the *AZPIA* plaintiffs' claim align conceptually and doctrinally with the Plaintiffs' cause of action here. In both cases, the question presented was whether an elections official (here, the Secretary; in *AZPIA*, the Recorder) failed to discharge a non-discretionary duty in conformance with a controlling law (here, A.R.S. § 16-550(A); in *AZPIA*, the EPM itself). *See* 250 Ariz. at 62, ¶ 12. Further, the relief sought in *AZPIA* was, in fact, at least partly proscriptive in nature; the plaintiffs had requested mandamus and injunctive remedies prohibiting the Recorder from enclosing the disputed instruction in early ballot packets. *Id*. at 61, ¶ 5.

Second, the AARA's argument that the Secretary has "discretion" to promulgate the disputed provision of the EPM embraces a circular conflation of standing with the merits.

The gravamen of the Plaintiffs' challenge is that the Secretary does ***not*** have discretion to administratively redefine in the EPM the term "registration record."

AARA's argument that discretionary duties cannot be compelled through mandamus is true but irrelevant. The AARA relies extensively on *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458 (App. 2007), where the plaintiffs sought a mandamus order requiring the Attorney General to withdraw or change an advisory opinion. Concluding that mandamus remedies were inapt, the Court of Appeals emphasized that the statutory "function of Attorneys General . . . is not to decide what the law is but merely opine about the law," and the Attorney General had, in fact, done exactly that by furnishing his opinion with respect to the relevant law. *Id.* at 465, ¶¶ 14, 18. Here, the Secretary of State is not only statutorily obligated to issue the EPM, but to do so within the limits of applicable statutes. That is because its provisions carry the binding force of law. *See* A.R.S. § 16-452. While the Legislature has conferred on the Secretary certain policymaking discretion within specific and delimited parameters in other areas,[1] the Supreme Court has repeatedly admonished that Section 16-452 does not itself vest the Secretary with discretion to independently (re)-define statutory words or concepts. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 517 P.3d 45, 51, ¶ 22 (2022) ("[I]t is this Court's role, not the Secretary's, to interpret [a statute's] intended meaning."); *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021). And AARA points to nothing beyond A.R.S. § 16-452 to support the Secretary's ostensible discretion to define the term "registration record."

Third, AARA's arguments rely on a formalistic and anachronistic conception of mandamus that Arizona courts have long since discarded. The common law recognized distinct writs for compelling the performance of ministerial duties (*i.e.*, mandamus) and for prohibiting or remedying actions in excess of a public officer or body's lawful authority

[1] *See, e.g.*, A.R.S. §§ 16-168(I) (allowing the Secretary to devise in the EPM protocols for "protect[ing] access to voter registration information in an auditable format and method"); 16-315(D) (instructing the Secretary to "establish in [the EPM] a procedure for registering circulators [of nomination petitions] and receiving service of process"); 16-579(E) (authorizing the Secretary to develop in the EPM a procedure for voters to affix their signatures in electronic pollbooks).

(*i.e.*, prohibition and certiorari). But these writs have since been "merg[ed]," Ariz. R. Proc. For Spec. Actions 1, State Bar Committee Note, into the unitary rubric of a special action. *See id.* Rule 3, State Bar Committee Note ("The practical consequence of the creation of a single special action will be to eliminate any problem of label if the conduct sought to be controlled is within the proper scope of either mandamus or prohibition."). The Plaintiffs accordingly have pleaded claims for all appropriate special action remedies. Am. Compl. ¶¶ 5, 44, Demand for Relief.

At the same time, the Supreme Court's conception of general statutory mandamus claims, *see* A.R.S. § 12-2021, has likewise evolved in a more functionalist direction. Recent cases have recognized mandamus as an appropriate mechanism for cases like this one that seek to denote and effectuate the proper scope of elected officials' statutory authority. *See AZPIA*, 250 Ariz. at 63, ¶ 17; *Arizonans for Second Chances, Rehabilitation & Public Safety v. Hobbs*, 249 Ariz. 396, 404, ¶ 19 (2020) (argument that Secretary was required to adapt electronic signature platform to accommodate initiative petitions was correctly brought as a mandamus claim, explaining that "one purpose of a mandamus action is to determine the extent of a state official's legal duties"); *see also Ariz. Dept. of Water Res. v. McClennen*, 238 Ariz. 371, 377, ¶ 32 (2015) ("The mandamus statute reflects the Legislature's desire to broadly afford standing on members of the public to bring lawsuits to compel officials to perform their 'public duties.'" (citation omitted)); *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209, ¶ 6 (2019) ("Special action jurisdiction is . . . particularly appropriate when a defendant 'has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority.'" (citation omitted)).

In short, Plaintiffs—which include "Arizona citizens and voters," *AZPIA*, 250 Ariz. at 62, ¶ 12—have standing to seek mandamus and injunctive remedies "to compel the

[Secretary of State] to perform his non-discretionary duty to provide [signature verification] instructions that comply with Arizona law," *id.*

B. The RPAZ Is "Affected" By the Laws Governing Early Ballot Signature Verification, and Thus Has Standing to Seek a Declaration of Its Invalidity

Under Arizona law, "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute." A.R.S. § 12-1832. This jurisdictional grant "is to be liberally construed and administered," *id.* § 12-1842, and is satisfied when a complaint pleads "sufficient facts to establish that there is a justiciable controversy, i.e., one that 'arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination.'" *Café Valley, Inc. v. Navidi*, 235 Ariz. 252, 255, ¶ 10 (App. 2014) (citation omitted).

Here, the RPAZ, as a political party committee, is organizationally oriented exclusively to the election of Republican candidates for public office. It accordingly possesses a singular and palpable interest in the lawful administration of Arizona election processes, including the verification of early ballots. *See generally* A.R.S. §§ 16-551, 16-531 (affording political parties the right to nominate individuals for appointment to early ballot boards). This distinct and differentiated stake in the correct construction of A.R.S. § 16-550(A) crystallizes a concrete controversy that a judicial declaration can resolve. Importantly, a plaintiff need not be directly constrained or compelled by a disputed law or regulation to seek a declaration of its (in)validity; it need only affect his legal rights or interests. *See Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 225, ¶ 20 (2022) (holding that a "trade association with members living and working in Pima County . . . were affected by the [challenged] bill's alleged impediments to the county's 'ability to exercise local control to protect its residents'" from COVID-related risks, and hence had standing under the Declaratory Judgment Act); *Pena v. Fullinwider,* 124 Ariz. 42, 44 (1979) ("Appellants as consumers are 'affected' by the amendment [which related to labeling standards] because cost-per-unit pricing information is designed to allow them to compare the costs of different

commodities. They have an actual or real interest in the matter for determination."). RPAZ easily meets that standard.

C. Each Plaintiff Need Not Independently Establish Standing

MFV fixates on RITE's putative lack of standing as an out-of-state organization. *See* MFV Mot. at 6–7. This is a red herring. When (as here) multiple plaintiffs seek the same, uniform non-damages remedies, the establishment of one plaintiff's standing obviates the issue as to the remaining plaintiffs. *See City of Tucson v. Pima Cnty.*, 199 Ariz. 509, 514, ¶ 14 (App. 2001) ("[E]ven if Pima County and Tortolita lack standing, there remain parties with unequivocal standing who offer the same arguments."); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1014 (9th Cir. 2013) ("We need only conclude that one of the plaintiffs has standing in order to consider the merits of the plaintiffs' claims."); *Poder in Action v. City of Phoenix*, 506 F. Supp. 3d 725, 728 (D. Ariz. 2020) ("[I]t is unnecessary to address the standing of each plaintiff in a multi-plaintiff case, at least where all plaintiffs seek the same form of relief, so long as one of the plaintiffs has standing.").[2] Mr. Kadar is an Arizona resident and qualified elector, see Am. Compl. ¶ 11, and RPAZ and the Arizona Free Enterprise Club are domiciled in Arizona, *id.* ¶¶ 8, 10. As such, each unquestionably has standing to seek mandamus, injunctive and/or declaratory relief. *See AZPIA*, 250 Ariz. at 62, ¶ 12; *Ariz. Sch. Bds. Ass'n.*, 252 Ariz. at 225, ¶ 20. The contours of the case, the scope of the Plaintiffs' claims, and the nature of the requested relief will be entirely unaffected by RITE's standing or lack thereof. Therefore, the Court need not address it.

In any event, RITE has standing. There is no residency prerequisite to seeking mandamus, injunctive or declaratory remedies in this State. While the *AZPIA* plaintiffs' status as Arizona residents accentuated the magnitude of their beneficial interest, the predicate statutes and court rules do not confine standing only to individuals or entities domiciled in Arizona. *See* A.R.S. §§ 12-2021, 12-1832; Ariz. R. Proc. for Spec. Actions

[2] *See Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 22 (2003) ("Although we are not bound by federal jurisprudence on the matter of standing, we have previously found federal case law instructive.").

2(a)(1).

D. In the Alternative, the Court Should Waive Any Applicable Standing Requirement

Standing is a prudential consideration, not a jurisdictional prerequisite in Arizona courts. *Biggs v. Cooper ex rel. County of Maricopa*, 236 Ariz. 415, 418, ¶ 8 (2014); *State v. B Bar Enterprises, Inc.*, 133 Ariz. 99, 101 n.2 (1982). Even if the Court concludes that none of the Plaintiffs has sufficiently established standing, it should reach the merits in its discretion, for at least two independent reasons.

First, the Amended Complaint presents questions of substantial and enduring importance. The integrity of elections is acutely dependent on lawful signature verification rubrics that conform to controlling statutes. *See generally Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 & n.1 (1986) (declining to decide standing in constitutional challenge to procedures for municipal annexations); *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 111 n.7 (App. 2012) (assuming standing to address questions regarding the application of open meeting laws and legislative immunity to redistricting committee proceedings)).

Second, and more fundamentally, hearing this case is necessary to prevent a structural asymmetry in Arizona's voting rights jurisprudence. Courts routinely accommodate plaintiffs who allege that a given electoral rule or practice is unduly restrictive, even if that voter himself is unable to demonstrate loss of the franchise. *See, e.g.*, *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1086 (D. Ariz. 2020) (finding that Arizona Democratic Party had standing to challenge deadline for curing missing early ballot signatures, even though it could not identify any specific voter who would be prospectively harmed by the statute), *vacated on other grounds*, 18 F.4th 1179 (Mem) (9th Cir. 2021). Permitting standing to challenge regulatory restrictions, but not unlawful

regulatory expansions, would, in many instances, place public officials' misuse of their authority beyond the reach of judicial correction.

Erroneous implementation of constitutional or statutory provisions governing election administration inevitably distorts and derogates the electoral process, undermining citizens' faith, trust, and confidence in their government. Recognition of this truism animated *AZPIA* and informed the Supreme Court's conception of mandamus and injunctive standing in this context. Even if this Court were to credit Defendants' arguments that *AZPIA* is inapplicable, it should nevertheless vindicate the principles underlying that decision by waiving any standing requirement in this case.

II. The Plaintiffs' Claims Are Timely

MFV's curious contention that this action is both tardy (*i.e.*, barred by laches) ***and*** premature (*i.e.*, not ripe) collapses under the weight of its own discordant logic. Laches requires a showing of both undue delay and resulting prejudice. In the election litigation realm, the operative temporal reference point is the election for which the plaintiffs seek relief. In this vein, courts have deployed laches only when plaintiffs have sought either to (1) obtain retroactive relief in connection with an election that had already concluded or (2) induce a last-minute change to the administration of an imminent election. *See, e.g.*, *Harris v. Purcell*, 193 Ariz. 409, 412–13, ¶¶ 16–17 (1998) (holding that "even a finding of unreasonable delay is not enough; it must also be established that the delay resulted in actual prejudice to the adverse parties," which occurs when a party "places the court in a position of having to steamroll through the delicate legal issues in order to meet the deadline for measures to be placed on the ballot.'" (citation omitted)); *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 8 (2000) (applying laches where requested relief would require extensive revisions to ballot language at a "late date," shortly before the printing deadline). This case involves neither.

Plaintiffs initiated this proceeding a full year before the next statewide election (*i.e.*, the 2024 presidential preference election) and have expressly confined their requested relief to solely prospective remedies. Am. Compl. ¶¶ 44, 51, Demand for Relief; *see McLaughlin*

v. Bennett, 225 Ariz. 351, 353, ¶ 6 (2010) (rejecting laches argument where plaintiff "filed this action almost sixteen weeks before the ballot printing deadline for the Secretary of State's publicity pamphlet and, therefore, did not 'deprive judges of the ability to fairly and reasonably process and consider the issues'" (citation omitted)).[3]

MFV's ripeness argument fares no better than its laches theory. It is ironically constructed on the speculative supposition that the 2019 EPM will be superseded imminently in some relevant respect. As this Court is aware, the Secretary, Attorney General and Governor were jointly responsible for revising the 2019 EPM prior to the 2022 elections but never did so, thereby "leaving the 2019 EPM in effect." *Leibsohn*, 517 P.3d at 51, ¶ 25 n.3. Perhaps a new iteration of the EPM will be implemented before next year; perhaps not. But the 2019 EPM undisputedly remains operative and governs the county recorders' signature verification practices. *Cf. Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949–50 (9th Cir. 2019) (courts consider the version of the law then in effect when evaluating justiciability). To be sure, if the hypothetical 2023/2024 EPM were to align with the Plaintiffs' construction of A.R.S. § 16-550(A)—a contingency that no Defendant suggests is plausible—such a development, if and when it occurs, may moot the Plaintiffs' claims. But the conjecture that a new EPM might be forthcoming at some unspecified future time is not a viable basis for dismissing this action as unripe.[4]

III. The Amended Complaint Pleads a Valid Claim That the EPM Is Inconsistent with A.R.S. § 16-452

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

[3] MFV alludes to intervening local elections. Preliminarily, Plaintiffs have not requested relief in connection with any specific local election in 2023. More broadly, local elections of various kinds can occur up to four times each calendar year. *See* A.R.S. § 16-204(B). If mere temporal proximity to one of these contests were a sufficient predicate for a laches defense, no claim relating to election administration claim could ever be timely.

[4] Relatedly, the AARA's passing remark that the Attorney General and Governor might be necessary parties if "the Plaintiff seek to change the EPM," *see* AARA Mot. at 6 n.3, is something of a *non sequitur* because the Plaintiffs have never requested a court-

place signature rosters and early ballot affidavits from prior elections—the EPM is, in relevant part, invalid and inoperative. Documents that cannot effectuate or amend a voter registration are not "registration record[s]," within the meaning of A.R.S. § 16-550(A).

The primary flaw in the Secretary's argument for dismissal on the grounds of failure to state a claim is that it assails an argument that the Plaintiffs have never made. Specifically, the Secretary ascribes to the Plaintiffs the position that the term "registration 'record' . . . should be limited to the voter's voter registration form." Sec'y of State Mot. at 3. That is not Plaintiffs' argument. Rather, their position is that the term "registration record" encompasses "the complete and facially valid federal forms submitted by that individual, and any amendments thereto made by the submission of new forms, an early ballot request form, a response to an Active Early Voting List notice, or a provisional ballot envelope." Am. Compl. ¶ 24; *see also id*. ¶¶ 22, 23, 37, 47. The Plaintiffs challenge the EPM's authorization of polling place signature rosters and historical early ballot affidavits as signature exemplars not because those documents are not "voter registration ***forms***"—which they are not—but rather because they have nothing to do with voter registration at all and therefore are not "***registration*** records," as A.R.S. § 16-550(A) requires.

A. Courts Cannot Defer to the Secretary's Interpretation of Statutory Terms

Before parsing the scope of the term "registration record," it bears emphasis that the Secretary's position is premised in part on the outmoded proposition that "the Secretary's interpretation of 'record', and corresponding EPM regulation, are entitled to great weight and deference." Sec'y of State Mot. at 8. While that notion found some favor historically, it is not the regnant law. Today, 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); *Univ. Med. Ctr. of S. Nev. v. Health Choice Ariz.*, 253 Ariz. 524, ¶ 14 (App. 2022) ("[T]he cases

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ordered issuance of a new or amended EPM. Rather, they have named the Secretary in his capacity as the State's "chief election officer," *see* A.R.S. § 16-142(A)(1), to enjoin or otherwise prohibit prospective enforcement of a discrete EPM provision. The Supreme Court has never held or even intimated that the Governor or Attorney General's presence is a condition precedent to adjudicating the validity of an EPM provision. *See Leibsohn v. Hobbs*, 254 Ariz. 1 (2022); *McKenna v. Soto*, 250 Ariz. 469, 473, ¶ 20 (2021).

Appellants rely on for judicial deference, or *Chevron* deference, are generally no longer applicable in this area of the law."). This doctrinal shift was precipitated by a 2018 legislative directive that courts "shall decide all questions of law, including the interpretation of a constitutional or statutory provision or rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency." A.R.S. § 12-910(F), as amended by 2018 Ariz. Laws ch. 180, § 1. 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, 514 P.3d 925, 927, ¶ 10 (App. 2022).[5]

Conclusions of law embedded in the EPM receive no judicial deference. Although the Legislature has not indexed "registration record" as a specifically defined term, the proper scope of this phrase is a pure question of law that resides squarely in the judicial domain. *Leibsohn* is instructive. A.R.S. § 19-118 requires all paid and out-of-state circulators of statewide ballot measure petitions to register with the Secretary of State, and a complete registration must include a signed and notarized affidavit. The statute also instructs the Secretary to establish in the EPM "a procedure for registering circulators, including circulator registration applications." A.R.S. § 19-118(A). Pursuant to this delegation, the Secretary took the position that subsequent or updated registrations by the same circulator need not be accompanied by a new affidavit. The Supreme Court did not temper its disagreement with deference to the Secretary's judgment. Commenting that it was "not persuaded to reach a different interpretation . . . simply because the Secretary may

[5] Not coincidentally, all the cases cited by the Secretary in support of his preferred standard of review pre-date the statutory change.

construe the requirement differently," 517 P.3d at 51, ¶ 22, the court emphasized that "it is this Court's role, not the Secretary's, to interpret § 19-118(B)(5)'s meaning," *id.*

In short, this Court must determine, independently, the meaning and ambit of the term "registration record," within the meaning of A.R.S. § 16-550(A). To the extent the EPM's signature verification provision is inconsistent with that construction, it is invalid.

B. A "Registration Record" Is Limited to Documents That Can Effectuate or Update a Voter's Registration

The EPM is contrary to A.R.S. § 16-550(A) because it permits the verification of early ballot affidavit signatures using documents—namely, polling place rosters and early ballot envelopes from prior elections—that have nothing to do with registration and are thus not "registration records." When, as here, the Legislature has not explicitly imbued a statutory term with a bespoke definition, "courts apply common meanings." *State v. Pena*, 235 Ariz. 277, 279, ¶ 6 (2014). In this interpretive project, the relevant statutory provision "should be read in context" and the Court "may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, ¶ 24 (2022) (citation omitted).

The term "registration record" certainly includes a voter's 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 Plaintiffs 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—namely:

(1) 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;

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

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

The EPM, however, traverses this statutory perimeter by designating effectively ***all*** election related documents in the county recorder's possession as "registration records"—even if they do not as a matter of law actualize or amend a voter's registration, or indeed have anything to do with registration at all. "In construing a statute, [courts] must, if possible, give effect to every word, not merely select words." *State v. Burbey*, 243 Ariz. 145, 148, ¶ 10 (2017). The Secretary's exertions to reinforce the (undisputed) proposition that these materials are "records" (even if they are not "forms") obscure the dispositive textual modifier; signatures must be verified by reference not just to any election-related "record," but to a particular type of election-related record: a ***registration*** record.

The Secretary's argument that polling place rosters and (more significantly) previous early ballot affidavits are "registration records" is semantically and structurally incongruent with A.R.S. § 16-550(A). An early ballot affidavit signature is the item to which an actual "registration record" is compared, which necessarily implies that it is wholly extrinsic to—and therefore not a component of—the voter's "registration record." The notion that an early ballot envelope automatically transmutes into a "registration record" after the election in which it is cast is textually untenable. It also is logically dubious. A document that has nothing to do with a voter's registration before an election does not, *sua sponte*, develop a relationship to registration after the election. Moreover, 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.

In sum, a "registration record," within the meaning of A.R.S. § 16-550(A), is a document that effectuates or amends an individual's registration as a qualified elector in Arizona elections. To the extent the EPM purports to authorize early ballot affidavit signature verification using documents that do not conform to these elements—namely, polling place signature rosters and historical early ballot affidavits—it is *ultra vires* and invalid.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendant's and Defendant-Intervenors' respective motions to dismiss in their entirety.

RESPECTFULLY SUBMITTED this 16th day of June, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

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