ARIZONA SUPREME COURT

WARREN PETERSEN, in his official capacity as the President of the Arizona State Senate; and STEVE MONTENEGRO, in his official capacity as the Speaker of the Arizona House of Representatives, Plaintiffs/Appellees/Cross-Appellants, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant/Appellant/ Cross-Appellee.	No. CV-26-0023-PR Court of Appeals No. 1 CA-CV 25-0219 Maricopa County Superior Court No. CV2024-001942

SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs, the President of the Arizona Senate and the Speaker of the Arizona House of Representatives (the "Legislators"), have framed this case as one of constitutional dimension in which the Secretary of State has "arrogat[ed]" to himself legislative power. (Pet. for Rev. at 1.) But the Secretary simply acted within his legislatively granted authority to: (1) reiterate, consistent with 114 years of Arizona legal authority, that the county board of supervisors' duty to canvass elections is ministerial; and (2) fill a statutory gap regarding the date on which county recorders must begin to carry out that statutory duty. Indeed, as the court of appeals recognized in its memorandum decision, it is the Legislators who "ask the court to diverge from longstanding precedent and recent affirmation of it," and the Secretary who acted "consistent with the statute's plain language, 100 years of precedent, and the most common meaning of" the statutory language at issue. *Petersen v. Fontes*, No. 1 CA-CV 24-0219, 2026 WL 35320, at *6, ¶¶ 37-39 (Ariz. App. Jan. 6, 2026). Moreover, the court of appeals determined that these issues were not novel or impactful enough to warrant a published opinion, and they likewise do not warrant review by this Court. *Cf.* Ariz. R. Sup. Ct. 111(b); ARCAP 28(b).

This Court should deny Plaintiffs' Petition for Review (the "Petition") for three reasons. First, published decisions of this Court and the court of appeals spanning nearly the entirety of Arizona's statehood conclusively establish the scope

of a county board of supervisors' canvassing duty, and there are no conflicting court of appeals decisions. *See State v. Osborne,* 14 Ariz. 185, 194 (1912); *Crosby v. Fish*, 259 Ariz. 127, 132-33, ¶¶ 18-19 (App. 2024). Second, this Court has already recognized that "[t]here is no statutory process to begin the removal notification [required by A.R.S. § 16-544(L)] during an election year" such as 2026, and the EPM directs counties to send the notices in 2027, essentially rendering the issue moot. (Order, at 3 (Jan. 28, 2026).) Third, the court of appeals correctly decided the unremarkable points of law that the Legislators continue to challenge. Accordingly, there is no basis for this Court to grant review in this case. *See* ARCAP 23(d)(3).

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after the Secretary issued the 2023 Elections Procedures Manual (the "EPM"), the Legislators challenged six of the 2023 EPM's provisions. (*See* Electronic Index of Record ("IR") 1, ¶¶ 55-116.) The Legislators asserted that each of the challenged provisions "(i) exceed the Secretary's specific statutory authorization and lawful authority because [they] conflict with specific statutes; (ii) do not carry the force of law; and (iii) are void." (IR 1, at 20.) The Complaint further sought preliminary and permanent injunctions barring enforcement of the challenged provisions. (*Id*. at 21.)

Only two of the six challenged provisions are relevant to this Petition for Review:

- **The County Canvass Provision:** 2023 EPM Chapter 13, § II(A)(2), which states that a county board of supervisors "has a non-discretionary duty to canvass the returns as provided by the [c]ounty [r]ecorder or other officer in charge of elections and has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order."[1]
- **The AEVL Removal Notice Provision:** 2023 EPM Chapter 2, § I(B)(7) n.34, which states that the first date on which county recorders must send voters on the Active Early Voting List ("AEVL") a notice of

[1] The 2023 EPM is no longer operative because, pursuant to A.R.S. § 16-452(B), the Secretary issued the 2025 EPM on December 22, 2025. The County Canvass Provision in the 2025 EPM contains the same language that the Legislators challenged in the 2023 EPM, but adds citations to A.R.S. § 16-407.03 and *Crosby*. 2025 EPM, at 278.

The Secretary publishes the EPM on his website. The 2023 version is available at: https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf and the 2025 version is available at: https://apps.azsos.gov/election/files/epm/2025/Election-Procedures-Manual-2025--FINAL-12-22-25.pdf. In addition, when cited in this Response, hyperlinks to the EPMs are provided.

their potential removal from AEVL is January 15, 2027, following the 2024 and 2026 elections cycles.[2]

The superior court concluded that the Legislators were entitled to declaratory and injunctive relief on the County Canvass Provision. (IR 111, at 13.) The superior court concluded that the AEVL Removal Notice Provision did not conflict with Arizona law and entered judgment for the Secretary on that claim. (*Id*. at 10.)

The Secretary appealed the superior court's decision on the County Canvass Provision. (IR 128.) The Legislators cross-appealed on the AEVL Removal Notice Provision. (IR 133.) On January 6, 2026, the court of appeals issued a memorandum decision reversing the superior court's judgment on the County Canvass Provision and affirming the judgment with respect to the AEVL Removal Notice Provision.[3] *Petersen*, 2026 WL 35320 at 7, 11, ¶¶ 39, 63. The Legislators have petitioned this Court to review these aspects of the court of appeals' non-precedential memorandum decision.

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[2] The relevant footnote in the 2025 EPM has been revised from the 2023 version, but it retains the direction to county recorders to implement the send the first AEVL Removal Notices in January 2027. 2025 EPM, at 67 n.4.

[3] The court of appeals first issued its Memorandum Decision on November 24, 2025, but that decision did not include a ruling on the County Canvass Provision. Following a Motion for Reconsideration, the court of appeals issued a new Memorandum Decision that reached the County Canvass Provision.

ANALYSIS

I. Review of the court of appeals' determination regarding the County Canvass Provision is unwarranted because the decision is consistent with more than a century's authority regarding a board of supervisors' canvassing duty.

The County Canvass Provision in the 2023 EPM stated that: "[t]he Board of Supervisors has a non-discretionary duty to canvass the returns as provided by the County Recorder or other officer in charge of elections and has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order." 2023 EPM, at 248. A.R.S. § 16-643 describes the method of canvass, which includes "opening the returns, other than the ballots, and determining the vote of the county." The court of appeals concluded that "consistent with the statute's plain language, 100 years of precedent, and the most common meaning of the word 'determine,' the boards are engaging in a ministerial act of fixing the election results conclusively and authoritatively. Nothing more. And the 2023 Manual provisions on county canvasses reflect that narrow act." *Petersen*, 2026 WL 35320, at *7, ¶ 39. The court of appeals reached the correct decision.

A. The County Canvass Provision correctly describes canvassing duties of county boards of supervisors.

This Court should not grant review because the court of appeals' memorandum decision is consistent with over a century of Arizona precedent and

does not decide any novel issues. Indeed, within a few months of Arizona joining the union, this Court described the act of canvassing an election as ministerial. *See Osborne*, 14 Ariz. at 194. More than 112 years later, the court of appeals did the same, recognizing the nondiscretionary nature of canvassing. *Crosby*, 259 Ariz. at 132-33, ¶¶ 18-19 (citing *Ariz. All. for Retired Ams., Inc. v. Crosby*, 256 Ariz. 328, 332, ¶¶ 10-11 (App. 2023)). The EPM's description of a county board of supervisors' canvassing duty as one that does not permit exercising discretion to alter or reject results (absent statutory authority or a court order) is wholly consistent with this unbroken history of election canvassing in the State.

The Legislators try to distinguish *Osborne* and *Crosby*, but they point to no binding authority from this Court or the court of appeals that contradicts this century-plus history of treating canvassing an election as a ministerial, nondiscretionary duty. In the absence of such authority, the Legislators argue about the appropriate dictionary definition of a word in A.R.S. § 16-643. But this skips over an important step in statutory interpretation, which directs courts to "look to the statute as a whole and . . . also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *Stambaugh v. Killian,* 242 Ariz. 508, 509, ¶ 7 (2017).

The Legislators concede that county "boards of supervisors have a mandatory duty to canvass an election by the statutory deadline." (Pet. at 11.) But they argue

that the County Canvass Provision conflicts with Arizona law because it removes boards of supervisors' discretion to "determine" the vote. (*Id*. at 11-12.) But the statutes do not speak to such discretion.

Moreover, the Legislators wholly ignore A.R.S. § 16-622, which describes what makes up an official canvass. In particular, that statute provides that "[t]he result printed by the vote tabulating equipment, to which have been added write-in and early votes, when certified by the board of supervisors or other officer in charge, shall constitute the official canvass of each precinct or election district." A.R.S. § 16-622(A); *see also* A.R.S. § 16-602(C) (providing that electronic tabulation results for a race that is subject to the hand count audit "constitute the official count for that race" if the difference, if any, between the hand count audit and the electronic tabulation is within the designated margin). No statutory language permits a board of supervisors to alter the returns from which it must determine the vote of the county. *See, e.g.,* A.R.S. § 16-643. In short, nothing in these sections permits a county board of supervisors to do anything besides the ministerial act of arithmetic.

The County Canvass Provision is consistent with the court of appeals' description of the process in *Crosby*: "Canvassing the election results involves adding write-in and early votes to the results from the vote tabulating equipment. Such a mathematical undertaking does not require the Board to make multiple discretionary decisions or balance goals. Instead, the Board had to follow the clear

instructions outlined in the statute . . . ." *Crosby*, 257 Ariz. at 132-33, ¶ 18. Accordingly, the court concluded that a county supervisor's duty to canvass "was not discretionary." *Id*. at 132, ¶ 16. And as this Court did regarding *Crosby*, it should decline to grant review here.

The Legislators' argument that "determining the vote of the county" allows a board of supervisors to exercise discretion with respect to which votes to include in their official canvass is inconsistent with the ministerial nature of canvassing and stretches the dictionary definition of "determine" well beyond the context in which A.R.S. § 16-643 uses it. (*See* Pet. at 12.) "Absent statutory definitions, courts generally give words their ordinary meaning, and may look to dictionary definitions." *DBT Yuma, L.L.C. v. Yuma Cnty. Airport Auth*., 238 Ariz. 394, 396, ¶ 9 (2015) (citation omitted). In this case, the court of appeals relied on the most common definition of "determine"—"to settle or decide (a dispute, question, etc.) by an authoritative or conclusive decision." *Petersen,* 2026 WL 35320, at *6, ¶ 38. Consistent with this definition, during the canvass of election returns, vote totals are "conclusively" and "authoritatively" put in final form. Nothing empowers county boards to change vote totals, reject election results, or delay certification—absent statutory authority or a court order.

The Legislators falsely suggest that the County Canvass Provision would prevent a county board of supervisors from having any recourse in a hypothetical

situation in which a board might be given vote totals that are plainly "inaccurate or incomplete." (*See* Pet. at 3.) But even in that hypothetical situation, the County Canvass Provision recognizes that the board could pursue a court order. *See* 2023 EPM, at 248. The point of the County Canvass Provision is simply to explain that boards of supervisors lack discretion to change vote totals, reject election results, or delay certification without statutory authority or a court order.

This lack of discretion in the county canvassing process makes perfect sense in light of the many opportunities to audit and confirm vote totals before the canvass. By the time the county canvass takes place, county election officials, who report to the board of supervisors, have spent weeks inspecting and processing ballots, counting votes, and verifying the election results. The post-election period provides several opportunities for officials with relevant expertise to detect irregularities and correct mistakes.

For example, county election officers document the chain of custody for all voted ballots. *See* A.R.S. § 16-621(E); 2025 EPM, at 227-28. They also resolve questions that arise about any ballot's legality. *See* A.R.S. § 16-609. And they process provisional ballots (by checking the voter's registration status and ensuring that the voter has not previously voted in that election). *See* A.R.S. § 16-584(D)-(E); 2025 EPM, at 241. After all votes are counted, local officials continue to take steps to verify the results. Most notably, counties conduct hand count audits to verify

the accuracy of the electronic vote tabulation. *See* A.R.S. § 16-602(B), (F). The hand counts must be completed before the canvass. A.R.S. § 16-602(B), (F), (I); *see generally* 2025 EPM, at 248-70. In view of the extensive and detailed review and auditing of ballots that state law mandates, the board's canvass duties are simply to confirm that the counting and verification process is complete. The EPM's acknowledgment that a county board of supervisors "has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order" is therefore wholly consistent with Arizona law. 2023 EPM, at 248.

B. The Secretary has authority to include the County Canvass Provision in the EPM.

Finally, the Legislators argue that the EPM should not include *any* guidance to counties about the canvassing process, because canvassing is not expressly specified in the list of topics for the EPM in A.R.S. § 16-452(A). (Pet. at 10-11.) But this argument fails because A.R.S. § 16-452(A) expressly directs the Secretary to include in the EPM rules relating to "counting" and "tabulating" ballots. The official canvass's contents are described in Arizona Revised Statutes Title 16, chapter 4, article 10, which is entitled "Tally and Returns." *See* A.R.S. § 16-622(A). Canvassing is an essential component of the ballot counting and tabulation process because the "official canvass" is the "official record" of the vote count, as tabulated

by tabulation equipment. A.R.S. § 16-646(A) (official canvass must record the "number of ballots cast" and the "number of votes" that each candidate received); *see also* A.R.S. § 16-444(A)(7) ("[v]ote tabulating equipment" is used to "count votes . . . and tabulate the results"). Without the canvass, ballots are not officially counted or tabulated.

Moreover, even if canvassing did not come under the auspices of counting and tabulating, the EPM may include guidance on subjects not expressly stated in A.R.S. § 16-452(A). *See McKenna v. Soto*, 250 Ariz. 469, 473, ¶¶ 20-21 (2021). As such, the Secretary properly included the County Canvass Provision in the EPM.

II. The Secretary properly interpreted A.R.S. § 16-544(L) in the AEVL Removal Notice Provision, and it is too late to require county recorders to send such notices now.

Every court to have considered the Legislators' claim concerning the AEVL Removal Notice Provision, including this Court, has concluded that the Secretary's guidance to county recorders regarding the first year in which they must send voters the notices described in A.R.S. § 16-544(L) is consistent with Arizona law. Specifically, the trial court determined that the Legislators "have not identified any statute or constitutional provision with which the EPM provision directly conflicts." (IR 111, at 10.) The superior court further stated that because the relevant statutory sections "became effective during the 2022 election cycle, the Secretary's

determination that implementation should begin on the next full election cycle is reasonable, and within the Secretary's statutory authority." (*Id*.)

The court of appeals affirmed the superior court's decision, stating that "[i]f the court were to adopt the Legislators' proposed interpretation, it would have the statute apply retroactively to voters' actions before the effective date of the statute. Based on *Krol* and other Arizona precedents, the court affirms the superior court's ruling because the statute does not apply to the 2022 election cycle." *Petersen*, 2026 WL 35320, at *11, ¶ 63 (citing *Krol v. Indus. Comm'n,* 259 Ariz. 261 (2025)).

In the context of deciding the Legislators' Motion to Expedite, this Court determined that both lower courts reached the correct result regarding the AEVL Removal Notice Provision. This Court stated:

> The removal notice provision in subsection (L), however, is required to be sent no later than January 15 in an odd-numbered year and requires affirmative action by the voter to remain on the AEVL. There is no statutory process to begin the removal notification during an election year. Any voter receiving the removal notice would no doubt be confused to receive it in 2026. The Court agrees with the lower courts that the statement in the EPM, "Therefore, the first AEVL removal notices must be sent out by January 15, 2027 to AEVL voters who vote by early ballot in zero eligible elections in the 2024 and 2026 election cycles," does not conflict with Arizona law.

(Order, at 3 (Jan. 28, 2026).) The Court's Order further notes that the decision regarding the Motion to Expedite is a decision of the Court *en banc*. (*Id*. at 5.) Consequently, it appears that this Court has already decided that the AEVL Removal

Notice Provision does not warrant this Court's review. However, in the event that the Court wishes to revisit the AEVL Removal Notice Provision, the Secretary briefly explains below why the Court should deny review of that provision.

The Legislators complain that the AEVL Removal Notice Provision amounts to "rewriting statutory text." (Pet. at 3.) But there was no statutory text to rewrite. A.R.S. § 16-544(L) does not provide a date certain on which the first AEVL Removal Notices must be mailed—only that it must happen in odd-numbered years. The EPM exists precisely to "serve[ ] a 'gap-filling function' to address election matters not specifically addressed by statute." *Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929, 952 (D. Ariz. 2024), *vacated in part on other grounds* 129 F.4th 691 (9th Cir. 2025). If the Legislators had wanted to avoid leaving a gap for the Secretary to fill with the AEVL Removal Notice Provision, they could have done so by including a date certain, as they have done in other election statutes. *See, e.g.,* A.R.S. § 16-579(A)(4) (applying to elections "beginning in 2026"). Because they did not, the Secretary was well within his authority to include the AEVL Removal Notice Provision in the EPM.

To avoid retroactive application of a statute that requires a voter to not use an early ballot for two full election cycles, the Secretary determined that two full election cycles must pass after the statute's September 2021 effective date. *See* A.R.S. § 16-544(H)(4), (S) (defining election cycle as "the two-year period

beginning on January 1 in the year after a statewide general election"). The Legislators argue that as long as there was one election left in the 2022 election cycle that began on January 1, 2021, applying A.R.S. § 16-544(L) to that election cycle would not constitute a retroactive application of the statute, relying on *Aranda v. Indus. Comm'n*, 198 Ariz. 467 (2000), which they deemed "canonical." (Pet. at 2.) But the Legislators ignore this Court's recent decision in *Krol*, on which the court of appeals relied.

In *Krol,* this Court explained in detail the difference between substantive law, which "creates, defines and regulates rights" and procedural law, which "prescribes the method of enforcing such rights or obtaining redress." 259 Ariz. at 269-70, ¶ 32. A.R.S. § 16-544 regulates the right to automatically receive an early ballot by mail, a right that is extended to all Arizona voters. *See* A.R.S. § 16-541(A), -544(A). Consequently, the court of appeals correctly determined that absent an express retroactivity term, A.R.S. § 16-544(L) could not be applied to an election cycle that started before its effective date. In particular, "under the Legislators' interpretation, the statute would apply retroactively to any failure to vote in" elections held in 2021 before the statute's effective date. *Petersen,* 2026 WL 35320, at *11, ¶ 62. In contrast, "[t]he Secretary's interpretation does not create the same retroactivity concern." *Id.* This determination is entirely consistent with this Court's retroactivity decisions.

Moreover, at this point—a few months in to 2026—the only way for county recorders to comply with the letter of A.R.S. § 16-544(L) is to send the first AEVL Removal Notices in January 2027—which is what the EPM directs. Accordingly, the combination of the statutory language, the need to avoid retroactive application of the statute, and the inexorable passage of time mean this Court should not grant review of the court of appeals' memorandum decision on the AEVL Removal Notice Provision.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 20th day of February, 2026.

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