IN THE SUPREME COURT
STATE OF ARIZONA

WARREN PETERSEN, in his official capacity as President of the Arizona State Senate; and STEVE MONTENEGRO, in his official capacity as 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._____ Court of Appeals No. 1 CA-CV 25-0219 Maricopa County Superior Court No. CV2024-001942

PETITION FOR REVIEW IN ACCELERATED APPEAL

Kory Langhofer (#024722)
Thomas Basile (#031150)
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Telephone: (602) 382-4078
kory@statecraftlaw.com
tom@statecraftlaw.com

Joseph Kanefield (#015838)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One East Washington Street
Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 382-6000
jkanefield@swlaw.com
tolson@swlaw.com

Attorneys for Arizona State Senate President Petersen and Speaker of the Arizona House of Representatives Steve Montenegro

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Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Steve Montenegro respectfully submit this petition for review of the Court of Appeals' opinion in *Petersen v. Fontes*, 2026 WL 35320 (Ariz. App. Jan. 8, 2026) ("Op.").

INTRODUCTION

While this case pivots on statutory construction, it vindicates a constitutional imperative. Article III of the Arizona Constitution encapsulates a cornerstone of "ordered democracy—the concept of dividing governmental power between three separate branches of government," which is nowhere "more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988). In this trichotomy, "[t]he legislature has the exclusive power to declare what the law shall be" while the executive "carr[ies] out the policies and purposes declared by the Legislature." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). The Legislature's "inalienable" power, *Roberts v. State*, 253 Ariz. 259, 270 ¶ 43 (2022), assumes special salience in the realm of elections, which the Constitution has expressly entrusted to it. *See* Ariz. Const. art. VII, § 12.

In promulgating the Elections Procedures Manual ("EPM"), the Secretary traversed these boundaries, arrogating the legislative power to displace elected representatives' policy judgments with his own. Two of those misadventures are presented here.

First, the Legislature has directed that, if a voter enrolled in the Active Early Voting List ("AEVL") has not cast an early ballot in the last two preceding election cycles, the county recorder must, "on or before January 15 of each odd-numbered year," send her a notice asking whether she wishes to remain on the AEVL. If the voter does not respond within 90 days, the recorder must remove her from the AEVL, although she remains a qualified elector and can still request an early ballot, vote in person, and re-enroll in the AEVL at any time. The statute went into effect on September 29, 2021. A.R.S. § 16-544(L)-(M), as amended by 2021 Ariz. Laws ch. 359, § 6 (S.B. 1485). The EPM, however, forbids county recorders from issuing the required notices until January 2027—effectively suspending the statute for several years ("AEVL Implementation Provision"). Op. ¶ 60.

In sustaining the Secretary's edict as necessary to avoid a "retroactive" application of S.B. 1485, the Court of Appeals disregarded this Court's canonical holding that retroactive enforcement occurs only when "the last moment [citizens] may choose to alter their behavior to avoid application of" the statute occurs "prior to the effective date of the statute." *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 473 ¶ 28 (2000). Here, every AEVL enrollee had multiple opportunities after September 2021 to avoid S.B. 1485's application by either returning an early ballot in the 2022 or 2024 elections or responding to the postcard that the county recorders should have issued in January 2025. Thus, even if the Secretary could exercise the

legislative function of rewriting statutory text to align with his preemptive resolutions of judicial questions, the EPM's suspension of S.B. 1485 was legally wrong.

Second, the EPM effectively transplants the canvassing function from the elected board of supervisors to the appointed county elections official. According to the EPM, the board "has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order" (the "County Canvass Provision"). Op. ¶ 31. But this directive conflates the duty to canvass with the canvass' contents and disposition. The board certainly has a mandatory duty to complete a canvass by the statutory deadline. But the canvass itself consists of the board's independent "determin[ation]" of the true and correct returns. A.R.S. § 16-643. As the Superior Court correctly observed, "the Secretary, without proper authority, has attempted to create a binding presumption in the EPM that the Board of Supervisors is limited to simply opening and counting during a canvass." EIR111 at 12. In reversing, the Court of Appeals licensed the Secretary to regulate a function that is outside his ambit of authority, and erroneously allowed him to transfigure the boards into rubber-stamps, constrained from doing anything but reflexively ratifying whatever returns—however inaccurate or incomplete they might be—that are put in front of it.

These twin errors misapprehend important issues of law, countenance the unlawful executive appropriation of legislative power, and skew the structural underpinnings of the imminent 2026 statewide elections.

BACKGROUND

The Secretary of State issued the 2023 EPM, with the approval of the Governor and Attorney General, on December 30, 2023. On January 31, 2024, the Speaker and President initiated this action, which challenged five provisions of the EPM as either beyond the scope of the Secretary's authority or inconsistent with a controlling statute.[1]

On December 16, 2024, the Superior Court entered an under advisement ruling, which found that the Speaker and President had standing to sue and enjoined the enforcement of all the challenged provisions, except for the AEVL Implementation Provision. The Secretary appealed; the Speaker and President cross-appealed with respect to the AEVL Implementation Provision.

On January 6, 2026, the Court of Appeals issued a memorandum decision that reversed the Superior Court's invalidation of the County Canvass Provision but otherwise affirmed the judgment.

[1] The parties stipulated to dismiss the challenge to a sixth provision.

Both the County Canvass Provision and the AEVL Implementation Provision were readopted in substantially identical form in the 2025 EPM. Ariz. Sec'y of State, 2025 Elections Procedures Manual (Dec. 2025) at 67 n.4 & 278.

ISSUES PRESENTED FOR REVIEW

1. Would issuance of AEVL notices prior to January 2027 constitute a "retroactive" application of S.B. 1485, even though every AEVL voter had multiple opportunities after S.B. 1485's effective date to avoid eligibility for a notice and/or removal from AEVL?

2. Can the Secretary regulate canvassing via the EPM, and, if so, do boards of supervisors lack discretion to do anything other than rubber-stamp county returns, irrespective of the boards' determination of their accuracy and completeness?

REASONS FOR GRANTING THE PETITION

This Court's review is warranted when a case involves important issues of law that were incorrectly decided, ARCAP 23(d)(3), or "the issues presented are of statewide importance," *Seisinger v. Siebel*, 220 Ariz. 85, 88 ¶ 6 (2009). The lawful conduct of elections is intrinsically of statewide importance. *See Ariz. Pub. Integrity All. v. Fontes* ("*AZPIA*"), 250 Ariz. 58, 61 ¶ 7 (2020) (granting direct special action review in case "involv[ing] election and statutory issues of statewide importance"); *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404-

05 ¶ 20 (2020) (accepting original special action jurisdiction in dispute over initiative process). The EPM's misconception of what constitutes a "retroactive" application of a statute and its reinvention of the boards of supervisors' statutory canvassing function are not only significant legal errors in their own right; left uncorrected, they erode the separation of powers and undermine the lawful administration of the 2026 elections.

I. The Issuance of AEVL Notices Prior to January 2027 Is Not a "Retroactive" Application of S.B. 1485.

A.R.S. § 16-544(L)'s plain text mandated that, no later than January 15, 2025, county recorders send notices to AEVL enrollees who had not voted an early ballot in any election during the 2022 or 2024 election cycles. The EPM unilaterally suspended the statute until January 15, 2027, on the rationale that a small subset of voters' eligibility to receive an AEVL notice in January 2025 would be premised, in part, on voting history between January 1, 2021 and the statute's September 29, 2021 effective date. Op. ¶¶ 51, 54.

In explaining that the Legislature did not make the statute retroactive, the Court of Appeals supplied the right answer to the wrong question. No one disputes S.B. 1485 is not retroactive. The crux of the case, rather, is whether consideration of 2021-22 voting history in determining eligibility for an AEVL notice actually constitutes a retroactive application of the law. The Court of Appeals believed it does, but its cursory conclusion is unsustained by any discernible reasoning and

unaccompanied by any citation to (let alone substantive engagement with) this Court's precedents explaining what is—and what is not—a retroactive application of a statute. Issuing AEVL notices on January 15, 2025 would not be a retroactive implementation of S.B. 1485 because the "last moment," *Aranda*, 198 Ariz. at 473 ¶ 28, each AEVL enrollee could have taken action to avoid being removed from AEVL occurred *after* the statute's September 2021 effective date. Further, there is sufficient time remaining before the 2026 elections to implement S.B. 1485.

A. Every AEVL Voter Had Multiple Opportunities After S.B. 1485's Effective Date to Avoid Eligibility for Removal or Even a Notice.

A statute is applied "retroactively" only if it "'disturb[s] vested substantive rights by retroactively changing the law that applies to completed events.'" *State v. Vergara*, 259 Ariz. 501, 508 ¶ 26 (App. 2025) (quoting *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999)); *see also Zuther v. State*, 199 Ariz. 104, 109 ¶ 15 (2000). For example, if S.B. 1485 had automatically removed from the AEVL any voter who had not cast an early ballot in 2020, it arguably would constitute a retroactive enactment.

But "[i]t is conclusively settled that laws are not retroactive simply because they relate to past events." *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 139 (1986); *see also* 73 AM. JUR. 2D STATUTES § 227 ("[A] statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its

passing."). This distinction is critical. A new statute can incorporate past events as elements of, or preconditions to, its application—as long as a regulated person has a post-enactment opportunity to avoid the newly imposed legal consequence. In other words, when "the last moment that [affected persons] may choose to alter their behavior to avoid the application of" a statute occurs after the statute's effective date, retroactivity concerns are not implicated. *Aranda*, 198 Ariz. at 473 ¶ 28.

Multiple cases illustrate the point. For example, this Court held that a statute levying a new tax on certain rental income was not "retroactive" simply because underlying leases had been executed prior to the tax's enactment, explaining that the law's partial reliance on "antecedent facts . . . does not import retrospective operation." *Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 251 (1973). Similarly, a statute that enhanced the consequences for repeat juvenile offenders could be applied to a defendant who had committed his first offense prior to the statute's enactment but committed his second offense after the effective date. *In re Jerry B.*, 193 Ariz. 449, 451 ¶ 7 (App. 1998) (reasoning that defendant could have avoided the new legal consequences by not committing a second offense).

In short, a consideration of pre-enactment events or occurrences does not constitute a "retroactive" application of a statute, if the dispositive actions or omissions that trigger new legal consequences occur after the effective date. If AEVL notices had been issued in January 2025, the recipients could avoid removal

from the AEVL by returning the postcard within 90 days—an action that necessarily would occur after the law's effective date. The Secretary seems to believe that the relevant legal right or interest at stake is the non-receipt of an AEVL notice, rather than removal from the AEVL itself. Even accepting *arguendo* the dubious notion that there can be a cognizable legal right not to receive a postcard in the mail, the analysis remains the same. These voters could avoid receiving an AEVL notice by submitting an early ballot in any election after September 29, 2021, including the 2022 and 2024 general elections. Thus, even under the Secretary's framing, the "last moment," *Aranda*, 198 Ariz. at 473 ¶ 28, one of these voters could have avoided receiving a notice occurred after the statute's effective date. [2]

The Court of Appeals accordingly erred in holding that the issuance of AEVL notices in January 2025 would be a "retroactive" application of S.B. 1485.

B. This Court Can Still Grant Effective Relief.

Although the AEVL notices are now untimely, the Court can still effectuate A.R.S. § 16-544(L) in advance of the 2026 Primary and/or General elections. "A case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties." *Sedona Private Prop. Owners*

[2] More fundamentally, AEVL is merely an administrative device; it is irrelevant to voting qualifications. Non-AEVL voters can still obtain an early ballot by simply requesting one. A.R.S. § 16-542(A). Thus, S.B. 1485 arguably does not affect "vested" substantive rights at all, regardless of implementation date.

Ass'n. v. City of Sedona, 192 Ariz. 126, 127 ¶ 5 (App. 1998). Early ballots for the primary election will not be mailed until July 8, and general election early voting begins on October 7. A.R.S. § 16-542(C). That leaves ample time for the issuance of notices and the 90-day response period. *See AZPIA*, 250 Ariz. at 65 ¶ 30 (holding that litigation delay "does not excuse the County from its duty to comply with the law"). Even the Secretary acknowledged that the claim did not become moot after January 15, 2025. Mot. Expedite Briefing Schedule, Ex. 6 at 7. The Court accordingly can grant relief, although (as set forth in the accompanying motion), expedited consideration is warranted.

II. The Secretary Exceeded His Authority in Issuing the County Canvass Provision.

The Court of Appeals erred by failing to enforce the proper scope of A.R.S. § 16-452(A) and declaring the County Canvass Provision valid.

A. The Secretary Has No Authority to Regulate Canvassing.

The Secretary's authority derives solely from statute. Ariz. Const. art. V, § 9. The Legislature has delegated to the Secretary the power to make "rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots."[3] A.R.S.

[3] Other statutes authorize the EPM to address additional topics that are not relevant here. *See, e.g.*, A.R.S. §§ 16-168(I), 16-246(G).

§ 16-452(A). "[A]n EPM regulation that exceeds the scope of [this] statutory authorization . . . does not have the force of law." *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021).

Canvassing is not within this delegation. Tabulation and vote counting are qualitatively different than canvassing and must be complete *before* canvassing. A.R.S. §§ 16-602(F), 16-615(B), 16-643; *see also* A.R.S. tit. 16, ch. 4, art. 10-11 (distinguishing the "official canvass" from "tally and returns"). The Court should presume that § 16-452's omission of canvassing was intentional. *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211 ¶ 13 (2019). The County Canvass Provision hence is facially invalid. *See Roberts*, 253 Ariz. at 268 ¶ 30 (reasoning statute must "'plainly authorize[]' executive agency action." (citation omitted)).

B. The County Canvass Provision Improperly Divests County Boards of Supervisors of All Discretion in Its Canvassing Duties.

Even if the Secretary could regulate canvassing in the EPM, the County Canvass Provision is inconsistent with Arizona law. There is no dispute that boards of supervisors have a mandatory duty to canvass an election by the statutory deadline, A.R.S. § 16-642, or that canvassing consists of "opening the returns, other than the ballots, and determining the vote of the county . . . ." A.R.S. § 16-643.

However, the County Canvass Provision goes beyond the statutes by deeming the duty "non-discretionary" and declaring that county boards have "no authority to

change vote totals, reject the election results, or delay certifying the results." This is inconsistent with the plain statutory text.

A.R.S. § 16-643 directs county boards to canvass by "determining the vote of the county." A.R.S. § 16-643. Use of the word "determine" indicates that canvassing must mean something different from simply rubber-stamping preprepared vote totals. *See Determine*, Merriam-Webster (defining determine as "fix conclusively or authoritatively," to "decide by choice of alternatives or possibilities," or to "come to a decision about by investigation, reasoning, or calculation").[4] By using "determine" the Legislature empowered the board to decide whether the returns presented to it are accurate and complete. It is this discretion that permits the board to act in (unlikely) instances when a canvass should be postponed, A.R.S. § 16-642(C), or a precinct's returns cannot be "clearly understood" or "definitely ascertained." A.R.S. § 16-644.

The Court of Appeals relies on two cases to set aside this plain language and erroneously conclude that when a board canvasses, it "act[s] strictly in a ministerial

[4] https://www.merriam-webster.com/dictionary/determine. Though the Court of Appeals criticizes the use of this dictionary, Op. at ¶ 38, in 2025 alone, this Court cited to it at least five times. *Montenegro v. Fontes*, 576 P.3d 692, 698 ¶ 27 (Ariz. 2025); *Pointe 16 Comm'ty Ass'n v. GTIS-HOV Pointe 16, LLC*, 575 P.3d 368, 373 ¶ 24 (Ariz. 2025); *State v. Rushing*, 573 P.3d 72, 89 ¶ 52 (2025); *Estate of Dominguez v. Dominguez*, 259 Ariz. 404, 407-08 ¶ 12 (2025); *Ariz. for Abortion Access v. Montenegro*, 259 Ariz. 326, 321-22 ¶ 29 (2025).

capacity." Op. ¶ 35 (citing *State v. Osborne*, 14 Ariz. 185 (1912)); Op. ¶¶ 28, 35-36 (citing *Crosby v. Fish*, 259 Ariz. 127 (App. 2024)). Both cases are distinguishable.

First, *Osborne* concerned an act[5] creating a canvassing board composed of the chief justice, governor, and secretary to canvass elections. 14 Ariz. at 193-94. The Court held that appointing the chief justice to the canvassing board was unconstitutional because the duty was assigned only to the secretary and canvassing is not a judicial function. *Id.* at 194. In deeming the canvassing duty "ministerial," there is no indication that the Court meant anything but non-judicial. *Id.*

Even if the "ministerial" reference were more than *dicta*, the legislatively prescribed method of canvassing was substantively different in 1912 than it is today. Registration and Election Laws of Arizona (1912) (the "1912 Code").[6] Unlike A.R.S. § 16-643, the 1912 Code (§§ 111-123) prescribed a detailed method for canvassing, including instructions for taking ballots out of a box, separating ballots, writing the number of ballots down, etc. Because every detail was statutorily pre-determined, it makes sense that the canvassing duty in 1912 could be considered conceptually more ministerial. *Ponderosa Fire Dist. v. Coconino County*, 235 Ariz. 597, 601-02 ¶ 19 (App. 2014) (comparing discretionary duties with ministerial

[5] The act's text is available at https://azmemory.azlibrary.gov/nodes/view/252871.
[6] https://azmemory.azlibrary.gov/nodes/view/102924. The act at issue in *Osborne* incorporated the election code by reference. Ariz. Sess. Laws, 1st Leg., 1st Special Sess. Ch. 24, 81-83 § 3.

duties that "specifically describe[] the manner of performance and leaves nothing to the discretion of the public official" (citation modified)). The Legislature has since changed the canvassing method to be less mechanical, and more discretionary, A.R.S. § 16-643, and *Osborne* requires deference to the Legislature's chosen process. *See* 14 Ariz. at 194 ("In passing upon the question we disclaim any purpose or right to interfere with the discretionary powers of the Legislature, or of any state officer.").

Second, *Crosby* held merely that canvassing is not protected by legislative immunity. 259 Ariz. at 130 ¶ 2. The Court of Appeals distinguished legislative acts (*i.e.*, "policymaking" with "multiple discretionary decisions") from administrative acts (*i.e.*, implementation of "established policy"), and concluded that canvassing did not require the board "to make *multiple* discretionary decisions or balance goals." *Id.* at 132 ¶ 18 (emphasis added). In this context, *Crosby*'s statement that canvassing is a "non-discretionary duty," *id.* ¶ 17, should be read to mean only that the duty is mandatory and administrative—not that the board lacks any discretion in its execution. *See id.* (citing *Hunt v. Campbell*, 19 Ariz. 254, 278-79 (1917) (describing mandatory duties)).

Just because canvassing is a *mandatory* administrative duty does not mean that the board lacks any discretion in how it executes that duty. *See Peters v. Frye*, 71 Ariz. 30, 35 (1950) ("Local laws almost universally call into action, to a greater

or less extent, the agency and discretion . . . to accomplish in detail what is authorized or required in general terms." (citation omitted); *Roberts*, 253 Ariz. at 268 ¶ 29 (explaining that legislative delegation of authority entails discretion as to execution of law). For instance, mandamus is available "to require an administrative body to exercise its discretion which the law makes it its duty to perform, even though it cannot require it to be exercised in any particular manner." *Ariz. State Hwy. Comm'n. v. Superior Court*, 81 Ariz. 74, 77 (1956).[7]

Thus, the Court of Appeals erred in concluding the County Canvass Provision is consistent with Arizona law.

REQUEST FOR FEES

The President and Speaker request an award of reasonable attorneys' fees pursuant to A.R.S. § 12-348.01 and ARCAP 21(a).

CONCLUSION

The Court should grant review and reverse the Court of Appeals' opinion in relevant part.

[7] Reading *Crosby* to mean that canvassing requires *no* discretion would also be internally inconsistent. Even *Crosby* acknowledged that discretion is necessary sometimes. *Id.* at 148 ¶ 17.

RESPECTFULLY SUBMITTED this 21st day of January, 2026.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

SNELL & WILMER, L.L.P.

By: */s/Joseph Kanefield*
Joseph Kanefield
Tracy A. Olson
One East Washington Street
Suite 2700
Phoenix, Arizona 85004

Attorneys for Arizona State Senate President Petersen and Speaker of the Arizona House of Representatives Steve Montenegro