

ARIZONA SUPREME COURT

REPUBLICAN NATIONAL
COMMITTEE; REPUBLICAN PARTY OF
ARIZONA, LLC; and YAVAPAI
COUNTY REPUBLICAN PARTY,

Plaintiffs-Appellants-
Respondents,

v.

ADRIAN FONTES, in his official capacity
as Arizona Secretary of State;

Defendant-Appellee-
Petitioner,

-and-

VOTO LATINO; ARIZONA ALLIANCE
FOR RETIRED AMERICANS;
DEMOCRATIC NATIONAL
COMMITTEE; and ARIZONA
DEMOCRATIC PARTY,

Intervenor-Defendants-Appellees.

No.

Arizona Court of Appeals
No. 2 CA-CV 2024-0241

Maricopa County Superior Court
No. CV2024-050553

PETITION FOR REVIEW

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INTRODUCTION

Since 1972, the Legislature has required the Secretary of State to prescribe election “rules” in “an official instructions and procedures manual” known as the Elections Procedures Manual (“EPM”). A.R.S. § 16-452(B). The EPM’s statutory requirements are unique and require:

- 1) Consultation with election officials from all fifteen counties,
- 2) Issued by December 31 of each odd-numbered year,
- 3) In manual form, and
- 4) Approved by the Governor and Attorney General.

A.R.S. § 16-452(A), (B). These features have always governed the EPM.

Compare Laws 1972, ch. 218, § 41 (30th Leg., 2d Reg. Sess.), *with* A.R.S. § 16-452.

For decades, the Secretary issued the EPM ensuring “the maximum degree of correctness, impartiality, uniformity and efficiency” in Arizona elections.

A.R.S. § 16-452(A). It has accomplished this mission and guided election officials in carrying out free, fair, and accurate elections as Arizona’s Constitution requires.

Ariz. Const. art. II, § 21. The primary audience for the EPM is local election officials, who benefit from uniform guidance.

Last year, plaintiffs Republican National Committee and others (collectively “RNC”) asserted, apparently for the first time ever, that the Secretary must comply

with the EPM's unique statutory process, *and* Arizona's Administrative Procedures Act ("APA"). The court of appeals agreed. (APP011-12 ¶ 25.)

This mistaken conclusion threatens to destabilize the administration of Arizona elections by jeopardizing the current, pending, and future EPMs. Complying with both the APA and the EPM's unique statutory process is practically impossible. Moreover, requiring such compliance undermines the statutory text and the legislative intent of both frameworks, and would mark a major shift from well-established historical practice. This case is of great public importance and cries out for this Court's review.

ISSUES PRESENTED FOR REVIEW

1. Must Arizona officials follow both Section 16-452's unique statutory process and the APA's rulemaking process when issuing the EPM?
2. If so, should that decision apply only prospectively to future EPMs?

ISSUES PRESENTED TO, BUT NOT DECIDED BY, THE COURT OF APPEALS

Do any of the eight EPM provisions that the RNC challenged violate Arizona law?

BACKGROUND

I. EPM Process.

In 1972, the Legislature began requiring the Secretary to prescribe election rules "not later than thirty days prior to each election," "in concert with" county

election officials, in an “instructions and procedures manual” for “the governor and the attorney general” to approve. Laws 1972, ch. 218, § 41 (30th Leg., 2d Reg. Sess.) (amending A.R.S. § 16-1038). The same bill defined “instructions and procedures manual” as a “manual prepared for use as a guide for the conduct of elections by an approved electronic voting system.” *Id.* § 30 (amending A.R.S. § 16-1022). Today’s EPM statutes are similar. *See* A.R.S. §§ 16-452 (authorizing EPM); 16-444(A)(6) (defining “instructions and procedures manual”). The EPM has remained a standalone manual for election officials, not part of Arizona’s Administrative Code (“A.A.C.”). *See generally* Ariz. Memory Proj., Election Proc. Manuals available at <https://azmemory.azlibrary.gov/nodes/view/260970> (providing EPM versions from 1994-2023).

The EPM has grown as the Legislature has assigned more topics to the EPM. *See, e.g.*, Laws 2014, ch. 45, § 8 (51st Leg., 2d Reg. Sess.) (amending A.R.S. § 19-118(A) to require initiative circulators to register under EPM requirements); Laws 2010, ch. 173, § 6 (49th Leg., 2d Reg. Sess.) (adding procedures for joining early voter list); Laws 2003, ch. 38, § 1 (46th Leg., 1st Reg. Sess.) (adding responsibilities for transmitting ballots to overseas and military voters).

Modern EPMs span hundreds of pages to help county election officials. *See generally* 2014 EPM¹. Recently, after multiple election cycles without a new

¹ Available at <https://tinyurl.com/bddxpr49>.

EPM, the Legislature amended Section 16-452(B) to require that the Secretary submit the EPM to the Governor and Attorney General by October 1 and issue it by December 31 of each odd-numbered year. Laws 2019, ch. 99, § 1 (54th Leg., 1st Reg. Sess).

Revising the EPM is a long and fluid process. The Secretary initially makes revisions that new statutes and court opinions require. Election officials in all fifteen counties then review those revisions and suggest their own. This process involves many election officials and takes months. For the 2023 EPM, it took from March through July 22, 2023.

Recently, the Secretary began inviting public comment during the EPM drafting process as a matter of sound administration, not due to any legal requirement. This comment period occurs before the EPM's submission to the Governor and the Attorney General. For example, in 2023, the Secretary accepted 460 pages of public comments between July 31 and August 15.² The Secretary also received and considered comments after the close of the comment period.

The Secretary began developing the 2025 EPM long before the court of appeals issued its decision. He is following a process similar to the 2023 EPM, but plans to invite thirty days of public comment.

² See Arizona Sec'y of State, 2023 Elections Procedural Manual Public Comment available at <https://tinyurl.com/y6jmkt76>.

II. APA Rulemaking.

The APA requires that agency rules substantially comply with APA rulemaking procedures “unless otherwise provided by law.” A.R.S. § 41-1030(A).

If APA rulemaking applies, agencies must:

- 1) Publish a notice of proposed rulemaking specifying which “chapter and article” of the Arizona Administrative Code is being revised and the proposed rule’s “exact wording”;
- 2) Accept public comment for at least thirty days after publishing the notice and, upon request, hold an oral proceeding with another thirty-day notice;
- 3) Start the notice-and-comment process anew if the agency makes a “substantial change,” and
- 4) Before finalizing the new rule, submit it either to the Governor’s Regulatory Review Council (“GRRC”) or the Attorney General within 120 days after public comment closes.

A.R.S. §§ 41-1022 through -1025; *see also* A.R.S. §§ 41-1051 through -1057 (describing GRRC review); A.R.S. § 41-1044 (describing Attorney General review). A rule becomes final after being filed with the Secretary, who publishes the Arizona Administrative Code. A.R.S. §§ 41-1001(11), -1011.

III. Lower Court Decisions.

The superior court granted the Secretary’s motion to dismiss the RNC’s Complaint, finding that “the APA does not apply to the 2023 EPM.” (APP015.) It reasoned that the APA applies “unless otherwise provided by law,” A.R.S. § 41-1030(A), and the Legislature had “otherwise provided by law” by establishing the

EPM's unique process in A.R.S. § 16-452. (APP015.) It explained that the EPM statute and the APA conflicted, including “deadline related conflicts” and “a conflict in obtaining governor approval.” (APP016.)

The court of appeals disagreed. It reasoned that APA rulemaking applies to agency rules unless “expressly exempted” or “expressly provide[d] otherwise,” A.R.S. § 41-1002(A), (B), and then erroneously concluded that the EPM statute was not an “express” exemption. (APP010-11, ¶ 23.) It also mistakenly concluded that the EPM process does not “directly conflict” with APA rulemaking requirements or create “impossible barriers to complying” with them.³ (APP012, ¶ 25.)

REASONS TO GRANT REVIEW

The Legislature requires Arizona elections to be conducted with “the maximum degree of correctness, impartiality, uniformity and efficiency” and that the Secretary issue an EPM with input from election officials to achieve this goal. A.R.S. § 16-452(A). The court of appeals’ decision jeopardizes the EPM, erroneously subjecting it to requirements that are incompatible with Section 16-452. This Court should grant review.

³ Although the court of appeals decision could also be read to hold as a matter of law that the Secretary did not substantially comply with the APA process, (APP012-13, ¶¶ 26-27), the Secretary interprets the decision merely to reject this fact-intensive argument (which was raised only by an intervenor) at the pleading stage.

I. The Decision Below Will Undermine the Administration of Elections in Arizona by Compromising the EPM.

Elections in Arizona are heavily litigated. The court of appeals decision would gut a crucial source of uniform elections administration, the EPM, which is especially important for rural counties with smaller, less specialized elections staff and fewer resources. No Secretary of State has ever issued an EPM pursuant to the additional restrictions in the APA, no Governor or Attorney General or Legislature has ever objected, and until now, no private party has either. Subjecting the EPM to APA rulemaking would jeopardize the current EPM (the 2023 version) and the pending 2025 EPM (since it is too late to make the process APA-compliant), potentially leaving Arizona with no governing EPM. The RNC has proposed using the 2019 EPM, but that manual was issued without APA-specific procedures too—like every EPM before it—and is outdated because of new legal developments.

The court of appeals' decision would also jeopardize the ability of the Secretary to issue future EPMs because it is often impossible to comply with both the EPM statute and APA rulemaking. The court of appeals decision will usher in a new era of APA-focused EPM litigation that will result in unstable and uneven election administration throughout the State.

That result is contrary to the statutory text and other principles of statutory interpretation. This Court should grant review to correct the court of appeals' error and safeguard the administration of elections in Arizona.

II. The EPM is Not Subject to the APA.

A. The Text Establishes that the EPM Is Not Subject to the APA.

An agency need not follow APA rulemaking procedures if “expressly exempted,” A.R.S. § 41-1002(A), or where the Legislature has “otherwise provided by law,” A.R.S. § 41-1030(A).

With respect to the EPM, the Legislature has created an express exemption and provided a different process from APA rulemaking. Consider a few examples:

EPM process	APA rulemaking
1. The Secretary must issue the EPM by December 31 of each odd-numbered year to ensure that election officials know updated rules before each election.	1. There is no deadline for issuing a rule, which can take years . A substantial change to a draft rule restarts the notice-and-comment process.
2. The Secretary must consult election officials from all fifteen counties. This is an informal and fluid process , which can involve substantial revisions to different parts of the EPM at different times.	2. The agency must specify its draft rule’s exact wording and accept public comment for at least thirty days (often longer). The process is rigid, not fluid , because a substantial change restarts the notice-and-comment process.
3. The EPM is published as a standalone manual for election officials. It is not part of the A.A.C.	3. Rules are part of the A.A.C. They become final after being filed with the Secretary, who publishes the A.A.C..
4. The Secretary must submit the EPM to both the Governor and the Attorney General by October 1 . Approval of both is required by December 31 .	4. The agency must submit its new rule to either GRRC or the Attorney General within 120 days after public comment closes. Approval of one or the other is required.

These differences illustrate how the EPM is expressly exempt from the APA and the EPM statute provides a different process “by law.” A.R.S. § 41-1030(A). Indeed, the Legislature has consistently described the EPM as a “manual,” not as part of the A.A.C. A.R.S. § 16-452(B); *see also* A.R.S. § 16-444(A)(6) (defining “instructions and procedures manual”). A “manual” is “a book that is conveniently handled,” especially a “handbook.” *Merriam-Webster Online Dictionary* (2025). A handbook is a “reference book covering a particular subject.” *Id.* The A.A.C. is not a manual.

Ignoring these differences, the court of appeals based its conclusion on the APA’s general statutory provisions stating that it applies to proceedings unless they are “expressly exempted” or the Legislature has “expressly provide[d] otherwise.” A.R.S. § 41-1002(A), (B). Those general provisions did not justify reversing the superior court.

First, the EPM process is best understood as an *express* exemption from the APA. The EPM statute, Section 16-452, provides a specific process that is contrary to the APA. That expressly exempted the EPM from the APA process, notwithstanding the lack of a statutory cross-reference.

Second, even if the court of appeals correctly held that the APA as a whole applies to the EPM, *see* A.R.S. § 41-1002(A), (B), despite Section 16-452’s distinct procedure, the APA rulemaking article itself contemplates that other

statutes may provide different rulemaking procedures. *See* A.R.S. § 41-1030(A) (a rule need not follow APA rulemaking when “otherwise provided by law”). Here, the Legislature provided other rulemaking procedures—*e.g.*, that instead of holding a public comment period, the Secretary shall “consult[] with each county board of supervisors or other officer in charge of elections.” A.R.S. § 16-452(A). Because the Secretary adhered to these statutory requirements, the 2023 EPM is valid.

B. The Secretary Cannot Comply with Both the EPM Process and the APA Rulemaking Process.

As the superior court realized, requiring the Secretary to comply with both the EPM and the APA rulemaking processes yields irreconcilable conflicts. These conflicts confirm that the EPM statute expressly exempts the EPM from the APA under Section 41-1002(A) or, alternatively, provides another rulemaking process “by law,” Section 41-1030(A). This Court should construe the statutes to avoid an “impossible or absurd” result. *Windhurst v. Ariz. Dep’t of Corr.*, 256 Ariz. 186, 192-93, ¶ 17 (2023) (internal quotation marks omitted).

1. Deadline Conflicts.

One fundamental conflict exists because in APA rulemaking, agencies do not close rulemaking by a date certain. *See* A.R.S. §§ 41-1021 through -1039. Agencies may propose a rule, accept comments, make a substantial change,

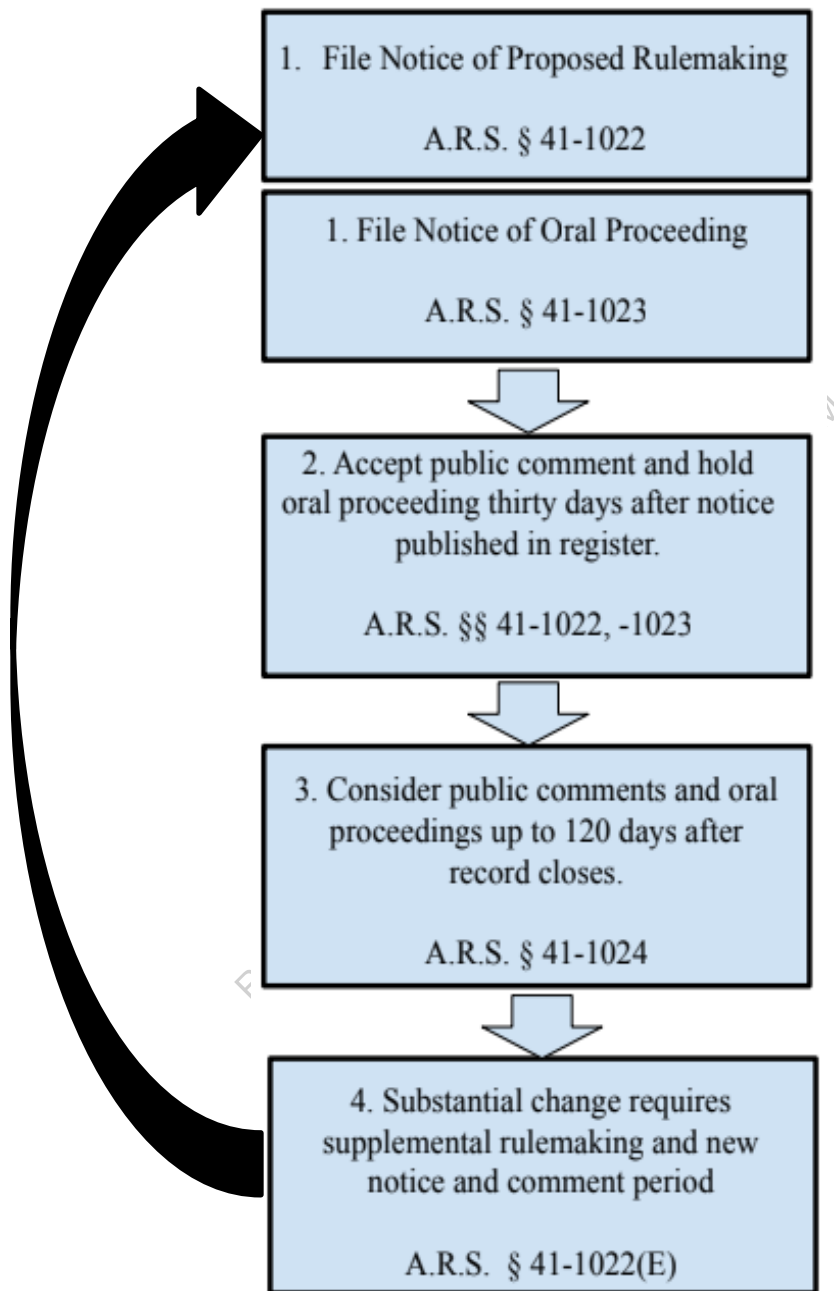
propose a modified rule, accept more comments, and so on. *See* A.R.S. § 41-1022(E). The main goal is thoroughness.

But the EPM's process *requires* the Secretary, as well as the Governor and the Attorney General, to comply with specific election-related deadlines. A.R.S. § 16-452(B). Because elections are complex events that must occur at specific times, election officials must know the rules in advance. Promptness is critical. *See, e.g., Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15 (1998) (“In election matters, time is of the essence.”).

The court of appeals erroneously suggested that any deadline-related conflict could be resolved by “promulgating the EPM earlier.” (APP012, ¶ 25.) But the Secretary already begins drafting each revised EPM near the beginning of each odd-numbered year. Starting “earlier” would require drafting to begin in election years, rather than “odd-numbered years” as required by statute. A.R.S. § 16-452(B). And the Secretary and the county election officials are least available at an election year's end. *See, e.g.,* A.R.S. §§ 16-662, -676 (recounts and election contests must be conducted in weeks immediately following the canvasses).

Moreover, no matter how early the Secretary starts drafting, members of the public may provide comments that warrant a substantial change at *each* public comment period. And if APA procedures apply, each substantial change to the draft EPM would require additional notice and comment, which could introduce

more substantial changes, and so on. *See* A.R.S. § 41-1022(E). This is why the Legislature created the unique EPM process. This loop illustrates the quandary:



Indeed, in 2023, the Secretary made several changes after the public comment period to improve the draft EPM submitted to the Governor and the Attorney General. These included additional instructions for Voting Rights Act

compliance. *Compare* Public Draft at 58-59 (July 30, 2023)⁴, *with* Submitted Draft at 57-58 (Sept. 30, 2023)⁵. Under the APA framework, the Secretary could not have made those important changes without additional public comment and would have missed the October 1 deadline.

Additionally, the EPM is intended to be a manual of *updated* election rules that accounts for recent legal developments. These may occur late in the drafting process, when notice and comment are impossible. In 2023, a federal court issued a major ruling invalidating parts of Arizona’s election laws long after the public comment period had ended. *See Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1104–05 (D. Ariz. 2023); A.R.S. § 16-452(B). The Secretary accounted for the ruling in the draft for the Governor and the Attorney General, although no time for additional public comment existed. *See Submitted Draft*, *supra*, at 13 n.8, and 19 n.12.

Finally, the APA requires additional, non-judicial review procedures. First, parties challenging rules have to exhaust administrative remedies. *Mills v. Ariz. Bd. of Technical Reg.*, 253 Ariz. 415, 420, ¶ 11 (2022). Separately, the APA gives

⁴ Available at https://apps.azsos.gov/election/files/epm/2023_arizona_secretary_of_state_election_procedures_manual_draft_for_public_comment_07_31.pdf

⁵ Available at https://apps.azsos.gov/election/files/epm/final_2023_epm_submission_20230929a.pdf

GRRC—an agency not mentioned in Section 16-452—the authority to review and “modify, revise or declare void” any rule. A.R.S. § 41-1033(K). Any person can petition GRRC to review a rule, and if GRRC modifies it or finds it void, the agency must start “new rulemaking” to continue pursuing the rule, apparently in place of judicial review. A.R.S. § 41-1033(K), (M). The ability of any person (not mentioned in Section 16-452), to use GRRC to potentially force the Secretary into a never-ending loop of rulemaking, apparently without any ability for the Secretary to seek judicial review, undermines the Legislative mandate setting the EPM’s effective date before each election cycle.

2. Official Approval Conflicts.

The Governor’s approval is not required for APA rulemaking, yet it is required for the EPM. *See* A.R.S. § 16-452(B). Similarly, although the Attorney General’s approval is required for some APA rulemaking, the Attorney General’s time to approve the EPM is longer than her time to approve APA rules.

Under the EPM statute, the Attorney General has ninety days to approve the EPM, which becomes effective immediately upon her (and the Governor’s) approval. A.R.S. § 16-452(B). Under the APA, the Attorney General has sixty days to review rules, and they are not effective for another sixty days. A.R.S. §§ 41-1031, -1032. A statute that provides a ninety-day period to approve rules that then become immediately effective conflicts with statutes that provide a sixty-day

period to secure approval and another sixty-day period to become effective, unless the Attorney General spends thirty *fewer* days reviewing the EPM than the Legislature provided.

C. Other Indicia Confirm that the Legislature Never Intended the EPM Process to Follow APA Procedures.

Well-established historical practice supports the conclusion that the EPM is not subject to the APA. This is apparently the first time in the EPM's history that anyone has argued that the EPM must follow APA procedures. The Legislature has amended the EPM statute over the decades, presumably aware of the well-established practice of following only that statute, without suggesting modification. "Where there has been such a background of acquiescence in the meaning of a law unless manifestly erroneous, we will not disturb it." *Dupnik v. MacDougall*, 136 Ariz. 39, 44 (1983).

The decision below also delays prompt judicial review of challenges to EPM provisions. Challenges like the RNC's here to EPM provisions are filed in superior court. This allows expeditious judicial review, hopefully in time to resolve the dispute before the election.

III. If the EPM Is Subject to APA Procedures, This Ruling Should Apply Only Prospectively.

While decisions in civil cases generally operate retroactively *and* prospectively, this Court may apply an opinion prospectively only. *Turken v. Gordon*, 223 Ariz. 342, 351, ¶ 44 (2010). The Court considers whether a ruling

“overrules settled precedent, establishes a new legal principle . . . whose resolution was not foreshadowed, or whether [r]etroactive application would produce substantially inequitable results.” *Id.* (internal quotation marks omitted).

If this Court determines that the EPM must follow APA procedures, it should apply its ruling only prospectively. The decision below establishes a new legal principle that contravenes fifty years of settled practice. No one has previously challenged the EPM on this basis. The new legal principle therefore was not foreshadowed.

Retroactive application would also harm the Secretary, the counties, and the voters. The Secretary’s staff and the counties began working on the 2025 EPM in January, before the court of appeals issued its decision. This year, county consultation will continue until July 22 and the public comment period will last from August 1-30. If a public comment causes the Secretary to make a substantial change to the 2025 EPM, he cannot do the additional notice and comment the APA requires, *see* A.R.S. § 41-1022(E), before October 1, *see* A.R.S. § 16-452(B).

Thus, if APA rulemaking procedures apply to the EPM, this Court should apply that decision prospectively only, not to the existing 2023 EPM or the developing 2025 EPM to ensure the “maximum degree of correctness, impartiality, [and] uniformity” required by Arizona law. A.R.S. § 16-452(A).

CONCLUSION

This Court should accept review and reverse the court of appeals' decision.

Respectfully submitted this seventh day of April, 2025.

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