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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA, LLC, and YAVAPAI COUNTY REPUBLICAN PARTY, Plaintiff-Respondents, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant-Petitioner, VOTO LATINO, ARIZONA ALLIANCE FOR RETIRED AMERICANS, DEMOCRATIC NATIONAL COMMITTEE, and ARIZONA DEMOCRATIC PARTY, Intervenor-Defendant-Petitioners.	No. CV-25-0089-PR No. 2 CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553

PLAINTIFF-RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Every other year, the secretary of state is tasked with "prescrib[ing] rules" consistent with statutory law for administering Arizona's federal and state elections in the Elections Procedures Manual (EPM). The Department of State and the Secretary of State are plainly an agency covered by the APA. The EPM, is, according to the Secretary, issued by him pursuant to a series of express legislative delegations to implement state elections policy, none of which exempt the Secretary from the APA. The EPM contains hundreds of pages of rules of general applicability that carry the force of law. Violation of these rules is a crime. A.R.S. § 16-452(C). Yet the Secretary would have this Court hold that any public participation in the creation of the EPM is gratuitous; the Secretary is free to flout the APA because secretaries before him have done so without being called to account. The practice—however long it has gone on—of making the rules governing Arizona's elections without protecting the right of the public to participate in that process is not authorized by the legislature. It cannot and should not be condoned by this Court. Because the 2023 EPM was adopted in violation of the APA, it is necessarily void. This Court should say so, and in so doing, vindicate the right of Arizonans to participate in agency rulemaking guaranteed by the APA.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY MUST COMPLY WITH THE APA'S RULEMAKING PROCESS WHEN PROMULGATING RULES TO GOVERN THE ADMINISTRATION OF ARIZONA'S ELECTIONS.

The power to make law in Arizona lies with the legislative branch. While the

legislature may delegate authority to implement legislative policy decisions to executive agencies, *Roberts v. State*, 512 P.3d 1007, 1016 (Ariz. 2022) (citing *Facilitec, Inc. v. Hibbs*, 80 P.3d 765, 767 (Ariz. 2003)), unless exempted, they must follow the Administrative Procedure Act (APA) when doing so. A.R.S. §§ 41-1002(A), -1005.

The APA outlines the administrative rulemaking process, elevating public participation "to ensure that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures." *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 895 P.2d 133, 138 (Ariz. App. 1994). Any "rule" adopted in violation of the APA, unless "expressly exempted" from the APA, is invalid. A.R.S. §§ 1002(A), 1030(A).

Here, there is no dispute that the 2023 EPM is a "statement of general applicability that … prescribes law or policy"—the definition of a "rule." *See* § 41-1001(21). Nor is it disputed that the Department of the Secretary of State (Department) and the Secretary are "agenc[ies]" subject to the APA. *See* § 41-1001(1). The applicability of the APA's rulemaking process to the 2023 EPM thus turns on whether EPM rulemaking is exempt from the APA. The answer is no.

A. Statutory Background and History of Elections Procedures Manuals.

The EPM Statute and History. Every other year, the chief election officer for Arizona, the secretary of state, is responsible for "prescrib[ing] rules" consistent with law "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures" for administering federal

and state elections in the state. *See generally* A.R.S. § 16-452 (EPM Statute). The EPM Statute directs the Secretary to "prescribe[]" the "rules" "in an official instructions and procedures manual" to be "approved by the governor and attorney general" no later than "December 31 of each odd-numbered year immediately preceding the general election." § 16-452(B). Violation of any rule in an EPM is subject to criminal prosecution. § 16-452(C).

The substance of EPM has significantly expanded over the years, from a limited set of guidelines to a comprehensive set of rules. For instance, the original EPM Statute, 1966 Ariz. Sess. Laws, ch. 93, p. 187 (codified at A.R.S. § 16-1038), delegated to the secretary limited "power to issue supplementary instructions and procedures" for the "use of electronic voting systems,", and the secretary's power was supplementary to the county board of supervisors' authority. A.R.S. § 16-1038 (1966). In 1972, section 1038 was overhauled to something close to its current form. *See* 1972 Ariz. Sess. Laws, ch. 218, p. 1537 (codified at A.R.S. § 16-1038). While the 1972 revision expanded the secretary's authority, it still checked it by requiring the secretary to prescribe rules and regulations "in concert with" the boards. A.R.S. § 16-1038(A) (1972). In practice, this meant the secretary had to work with the boards to jointly prescribe the rules in the EPM.[1] In 1993, the legislature amended the statute to remove the county board of supervisors' role as joint issuers of the EPM. Rather than require the secretary to prescribe the rules and regulations "in concert with" each of the 15 county boards, the amendment

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

reduced the boards' role to that of "consultation." *See* 1993 Ariz. Sess. Laws, ch. 98, § 31 (codified in A.R.S. § 16-452(A)).

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

State agencies must comply with the APA's process for rulemaking, unless "expressly exempted" by statute. A.R.S. § 41-1002(A); *Ariz. State Univ. ex rel. Ariz. Bd. of Regents*, 349 P.3d 220, 226 (Ariz. App. 2015) ("The rulemaking procedure of the APA 'appl[ies] to all agencies and all proceedings not expressly exempted.'"). The rulemaking process includes: preparing and making available to the public a regulatory agenda, § 41-1021.02(A); providing notice of the proposed rulemaking in a statutorily prescribed format, and publishing such notice in the register maintained by the Secretary, § 41-1022(A); providing at least 30 days after publication for the public to comment on the proposed rulemaking, § 41-1023(B); holding an oral proceeding on the proposed rule if requested during the comment period, § 41-1023(C); in most circumstances, submitting the proposed rule to the governor's regulatory review council or the attorney general for approval, § 41-1024(B)(1); and maintaining an official record, § 41-1029(A).

The APA defines "rulemaking" as "the process to make a new *rule* or amend, repeal or renumber a rule." § 41-1001(22) (emphasis added). And a "rule"

is "an agency statement of general applicability that implements, interprets *or prescribes law* or policy, or describes the procedure or practice requirements of an agency." § 41-1001(21) (emphasis added).

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

B. A.R.S. § 41-1002(A) and (B) control.

Such an express exemption is the only way for the legislature to exempt the EPM from the APA's rulemaking process. A.R.S. § 1002(A). The APA is organized into articles, including articles on the publication of agency rules (Article 2), rulemaking (Article 3), review by the attorney general (Article 4), and review by the governor's regulatory review council (Article 5).[2] Article 1 outlines the APA's "General Provisions." There, the APA defines its "[a]pplicability and [r]elation to other law." *See* A.R.S. § 41-1002. Subsection 1002(A), the *second* section of the APA (after the definitions) sets forth a straightforward rule of

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

applicability: "This article and articles 2 through 5 of this chapter apply to *all* agencies and *all* proceedings not *expressly exempted*." (emphasis added).

And subsection 1002(B), in turn, provides three directives: (1) the APA "creates only procedural rights and imposes only procedural duties"; (2) the procedural rights and duties "are *in addition to* those created and imposed by other statutes"; and, (3) "[t]o the extent that any other statute would diminish a right created or duty imposed by this chapter, *the other statute is superseded* ... , unless the other statute expressly provides otherwise." (Emphasis added.) The APA therefore provides minimum procedures applicable to all agencies and all proceedings in addition to those imposed by other statutes and that cannot be varied absent express exemption.

As previewed above, there are two ways for the legislature to express an exemption. (*See* Op. ¶ 21.) *First*, the legislature may include an express exemption in the APA itself. Section 1005 of the APA, titled "Exemptions," lists nearly 40 exemptions, from subject-matter specific exemptions, § 1005(A)(1) (exempting rules related to "use of public works"), (A)(3) ("motor vehicle operation"), to exemptions for certain agencies, § 1005(D) ("the board of regents"), (F) ("state board of education"), to program specific exemptions, § 1005(A)(35) ("livestock operator fire and flood assistance grant program"), (A)(29) ("public assistance program monies related to disaster declarations").

Second, the legislature may include an express exemption in the implementing statute. And it regularly does so. *See, e.g.*, §§ 3-109.03(C) (stating department of agriculture "is exempt from title 41, chapter 6" [i.e., the APA] for

purposes of rules on the livestock operator fire and flood assistance grant program (footnote omitted)). These express exemptions are readily identifiable by their use of the phrase "is exempt" and direct reference to the APA.

The court of appeals held that "neither the EPM [S]tatute … nor the APA … expressly exempts the EPM from the APA's rulemaking process." (Op. ¶ 22.) This decides the first issue: because the Secretary is an "agency" who issued "rules" in the EPM, and because the APA does not expressly exempt the EPM, the Secretary must comply with the APA's rulemaking process.

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

Before the lower courts, Petitioners relied almost entirely on another APA provision, subsection 1030(A), which "is remedial and merely sets out conditions or requirements for a valid rule." (Op. ¶ 22.) Subsection 1030(A)'s text, structure, and history confirm the court of appeals' read of the statute and make plain it is not the escape hatch Plaintiffs claim.

Subsection 1030(A) provides, "A rule is invalid unless it is consistent with the statute, reasonably necessary to carry out the purpose of the statute and is made and approved in substantial compliance with [the APA rulemaking process], unless otherwise provided by law." Petitioners contended below that phrase "unless otherwise provided by law" bypasses subsection 1002's express-exemption mandate. To Petitioners, because the legislature "otherwise provided by law" additional procedures to promulgate the EPM, the 2023 EPM cannot be subject to the APA. The court of appeals confirmed that this is obviously wrong.

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

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

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

The second conditional—"unless otherwise provided by law"—is preceded by a comma and could be read one of two ways. *First*, that a rule is invalid unless the law provides for a remedy other than invalidation, e.g., remand to the agency without invalidating or vacating the rule. No court has adopted this reading, and no party has argued the EPM Statute provides an alternative remedy for an APA violation. *Second*, that a rule is invalid unless it is prescribed in substantial compliance with the APA's rulemaking process, unless otherwise provided by law. That is, a recognition that rules are not categorically invalid because they did not adhere to the APA's rulemaking process. This is undoubtably true, because some agency rulemakings are *expressly exempt* from the APA's rulemaking process. Thus, a rule is not invalid for failure to comply with the APA if the legislature

expressly exempted the rulemaking from the APA. This read harmonizes subsections 1002(A) and 1030(A).

Petitioners' interpretation, however, violates multiple canons of statutory interpretation. "In construing a specific provision, [courts] look to the statute as a whole" to determine its meaning, *Glazer v. State*, 423 P.3d 993, 995 (Ariz. 2018), adopting the "meaning which best harmonizes with the context," *Rotter v. Coconino Cnty.*, 805 P.2d 1031, 1036 (Ariz. App. 1990). Interpretations should also avoid rendering "any clause, sentence or word 'superfluous, void, contradictory or insignificant.'" *State v. Cid*, 892 P.2d 216, 219 (Ariz. App. 1995) (citations omitted). Again, the provision defining the APA's applicability and its relation to other laws broadly states that agency rulemakings are subject to the APA unless expressly exempted. A.R.S. § 41-1002(A). Crediting Petitioners' view of subsection 1030(A) would mean "the APA effectively recognizes a silent, implied exemption that contradicts and voids § 41-1002." (Op. ¶ 23.) But, as the court of appeals reiterated, the relevant statutory provisions must be read "in harmony," and the only way to do so is to "interpret the 'unless otherwise provided by law' language in [subsection] 1030(A) as reiterating [section] 1002's directive that any exemptions must be expressly made." (*Id.*)

Unsurprisingly, Petitioners' interpretation is also against decisional law. An implementing "statute's silence does not exempt the [agency] from the APA's rulemaking procedure." *Ariz. State Univ.*, 349 P.3d at 226; *see also Carondelet Health Servs.*, 895 P.2d at 140 (first stating "[a]ll agencies are subject to the APA unless they are expressly exempted," and then concluding "had the legislature

intended that [the agency] be exempt from the APA when administering the session law, it would have so stated"). But that is what Petitioners advocate for: an exemption despite the EPM Statute's silence on the APA. While the EPM Statute says nothing about the APA, Petitioners infer an exemption through the Statute's supplementary process requiring the governor and attorney general to approve the EPM. But as Arizona appellate courts have recognized before, supplementary processes are no substitute for an express exemption. *See Legacy Educ. Grp. v. Ariz. State Bd. for Charter Sch.*, No. 1 CA-CV 17-0023, 2018 WL 2107482, at *6 (Ariz. App. May 8, 2018) (holding despite supplementary process in implementing statute "no statute has expressly exempted the Board from the APA's rulemaking provisions" and therefore "the Board must follow the APA's rulemaking provisions in promulgating [the framework rules]").

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

https://bit.ly/3zBwr2h (ep 27, 31); H.B. 2578 Fact Sheet (ep 22). Before H.B. 2578, only those rules approved by the attorney general and filed with the secretary of state were published in the code. Because H.B. 2578 required the Secretary to publish in the code *all* rules, the Furman Amendment also amended subsection 1030(A) for clarity. *See* Furman Amendment, § 8 (ep 31) ("A rule is invalid unless adopted and certified in substantial compliance with [the APA's rulemaking process] UNLESS OTHERWISE PROVIDED BY LAW."). As amended, the statute makes clear that not all rules—now published in the code—are invalid for failure to comply with the APA.

The text, structure, and history of subsection 1030(A) of the APA overwhelmingly support the court of appeals' conclusion that this subsection cannot be used to avoid subsection 1002(A)'s clear requirement for an express exemption from the APA.

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

There is no conflict between the APA and the EPM Statute; and, even if there were, the APA would supersede any conflicting provision.

1. The APA's plain language resolves this issue. Subsection 1002(B) unambiguously states, "To the extent that any other statute would diminish a right created or duty imposed by this chapter, *the other statute is superseded by this chapter* ... ." (Emphasis added.) In other words, if a right or duty (like following the rulemaking process) created by the APA conflicts with another statute, the APA prevails, always, absent an express exemption.

Arizona appellate courts have previously recognized this concept. In

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

2. The APA and EPM Statute do not conflict. The court of appeals rejected Petitioners' arguments that "there is an irreconcilable conflict" between the two statutes. (Op. ¶¶ 24–25.) While the court credited the Secretary's gripe that complying with both the APA and EPM Statute might be more difficult and lead to "potential impracticalities," those do not equate to conflicts." (*Id.* ¶ 25.) Simply, "[t]he APA and EPM statutes impose duties on the Secretary that may require him to begin promulgating the EPM earlier, but they are not inconsistent, do not directly conflict, and do not create impossible barriers to complying with both." (*Id.*)

Nor is the superior court's concern about "deadline related conflicts" and "a

conflict in obtaining governor approval" real. (Order at 3, nn. 3–4.) As to the governor's approval conflict, the lower court cited A.R.S. § 41-1039(B)–(D). But those APA provisions are no obstacle to complying with the EPM Statute's requirement that the Secretary submit the manual to the governor "not later than October 1 of the year before each general election" and that the governor approve the EPM. § 16-452(B). Subsection 41-1039(B) establishes the governor's approval as a prerequisite to review by the governor's regulatory review council (that's no conflict); subsection 41-1039(C) requires agencies to recommend "for consideration ... at least three existing rules to eliminate for every additional rule requested by the state agency" (that's no conflict); and subsection 41-1039(D) limits the publicization of "directives, policy statements, documents or forms" unless authorized by statute or rule (that's no conflict). None of these provisions impede the Secretary from submitting the EPM to the governor by October 1. None, for example, call for any action to be undertaken after that date.

Indeed, Respondents' read is the same as the attorney general's earlier view. (ROA 39 ep 37 (attaching Arizona Attorney General Opinion, dated Oct. 19, 1979).) The attorney general previously reviewed A.R.S. § 35-192(G), which required "the director of the division of emergency management" to "develop rules for administering the monies authorized for liabilities" for disaster declarations, "subject to approval by the governor." (*Id.* ep 43.) Responding to the director of the division of emergency management's questions on the application of the APA to subsection 192(G), the attorney general concluded: "The fact that the rules and regulations [authorized under subsection 192(G)] are subject to the Governor's

approval does not excuse them from compliance with the APA. This is merely one additional step in the rule-making process." (*Id.*) That is Respondents' point.

As to conflicting deadlines, the superior court cited the APA's required notice of a proposed rulemaking (§ 41-1022(A), (B), (D), and (E)), and public-comment period and oral-proceeding (§ 41-1023(B), (C), and (D)). (Order at 3, n.3.) The EPM Statute does not address any of these topics, so it's unclear how these APA requirements could conflict with non-existing provisions in the EPM Statute. Nor does the general theory of a "deadline conflict" even hold up to scrutiny. As Respondents explained below, there are no limits on when the Secretary can *start* the rulemaking process. The EPM Statute only requires him to prescribe the rules required under subsection 452(A) "in an official instructions and procedures manual" issued "not later than December 31 of each odd-numbered year immediately preceding the general election." A.R.S. § 16-452(B). While the Secretary must submit the EPM to the governor and attorney general by October 1 of odd-numbered years, *id.*, he is free to complete the rulemaking process and then submit it to the governor before then. There is ample time to comply with even the longest version of the rulemaking process if it were initiated early in the odd-numbered year or even in the previous even-numbered year.

E. Petitioners' other arguments for a bespoke exemption fail.

In the lower courts, Petitioners offered a host of other arguments to justify the Secretary's noncompliance with the APA. None persuade.

1. ***No multi-agency rulemaking.*** The Secretary invited the lower courts to approve a never-recognized exemption under the APA for "multi-party"

rulemakings. (Sec'y Br. 20.) He cited no caselaw, nor did he reconcile his view with A.R.S. § 41-1002(A), which states the APA's rulemaking process "appl[ies] to *all* agencies and *all* proceedings." (Emphasis added.)

Further, while multi-agency participation in a rulemaking is legally irrelevant, the EPM Statute assigned the duty to "prescribe rules" to the secretary. A.R.S. § 16-452(A). "The legislature has expressly delegated to *the Secretary* the authority to promulgate rules and instructions" under section 452; the Department and the Secretary are the issuing agency. *See Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (unpublished) (emphasis added). (*See also* ROA 1 ep 31 (stating the EPM is "A PUBLICATION OF *THE ARIZONA SECRETARY OF STATE'S OFFICE* ELECTIONS SERVICES DIVISION" (emphasis added)).)

Nor does the Secretary's passing reference to the governor's involvement change the analysis here. (*See* Sec'y COA Br. 21.) Again, this argument wrongly assumes the governor is responsible for issuing, or even co-issuing, the EPM. She is not. The secretary prescribes the rules and issues the EPM. Even more, the APA actually allows for additional procedural requirements beyond the APA's minimum floor. *See* A.R.S. § 41-1002(B). "This is merely one additional step in the rule-making process." (ROA 39 ep 43 (attaching Arizona Attorney General Opinion, dated Oct. 19, 1979).)

2. ***No substantial compliance.*** In the proceedings below, Intervenor-Petitioners added that, even if the APA applies to the EPM, the Secretary "substantially complied" with the APA's rulemaking process. (DNC COA Br. 19–

23; Voto Latino COA Br. 22–21.) The court of appeals flatly rejected this argument as a matter of law. (*See* Op. ¶ 27.) *First*, the Secretary provided only 15 days for public comment when the APA requires at least thirty. A.R.S. § 41-1023(B). Such a ruling would revolutionize the APA in this state, giving regulators immediate license to cut public comment periods in half. *Second*, even if the Secretary's provision of half of the minimum public comment period qualifies as *substantial* compliance with subsection 1023(B), his failure to attempt compliance with other mandatory provisions cannot be excused as substantial compliance. Some of the mandatory provisions include providing notice of the proposed rulemaking, following the statutorily prescribed format, and publishing the notice in the register, § 41-1022(A); holding an oral proceeding, if requested, as was done here, § 41-1023(C); and maintaining an official rulemaking record, § 41-1029(A). *Third*, the Secretary added *15 pages* of new rules in consultation with the governor and attorney general that the public never saw until they were released in final form on Saturday, December 30, 2023. To claim such a process furthers the APA's purpose "to ensure that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures," *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 895 P.2d 133, 138 (Ariz. App. 1994), makes a mockery of the APA.

Of course, Intervenors cited no authority holding that an agency may ignore the APA—and maintain the APA does not apply—yet still show substantial compliance with it. And to his credit, the Secretary did not advance this argument,

which is reason enough for the Court to reject it. Failure to do so will render the APA's procedural requirements optional and destroy the minimum procedural protections that the legislature imposed on agencies when rulemaking.

II. BECAUSE THE APA MANDATES THE REMEDY FOR NONCOMPLIANCE WITH ITS RULEMAKING PROCESS, THIS COURT MAY NOT APPLY A DECISION CONFIRMING THE APA'S APPLICATION TO ONLY FUTURE EPMS.

In Arizona, unless otherwise specified, an opinion in a civil case operates retroactively as well as prospectively. *See Law v. Superior Court*, 755 P.2d 1135, 1148 (Ariz. 1988); *Mark Lighting Fixture v. General Elec. Supply Co.*, 745 P.2d 85, 88 (Ariz. 1987); *Brannigan v. Raybuck*, 667 P.2d 213, 220 (Ariz. 1983); *Chevron Chem. Co. v. Superior Court*, 641 P.2d 1275, 1279 (Ariz. 1982). While ordinarily, "[w]hether an opinion will be given prospective application only is a policy question within this court's discretion," *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 251 (Ariz. 1990), this Court's discretion must necessarily be cabined by express statutory or constitutional language requiring that a legislative or executive enactment be null and void or invalid. *Fain Land & Cattle Co.*, 790 P.2d at 273 (Fain, J., concurring in part, noting that Court was within its discretion to apply ruling prospectively only because remedy of nullity provided for in state constitution did not squarely apply to the transaction at issue).

Here, the APA clearly states the remedy for a rule adopted outside its rulemaking process: a judicial declaration invalidating the offending rule. A.R.S. §§ 41-1030(A), -1034. This is because, under the APA, "[a] rule is invalid" if not "made and approved in substantial compliance with [sections] 41-1021 through 41-1029." A.R.S. § 41-1030(A). Because the Legislature has unmistakably provided

invalidation as the exclusive remedy for an APA violation, this Court does not have discretion to hold that the APA only applies to future EPMs and to thereby leave the 2023 EPM in place despite the Secretary's failure to comply with the law.

Even if the Court were to look past the Legislature's unambiguous statutory command and analyze whether a holding that the APA applies to the EPM should be applied prospectively only, the three factors the Court uses for such analysis each weigh strongly in favor of retroactive and prospective application here.

The factors to be considered in such an analysis are: 1. Whether the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed; 2. Whether retroactive application will further or retard operation of the rule, considering the prior history, purpose, and effect of the rule; and 3. Whether retroactive application will produce substantially inequitable results. *Fain Land & Cattle Co.*, 790 P.2d at 252. These are often called the Reliance, Purpose and Inequity factors. *Id.*

Reliance. Here, there is no "clear and reliable precedent" on which the Secretary could reasonably rely for refusing to abide by the APA in a rulemaking. The Secretary has admitted as much, pointing only to a practice of adopting EPMs without public input. But the absence of a challenge to such a procedure cannot constitute a clear and reliable precedent. If anything, all it can show is that until recently, parties regulated by the EPM were content to allow it to be adopted without public participation. In the case of the 2023 EPM, Respondents specifically asked the Secretary to provide for the full 30 days' time to comment on the EPM and promptly initiated this action when the EPM was adopted without

complying with the APA. (ROA 1 ep 6.) The legal principle that a rule—here a volume of rules—must be adopted in accordance with the APA is not new; it has been the law for decades. *See* 1986 Ariz. Sess. Laws, ch. 232 (1986). The resolution has been foreshadowed in the APA itself and in every Court of Appeals decision to touch on an invalid rulemaking. *See, e.g. Ariz. State Univ.*, 349 P.3d at 226 (invalidating offending rule).

Purpose. The purpose of a holding confirming that the APA applies to the Secretary when he issues the EPM will be furthered by application of the ruling to the 2023 EPM and undermined by a failure to do so. If the 2023 EPM survives despite its adoption in violation of the APA, this Court will provide a pathway for other rulemaking bodies to claim ignorance of the APA's application and later save rules adopted in reliance on such claimed ignorance. It will encourage more litigation under the APA in such instances and embolden regulators to insist on compliance with invalidly adopted rules until and unless a court invalidates them.[3] Indeed, the Secretary himself is currently working to adopt a new EPM for 2025, and while he has allowed 30 days notice and comment, he has conspicuously not adhered to other provisions of the APA. He has not published a notice of

[3] Indeed, the Secretary himself is currently working to prescribe a new EPM for 2025, while conspicuously not adhering to the APA. While he has permitted 30 days for public comment on the draft, he has not published including a notice of rulemaking in the register, A.R.S. § 41-1022(A); he has arbitrarily limited all public commenters to comments on six provisions in the EPM in violation of A.R.S § 41-1023(B); he has not afforded commenting parties the opportunity to request an oral proceeding on the proposed rule in violation of A.R.S.§ 41-1023(C); and he has not maintained an official rulemaking record as required under A.R.S.§ 41-1029(A).

rulemaking in the register, A.R.S. § 41-1022(A); he has arbitrarily limited all public commenters to comments on six provisions of the EPM in violation of A.R.S § 41-1023(B); he has not afforded commenting parties the opportunity to request an oral proceeding on the proposed rule in violation of A.R.S.§ 41-1023(C); and he has not maintained an official rulemaking record as required under A.R.S.§ 41-1029(A). Refusal to invalidate the 2023 EPM would reward the Secretary's refusal to follow the unambiguous requirements of the APA.

Inequity. There will be no injustice or hardship that results from an invalidation of the 2023 EPM. All that will happen is a reversion to the 2019 EPM, which governed Arizona elections for four years, including the 2022 general election.[4] The Secretary will remain free to issue guidance and updates regarding new legislation.

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

CONCLUSION

Petitioners ask the Court to affirm the court of appeals opinion holding the APA applies to the EPM, and, because the Secretary failed to comply with the APA's rulemaking process in prescribing the rules in the 2023 EPM, the EPM is invalid under A.R.S. § 41-1030(A).

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

DATED this 8th day of September 2025.

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