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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' BRIEF IN RESPONSE TO AMICI CURIAE
PIMA COUNTY AND HON. KENNETH BENNETT**

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INTRODUCTION

Amici former Secretary of State Hon. Kenneth Bennett and Pima County have filed briefs arguing, respectively, for this Court to either (1) refuse to apply the APA to the EPM because it will be “unrealistic” for Secretaries to comply with such a ruling or (2) if the APA must be applied to the EPM, leave the 2023 EPM in place and require only new EPMs to follow the APA. These issues of administrative convenience do not meaningfully engage with the APA itself, which provides for emergency rulemaking when necessary to avoid a violation of state or federal law. The APA also controls over any other rulemaking statute absent an express exemption and expressly provides that any rule adopted in violation of its provisions is invalid. For these reasons, these amici do not present any reason for this Court to deviate from affirming the Court of Appeals and vindicating the right of Arizonans to participate in agency rulemaking guaranteed by the APA.

ARGUMENT

I. THE SECRETARY CAN COMPLY WITH BOTH THE APA AND THE EPM STATUTE.

Former Secretary of State Bennett makes essentially the same argument as Petitioner at pages 14-16 of its supplemental brief: that the Secretary cannot comply with both the APA’s rulemaking process and A.R.S. § 16-452. Former Secretary Bennett argues that the APA’s “rigid timing requirements” and its requirement that proposed rules be offered for public comment in full will frustrate the ability to account for late-breaking legal developments (whether legislative or judicial in origin). (Bennett Br. at 11-12.) Former Secretary Bennett argues that changes in the law require flexibility until the last-minute before the October 1

submission deadline under Section 16-452. (Bennet Br. at 11.) But this same argument could, of course, be made regarding any set of rules: the law can, and sometimes does, change after regulations are proposed or adopted. Indeed, this has happened recently in the context of the 2023 EPM when a federal district court enjoined A.R.S. § 16-121.01(C)’s requirement of documentary proof of citizenship for new voter registrations. *See Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929, 951 (D. Ariz. 2024). This injunction was later stayed by a motions panel of the Ninth Circuit, *Mi Familia Vota v. Fontes*, No. 24-3188, 2024 WL 3629418, at *1 (9th Cir. July 18, 2024), reinstated by the Ninth Circuit merits panel, *Mi Familia Vota v. Fontes*, 111 F.4th 976, 980 (9th Cir. 2024), and finally stayed again by the Supreme Court. *Republican Nat’l Comm. v. Mi Familia Vota*, 145 S. Ct. 108 (2024). All this happened after the 2023 EPM was adopted. Nothing prevented Secretary Fontes from ensuring compliance with these court orders even though the 2023 EPM was no longer subject to change when they were issued.

More fundamentally, the APA anticipates the possibility of late-breaking changes in law by providing for emergency rulemaking where necessary to “[a]void violation of federal law or regulation or other state law.” A.R.S. § 41-1026. Former Secretary Bennett’s tacit admission that the APA’s rulemaking process can be complied with if the Secretary begins earlier (Bennet Br. at 12) shows that compliance with both the APA and the Section 16-452 is primarily a matter of allowing more time—time the APA requires be provided to Arizonans whose elections will be governed by the rules in the EPM. In the end, if any portion of Section 16-452 truly cannot be complied with because of the

requirement the Secretary comply with the APA, it is Section 16-452 that must give way, not the APA. A.R.S. § 41-1002(B).

II. EMERGENCY RULEMAKING AUTHORITY MEANS A RETURN TO THE 2019 EPM WILL NOT DISRUPT ADMINISTRATION OF ARIZONA'S ELECTIONS

Pima County argues for prospective-only application of any holding confirming that the EPM must be promulgated in accordance with the APA on the ground that certain provisions of the 2019 EPM—which would become operative if the 2023 EPM is invalid—are different than similar provisions in the 2023 EPM. (Pima Cnty. Br. at 7-10.) Pima County argues this may cause difficulty in administering elections. (Pima Cnty Br. at 5.) Not so. As noted above, the APA provides a solution: emergency rulemaking. While emergency rulemaking cannot be used where the law doesn't require an update to a 2019 EPM provision, like Pima County's preference for the 2023 EPM version of the rule on early-submitted written challenges to ballots (Pima Cnty Br. at 7), it would seem to be tailor made to accommodate updates to statutes like those regarding removal of names from the Active Early Voting List. (Pima Cnty. Br. at 9.) At bottom, where legal developments since the 2019 EPM require updates to that manual, the APA will permit emergency rulemaking to accomplish this task. Pima County's concerns regarding administrative convenience cannot support a refusal to invalidate the 2023 EPM.¹

¹ Respondents note that Pima County's preferences regarding administrative convenience best juxtaposed with Pinal County's concrete concerns that any prospective-only decision will violate the substantive rights of its Supervisors to comment on rules that were added without *any* notice and comment and have since

III. THE APA REQUIRES INVALIDATION

The APA clearly states the only remedy for a rule adopted outside its rulemaking process is 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. The Court should not do violence to this unambiguous statutory directive to save the Secretary the trouble of emergency rulemaking that may be necessary to bring discrete portions of the 2019 EPM up to date.

CONCLUSION

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. Petitioners again ask the Court to affirm the court of appeals.

been the subject of “enforcement” proceedings by the Secretary. *See* Brief of Amici Curiae Pinal County Board of Supervisors and Pinal County Recorder Dana Lewis in Support of Respondents.

DATED this 3rd day of October 2025.

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