

SUPREME COURT OF ARIZONA

REPUBLICAN NATIONAL COMMITTEE;
et al.,

Plaintiffs/ Appellants/ Respondents,

v.

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

Defendant/ Appellee/ Petitioner,

-and-

VOTO LATINO; et al.,

Intervenor-Defendants/ Appellees.

Arizona Supreme Court
No. CV-25-0089-PR

Court of Appeals
Division Two
No. 2 CA-CV 24-0241

Maricopa County
Superior Court
No. CV2024-050553

SECRETARY OF STATE'S CONSOLIDATED RESPONSE TO FIVE AMICUS BRIEFS THAT SUPPORT RESPONDENTS

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Secretary Fontes respectfully responds to amicus briefs from:

- (1) Arizona’s Senate President and House Speaker (“Legislative Leaders”);
- (2) Pinal County’s Board of Supervisors and Recorder (“Pinal Officials”);
- (3) Honest Elections Project (“HEP”);
- (4) Center for Election Confidence (“CEC”); and
- (5) America First Legal Foundation (“AFL”).

INTRODUCTION

The amici offer no persuasive response to four fundamental points.

First, if the Legislature has “otherwise provided by law” a distinct process for an agency to adopt certain rules, and the agency follows that process, then the APA does not invalidate those rules. See [A.R.S. § 41-1030\(A\)](#). Here, the Legislature otherwise provided by law a unique process for adopting EPMs, which the Secretary followed. See [A.R.S. § 16-452](#).

Some amici argue that, when the Legislature added the clause “unless otherwise provided by law” to § 41-1030 in 1992, the Legislature was just reiterating the APA’s general provision stating that the APA applies absent an “express” exemption. See [A.R.S. § 41-1002\(A\)](#). But as the Secretary already explained, this interpretation ignores textual differences between the APA’s general provision and the 1992 revision, and it would render the

1992 revision superfluous. *See* Secretary’s Suppl. Br. 4–8. The amici fail to address this basic problem with their view. And they do not dispute that the EPM-specific process in § 16-452 differs from APA rulemaking or that the Secretary followed § 16-452.

Second, the Legislature has also “expressly” provided that EPMs are not subject to the APA. *See* [A.R.S. § 41-1002\(A\), \(B\)](#). The Legislature did so by expressly stating that EPMs must be adopted pursuant to the process in § 16-452, and by placing that process in an article that expressly supersedes “[a]ny provision of law that conflicts with this article.” [A.R.S. § 16-444\(B\)](#).

Tellingly, the amici offer no contrary interpretation of § 16-444(B). Some amici argue that, if the Legislature wanted to expressly exempt EPMs from the APA, the Legislature needed to use more specific language – either by specifically mentioning EPMs in the APA, or by specifying in § 16-452 that the APA does not apply. But this is a false dichotomy. The fact that the Legislature “could have followed” one of these methods of express statement does not mean it was “required” to do so. [City of Phoenix v. Glenayre Elecs., Inc.](#), 242 Ariz. 139, 143–44, ¶¶ 15–18 (2017).

Third, although Arizona has issued EPMs for more than fifty years, the amici identify no prior instance where anyone thought that APA rulemaking

applied. In fact, former Secretary Bennett explains that his tenure was the first time an EPM was open to public comment—and even that was a policy decision, not a statutory obligation. For decades, Secretaries, Governors, and Attorneys General have issued EPMs without following APA rulemaking.

Such widespread consensus is itself evidence of statutory meaning, as this Court has recognized. Although some amici urge the Court to depart from this consensus, no one denies that the consensus has long existed.

Fourth, if this Court concludes that EPMs must follow APA rulemaking, the Court has inherent authority to apply its opinion prospectively only. [*Turken v. Gordon*, 223 Ariz. 342, 351, ¶ 44 \(2010\)](#). The Court should do so, given (1) the decades-long consensus that APA rulemaking does not apply to EPMs, (2) the need for Arizona election officials to have a valid updated EPM, (3) the public’s opportunity to comment on the 2023 EPM and forthcoming 2025 EPM, and (4) the serious concerns expressed by both Secretary Fontes and former Secretary Bennett that imposing APA rulemaking would make it practically impossible to finish EPMs in compliance with statutory deadlines.

One amicus argues that this Court lacks authority to apply its opinion prospectively, because this case is about whether the Secretary followed a

statute, and the statute provides a remedy. But this Court has not prohibited itself from applying its opinions prospectively in such situations. Nor would such a restriction on the Court's inherent authority make sense. This case involves an issue of statutory interpretation: whether EPMs must follow APA rulemaking. If the Court decides that the answer is yes, but also decides for equitable reasons that the answer was previously unclear and should apply only to future EPMs, the Court can and should say so.

ARGUMENT

I. The 2023 EPM is valid because the Secretary adopted it pursuant to the process specified by the Legislature in § 16-452.

A. If an agency follows a rulemaking process that the Legislature “provided by law,” the APA does not invalidate the rule.

Since 1986, APA Articles 1 through 5 have governed agencies and proceedings unless “expressly exempted,” and the APA has superseded conflicting statutes unless the Legislature “expressly provides otherwise.” [Laws 1986, ch. 232, § 4 \(37th Leg., 2nd Reg. Sess.\)](#) (adding [A.R.S. § 41-1002](#)). In addition, between 1986 and 1992, APA Article 3 (“Rulemaking”) stated that rules by non-exempt agencies that do not substantially comply with the APA’s rulemaking process were “invalid.” *Id.* § 5 (adding [A.R.S. § 41-1030](#)).

But in 1992, the Legislature narrowed the circumstances in which a rule is invalid under the APA, so that rules by non-exempt agencies that do not substantially comply with APA rulemaking are “invalid . . . *unless* otherwise provided by law.” [Laws 1992, ch. 239, § 8 \(40th Leg., 2nd Reg. Sess.\)](#) (amending [A.R.S. § 41-1030](#)) (emphasis added). As a result, if the Legislature provides an alternative rulemaking process and the agency follows it, the APA does not invalidate the rule.

Most of the amici completely ignore the Legislature’s 1992 revision of § 41-1030. They simply do not mention it. Two amici—HEP and AFL—acknowledge the statutory language, but misconstrue it.

HEP sets up a straw man in the statute’s place, arguing that the Legislature’s revision of § 41-1030 in 1992 does not allow courts to “create an implied exemption” from the APA. HEP Br. 11. But the Secretary is not asking the Court to “create an implied exemption” from the APA. Rather, the Secretary is asking the Court to apply the APA’s text: Within the APA article on rulemaking, the Legislature chose not to invalidate a rule if the agency follows an alternative rulemaking process that the Legislature “otherwise provided by law.” [A.R.S. § 41-1030\(A\)](#).

For this reason, this case is quite different from the Court of Appeals cases cited by HEP. *See* HEP Br. 11. For example, this is not a case where “the Legislature is silent” on the process for EPMs. *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 252, ¶ 25 (App. 2015). Rather, the Legislature has provided a process for EPMs. *A.R.S. § 16-452*.

Similarly, AFL argues that the Legislature’s revision of § 41-1030 in 1992 merely “reiterated” the APA’s pre-existing provision stating that exemptions to the APA must be “express.” AFL Br. 12–13 (quoting Court of Appeals) (cleaned up). But that is not what the Legislature actually said. The following chart compares AFL’s view with statutory text:

AFL’s view of § 41-1030(A)	Text of § 41-1030(A)
“A rule is invalid unless it is . . . made and approved in substantial compliance with §§ 41-1021 through 41-1029 . . . <i>unless the agency or proceeding is expressly exempted.</i> ”	“A rule is invalid unless it is . . . made and approved in substantial compliance with §§ 41-1021 through 41-1029 . . . <i>unless otherwise provided by law.</i> ”

AFL overlooks this “material variation in terms,” which signifies “a variation in meaning.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012).

AFL and HEP’s view would render superfluous the distinct language in § 41-1030(A). Before 1992, the APA already stated that Articles 1 to 5 did

not apply to “expressly exempted” agencies and proceedings. [A.R.S. § 41-1002\(A\)](#). So, it was already clear that § 41-1030 did *not* invalidate rules issued under an express exemption. Yet according to amici, when the Legislature revised § 41-1030, it was just repeating itself. But “[w]hen possible, we interpret statutes to give meaning to every word.” [State v. Serrato, 568 P.3d 756, 760, ¶ 18 \(Ariz. 2025\)](#) (cleaned up). As the text shows, the Legislature recognized that other statutes can specify rulemaking processes distinct from the APA, so the APA does not invalidate such rules. Amici ignore this sensible interpretation, instead urging a view that would cause the revision of § 41-1030 to “duplicate another provision.” Scalia & Garner, *supra*, at 174.

Notably, no amicus cites legislative history of the 1992 revision to § 41-1030. This is because legislative history sheds no light on the specific text at issue. The revision was part of a larger set of APA amendments. See [Laws 1992, ch. 239 \(40th Leg., 2nd Reg. Sess.\)](#). Some amendments required agencies that issue rules pursuant to an APA exemption to file copies with the Secretary. *E.g., id.*, § 1 (amending [A.R.S. § 41-1005](#)). As part of these amendments, Senator Furman proposed *also* revising § 41-1030 to state that rules that do not substantially follow APA rulemaking are invalid “unless otherwise provided by law.” See [Ariz. Senate, Furman Floor Amendment](#)

(Apr. 29, 1992). The record does not show what motivated Senator Furman to propose this specific revision. The legislative history “is not particularly helpful” on this point. *State v. Jurden*, 239 Ariz. 526, 530, ¶ 18 (2016).

AFL also argues that § 41-1030(A) must invalidate *all* rules made without an express APA exemption, or else the express exemption provision in § 41-1002(A) is “meaningless.” AFL Br. 12. Not so. Both provisions have meaning. Section 41-1002(A) recognizes that agencies and proceedings can be expressly exempt from several APA articles (including rulemaking). Section 41-1030(A), in turn, recognizes that even for non-exempt agencies and proceedings, the APA rulemaking article does not invalidate rules made under a distinct process that the Legislature otherwise provided.

B. For the 2023 EPM, the Secretary followed a unique rulemaking process that the Legislature “otherwise provided by law.”

The EPM is a “manual prepared for use as a guide for the conduct of elections.” *A.R.S. § 16-444(A)(6)*. Given the EPM’s unique function, the Legislature provided a unique process for adopting EPMs, including:

- 1) Consultation with stakeholders (County election officials);
- 2) Specific date of issuance (December 31 of each odd-numbered year);
- 3) Approval of two executive officials (Governor and Attorney General);

- 4) Specific date of submission to those officials (October 1 of same year);
- 5) Prescribed form (a manual); and
- 6) Regular recurrence (full updated manual every two years).

See [A.R.S. § 16-452\(A\), \(B\)](#).

The process of APA rulemaking differs dramatically. Under the APA:

- 1) Agencies must issue a notice of proposed rulemaking, including the “exact wording” of the rule.
- 2) Agencies are not required to affirmatively “consult” with anyone, much less a specific set of officials. Rather, agencies must allow people to submit comments (and, upon request, to participate in oral proceedings).
- 3) There is no specific date by which agencies must issue rules. Indeed, if an agency makes a “substantial” change, the process restarts.
- 4) The Governor does not participate. Instead, either the Governor’s Regulatory Review Council or the Attorney General reviews. If the Attorney General reviews, it is only for specific criteria and in a relatively short time.
- 5) Rules become part of Arizona’s Administrative Code, not a “manual.”

There is no requirement that agencies produce a full update every two years.

See [A.R.S. §§ 41-1001\(1\), 41-1022-25, 41-1044, 41-1052, 41-1057](#).

The amici do not dispute that the EPM process differs from APA rulemaking. And these differences show that the Legislature “otherwise provided by law” a process for adopting EPMs. [A.R.S. § 41-1030\(A\)](#). The term “otherwise” means “[i]n a different way; in another manner.” *Otherwise*, [Black’s Law Dictionary](#) (12th ed. 2024). It can also mean “[t]o the contrary; differently.” *Id.* As this Court has observed elsewhere, the clause “otherwise provided by law” is triggered when the Legislature enacts some “other ‘law’ to the contrary.” *May v. Ellis*, 208 Ariz. 229, 231, ¶ 11 (2004).

Here, the process for adopting EPMs, when compared with APA rulemaking, provides different (or contrary) answers to key questions:

- With whom must the Secretary communicate while drafting the EPM, and in what manner?
- Which executive officials must review the EPM, and what is the nature and timeline of their review?
- In what form must the EPM be issued, and for whom is it issued?
- If a major development affecting elections occurs after public comment but before the EPM is final, how should the Secretary proceed?

The differing answers to these questions confirm that the Legislature “otherwise provided by law” a process for EPMs. [A.R.S. § 41-1030\(A\)](#).

To be sure, two of the amici assert that it is *possible* for the Secretary to follow both the EPM-specific process and APA rulemaking when adopting an EPM. Specifically, AFL asserts that this dual approach is “practically feasible” (AFL Br. 8, 11), and CEC asserts that the Secretary “could use emergency rulemaking” to overcome practical difficulties (CEC Br. 11–13).

These assertions are incorrect, as explained in Arg. § II.C below. For now, it is enough to point out that these assertions use the wrong legal standard. Whether the Legislature has “otherwise provided by law” a process for adopting EPMs, [A.R.S. § 41-1030\(A\)](#), does not depend on whether it is *literally impossible* to comply with both. Rather, it depends on whether the statutory process for adopting EPMs is different from APA rulemaking. And it clearly is. For these reasons, EPMs adopted under the EPM-specific process established in A.R.S. § 16-452 are not invalid under the APA.

The RNC does not dispute that the Secretary followed the EPM-specific process in § 16-452 when adopting the 2023 EPM. Generally, neither do the amici.¹ Thus, the APA does not invalidate the 2023 EPM.

¹ The Pinal Officials suggest that the Secretary failed to sufficiently consult with them in 2023. See Pinal Officials’ Br. 3. The Secretary strongly disagrees. In any event, amici may not enlarge issues on appeal. [Vangilder v. Arizona Dep’t of Revenue](#), 252 Ariz. 481, 493, ¶ 46 (2022).

II. Alternatively, the Legislature has “expressly” provided that EPMs need not follow APA rulemaking.

A. There are more than two ways in which the Legislature can “expressly” provide that APA rulemaking does not apply.

Apart from whether the Legislature “otherwise provided by law” a process for EPMs, *see* [A.R.S. § 41-1030\(A\)](#), this Court may inquire whether the Legislature “expressly” provided that APA rulemaking does not apply to EPMs, *see* [A.R.S. § 41-1002\(A\)](#), (B). For example, the Legislature may have “expressly exempted” EPMs from the APA. [A.R.S. § 41-1002\(A\)](#). Or, if the EPM process conflicts with the APA, the Legislature may have “expressly provide[d]” that the EPM process “supersede[s].” [A.R.S. § 41-1002\(B\)](#).

Several amici frame this inquiry too narrowly. They point out that, in other contexts, the Legislature has declared within the APA that the APA does not apply to an agency or proceeding ([A.R.S. § 41-1005\(A\)](#)), or has specified in another statute that APA rulemaking does not apply (*e.g.*, [A.R.S. § 16-974\(D\)](#)). This much is true. But then the amici suggest that these are the *only* ways in which the Legislature can expressly provide that the APA does not apply. *See* Legislative Leaders’ Br. 1; HEP Br. 10–11; AFL Br. 5–6.

This Court has rejected a similar restrictive view. In *City of Phoenix v. Glenayre Electronics, Inc.*, the Court considered whether the Legislature had

“expressly and definitely declared” that a statute of repose superseded a conflicting statute. [242 Ariz. 139, 143, ¶ 14 \(2017\)](#) (citation omitted). Although the Legislature had previously expressed such an intent using one of two methods, the Court explained that the Legislature “was not required to” follow those methods and could instead use more general language to “make[] clear that the statute of repose controls over other, potentially conflicting state laws.” *Id.* at 143–44, ¶¶ 15–16.

Here too, in considering whether the Legislature has “expressly” provided that APA rulemaking does not apply to EPMs, this Court should not require the Legislature to specifically mention EPMs in the APA, nor to specifically mention the APA in § 16-452. There are other possibilities.

B. The Legislature expressly established a separate process for EPMs, in an article that expressly supersedes conflicting laws.

The Legislature has repeatedly stated that EPMs are adopted “pursuant to” the process in § 16-452—without mentioning the APA. *See* [A.R.S. §§ 16-168\(I\); 16-246\(G\); 16-315\(D\); 16-341\(H\); 16-411\(B\)\(5\)\(b\), \(K\); 16-449\(A\); 16-452\(C\); 16-542\(A\), \(E\), \(I\); 16-543\(A\), \(B\), \(C\); 16-544\(B\); 16-579\(A\)\(2\), \(E\); 16-602\(B\); 16-926\(A\); 16-938\(B\); 19-118\(A\); 19-121\(A\)\(5\); 19-205.01\(A\)](#). This multitude of statements shows that the Legislature has been

express—i.e., has “[c]learly and unmistakably communicated” the process that EPMs must follow. [Express, Black’s Law Dictionary \(12th ed. 2024\)](#).

Tellingly, the amici ignore these statements. They make no attempt to explain why these statements do not render the Legislature’s intent express.

Moreover, the Legislature placed the EPM-specific process in a statutory article that expressly supersedes conflicting laws: “Any provision of law that conflicts with this article does not apply to the elections in which electronic tabulating devices are used.” [A.R.S. § 16-444\(B\)](#). This Court has interpreted similar statutory language as showing a broad intent to supersede. See [Glenayre Elecs., Inc., 242 Ariz. at 144, ¶¶ 17–18](#) (interpreting the clause “[n]otwithstanding any other statute”). Similarly, the U.S. Supreme Court has deemed an exclusivity provision in a federal statute as expressly superseding the federal APA, even though it did not mention the APA. [Marcello v. Bonds, 349 U.S. 302, 310 \(1955\)](#).

The amici ignore this express legislative intent to supersede conflicting laws. They do not dispute that elections in Arizona use “electronic tabulating devices” within the meaning of [§ 16-444\(B\)](#). Nor do they dispute that EPMs are “for the conduct of elections by an approved electronic voting system.” [A.R.S. § 16-444\(A\)\(6\)](#).

The Legislature’s decision to place the EPM-specific process in a statutory article that expressly supersedes any law “that conflicts with this article,” [§ 16-444\(B\)](#), is especially significant because there are clear conflicts between the EPM process and APA rulemaking. To take three examples:

1. There are “deadline related conflicts,” as the superior court noted. APP016. Former Secretary Bennett agrees, explaining that the APA process is both “incompatible with the process for creating an accurate, uniform EPM” and “irreconcilable with the reality of election law.” Bennett Br. 9–14.

2. There are conflicts in Executive Branch approval. Whereas EPMs require approval from *both* the Governor and Attorney General after nearly three months of review, the APA requires review by *either* the Governor’s Regulatory Review Council or the Attorney General—and when the Attorney General reviews, the scope and timeline are limited. Compare [A.R.S. § 16-452\(B\)](#) with [A.R.S. §§ 41-1044, -1052, -1057](#).

3. The EPM is a self-contained “manual” to guide election officials, whereas rules under the APA are in Arizona’s Administrative Code. Compare [A.R.S. § 16-444\(A\)\(6\)](#) with [A.R.S. § 41-1012\(A\)](#). It would be odd to see a manual like the EPM published in the Code, which consists of numbered regulations. And this difference has broader implications. For

example, normally if an agency wishes to amend a rule, the agency may seek to change a specific Code provision. *See* [A.R.S. § 41-1022\(A\)](#). But the EPM process does not contemplate such targeted revisions. Instead, a full manual issues every two years. [A.R.S. § 16-452\(B\)](#). That is why the RNC argues that the remedy here is to invalidate the *entire* 2023 EPM. The excessiveness of that proposed remedy is another sign of conflict between the two processes.

For these reasons, the Legislature has “expressly” provided that EPMs need not follow APA rulemaking. EPMs are exempt ([§ 41-1002\(A\)](#)), or alternatively, the EPM article supersedes conflicting laws ([§ 41-1002\(B\)](#)).

C. The attempts by amici to downplay conflicts are unpersuasive.

Some of the amici offer responses, but none is persuasive. AFL asserts that it is “practically feasible” for the Secretary to comply with both the EPM-specific process and APA rulemaking. AFL Br. 8, 11. This is not true, as both Secretary Fontes and former Secretary Bennett have explained. *See* Pet. 10–15; Bennett Br. 10–14. Indeed, former Secretary Bennett (who oversaw three different EPMs) warns that following both processes would be “extremely burdensome and practically impossible.” Bennett Br. 11.²

² To the extent the Court has doubt on this factual issue, the Court should not resolve the issue conclusively at the pleading stage. The superior

Moreover, the APA itself, when describing conflicts with other statutes, does not define conflict in terms of whether compliance with multiple statutory processes is “practically feasible.” Rather, the APA recognizes that conflict may arise if another statute merely “diminish[es]” an agency’s duties under the APA. [A.R.S. § 41-1002\(B\)](#). Here, the Secretary’s obligation to follow the EPM-specific process in § 16-452 at least “diminishes” his duty to follow APA rulemaking (if such a duty exists). And in such cases, the APA yields to the conflicting statute if the conflicting statute “expressly” supersedes. [A.R.S. § 41-1002\(B\)](#). Here, the EPM chapter expressly supersedes conflicting laws, as explained above. [A.R.S. § 16-444\(B\)](#); accord *Glenayre Elecs., Inc.*, 242 Ariz. at 143–44, ¶¶ 14–18.

AFL also argues that the Governor’s role in EPMs creates no conflict with the APA, because that is just “one additional step” according to an Attorney General opinion from 1979. AFL Br. 14 (quoting ROA 39 ep 43). But this argument oversimplifies the extent of the conflict, described above. Regardless, the Attorney General opinion cited by AFL was not about the

court dismissed the RNC’s complaint for failure to state a claim, so the case has not benefited from testimony of lay or expert witnesses. See APP020. If the Court deems factual development important, the Court should remand.

EPM. Indeed, the opinion went on to explain that “if the Legislature had intended to exempt these rules from the APA, it would have done so specifically *by establishing an alternative procedure.*” ROA 39 ep 43 (emphasis added). That is what the Legislature has done with the EPM process.

CEC makes the novel argument that the Secretary could resolve timing conflicts between the EPM process and the APA by invoking the APA’s “emergency” rulemaking procedure in A.R.S. § 41-1026. CEC Br. 11-13. This untested idea fails to solve the problem for at least two reasons.

First, emergencies are, by their nature, sudden or unforeseen. *See Emergency, Black’s Law Dictionary (12th ed. 2024)* (“sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm”). Here, however, it is entirely foreseeable that, if the Secretary is required to follow APA rulemaking for EPMs, timing problems will routinely arise. *See Bennett Br. 10-15.* The fact that CEC is proposing an emergency tool to solve foreseeable routine problems confirms that APA rulemaking is a poor fit for EPMs.

Second, emergency rulemaking is an inadequate solution because emergency rules are only “valid for one hundred eighty days.” [A.R.S. § 41-1026\(D\)](#). And EPMs are issued by the end of the year preceding a general

election. [A.R.S. § 16-452\(B\)](#). Thus, an emergency rule issued on, say, December 31, 2025, would expire in mid-2026 – shortly before the first major election the EPM is designed for. An emergency rule can be extended another 180 days, but only if, among other things, “[t]he agency makes the rule as a proposed rule.” See [A.R.S. § 41-1026\(D\)\(4\)](#). Thus, CEC’s supposed solution would require the Secretary to routinely use emergency rulemaking that would last a fraction of an EPM’s lifespan, and then do regular rulemaking in even-numbered years, contrary to the Legislature’s direction to issue EPMs by the end of “each odd-numbered year.” [A.R.S. § 16-452\(B\)](#).

Finally, the Pinal Officials’ brief, if anything, *illustrates* conflict between the EPM process and APA rulemaking. The Pinal Officials complain that the Secretary added a provision to the 2023 EPM without consulting counties. See Pinal Officials’ Br. 3–7. This complaint is a preview of what would occur if the Secretary tried to comply with both § 16-452 and APA rulemaking. If the Secretary were to consult county officials while drafting an EPM (under § 16-452), and then invite public comment (under the APA), and *then* make a substantial change based on public comment, some county officials may feel they deserve *another* round of consultation under § 16-452, in addition to the extra round of public comment under the APA. At some point,

enough must be enough. The purpose of § 16-452 is to have a valid updated EPM for election officials as they begin an election year. Imposing APA rulemaking would contravene that purpose.

III. Other principles of statutory interpretation confirm that EPMs need not follow APA rulemaking.

A. For decades, the consensus among Arizona officials has been that APA rulemaking does not apply to EPMs.

No one disputes that since 1972, Secretaries—with approval of Governors and Attorneys General—have issued EPMs pursuant to the unique process in A.R.S. § 16-452, not the APA. In fact, former Secretary Bennett explains that his tenure (2009–2015) was the first time an EPM was open to public comment at all—and he did this because he valued public input, not because he thought that the APA applied. Bennett Br. 5–6, 9–10.

Likewise, the Legislature has repeatedly amended the process for adopting EPMs. See [Laws 1985, ch. 292, § 1 \(37th Leg., 1st Reg. Sess.\)](#); [Laws 1993, ch. 98, § 31 \(41st Leg., 1st Reg. Sess.\)](#); [Laws 2019, ch. 99, § 1 \(54th Leg., 1st Reg. Sess.\)](#). Each time, the Legislature did not state that the APA applies—even though it has specified that other rules are adopted “pursuant to” the APA. *E.g.*, [A.R.S. §§ 5-104\(S\), 20-2121\(B\), 20-2539, 20-3604\(A\), 32-1404\(D\), 37-336\(A\), 42-5044\(D\), 43-1011\(E\), 44-330, 44-3131\(A\), 49-1203\(C\)](#).

The amici do not deny this history. Instead, amicus AFL points out that historical practice alone does not make conduct lawful. *See* AFL Br. 15–16. That much is true. But “the contemporary and consistent views of a coordinate branch of government can provide evidence of the law’s meaning.” *Bondi v. VanDerStok*, 145 S. Ct. 857, 874 (2025). This is because statutory language does not exist in a vacuum, but is understood and applied by government officials. Thus, when interpreting well-established statutes, this Court considers whether consensus has developed among officials. *See* Secretary’s Suppl. Br. 12–14 (citing cases). Here, the consensus has been that EPMs need not follow APA rulemaking.

Amicus HEP offers a different understanding of “consensus,” urging the Court to follow practices in other states. According to HEP, “most States” require election rules to comply with some version of APA rulemaking absent an “express statutory exemption.” HEP Br. 3. But HEP’s generalization about other states is unhelpful for two basic reasons.

First, when it comes to administrative procedure, states have differing laws. For example, here the RNC relies on general provisions of Arizona’s APA enacted in 1986, based on the 1981 Uniform Model State Administrative Procedure Act. *See* [Laws 1986, ch. 232, § 4 \(37th Leg., 2nd Reg. Sess.\)](#) (adding

A.R.S. § 41-1002). Although HEP asserts that most other states' laws "are based on the same model act as Arizona's APA" (HEP Br. 3), that is not true. Rather, as one scholar explains: "In the thirty years following the adoption of the 1981 [Model Act], New Hampshire, Arizona, and Washington adopted many of its provisions, and several other states drew ideas from the Act, but there has *not* been widespread adoption of the [Act]." [John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 St. Mary's L.J. 241, 262–63 \(2012\)](#) (emphasis added) (citations omitted). Thus, generalizations about how other states interpret their own APAs are not helpful without a careful comparison of statutory text—which HEP omits.

This apples-to-oranges problem is especially egregious here, where perhaps the most consequential statutory provision in the entire case is the clause "unless otherwise provided by law" in A.R.S. § 41-1030(A). Arizona added this clause in 1992, and it marked a *departure* from the 1981 Model Act. Indeed, HEP does not say whether any other state has this clause. Thus, consideration of how other states generally interpret their own APAs sheds no light on how this Court should interpret Arizona's APA here.

Second, when it comes to election procedure, states *also* have differing laws. Indeed, Arizona’s EPM process seems fairly unique. For example, a Westlaw search for the term “elections procedures manual” yields 29 case results, all of which are either Arizona cases or federal cases that mention Arizona’s EPM. Similarly, a Westlaw search for the term “instructions and procedures manual” (the term in A.R.S. § 16-452(B)) yields 14 case results, and 12 are either Arizona cases or federal cases that mention Arizona’s EPM.

The uniqueness of Arizona’s EPM further exacerbates the apples-to-oranges problem here. Notably, HEP does not say whether any other state has a statutory process for adopting EPMs like A.R.S. § 16-452. And even if such a process exists elsewhere and resembles § 16-452, HEP does not say whether that process supersedes conflicting laws like A.R.S. § 16-444(B) does. For this additional reason, consideration of how other states generally interpret their own APAs is especially unhelpful here, where this Court is interpreting both Arizona’s APA and Arizona’s unique EPM process.

HEP identifies only one instance where, it says, the “same issue” was addressed in another state: a Louisiana Attorney General opinion from 1998. HEP Br. 6–7. Even then, HEP misstates the opinion’s conclusion. The opinion concludes: “In sum, whether the manual you are proposing falls

under the APA is a factual determination that we are not able to make at this time.” [1998 WL 553063](#), at *2. This opinion is unhelpful here too.

B. Any consideration of statutory purpose must include not only purposes of the APA, but also purposes of the EPM statute.

In general, the amici argue that the purposes underlying Arizona’s APA—government transparency and public participation—are important. *See* Legislative Leaders’ Br. 4–12; Pinal Officials’ Br. 3–7; HEP Br. 12–18; CEC Br. 17–18; AFL Br. 9–11. The Secretary agrees. That is why he invited 15 days of public comment for the 2023 EPM, as well as 30 days for the forthcoming 2025 EPM.

But any consideration of purpose must *also* include the purposes served by the EPM-specific statute. That statute is intended to ensure that election officials in Arizona have a valid updated manual at the start of each election cycle, to maintain “the maximum degree of correctness, impartiality, uniformity and efficiency” in election procedure. [A.R.S. § 16-452\(A\), \(B\)](#). As former Secretary Bennett explains, election officials depend on the EPM “to deliver fair and accurate election results,” as well as “to train elections workers and implement the requirements and guidance of the EPM in time for the upcoming election year.” Bennett Br. 8–9.

If the only thing the RNC sought were a 30-day period of public comment for each EPM, that may well be workable. But the RNC instead seeks to impose the *entire* APA rulemaking process on the EPM. As former Secretary Bennett explains, that approach “is unrealistic, undermining the legislative purpose of the EPM.” Bennett Br. 10.

Amicus HEP goes even farther, asserting that the EPM binds “the public” and suggesting that the public has a due process right to be heard. HEP Br. 12–18. This Court has never stated that EPM rules bind the public, nor should it. The EPM is “a guide for the conduct of elections,” intended for election officials. [A.R.S. § 16-444\(A\)\(6\)](#). Although violating a rule adopted pursuant to A.R.S. § 16-452 is a misdemeanor, *see* [A.R.S. § 16-452\(C\)](#), that penalty is intended for election workers, not the general public. And none of the cases cited by HEP suggests that a due process right applies here.

Two amici also raise disputes they have had with the Secretary about specific provisions in the 2023 EPM. *See, e.g.,* Legislative Leaders’ Br. 10–12; Pinal Officials’ Br. 4–12. This is not the right forum to litigate such disputes. *See* [Vangilder v. Arizona Dep’t of Revenue](#), 252 Ariz. 481, 493, ¶ 46 (2022) (amici may not enlarge issues on appeal). And, to date, the Secretary has been largely successful in litigation over specific provisions in the 2023 EPM.

IV. If the Court concludes that EPMs must follow APA rulemaking, it should apply that decision prospectively only.

A. The Court retains inherent authority to apply civil opinions prospectively only, even when a statute prescribes a remedy.

This Court has discretion to apply civil opinions prospectively only.

Turken v. Gordon, 223 Ariz. 342, 351, ¶ 44 (2010); see also, e.g., *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 363–66 (1932) (explaining that state courts may choose between retroactive and prospective application of decisions without violating due process). Amicus CEC argues, however, that A.R.S. § 41-1030(A) strips the Court of its discretion by stating that rules adopted without substantial compliance with APA rulemaking are “invalid” unless otherwise provided by law. See CEC Br. 7–11. This argument mistakenly relies on the general principle that, when the Legislature specifies a remedy, courts do not imply *additional* remedies. See *id.* 9–10.

That principle has no application here, because this appeal involves a threshold question: whether APA rulemaking governs the EPM process *at all*. Even if this Court rules that APA rulemaking governs the EPM process, the Court may also decide that its ruling was not previously foreshadowed and should apply only to future EPMs. And then, in disputes about future EPMs, the remedy under the APA would be a declaration of invalidity.

Turken, a case about the Gift Clause, is instructive. The Gift Clause states that neither the State nor its subdivisions “shall ever” make a donation or grant to private parties (with certain exceptions). [Ariz. Const. art 9, § 7](#). Although the Court held that the government’s conduct “quite likely violates the Gift Clause,” the Court applied its decision “prospectively only,” [223 Ariz. at 344, ¶ 1](#), despite the Gift Clause’s mandatory text and that “provisions of this Constitution are mandatory,” [Ariz. Const. art. 2, § 32](#).

The same logic applies to statutes. Tellingly, CEC cites no case holding that a court loses discretion over the temporal reach of its rulings if the case involves a statute with a remedy. Such a limit would make little sense. Indeed, looking at other states, “some observers have noted that prospective rulings have been *more common* in the case of new statutory interpretations than in the case of new common law rules.” [Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 Am. J. Compl. L. 37, 65–66 \(2014\)](#) (emphasis added) (citations omitted).³ This Court should decline CEC’s unsupported invitation to limit its own discretion here.

³ Moreover, a statute that purports to limit this Court’s discretion about its own rulings would raise separation-of-powers concerns. The Court’s discretion flows not from any statute, but from our Constitution’s vesting of the “judicial power” in the courts. See [Ariz. Const. art. 6, § 1](#).

B. The traditional factors weigh in favor of a prospective-only ruling, and such a ruling would set no dangerous precedent.

Contrary to CEC's view (*see* CEC Br. 14–16), all three traditional factors weigh in favor of a prospective-only ruling.

First, regarding reliance, there is no dispute that the decades-long consensus has been that EPMs must follow the process established in A.R.S. § 16-452, not APA rulemaking. *See* Arg. § III.A above. Indeed, even this Court has described the EPM process by referring to § 16-452, not the APA. *See, e.g., Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020).

Although the Court of Appeals reached a contrary decision earlier this year, no one disputes that the Secretary had already begun work on the 2025 EPM by that time. *See* Secretary's Suppl. Br. 19. Moreover, the Court of Appeals merely reversed the superior court's dismissal and remanded for "further proceedings." APP013 ¶ 28. It did not, for example, direct entry of judgment against the Secretary. And of course, the Secretary had the right to petition for review by this Court. So the case was far from over.

Second, regarding statutory purpose, retroactive application here would undermine the purposes of the EPM statute, which is to ensure that election officials have a valid updated manual at the start of each election

cycle. *See* Arg. § III.B above. And, although retroactive application may further some of the APA’s purposes, the Court should keep in mind that the public at least had 15 days to comment on a draft of the 2023 EPM (and, more recently, 30 days to comment on a draft of the forthcoming 2025 EPM).

Third, regarding inequity, CEC states that invalidating the 2023 EPM could leave the 2019 EPM as the operative valid manual. *See* CEC Br. 13. But the 2019 EPM does not account for the significant election law changes of the last six years.

To take just one example: In 2022, the Legislature substantially changed Arizona’s laws governing how voters prove citizenship and residency. Those changes triggered eight federal lawsuits that ultimately yielded a complex federal injunction, which has been partially affirmed and partially vacated by the Ninth Circuit and also partially stayed by the U.S. Supreme Court. *See* [Mi Familia Vota v. Fontes](#), 129 F. 4th 691, 702–06 (9th Cir. 2025) (summarizing facts and procedural history); *id.* at 732–33 (Bumatay, J., dissenting) (same). Appellate litigation in that case remains ongoing. County election officials need to know how to apply these laws and court rulings for elections in 2026. The 2023 EPM and forthcoming 2025 EPM address this subject at length. The 2019 EPM does not.

Pima County offers additional (non-exhaustive) examples and, like the Secretary, urges the Court to take a prospective-only approach to any ruling that the APA applies. *See* Pima County Br. 5-10. That way, election officials can “continue to rely upon established and contemporary rules.” *Id.* 10-11.

Finally, contrary to CEC’s assertions (CEC Br. 16-17), a prospective-only ruling here would not set a “dangerous precedent.” This case is unique. Indeed, CEC identifies no other agency that has, for decades, been following a specific rulemaking process set by the Legislature—with the approval of Governors and Attorneys General (not to mention legislatures and courts)—only to discover, during its most recent rulemaking process, that the Court of Appeals sees the APA differently. In that sort of rare situation, the Court can (and should) exercise its discretion to issue a prospective-only ruling.

CONCLUSION

This Court should reverse the Court of Appeals and affirm the Superior Court’s dismissal of the RNC’s claim that the 2023 EPM is invalid. If, however, this Court affirms the Court of Appeals, this Court should clarify that its opinion applies only to EPMs issued after 2025.

RESPECTFULLY SUBMITTED this 3rd day of October, 2025.

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