

Christopher O. Murray (*pro hac vice*)
Julian R. Ellis, Jr. (*pro hac vice*)
FIRST & FOURTEENTH PLLC
2 N. Cascade Avenue, Suite 1430
Colorado Springs, Colorado 80903
Telephone: (719) 428-4937
Email: chris@first-fourteenth.com;
julian@first-fourteenth.com

Kurt Altman (#015603)
KURT M. ALTMAN, P.L.C.
ALTMAN LAW + POLICY
12621 N. Tatum Boulevard, Suite 102
Phoenix, Arizona 85032
Telephone: (602) 491.0088
Email: admin@altmanaz.com

Attorneys for Respondents

IN THE SUPREME COURT OF ARIZONA

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,

Intervenors-Defendants-
Appellees.

No. CV-2025-0089-PR

Court of Appeals Division Two
No. 2 CA-CV 2024-0241

Maricopa County Superior Court
No. CV2024-050553

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Every other year, the secretary of state is tasked with “prescrib[ing] rules” consistent with statutory law for administering federal and state elections in the Elections Procedures Manual (EPM). The rules in the EPM are of general applicability and carry the force of law. Violation of these rules is a crime. A.R.S. § 16-452(C). The Court of Appeals straightforwardly held that because the Secretary and the Department of State are agencies covered by the APA, they must comply with the APA’s rulemaking process when promulgating the EPM.

The Secretary would have this Court grant review of this unremarkable holding based on his view that compliance with both the APA and A.R.S. § 16-452 (the EPM statute) is impractical—and therefore excused—and any public participation in the promulgation of the EPM is gratuitous. This Court should decline the Secretary’s invitation. The APA and established caselaw are unambiguous: absent an express exemption, which is missing here, the APA applies to all rulemakings by covered agencies and supersedes any statute that conflicts with it.

ISSUES PRESENTED TO BUT NOT DECIDED BY COURT OF APPEALS

Respondents agree with the Secretary that in the event review is granted, the Court may need to decide whether eight specific provisions of the 2023 EPM are invalid because they are contrary to or in excess of statute.

REASONS TO DENY REVIEW

I. The Court of Appeals’ Correctly Applied Settled Law Governing the APA and Agency Rulemaking.

The Court of Appeals’ decision did not break new ground. Consistent with the APA and existing caselaw, it applied the APA (which governs all agency rulemakings not expressly exempted from its requirements) to the Secretary (a non-exempt agency) when he promulgates the EPM (a set of rules). Nothing about this straightforward and routine holding warrants this Court’s review.

The APA outlines the requirements agencies must follow in prescribing rules consistent with their delegated authority. The requirements include notice, a 30-day public-comment period, the right to be heard in an oral proceeding, among other provisions. Recognizing the APA must interact with many other statutes, like the statutes delegating authority to covered agencies, the APA defines its applicability and relation to other law in its second section. A.R.S. § 41-1002. As to “applicability,” subsection 1002(A) speaks in absolutes: the APA “appl[ies] to *all* agencies and *all* proceedings not *expressly exempted*.” (Emphases added.) Here, there is no dispute that (1) the Secretary and his Department are agencies subject to the APA; (2) the 2023 EPM is a statement of general applicability that prescribes law or policy—the APA’s definition of a rule; and (3) neither the APA nor the EPM Statute *expressly* exempts EPM rulemakings from the APA.¹ The Court of Appeals’ decision recognizing that the Secretary must comply with the APA when he promulgates the EPM is the necessary and wholly unremarkable result.

¹ As he did below, the Secretary attempts to create an “express” exemption out of a supposed conflict between the APA and the EPM statute. But, as this Court has recognized, a conflict creates, at best, an implied exemption. *Cf. Varela v. FCA US LLC*, 505 P.3d 244, 251 (Ariz. 2022) (discussing “[e]xpress preemption” and stating, “it occurs when federal lawmakers *explicitly state* that related state law is preempted,” as opposed to implied preemption, which includes conflict preemption (emphasis added)). As explained in the following sections, there is no conflict between the APA and the EPM statute; but, even if there were, the APA expressly provides that it prevails in the event of any conflict.

The Court of Appeals’ opinion is also in keeping with its own well-established decisional law applying the APA. For example, in *Arizona State University ex rel. Arizona Board of Regents v. Arizona State Retirement System*, the Court of Appeals described subsection 1002’s mandate as “unambiguous language” that “cannot [be] ignore[d].” 349 P.3d 220, 226 (Ariz. App. 2015). “Section 41-1002 provides that in the absence of an express exemption, agencies must comply with the APA.” *Id.* The Court of Appeals held the exact same thing 21 years prior in *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System Administration*, where it recognized that subsection 1002 means that “[a]ll agencies are subject to the APA unless they are expressly exempted.” 895 P.2d 133, 140 (Ariz. App. 1994).

Because the Court of Appeals’ decision is an uncontroversial and straightforward application of the APA to a covered agency rulemaking, there is no reason for this Court to grant review.

II. Any Conflict Between the APA’s Rulemaking Process and the EPM Statute Must Be Resolved in Favor of the APA.

The Secretary’s petition argues that the Court of Appeals’ decision will “[u]ndermine the [a]dministration of [e]lections in Arizona by [c]ompromising the EPM” (Pet. at 7), primarily on the basis of a supposed conflict between the APA and the requirements of the EPM statute. Even if such a conflict existed—it does not as explained in Section III below—the APA expressly provides that it is the EPM statute that must give way. Thus, the Secretary’s claimed conflict cannot change the result of the case: that the EPM is subject to the APA.

Subsection 41-1002(B) governs the APA’s relation to other law. It 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.” (Emphases added.) Subsection 1002(B) tracks verbatim subsection 1-103(b) of the 1981 Uniform Model State Administrative Procedure Act (1981 Model Act) (available on Westlaw).² The 1981 Model Act “assur[es] a uniform minimum procedure to which all agencies will be held in the conduct of their functions.” 1981 Model Act, Prefatory Note. The Act imposes duties “in addition to those ... imposed by other statutes. And, except to the extent another statute expressly provides that it shall take precedence over this Act, the [1981] Model Act ... take[s] precedence over all other statutes, including those subsequently enacted, that appear to diminish a right created or a duty imposed by the Model Act.” *Id.* As this Court has recently reminded litigants, “when a statute is based on a uniform act, [Arizona courts] assume that the legislature intended to adopt the construction placed on the act by its drafters” and the “[c]ommentary to such a uniform act is highly persuasive unless erroneous or contrary to the settled policy of Arizona.” *Cao v. PFP Dorsey Invs., LLC*, 545 P.3d 459, 466 (Ariz. 2024) (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 26 P.3d 510, 515 (Ariz. 2001)).

² The Arizona Legislature adopted the 1981 Model Law in 1986. *See* 1986 Ariz. Sess. Laws, ch. 232 (1986).

Published Court of Appeals decisions also recognize the effect of Subsection 1002(B). 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 of Appeals 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 of Appeals 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.*

The effect of subsection 1002(B) is thus unmistakable: even if the Secretary were correct (he is not) that some part of the EPM statute could not be complied with as a result of application of the APA, it is the EPM statute that must give way to allow full compliance with the APA. The Court of Appeals’ decision correctly recognized this. (APP011-012.) As such, any conflict between the APA and the EPM statute is no reason to grant review.

III. The EPM Statute Does Not Conflict with the APA.

The Secretary contends there is a conflict between the APA and the EPM statute because compliance with the APA’s rulemaking process is impractical.

Specifically, the EPM statute mandates that the Secretary promulgate a new EPM at the conclusion of each odd-numbered year and obtain approval from both the attorney general and governor. (Pet. at 12–14.) According to the Secretary, if substantial modifications to a draft EPM become necessary due to notice-and-comment feedback, the process might need to restart, potentially requiring multiple rounds of notice and comment before the October 1 deadline for submission to the governor and attorney General. (*Id.*) This argument is flawed, however, as there exists no restriction on when the Secretary may *start* the rulemaking process.

The EPM statute only requires that the Secretary prescribe the rules required “in an official instructions and procedures manual” that must be issued “not later than December 31 of each odd-numbered year immediately preceding the general election.” A.R.S. § 16-452(B). While the manual must be submitted to the governor and attorney general by October 1 of odd-numbered years, *id.*, the Secretary is free to complete the rulemaking process and then submit the manual to the governor before this date. Even if the rulemaking process under the APA would take multiple rounds of notice and comment, as suggested by the Secretary, 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.

Indeed, there is no reason to expect an APA-compliant process for adopting the EPM will take this long. All that is required is 30 days’ advance publication in the register, § 41-1013(A), and a 30-day comment period, § 41-1023(B). Absent an oral proceeding (which could be held on 30 days’ notice, § 41-1023(D)), the

Secretary will be free to submit the rule to the attorney general and the governor. Of course, it is true that the attorney general or governor themselves could require a restart of this process by rejecting the proposed EPM. §§ 41-1044(E), 16-452(B). But this sort of rejection has already happened in recent history, and because of the practice of past secretaries (and past attorneys general and governors) to wait until the last minute, such rejections have resulted in the failure to adopt an updated EPM. *See* Elizabeth Troutman, *Arizona 'Election Bible' Stalls as Ducey Refuses to Sign Unfinished Work*, The Center Square (Jan. 5, 2022), <https://bit.ly/4do5gYN>.

Although subsection 1002(B) requires any conflict between the EPM statute and the APA to be resolved in favor of the APA, here there is no conflict between the statutes. Hence, there is no reason for this Court to grant review.

CONCLUSION

Because the Court of Appeals correctly applied settled law in requiring the Secretary to follow the APA's rulemaking process when he adopts the rules in the EPM, this Court should deny the petition for review.

DATED this 7th day of May 2025.

FIRST & FOURTEENTH PLLC

By: /s/ Christopher O. Murray
Christopher O. Murray
Julian R. Ellis, Jr.
2 N. Cascade Avenue Suite 1430
Colorado Springs, Colorado 80903

KURT M. ALTMAN, P.L.C.
ALTMAN LAW + POLICY

By: /s/ Kurt Altman
Kurt Altman
12621 N. Tatum Boulevard,
Suite 102
Phoenix, Arizona 85032

Attorneys for Respondents