

THE SUPREME COURT
STATE OF ARIZONA

Republican National Committee;
Republican Party of Arizona, LLC; and
Yavapai County Republican Party,

Plaintiffs/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-Defendants/Petitioners.

Supreme Court No.
CV-25-0089-PR

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

Maricopa County Superior Court
No. CV 2024-050553

**AMICUS BRIEF OF HONEST ELECTIONS PROJECT
IN SUPPORT OF PLAINTIFFS-RESPONDENTS
FILED WITH WRITTEN CONSENT OF ALL PARTIES**

Andrew W. Gould (No. 013234)
Alexandria Saquella (No. 036331)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
2555 E. Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
asaquella@holtzmanvogel.com

Elizabeth Price Foley (FL Bar No.
0092380)*
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
119 S. Monroe Street, Suite 500
Tallahassee, FL 32301
(850) 270-5938
efoley@holtzmanvogel.com
**Pro Hac Vice Application
Forthcoming*

Counsel for Amicus Curiae The Honest Elections Project

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
I. There is Broad Bipartisan Consensus that the APA’s Notice and Comment Rulemaking Processes Apply to Election Rules and Regulations.....	3
A. States Other than Arizona.....	4
B. Arizona	8
II. Election Rules Ensure the Proper Functioning of Democracy Itself and Must Satisfy Due Process	12
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. State</i> , 14 Ariz. 458 (Ariz. 1913)	17
<i>Am. Trust Adm’rs, Inc. v. Sebelius</i> , 44 P.3d 1253 (Kan. 2002)	7
<i>Ariz. Pub. Integrity All. v. Fontes</i> , 250 Ariz. 58 (Ariz. 2020)	3, 12
<i>Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.</i> , 237 Ariz. 246 (Ariz. 2015)	8, 11
<i>Arizona Dep’t of Aeronautics v. Fred Harvey Transp. Co.</i> , 114 Ariz. 401 (Ariz. 1977)	8
<i>Cabarrus Cnty. Bd. of Educ. V. Dep’t of State Treasurer</i> , 839 S.E.2d 814 (N.C. 2020)	5
<i>Cafeteria and Rest. Workers Union v. McElroy</i> , 367 U.S. 886 (1961)	13, 15
<i>California v. Azar</i> , 911 F.3d 558 (9th Cir. 2018)	15
<i>Carondelet Health Servs. v. Arizona Health Care Cost Containment Sys. Admin.</i> , 182 Ariz. 221 (App. 1994)	8, 9, 11
<i>Chavez v. Brewer</i> , 222 Ariz. 309 (App. 2009)	16
<i>Chiles v. Dep’t of State, Div. of Elections</i> , 711 So.2d 151 (Fla. Ct. App. 1998)	6
<i>County of San Diego v. Bowen</i> , 82 Cal. Rptr.3d 818 (Cal. Ct. App. 2008)	6

<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008) (plurality opinion)	14
<i>Democratic Exec. Comm. of Fla. v. Lee</i> , 915 F.3d 1312 (11th Cir. 2019)	14
<i>Dep’t of Educ. v. Bennett</i> , 864 F.2d 655 (9th Cir. 1988)	12
<i>Donald J. Trump for President, Inc. v. Sec’y of Pa.</i> , 830 F. App’x 377 (3d Cir. 2020)	14
<i>Emmett McLoughlin Realty, Inc. v. Pima Cnty.</i> , 212 Ariz. 351 (App. 2006)	13
<i>Fairfield Cnty. Bd. of Comm’rs v. Nally</i> , 34 N.E.3d 873 (Ohio 2015)	7
<i>Gonzales v. Ariz. State Bd. of Nursing</i> , 255 Ariz. 132 (App. 2023)	12
<i>Green Party of Haw. v. Nago</i> , 378 P.3d 944 (Haw. 2016)	6
<i>Hanlen v. Gessler</i> , 333 P.3d 41 (Conn. 2014)	6
<i>Home Health Serv., Inc. v. South Carolina Tax Comm’n</i> , 440 S.E.2d 375 (S.C. 1994)	5
<i>Huck v. Haralambie</i> , 122 Ariz. 63 (Ariz. 1979) (en banc)	13
<i>Jones v. Sterling</i> , 210 Ariz. 308 (Ariz. 2005)	17
<i>Joseph v. S.C. Dep’t of Labor, Licensing and Regul.</i> , 790 S.E.2d 763 (S.C. 2016)	7

<i>LaChance v. Erickson</i> , 522 U.S. 262 (1998)	13
<i>Lee Way Motor Freight, Inc. v. Indus. Comm’n</i> , 27 Ariz. App. 243 (App. 1976)	9
<i>Marcello v. Bonds</i> , 349 U.S. 302 (1955)	15
<i>Maxi Drug North, Inc. v. Comm’r, N.H. Dep’t of Health and Human Servs.</i> , 907 A.2d 974 (N.H. 2006)	4
<i>Metromedia, Inc. v. Dir., Div. of Tax’n</i> , 478 A.2d 742 (N.J. 1984)	7
<i>Miller v. Bd. of Supervisors of Pinal Cnty.</i> , 175 Ariz. 296 (Ariz. 1993) (en banc)	15
<i>Morton v. Ruiz</i> , 415 U.S. 199 (1974)	4
<i>OPAWL-Bldg. AAPI Feminist Leadership v. Yost</i> , 118 F.4th 770 (6th Cir. 2024)	14
<i>Parker v. Gorczyk</i> , 787 A.2d 494 (Vt. 2001)	15
<i>Renck v. Superior Ct. of Maricopa Cnty.</i> , 66 Ariz. 320 (Ariz. 1947)	17
<i>Republican Nat’l Comm. v. Fontes</i> , ___ Ariz. ___, 566 P.3d 984 (App. 2025)	2, 9, 10, 11
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	15
<i>Rodriguez v. Serv. Lloyds Ins. Co.</i> , 997 S.W.2d 248 (Tex. 1999)	5

<i>Samiuddin v. Nothwehr</i> , 243 Ariz. 204 (Ariz. 2017)	13
<i>State ex rel. Brnovich v. City of Tucson</i> , 251 Ariz. 45 (Ariz. 2021)	16
<i>State v. Moore</i> , 257 Ariz. 324 (App. 2024)	13, 15, 17
<i>V Bar Ranch LLC v. Cotton</i> , 233 P.3d 1200 (Colo. 2010)	4
<i>Valentine v. Board of License Comm'rs</i> , 435 A.2d 459 (Md. Ct. App. 1981)	4
<i>Ward v. Carter</i> , 90 N.E.3d 660 (Ind. 2018)	7

Constitutional Provisions

Ariz. Const. art. 2, § 2	16, 17
Ariz. Const. art. 2, § 21	3, 4, 16
Ariz. Const. art. 7, § 12	3, 4, 16

Statutes

A.R.S. § 3-109.03	11
A.R.S. § 16-452	2, 3, 8, 9, 11, 12
A.R.S. § 16-974(D)	11
A.R.S. § 17-255.01	11
A.R.S. § 20-1241.09	11
A.R.S. § 36-736	11
A.R.S. § 41-1001	8, 9
A.R.S. § 41-1002	10, 11, 14

A.R.S. § 41-1005	4, 10
A.R.S. § 41-1023	10
A.R.S. § 41-1030	10, 11, 14
Ala. Code § 17-1-3	6
Alaska Stat. § 15.15.010	6
Ariz. Stat. Ann. § 41-1023(B)	2
Del. Code Ann. tit. 29, § 10161	6
Iowa Code § 47.1	6
N.M. Stat. Ann. § 1-1-1	6
Okla. Stat. tit. 26, § 2-107 (2024)	6
R.I. Gen. Laws § 42-35-18(b)(7)	7
Tenn. Code Ann. § 4-5-106(c)	7
Utah Code Ann. § 20A-3a-106	6
Va. Code Ann. § 2.2-4002	7
Wyo. Stat. Ann. § 22-2-121	7
Rules	
Ariz. R. Civ. P. 16	1
Other	
94-270-2 Me. Code R. § 2(1)	6
<i>Ark. Att’y Gen. Op. No. 118</i> (1990), 1990 WL 593684	6
<i>La. Att’y Gen. Op. No.</i> 307 (1998), 1998 WL 822146	6, 7

Ill. Admin. Code tit. 26, § 125.620	6
Or. Admin. R. 165-001-0005	6

INTEREST OF *AMICUS CURIAE*

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends fair and reasonable measures that protect the integrity of voting. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, which implicates the ability of the public to obtain reasonable notice of, and have a meaningful opportunity to participate in, the formation or alteration of election rules adopted by the Arizona Secretary of State.¹

INTRODUCTION

Elections are the lifeblood of democracy. The public's confidence in elections is predicated on an open and transparent process that invites the widest possible public participation and scrutiny in the formation of rules governing those elections. When election rules fail to satisfy these basic criteria of fairness, election results are viewed with suspicion, democracy is eroded, and a risk of chaos and government instability is fueled.

¹ Pursuant to ARCAP 16(b)(3), the undersigned certifies that no other persons or entities, aside from the Honest Elections Project, have provided any financial resources for the preparation of this brief.

The question here is whether Arizona’s Elections Procedures Manual (“EPM”), promulgated by the Secretary of State (“Secretary”), must abide by the procedures specified in the Arizona Administrative Procedures Act (“APA”), including a public comment period of “at least thirty days.” *See* Ariz. Stat. Ann. § 41-1023(B). The Arizona Court of Appeals answered this question “yes,” concluding that because Arizona’s legislature has provided no express exemption from the APA, the EPM is subject to the APA’s rulemaking procedures. *Republican Nat’l Comm. v. Fontes*, __ Ariz. __, 566 P.3d 984, 993 (App. 2025). In addition, because the Secretary allowed for only a fifteen-day period for public comment on the EPM, the Court of Appeals held that the Secretary’s promulgation of the EPM did not substantially comply with the APA’s notice requirement. *Id.* at 993-94.

To protect the public’s ability to meaningfully participate in the formulation of Arizona’s election rules, this Court should affirm the Court of Appeals’ decision. The rules contained in the EPM are arguably the most important rules promulgated by any administrative agency in Arizona. They provide the rules for democracy itself, specifying the manner in which all elections in the State are held, and implementing the Arizona legislature’s goal of “achiev[ing] and maintain[ing] the maximum degree of correctness, impartiality, uniformity and efficiency” for elections. Ariz. Rev. Stat. § 16-452(A). They govern how ballots are “produc[ed], distribut[ed], collect[ed], count[ed], tabulat[ed] and store[d].” Ariz. Rev. Stat. § 16-

452(A). They directly and palpably affect Arizonan’s state constitutional right to vote in free and equal elections that are secured against abuses. Ariz. Const. art. 2, § 21, art. 7, §12. They affect the rights of private parties, who are subject to criminal punishment when they violate EPM rules. Ariz. Rev. Stat. § 16-452(C). As this Court recently acknowledged, the EPM “has the forc of law.” *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (Ariz. 2020).

As this brief shows, most States, in a bipartisan fashion, apply their APAs (most of which are based on the same model act as Arizona’s APA) to election standards that constitute a “rule” or “regulation,” so long as the legislature has provided no express statutory exemption. Given the centrality of election rules to the proper functioning of democracy, adherence to APA procedures, including 30-day public comment period, is essential to ensuring basic fairness in the adoption of such rules.

I. There is Broad Bipartisan Consensus that the APA’s Notice and Comment Rulemaking Processes Apply to Election Rules and Regulations

The APA’s notice and comment rulemaking procedures serve a critical function in modern republics, where administrative agencies, not just legislatures, play a significant role in formulating law-like rules that bind the public. Given this purpose, it is essential that the APA apply to the formulation of election rules. Doing so preserves the public’s right to notice of, and participation in, the formulation of

rules directly affecting their right to vote in free and fair elections. Ariz. Const. art. 2, § 21; *id.* at art. 7, § 12.

A. States Other than Arizona

At its core, the APA provides a uniform framework of procedures that agencies must follow to ensure procedural due process for those affected. Every state (and the federal government) has its own version of the APA, but all states' versions universally impose some version of notice and comment rulemaking. The APA's overriding purpose is to provide processes by which "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

Whether the APA applies initially turns on two questions: (1) is the entity taking action an "agency" and if so, (2) is the action being taken a "rule." *Maxi Drug North, Inc. v. Comm'r, N.H. Dep't of Health and Human Servs.*, 907 A.2d 974 (N.H. 2006). *Valentine v. Board of License Comm'rs*, 435 A.2d 459, 466 (Md. Ct. App. 1981). When there is a conflict between the APA and agency-specific statutes, the APA serves as a "gap-filler," applying to all agency rulemaking unless expressly exempted. *V Bar Ranch LLC v. Cotton*, 233 P.3d 1200, 1205 (Colo. 2010).

Like Arizona, most state legislatures have provided for express exemptions from the APA, either within the APA itself or another statute. *See* A.R.S. § 41-1005.

When there is uncertainty, however, the APA applies because it is designed by the legislature to be a background rule of procedural fairness for all law-like agency actions. Indeed, there is a strong presumption in favor of adopting rules of general applicability through the APA's formal rule-making processes because those processes ensure that affected persons receive adequate notice and a meaningful opportunity to be heard. *See, e.g., Cabarrus Cnty. Bd. of Educ. V. Dep't of State Treasurer*, 839 S.E.2d 814, 825 (N.C. 2020); *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999). As one state supreme court put it, if there is a "close question" whether agency action is subject to the APA, the agency "should promulgate the ruling as a regulation in compliance with the APA." *Home Health Serv., Inc. v. South Carolina Tax Comm'n*, 440 S.E.2d 375, 378 (S.C. 1994).

Amicus conducted a comprehensive review of state APAs, contained in Exhibit A, which reveals a broad, bipartisan consensus: Election-related rules and regulations must comply with the APA unless explicitly exempted. Even in jurisdictions that have not specifically adjudicated the APA's application to election rules, courts consistently emphasize the importance of applying APA standards to any agency rule that has the force of law. Arizona should be no exception.

As Exhibit A shows, state courts that have considered the APA's applicability to election rules have uniformly concluded that it does apply, in the absence of an express statutory exemption, when those rules have general applicability and bind

the public by implementing or interpreting law enforced by the agency. *See, e.g., Green Party of Haw. v. Nago*, 378 P.3d 944, 954-55, 957-59 (Haw. 2016); *Hanlen v. Gessler*, 333 P.3d 41, 48-49 (Conn. 2014); *County of San Diego v. Bowen*, 82 Cal. Rptr.3d 818, 831, 834 (Cal. Ct. App. 2008); *Chiles v. Dep’t of State, Div. of Elections*, 711 So.2d 151, 154-55 (Fla. Ct. App. 1998). Other states have made clear, in statutes and regulations, that the APA’s notice and comment procedures apply to election rules, including Alabama, Alaska, Delaware, Illinois, Iowa, Maine, New Mexico, Oklahoma, Oregon, and Utah. *See* Ala. Code § 17-1-3; Alaska Stat. § 15.15.010; Del. Code Ann. tit. 29, § 10161(a)(47); Ill. Admin. Code tit. 26, § 125.620; Iowa Code § 47.1(1); 94-270-2 Me. Code R. § 2(1); N.M. Stat. Ann. § 1-1-1(B)(2); Okla. Stat. tit. 26, § 2-107 (2024); Or. Admin. R. 165-001-0005; Utah Code Ann. § 20A-3a-106. Still other states, like Louisiana and Arkansas, have Attorney General (“AG”) opinions acknowledging the APA’s application to election rules. La. Att’y Gen. Op. No. 307 (1998), 1998 WL 822146; Ark. Att’y Gen. Op. No. 118 (1990), 1990 WL 593684. Indeed, the Louisiana AG’s opinion addressed the same issue as in this case—namely, whether the APA applies to an election manual issued by the state’s Department of Elections & Registration. The Louisiana AG concluded that any “rules” contained in the election manual must be promulgated via APA notice and comment rulemaking procedures. La. Att’y Gen. Op. No. 307 (1998), 1998 WL 822146. Specifically, the Louisiana AG posed the following questions: “[W]ill the

manual ascertain the facts upon which the law operates, or upon which the law is to be applied and/or enforced? By writing this manual, are you establishing rules, which fill in the details of the law?” The AG then concluded, “If the answer to either of these questions is yes, then you must follow the APA in writing the manual.” *Id.*

Election rules are exempt from the APA in only a handful of states, and only because the legislature has provided an express statutory exemption. *See, e.g.*, R.I. Gen. Laws § 42-35-18(b)(7); Va. Code Ann. § 2.2-4002(B)(8). Other states have express statutory exemptions for certain narrow categories of election activities, but only activities that are *not related* to rulemaking. *See, e.g.*, Tenn. Code Ann. § 4-5-106(c); Wyo. Stat. Ann. § 22-2-121(d).

Moreover, as Exhibit A shows, in states that have not specifically addressed the APA’s applicability to election rules, caselaw nonetheless makes clear that the APA attaches to all agency rules or regulations of general applicability that have binding effect. *See, e.g., Ward v. Carter*, 90 N.E.3d 660, 662-65 (Ind. 2018); *Am. Trust Adm’rs, Inc. v. Sebelius*, 44 P.3d 1253, 1259-60 (Kan. 2002); *Metromedia, Inc. v. Dir., Div. of Tax’n*, 478 A.2d 742, 750-51 (N.J. 1984); *Fairfield Cnty. Bd. of Comm’rs v. Nally*, 34 N.E.3d 873, 879-81 (Ohio 2015); *Joseph v. S.C. Dep’t of Labor, Licensing and Regul.*, 790 S.E.2d 763, 772-73 (S.C. 2016).

Thus, a comprehensive review of nationwide applications of the APA shows that election-related rules and regulations must comply with the APA, unless

expressly exempted by the legislature.

B. Arizona

The Arizona APA defines a “rule” as an agency statement of “general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements for an agency.” A.R.S. § 41-1001(21). An “agency” is defined as “any board, commission, department, officer or other administrative unity of this state, included the agency head.” A.R.S. § 41-1001(1). The statute directs the Secretary to “prescribe *rules*” relating to elections in an “official instructions and procedures manual” Ariz. Rev. Stat. § 16-452(A)-(B) (emphasis added).

Given the Arizona APA’s broad definition of a “rule,” this Court and lower Arizona courts have unsurprisingly applied the APA to actions by Arizona agencies that affect private rights via a rule of general applicability that implements, interprets or prescribes law or policy. *See Arizona Dep’t of Aeronautics v. Fred Harvey Transp. Co.*, 114 Ariz. 401, 403 (Ariz. 1977); *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 250-52 ¶¶ 14-21 (Ariz. 2015); *Carondelet Health Servs. v. Arizona Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 226-28 (App. 1994); *Lee Way Motor Freight, Inc. v. Indus. Comm’n*, 27 Ariz. App. 243, 244 (App. 1976).

In this case, there is no dispute that the EPM consists of “rules” as defined by the APA. Ariz. Rev. Stat. § 41-1001(21). Indeed, there could be no reasonable conclusion otherwise: Arizona’s legislature repeatedly characterized the EPM as “rules.” Ariz. Rev. Stat. § 16-452(A)-(C). Additionally, there is no dispute that the Secretary of State’s office is an “agency” under the APA. Ariz. Rev. Stat. § 41-1001(1). As the Court of Appeals correctly gleaned, at issue “is whether the adoption and promulgation of the EPM, under A.R.S. § 16-452, is subject to the rulemaking process under the APA.” *Republican Nat’l Comm*, __ Ariz. __, 566 P.3d at 991 ¶ 19.

Whenever a proposed agency action falls within the broad definition of a “rule” set forth in the APA, “the rule must be enacted in accordance with the provisions of the Administrative Procedure Act.” *Lee Way Motor Freight*, 27 Ariz. App. at 244. “APA rulemaking requires public notice, and the opportunity for public participation and comment, 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.*, 182 Ariz. at 226. Accordingly, all “rules” must conform to the APA’s notice and comment rulemaking procedures.

As relevant here, the Arizona APA requires an agency to publish a notice of proposed rulemaking and “afford persons the opportunity to submit in writing statements, arguments, data and views on the proposed rule” for at “least thirty days”

after such notice is published. Ariz. Rev. Stat. § 41-1023(B). Yet, the Secretary of State only provided 15 days' notice before implementing the EPM. With only half of the time required by the APA, the RNC was "prejudiced by the abbreviated comment period," and deprived of the proper notice and opportunity to be heard that is guaranteed by the APA and due process. *Repub. Nat'l Comm.*, 566 P.3d at 993 ¶ 27. As the APA clearly states, "[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...unless otherwise provided by law." A.R.S. § 41-1030.

The Arizona legislature has expressly commanded that the APA apply unless it has provided an explicit statutory exemption, either within the APA itself or another statute. Ariz. Rev. Stat. § 41-1002(A) (APA applies to "all agencies and all proceedings not *expressly exempted*.") (emphasis added). The Court of Appeals correctly held that no exemption exists here, as neither the APA nor the EPM statute expressly exempts the EPM from the APA's rulemaking process. *Republican Nat'l Comm.*, ___ Ariz. ___, 566 P.3d at 992 ¶ 23. The APA exemptions are clearly listed in Ariz. Rev. Stat. § 41-1005, and do not mention either the EPM or the Secretary of State. Moreover, the APA operates "in addition to" any duties imposed upon agencies by other statutes. Ariz. Rev. Stat. § 41-1002(B). It further declares, "To 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.” *Id.* (emphasis added). Here, the EMP statute contains no language exempting the manual from the APA. A.R.S. § 16-452.

A “statute’s silence does not exempt [an agency] from the APA’s rulemaking procedure.” *Ariz. State Univ.*, 237 Ariz. at 252 ¶ 23; *accord Carondelet Health Servs.*, 182 Ariz. at 228. Nor does the language “unless otherwise provided by law” under A.R.S. § 41-1030 allow *courts* to create an implied exemption. As the Court of Appeals understood, the Arizona APA’s plain language makes clear that only the legislature, not the courts, may exempt agency rulemaking from the APA. *Republican Nat’l Comm.*, 566 P.3d at 992 ¶ 22.

Reading all relevant statutes together (A.R.S. § 41-1002; A.R.S. § 41-1030(A); A.R.S. § 16-452) demonstrates that any exemption from the APA can only be granted by the Arizona legislature. The legislature knows how to exempt an agency from the APA when it intends to do so. *See, e.g.,* Ariz. Rev. Stat. § 16-974(D); *id.* at § 3-109.03 (C); *id.* at § 17-255.01 (D); *id.* at § 20-1241.09(B); *id.* at § 36-736(A). Where no such exemption is found, however, the APA applies. Accordingly, the EPM is not exempt from the APA. The Secretary of State’s failure to follow APA procedures resulted in the promulgation of the EPM without adequate notice, public input, transparency, or accountability. This is precisely the harm the APA was designed to prevent.

II. Election Rules Ensure the Proper Functioning of Democracy and Must Satisfy Due Process

The Arizona legislature has declared, in the APA, that all “rules” must be promulgated via notice and comment rulemaking, including a 30-day public comment period. The APA is the expression of the Arizona legislature’s belief that to satisfy due process, the public must have at least 30 days to provide input on rules that bind them. It is the courts’ role to implement that legislative intent. As the Arizona Court of Appeals recently put it, “Arizona law guarantees due process under the Administrative Procedures Act,” and in particular, “[b]y requiring a 30-day notice period, the [Arizona APA] guarantees . . . due process” by providing affected persons a meaningful opportunity to be heard. *Gonzales v. Ariz. State Bd. of Nursing*, 255 Ariz. 132, 136 ¶ 15 (App. 2023); *see also Dep’t of Educ. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988) (federal APA “codifies [due process] fairness guarantees for the administrative process.”).

The rules contained in the EPM are significant in scope and effect. They have general applicability, defining the manner and means by which all elections are held and conducted in the State. They affect the rights and liberty of private parties, who are subject to punishment when they are violated. Ariz. Rev. Stat. § 16-452(C). As this Court has recognized, the EPM “has the force of law.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16. Because of this, adherence to the APA’s rulemaking processes is especially important.

The “core” of due process is adequate notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, 355 ¶ 17 (App. 2006). Notice must be “reasonably calculated” to apprise interested parties of the government’s actions and allow them to present objections. *Huck v. Haralambie*, 122 Ariz. 63, 65 (Ariz. 1979) (en banc) (citing *Mullane v. Cent. Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950)). While this Court understandably has not specified a minimum period to lodge objections in a meaningful fashion, it has acknowledged that procedural due process is a “flexible” concept that demands reasonable notice and opportunity to be heard “as the particular situation demands.” *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211, ¶ 20 (Ariz. 2017) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Similarly, the U.S. Supreme Court has instructed that when analyzing due process, courts “must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Cafeteria and Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); accord *State v. Moore*, 257 Ariz. 324, 328 ¶ 14 (App. 2024).

Here, “the government function involved” is elections. The EPM establishes the rules governing how elections are conducted in Arizona, and consequently, they are the most important rules of all; they are the heartbeat of our democracy. As the Supreme Court has acknowledged, “[P]ublic confidence in the integrity of the

electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion). “[P]rotecting public confidence in elections is deeply important—indeed, critical—to democracy.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019); *accord OPAWL-Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 781 (6th Cir. 2024). It is no exaggeration to say, therefore, that “[f]ree, fair elections are the lifeblood of our democracy.” *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 381 (3d Cir. 2020). If election rules are perceived by the public as unjust or unfair, election results will be questioned and political chaos unleashed.

Given the critical importance of public trust in elections, there should be a strong presumption in favor of more process, not less, when promulgating the rules that govern elections, such as those in the EPM. The plain language of the Arizona APA makes this presumption clear: The APA applies “to all agencies and all proceedings *not expressly exempted*,” Ariz. Rev. Stat. § 41-1002(A) (emphasis added), and consequently “[a] rule is *invalid unless* it is . . . made and approved in substantial compliance with [notice and comment rulemaking] . . . unless otherwise *provided by law*.” Ariz. Rev. Stat. § 41-1030(A) (emphasis added). Absent an *express statutory exemption*, therefore, the Arizona legislature has made clear that all rules, from all agencies, must derive from notice and comment rulemaking. Exceptions to

the APA's notice-and-comment rulemaking processes "are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 319 (1955); accord *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Under the plain language of Sections 41-1002(A) and 41-1030(A), an exemption from Arizona's APA must be express, not implied.

The legislature has provided no express exemption for the EPM, and the Secretary's argument about inconvenience does not empower courts to create an exemption by judicial fiat. Nothing in the APA will "impinge[] on the [Secretary's] day-to-day decision-making authority; the APA does not concern itself with daily individual decisions of the [Secretary], except as they are related to rules of general applicability. To the extent that the [Secretary] promulgates new policies of general applicability, they are subject to the rulemaking procedure. The APA goes no further." *Parker v. Gorczyk*, 787 A.2d 494, 498-99 (Vt. 2001).

Moreover, "the nature of the . . . private interest that has been affected" by the EPM, *Cafeteria and Rest. Workers Union*, 367 U.S. at 895; *Moore*, 257 Ariz. at 328 ¶ 14, is Arizonans' constitutional right to vote. The right to vote "constitutes the essence of American democracy." *Miller v. Bd. of Supervisors of Pinal Cnty.*, 175 Ariz. 296, 301 (Ariz. 1993) (en banc); accord *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (voting is "the essence of a democratic society."). The rules contained in the EPM palpably and directly affect Arizonans' state constitutional rights relating to voting, evinced in three separate constitutional provisions. First, Article 2, Section

21 of the Arizona Constitution protects the right to “free and equal” elections. Ariz. Const. art. 2, §21 (“All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”). This right commands that Arizona elections be unencumbered by improper influence and that each ballot be as effective as every other ballot. *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009). Second, the EPM rules also directly affect Article 7, Section 12 of the Arizona Constitution, which states that “[t]here shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.” Ariz. Const. art. 7, § 12. This provision guarantees “fair and honest election-related procedures, which are necessary to ensure voters’ trust.” *See State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 32 (Ariz. 2021).

And finally, the EPM rules implicate Article 2, Section 2 of the Arizona Constitution, which declares, “All political power is inherent in the people.” Ariz. Const. art. 2, § 2. This provision “is not a mere metaphor that sounds pleasing to the ear [I]t is a vital principle, adhered to in the formation of the government of this state.” *Renck v. Superior Ct. of Maricopa Cnty.*, 66 Ariz. 320, 326 (Ariz. 1947); *Allen v. State*, 14 Ariz. 458, 467 (Ariz. 1913). It bespeaks the need for courts to respect the authority of the people and their elected representatives to determine the rules that bind, particularly when those rules relate to elections. *See Renck*, 66 Ariz. at 325-26.

As this Court recognized in *Allen*, Article 2, Section 2 reflects the principle that “[i]n this state the Legislature and the people constitute the lawmaking power.” *Allen*, 14 Ariz. at 467. Because all political power originates with the people, they have a right to notice and an opportunity to be heard, consistent with due process, before any law-like agency rules can have legal effect.

Taken together, these state constitutional provisions demonstrate the importance of elections, the rules governing those elections, and the need for robust public participation in the formulation of those election rules. The Arizona legislature has made clear that the EPM is not exempted from the APA, and courts must protect Arizonans’ right to meaningfully participate in the creation of rules governing their fundamental right to vote. The EPM must be adopted in a manner that is consistent with this fundamental right, avoiding any constitutional doubt. *Jones v. Sterling*, 210 Ariz. 308, 314-15 ¶ 27 (Ariz. 2005) (constitutional avoidance canon is applied to rules).

Because the “government function involved” in the EPM is elections and “the private interest that has been affected by” the EPM is the right to vote, *McElroy*, 367 U.S. at 895; *Moore*, 257 Ariz. at 328 ¶ 14, due process demands adherence to the APA’s notice and comment rulemaking procedures. The rules governing elections impact the functioning of democracy itself; they ensure that elections take place in a uniform, fair, and transparent manner. For this reason, abiding by APA’s notice-

and-comment rulemaking processes is critical. Rules specifying how elections are conducted are the most important rules of all, and it would be absurd and dispiriting to discard the APA when it is needed most.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted this 22nd day of September 2025 by:

/s/ Andrew W. Gould

Andrew W. Gould (No. 013234)
Alexandria Saquella (No. 036331)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
2555 E. Camelback Road, Suite 700
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
asaquella@holtzmanvogel.com

/s/ Elizabeth Price Foley

Elizabeth Price Foley (FL Bar No.
0092380)*
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
119 S. Monroe Street, Suite 500
Tallahassee, FL 32301
(850) 270-5938
efoley@holtzmanvogel.com
*Pro Hac Vice Application
Forthcoming

*Attorneys for Amicus Curiae
The Honest Elections Project*