

SUPREME COURT OF ARIZONA

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Plaintiffs/Appellants,

v.

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

Defendant/Appellee/Petitioner,

and

VOTO LATINO; et al.;

Intervenor-Defendants/Appel-
lees.

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

Court of Appeals,
Div. 2, No. 2 CA-CV
24-0241

Maricopa County
Superior Court, No.
CV2024-050553

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Amicus Curiae Brief of America First Legal Foundation

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Table of Contents

Introduction	1
Interest of Amicus Curiae	2
Argument.....	3
I. Arizona law unequivocally requires express exemption from APA coverage.....	3
A. The Legislature is aware of the express exemption requirement.	5
II. There is no conflict between the EPM statute and APA.....	6
A. APA procedures are “in addition to” other statutory requirements.....	7
B. Simultaneous compliance with both statutes is practically feasible.	8
III. Public participation in election rulemaking serves fundamental democratic values.	9
A. The Secretary’s abbreviated process undermined the APA’s purposes.	11
IV. The Secretary’s arguments for implied conflict are without merit.	12
V. The “otherwise provided by law” clause does not create implied exemptions.	12
B. Timeline constraints do not justify implied exemptions.	13
C. Executive branch approval requirements are not incompatible.	14
D. Historical practice cannot override statutory requirements.....	15

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Arizona Pub. Integrity All. v. Fontes</i> , 250 Ariz. 58 (2020)	15
<i>Carondelet Health Servs., Inc. v. AHCCCS</i> , 182 Ariz. 221 (App. 1994)..	9, 10
<i>Chavez v. Brewer</i> , 222 Ariz. 309 (App. 2009)	10
<i>Daou v. Harris</i> , 139 Ariz. 353 (1984)	5
<i>State v. Garza Rodriguez</i> , 164 Ariz. 107 (1990)	5
<i>UNUM Life Ins. Co. of Am. v. Craig</i> , 200 Ariz. 327 (2001).....	7

U.s. Supreme Court Cases

<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	10
<i>NLRB v. Noel Canning</i> , 573 U.S. 513 (2014)	15

Federal Cases

<i>Maricopa County Superior Court</i> , No. CV2024-05055.....	1
<i>Supreme Court</i> , No. CV-25-0089.....	1

State Constitutional Provisions

Ariz. Article V § 1	4
---------------------------	---

Statutes

A.R.S. § 16-452.....	1, 4, 6, 7, 8
A.R.S. § 16-974.....	6
A.R.S. § 17-255.01.....	6
A.R.S. § 36-736.....	6
A.R.S. § 41-1001.....	4
A.R.S. § 41-1002.....	4, 12
A.R.S. § 41-1030.....	10, 12

Introduction

This case presents a fundamental question about the scope of public participation in Arizona’s election rulemaking process. The Arizona Court of Appeals correctly held that the 2023 Elections Procedures Manual (EPM) was subject to the Arizona Administrative Procedure Act (APA) and that the Secretary of State failed to substantially comply with the APA’s rulemaking requirements by only allowing for a fifteen-day public-comment period for the EPM. This decision properly applied well-established Arizona law requiring express exemptions from APA coverage and rejected the Secretary’s attempt to create an implied exemption based on supposedly irreconcilable conflicts between the two statutory schemes.

The Secretary’s petition fundamentally mischaracterizes both the legal requirements and the practical relationship between A.R.S. § 16-452 (the EPM statute) and the APA. There is no conflict between these statutes that would justify departing from Arizona’s express exemption

requirement. Instead, the statutes operate harmoniously, with the EPM statute providing specialized requirements that supplement—rather than replace—the APA’s fundamental rulemaking procedures. The Secretary’s abbreviated process directly undermined the APA’s purposes even though he could have, and was legally required to, comply with both statutes.

AFL respectfully urges this Court to affirm the Court of Appeals’ decision for four key reasons: (1) Arizona law unequivocally requires express exemption from APA coverage; (2) the EPM statute and APA can be harmonized; (3) public participation in election rulemaking serves fundamental democratic values; and (4) the Secretary’s arguments for implied conflict are without merit.

Interest of Amicus Curiae

America First Legal Foundation (“AFL”) is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every

American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. AFL has a strong interest in ensuring that election administration rules—which affect the fundamental right to vote—are developed through processes that maximize transparency and public participation. AFL therefore has a substantial interest in the proper interpretation and application of Arizona’s statutory requirements governing the promulgation of the Elections Procedures Manual.¹

Argument

I. Arizona law unequivocally requires express exemption from APA coverage.

The Arizona Court of Appeals correctly applied the well-established rule that agencies cannot claim an implied exemption from APA

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

rulemaking requirements. As the court explained, “§ 41-1002 provides that all agencies—including the Secretary and his Department—are subject to the APA rulemaking process unless ‘expressly exempted.’” Op. ¶ 23. This holding builds upon definitive Arizona precedent establishing that the APA’s express exemption requirement cannot be circumvented through judicial creation of implied exemptions.

The Arizona Administrative Procedure Act (APA) “appl[ies] to *all* agencies and *all* proceedings not expressly exempted.” A.R.S. § 41-1002(A) (emphasis added). The APA defines “agency” to include “any board, commission, department, **officer** or other administrative unit of this state.” A.R.S. § 41-1001(1) (emphasis added). The Secretary of State is an officer of the State. Ariz. Const. art. V, § 1. Because there is no express APA exemption in the Election Procedures Manual (EPM) statute, A.R.S. § 16-452, the APA applies to the Secretary of State’s promulgation of the EPM.

A. The Legislature is aware of the express exemption requirement.

This Court “presume[s] that the legislature knows the existing laws when it enacts or modifies a statute.” *State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990) (quoting *Daou v. Harris*, 139 Ariz. 353, 357 (1984)). Applying that principle here means that the Legislature must be presumed to have been aware of the EPM statute when it adopted the express exemption requirement and that it chose not to expressly exempt the EPM statute when it adopted the express exemption requirement. And, it must be presumed to have been aware of the express exemption statute every subsequent time it amended the EPM statute and chose not to add an express exemption. Because the Legislature did not expressly exempt the EPM statute, the EPM is subject to the requirements of the APA.

Here, this Court does not even need to presume. The Legislature has demonstrated, over and over, that it is aware of the express exemption requirement and that it knows how to invoke it. The court of appeals correctly noted that “the legislature has expressly exempted an agency

from the APA” in two ways: “(1) by listing a number of exempted subject-matter specific rules and agencies within the APA in § 41-1005 titled Exemptions, and (2) by including express language in implementing statutes indicating they are exempt from title 41, chapter 6.” Op. ¶ 21 (cleaned up).

As the court of appeals correctly noted, examples of express exemptions include A.R.S. § 16-974(D) (exempting rules adopted by Citizens Clean Elections Commission), A.R.S. § 17-255.01(D) (exempting Game and Fish Department orders), and A.R.S. § 36-736(A) (exempting local health officer orders). The absence of any similar exemption language in A.R.S. § 16-452 confirms legislative intent to preserve APA protections for EPM rulemaking.

II. There is no conflict between the EPM statute and APA.

Arizona’s EPM statute and the APA operate harmoniously through established principles of Arizona statutory construction. This Court’s harmonization mandate in *UNUM Life Ins. Co. of Am. v. Craig*, requires that “when two statutes appear to conflict, whenever possible, we adopt

a construction that reconciles one with the other, giving force and meaning to all statutes involved.” 200 Ariz. 327, 333 ¶ 28 (2001) (citation omitted). Both A.R.S. § 16-452 and the APA relate to administrative rulemaking and can be harmonized through compliance with both statutes without rendering either statute superfluous.

A. APA procedures are “in addition to” other statutory requirements.

Section 41-1002(B) explicitly provides that APA procedures are “in addition to those created and imposed by other statutes.” In other words, the APA provides a minimum procedural floor that other statutes may supplement but cannot diminish absent express authorization. As the court of appeals correctly explained, “the potential impracticalities of abiding by both the APA and the EPM procedures ... do not equate to conflicts.” Op. ¶ 25.

When the court of appeals concluded that “the APA and EPM statutes impose duties on the Secretary that may require him to begin promulgating the EPM earlier, but they are not inconsistent, do not directly

conflict, and do not create impossible barriers to complying with both,” *id.*, it was following the Legislature’s command that administrative efficiency cannot justify bypassing statutory procedural requirements.

B. Simultaneous compliance with both statutes is practically feasible.

The Secretary’s timeline arguments lack merit and ignore the practical feasibility of dual compliance. A coordinated approach would allow the Secretary to:

- Begin EPM drafting in July-August with county consultation while filing a Notice of Proposed Rulemaking;
- Run the 30-day public comment period concurrently with the county consultation process in August-September;
- Review and incorporate comments alongside county input in September;
- Submit the final EPM to the Governor and Attorney General by the October 1 deadline required by A.R.S. § 16-452(B);
- Issue the EPM by December 31, following executive approval.

This timeline demonstrates that dual compliance enhances rather than diminishes procedural protections by combining specialized election expertise through county consultation with broad public participation through APA comment periods.

III. Public participation in election rulemaking serves fundamental democratic values.

Dual compliance provides superior procedural protections by combining the specialized election expertise available through county consultation with the broad public participation guaranteed by APA comment periods. This approach serves the core values underlying both statutes: specialized expertise in election administration and enhanced democratic accountability through multiple review mechanisms.

The Arizona Court of Appeals has correctly noted that APA rulemaking procedures exist “to ensure that those affected by a rule have adequate notice of the agency’s proposed procedures and the opportunity for input into the consideration of those procedures.” *Carondelet Health Servs., Inc. v. AHCCCS*, 182 Ariz. 221, 226 (App. 1994) (citation omitted). Election administration affects every Arizona citizen’s fundamental right to vote, counseling in favor of enhanced, not reduced, procedural protections.

The democratic importance of elections counsels strongly in favor of

maximum public participation in election rulemaking. As the court of appeals recognized here, “once issued, ‘the EPM has the force of law’ and any violation of a rule within it is punishable as a class two misdemeanor.” Op. ¶ 3. Rules carrying criminal penalties and governing the fundamental right to vote demand the highest level of procedural protection. *Chavez v. Brewer*, 222 Ariz. 309, 320 ¶ 36 (App. 2009) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)) (“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure”).

APA rulemaking procedures are designed to “facilitate and encourage public participation in the formulation of rules.” *Carondelet Health Servs., Inc.*, 182 Ariz. at 229. This purpose applies with particular strength to election rulemaking, given its impact on fundamental democratic rights. The substantial compliance standard in A.R.S. § 41-1030(A) permits and encourages dual compliance that enhances rather than diminishes procedural protections. The court of appeals correctly held that

the Secretary failed to substantially comply by only allowing for an abbreviated 15-day comment period for the EPM. Op. ¶ 27.

A. The Secretary’s abbreviated process undermined the APA’s purposes.

The court of appeals correctly found that the Secretary’s provision of only fifteen days for public comment—half the APA’s minimum requirement—could not constitute substantial compliance. Op. ¶ 27. As the court explained, “the RNC was prejudiced by the abbreviated comment period,” and therefore “we cannot say under the circumstances here that the 2023 EPM’s promulgation process fulfilled the APA’s purpose.” *Id.*

This holding was particularly compelling given that the RNC raised concerns about the “unnecessarily restrictive” timeframe and requested additional time, noting that it had only “preliminarily” identified issues in the “brief time” allotted for review. *Id.* The Secretary’s failure to accommodate this reasonable request undermined the fundamental APA principle of meaningful public participation.

IV. The Secretary's arguments for implied conflict are without merit.

The Secretary's supplemental brief advances several arguments attempting to justify departure from Arizona's express exemption requirement. These arguments fail to overcome the established legal framework governing APA applicability.

A. The "otherwise provided by law" clause does not create implied exemptions.

The Secretary argues that A.R.S. § 41-1030(A)'s phrase "unless otherwise provided by law" creates an alternative pathway for avoiding APA compliance without express exemption. AZSOS Suppl. Brief at 4-5. This interpretation is contrary to established Arizona law and would render meaningless the express exemption requirement in § 41-1002(A).

The court of appeals correctly held that this clause serves to "reiterat[e] § 41-1002's directive that any exemptions must be expressly made." Op. ¶ 23. The phrase clarifies that rules promulgated under express exemptions are not invalid for failing to comply with APA procedures, but it does not create a new category of implied exemptions. The

Court of Appeals correctly rejected attempts to “read into” this remedial provision an exemption mechanism that contradicts the APA’s foundational requirement for express exemptions. *Id.* ¶ 16.

B. Timeline constraints do not justify implied exemptions.

The Secretary argues that supposed conflicts between APA deadlines and EPM requirements justify finding an implied exemption. AZSOS Suppl. Brief at 14-16. This argument fails for several reasons.

First, as explained above in Section II.B, adequate time exists to complete the full APA rulemaking process.

Second, administrative convenience cannot override clear statutory requirements. As the court of appeals noted, “impracticalities do not equate to conflicts.” Op. ¶ 25. The APA’s purpose is to ensure adequate public participation in rulemaking, and this purpose cannot be sacrificed merely because agencies find compliance burdensome.

Third, the Secretary’s timeline arguments ignore the reality that election law changes throughout the two-year EPM cycle, requiring

updates regardless of when the process begins. The solution is proper planning and coordination, not abandonment of procedural protections.

C. Executive branch approval requirements are not incompatible.

The Secretary contends that the Governor's role in EPM approval creates an irreconcilable conflict with APA procedures. AZSOS Suppl. Brief at 14-16. This argument lacks merit. Section § 41-1002(B) explicitly provides that APA procedures are "in addition to those created and imposed by other statutes." The Governor's approval requirement under Section 16-452(B) is simply "one additional step in the rule-making process," as the Attorney General concluded in 1979. ROA 39 ep 43.

The court of appeals correctly recognized that the Secretary "does not explain how § 16-452 acts to diminish any rights created or duties imposed by the APA" or "how a conflict would result in § 16-452 superseding the APA when § 41-1002(B) provides for the opposite result." Op. ¶ 25. The executive approval requirement supplements rather than replaces APA procedures.

D. Historical practice cannot override statutory requirements.

The Secretary's argument that decades of non-compliance with APA requirements justify continued non-compliance is unavailing. AZSOS Suppl. Brief at 1-2, 11. Long-standing agency practice cannot override clear statutory mandates, particularly where the practice involves avoiding procedural protections designed to safeguard public participation.

The Secretary seems to be implicitly urging this Court to create a new doctrine of adverse possession for unlawful executive practices. This is wholly inappropriate. As this Court has explained, a party's "delay" in challenging an unlawful action "does not excuse the [public agency] from its duty to comply with the law." *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 65 ¶ 30 (2020). And as Justice Scalia has pointed out, there is no "adverse-possession theory of executive authority," *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment).

Moreover, the Secretary's historical practice argument cuts both

ways. The fact that previous Secretaries may have failed to comply with APA requirements does not establish that such compliance was unnecessary, but can just as easily be seen as merely demonstrating that the violation went unchallenged. The length of time that some unlawful practice has gone unchallenged does not magically transform into being lawful.

Conclusion

The Arizona Court of Appeals correctly held that the 2023 EPM was subject to APA rulemaking requirements and that the Secretary failed to substantially comply with those requirements. This holding properly applied established Arizona law requiring express exemptions from APA coverage and appropriately harmonized the EPM statute with APA requirements through a dual compliance approach.

The Secretary's arguments for implied exemption lack merit and would undermine fundamental principles of public participation in administrative rulemaking. Given the democratic importance of election

rules and their impact on citizens' fundamental voting rights, Arizona law requires maximum procedural protection through compliance with both the specialized EPM process and the APA's general rulemaking requirements.

AFL respectfully urges this Court to affirm the Court of Appeals' decision and reject the Secretary's petition for review.

RESPECTFULLY SUBMITTED this 22nd day of September 2025.

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