

ARIZONA SUPREME COURT

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,

VOTO LATINO; ARIZONA
ALLIANCE FOR RETIRED
AMERICANS; DEMOCRATIC
NATIONAL COMMITTEE; and
ARIZONA DEMOCRATIC PARTY,

Intervenors-Defendants-
Appellees.

No. CV-2025-0089-PR

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

Maricopa County Superior Court
No. CV2024-050553

BRIEF OF AMICUS CURIAE CENTER FOR ELECTION CONFIDENCE

(with written consent of Petitioner and Respondents)

Brunn (Beau) W. Roysden III (028698)
Katlyn J. Divis (035583)
FUSION LAW, PLLC
7600 N. 15th St., Suite 150
Phoenix, Arizona 85020
Telephone: (602) 315-7545
beau@fusion.law
kd@fusion.law

Attorneys for Amicus Curiae Center for Election Confidence

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INTRODUCTION

Center for Election Confidence, Inc. (“CEC”) submits this amicus brief in support of Respondents. The Court of Appeals correctly held that the Secretary must comply with the Administrative Procedure Act (“APA”) when issuing the Elections Procedures Manual (“EPM”). The Secretary challenges this holding and alternatively asks that if this Court affirms, it apply its holding “only to future EPMs.” Sec.’s Supp. Br. at 19. This Court should reject the Secretary’s request for prospective-only relief because it is contrary to the clear statutory command and settled law.

First, the APA’s plain language states that when an agency fails to substantially comply with the APA in issuing a rule, the “rule is invalid.” A.R.S. § 41-1030(A); *see also* *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246, 250 ¶ 14 (App. 2015) (“[T]he University argues the Policy is a rule within the meaning of the APA and, therefore, because the System adopted it without following the rulemaking procedure provided in the APA, ***it is void***. . . . [W]e agree with the University.” (emphasis added)). Simply put, the APA does not grant courts discretion to craft a different remedy than invalidation.

Second, affirming the Court of Appeals here and invalidating the 2023 EPM does not create practical problems for the Secretary now or for future EPMs. This is because a provision in the APA allows emergency rulemaking when necessary to

“[a]void violation of federal law or regulation or other state law.” A.R.S. § 41-1026(A)(3). To the extent that subsequent court decisions or legislation renders discrete portions of the 2019 EPM contrary to law, the Secretary can remedy those specific issues through an emergency rulemaking in full compliance with the APA.

Third, if the Court were to grant the Secretary’s requested “prospective-only” relief, it would go against the state’s settled precedent that civil decisions presumptively apply retroactively. The Secretary has not overcome this strong presumption here. Additionally, such a ruling would set a dangerous precedent that would allow other agencies to enact and enforce rules that violate the APA. And such unlawfulness is particularly harmful in this context, where public confidence in elections relies on consistent and transparent enforcement of the law.

INTEREST OF AMICUS CURIAE

CEC is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral

process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files amicus briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration. This brief discusses the dangers of the Secretary's requests here—either allowing the Secretary to enforce a rule declared invalid or to flout the requirements of the APA when promulgating a new rule. Instead, this Court should adhere to the APA's plain language and conclude that the Secretary must comply with the APA for an EPM to be valid.

ARGUMENT

I. Invalidation Is the Only Remedy the APA Has Prescribed for Failing to Adhere to Its Requirements When Promulgating a Rule.

The APA is a comprehensive statutory scheme promulgated by the Legislature. Accordingly, courts are limited to the statutory remedy prescribed in the APA. That remedy is clear. If a rule is not issued in substantial compliance with the APA's rulemaking procedures, the "rule is invalid." A.R.S. § 41-1030(A). Arizona courts have not strayed from this mandate, and this Court should decline to set a new and dangerous precedent.

A. The Plain Language of § 41-1030(A) Requires a Court to Declare a Rule Invalid If It Was Issued Without Substantial Compliance with the APA's Rulemaking Provisions.

The plain language of the APA leaves a court with only one remedy after it has concluded that an agency has failed to substantially comply with the APA's

rulemaking requirements—the rule must be declared invalid. A.R.S. § 41-1030(A) (“*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 with §§ 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter[.]*” (emphasis added)); *see also City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178 ¶6 (App. 2008) (“When the language of a statute is clear and unambiguous, a court should not look beyond the language, but rather simply apply it without using other means of construction, assuming that the legislature has said what it means.” (internal quotation marks omitted)).

Indeed, an invalid rule is “defin[ed]” as “one whose promulgation was not in substantial compliance with procedural requirements.” *Samaritan Health Sys. v. Ariz. Health Care Cost Containment Sys. Admin.*, 198 Ariz. 533, 537–38 ¶22 (App. 2000) (citing A.R.S. § 41-1030(A)). Consequently, “Arizona law is clear that ‘[a] rule is invalid unless adopted and approved in substantial compliance with ... [the relevant sections of the APA].’” *Phx. Children’s Hosp. v. Ariz. Health Care Cost Containment Sys. Admin.*, 195 Ariz. 277, 279–80 ¶6 (App. 1999) (quoting A.R.S. § 41-1030).

Arizona courts have consistently complied with this requirement, and, in each instance in which a court has concluded an agency failed to substantially comply with the APA’s rulemaking requirements when issuing a rule, has held the rule

invalid and without legal force and effect. *See Ariz. State Univ. ex rel. Ariz. Bd. of Regents*, 237 Ariz. at 253–54 ¶32 (relying on § 41-1030(A) to declare a rule adopted “without ‘substantial compliance’ with the rulemaking procedure of the APA ... invalid”); *U S W. Commc’ns, Inc. v. Ariz. Corp. Comm’n*, 197 Ariz. 16, 25 ¶37 (App. 1999) (relying on § 41-1030(A) to hold certain rules enacted by the Corporation Commission invalid because the Commission failed to follow certain APA rulemaking requirements); *Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 228 (App. 1994) (relying on § 41-1030(A) to hold a rule invalid because it was not “promulgated pursuant to the APA”); *Wilkinson v. State*, 172 Ariz. 597, 599 (App. 1992) (relying on § 41-1030(A) to hold a rule invalid because it was not “promulgated lawfully”).

The Secretary does not dispute this, and has failed to point to a single case in which a court has granted the relief the Secretary seeks—or indeed any relief beyond a declaration that a rule was invalid. The plain text of the APA has prescribed the remedy here, and the Court is without discretion to grant the Secretary’s request to enforce either the 2023 EPM, or to allow him to promulgate a new EPM for 2025 without substantially complying with the APA’s rulemaking provisions.

B. Because the APA Is a “Creature of the Legislature,” the Remedy Is Limited to that Which Is Provided in the Statutory Scheme.

The APA is not a “part of the common law system of this state,” but a “creature[] of the legislature,” so any remedy a party may obtain is limited to that

which is provided in the statute. *See Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 509 (1991); *see also FL Receivables Tr. 2002-A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160, 167 ¶32 (App. 2012) (“When the legislature has set forth certain remedies and not others in a comprehensive statutory scheme, we will not imply or interpret additional remedies.”); *Blankenbaker v. Jonovich*, 205 Ariz. 383, 387 ¶18 (2003) (“When, as here, a statute ‘creates a right and also provides a complete and valid remedy for the right created, the remedy thereby given is exclusive.’”).

The “crafting of ... a statutory remedy is the province of the legislature, not the courts.” *Hull v. DaimlerChrysler Corp.*, 209 Ariz. 256, 259 ¶13 (App. 2004). Indeed, “[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *FL Receivables Tr. 2002-A*, 230 Ariz. at 168 ¶32. Consequently, courts are not free to “formulat[e] public policy” or to determine a remedy “based largely on equitable principles.” *Consol. Enters., Inc. v. Schwindt*, 172 Ariz. 35, 40 (1992). Instead, courts are “obliged to give effect to the legislature’s mandate.” *Id.*

The APA is a “comprehensive statutory scheme” crafted by the Legislature. *FL Receivables Tr. 2002-A*, 230 Ariz. at 167 ¶32. Throughout that scheme, the Legislature has provided only one enforcement mechanism and only one remedy if an agency fails to comply with the APA’s rulemaking provisions. As to the enforcement mechanism, the APA only permits a plaintiff to seek a declaration

regarding a rule's validity. A.R.S. § 41-1034(A) ("Any person who is or may be affected by a rule *may obtain a judicial declaration of the validity of the rule* by filing an action for declaratory relief in the superior court in Maricopa county in accordance with [the Declaratory Judgments Act]." (emphasis added)); *see also Phx. Children's Hosp.*, 195 Ariz. at 280 ¶6. And regarding the remedy, as discussed above, the APA only allows for a declaration that the rule is either valid or invalid. A.R.S. § 41-1030(A). This makes sense as it would be inconsistent to only allow a plaintiff to sue to obtain a declaration regarding a rule's validity while simultaneously allowing a court to craft a remedy other than declaring a rule valid or invalid.

Accordingly, once a court has determined that an agency failed to substantially comply with the rulemaking requirements of the APA, the court is "obliged to give effect to the legislature's mandate" and must declare the rule invalid. *See Consol. Enters., Inc.*, 172 Ariz. at 40.

II. Adhering to the APA's Plain Language Creates No Practical Problems in This Case or For Future EPM Rulemaking Because of the APA's Emergency Provision.

The APA includes a specific accommodation for situations like those in this case, and those that may be present in the future due to election-related litigation. Specifically, the Secretary has argued (Pet. at 11-13; Supp. Br. at 15) that there are sometimes "important legal developments" that occur late in the year in which the

EPM must be issued. *See* A.R.S. § 16-452(B). According to the Secretary, these legal developments often require alterations to the EPM that have the potential to begin the notice and comment period anew. Additionally, the Secretary has argued that he will be unable to comply with the APA when issuing the 2025 EPM. The APA’s emergency rulemaking provision alleviates each of these concerns.

The APA allows for emergency rulemaking “[i]f an agency makes a finding that a rule is necessary as an emergency measure,” allowing the agency to bypass the APA’s rulemaking docket requirements, as well as the public notice and comment requirements, *see* A.R.S. § 41-1026(A),¹ with which the Secretary seems particularly concerned.

The APA’s emergency provision, however, cannot be used to get around the APA. An emergency rulemaking must be approved by the Attorney General, §§ 41-1026(A), (B), -1044, who cannot approve an otherwise avoidable emergency situation unless the agency “submits substantial evidence” showing that the emergency measure is necessary. According to the emergency rulemaking provision, the Secretary would be able to submit evidence that emergency rulemaking is

¹ Note that § 41-1026 also refers to bypassing “prior review” by the governor’s regulatory review council, but as a practical matter, the exemption from review by the council is inconsequential here as the Secretary is already exempt from complying with the APA’s provisions pertaining to the council. A.R.S. § 41-1039(E)(2)(a); A.R.S. § 41-1057(A)(1).

necessary to “[a]void violation of federal law or regulation or other state law.” *See* A.R.S. § 41-1026(A)(3).

If the 2023 EPM is declared invalid, and if the Secretary also has not followed the APA in promulgating the 2025 EPM, the Secretary could use emergency rulemaking to conform any provisions of the 2019 EPM, so that it is in line with “federal law or regulation or other state law.” *See* A.R.S. § 41-1026(A)(3).

Consequently, this Court can require the Secretary to comply with the APA, declare invalid rules that are indeed invalid, all while not “jeopardizing” the Secretary’s ability to have a functioning EPM for the 2026 election. *See* Sec.’s Supp. Br. at 20.

III. Because the APA Has Prescribed the Exclusive Remedy Here—Invalidation of the EPM—the Secretary Cannot Obtain His Requested “Prospective-Only” Relief.

Instead of following the APA’s plain language, the Secretary is requesting this Court craft an entirely new remedy not contemplated by the APA or compatible with it. The Secretary is asking this Court to apply its holding “prospectively only” and “limit [its] ruling to EPMs prepared ‘after the date of [the Court’s] opinion’—in 2026 and beyond.” Supp. Br. at 19–20.

In reality, the Secretary is not asking for the Court to apply its holding “prospectively only.” The Secretary is asking this Court to ignore the express language of the APA, to allow him to enforce an invalid rule (*i.e.*, the 2023 EPM),

and even go so far as to permit him to issue and enforce *an additional* invalid rule (*i.e.*, the 2025 EPM). Allowing this (1) is contrary to the well-settled presumption that civil decisions apply retroactively; (2) would set a dangerous precedent and encourage other agencies to ignore the APA’s requirements; and (3) would create significant harm to the public interest.

A. The Court Should Adhere to the Well-Settled Presumption that Civil Decisions Apply Retroactively.

When an action involves “purely civil matters, the law of the State of Arizona has always been that unless otherwise stated, a court opinion operates retroactively as well as prospectively[.]” *Chevron Chem. Co. v. Super. Ct.*, 131 Ariz. 431, 435 (1982). Arizona has long recognized this “presumption that opinions by appellate courts of this state are retroactive as well as prospective.” *Id.* at 436. To determine if this presumption has been overcome, courts apply a three-part test and consider whether: “(1) the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed; (2) retroactive application will further or retard operation of the rule, considering the prior history, purpose, and effect of the rule; and (3) retroactive application will produce substantially inequitable results.” *Ariz. Sch. Bds. Ass’n, Inc. v. State*, 252 Ariz. 219, 228–29 ¶40 (2022) (quotation marks omitted) (quoting *Chevron Chem. Co.*, 131 Ariz. at 436); *see also Turken v. Gordon*, 223 Ariz. 342, 351–52 ¶¶ 44–49

(2010). Despite the Secretary’s contention (Supp. Br. at 19–20), none of these factors favors prospective-only application here.

First, the plain language of the APA requires that the EPM be promulgated in compliance with the APA, and the Court need not overrule any precedent to apply the plain language of the APA here. *See Ariz. Sch. Bds. Ass’n*, 252 Ariz. at 229 ¶41 (“[W]e do not announce a new standard today by applying the single subject rule’s plain meaning.”). Accordingly, the Secretary’s argument that he did not know what “should happen” after the Court of Appeals issued its decision early this year is without merit. The APA clearly states that a rule not promulgated in substantial compliance with its procedures “is invalid.” A.R.S. § 41-1030(A). Thus, the Secretary did not have to wait for any “further proceeding[s]” to conclude he had to comply with the APA for the 2025 EPM to be valid. But instead of following the Court of Appeals’ decision and complying with the APA, the Secretary chose to promulgate the 2025 EPM in virtually the same manner as he did previously. He now asks that his failure to comply with the APA over the last six months be rewarded, through what he characterizes as “prospective-only” application of the plain language of the APA. This Court must decline to do this.

Next, the requirement that the Secretary follow the APA when issuing the EPM will further the purpose of the APA. *See Chevron Chem. Co.*, 131 Ariz. at 436–37. The purpose of the APA is “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. Requiring the Secretary to comply with the APA when issuing EPMs furthers, rather than frustrates, this purpose.

Finally, retroactive application will not produce substantially inequitable results. As already explained, the Secretary chose to continue his practice of failing to comply with the APA even after the Court of Appeals issued its decision. But even in light of this failure, the Secretary can still comply with the APA and issue a 2025 EPM by following the APA’s emergency procedures. *See* A.R.S. § 41-1026; *see also* Part II, *supra*. Consequently, this Court should decline to allow the Secretary to continue to flout the APA’s requirements until he issues another EPM in the future. Instead, he must comply with the APA when issuing the 2025 EPM.

B. Allowing the Secretary to Enforce Either the 2023 or a 2025 EPM Without Substantial Compliance with the APA’s Rulemaking Procedures Sets a Dangerous Precedent.

By asking for a prospective-only holding here, the Secretary is actually asking for this Court to condone his failure to comply with the APA. Because the Secretary failed to comply with the APA when he issued the 2023 EPM, it must be declared invalid. And he admits (Supp. Br. at 19) that he “did not take every step that the APA would require” when he began work on the 2025 EPM. So the 2025 EPM would similarly be “invalid.” A.R.S. § 41-1030(A). The APA permits nothing else.

Were the Court to contravene the APA's express language and years of settled precedent, it would be encouraging other agencies to violate the APA. The APA's mandate that a rule be declared invalid ensures that agencies make every effort to comply with the APA, and compliance is necessary so people have notice of the rule and an "opportunity for input into" it. *Carondelet Health Servs.*, 182 Ariz. at 226. To allow the EPM to stand even though the Secretary did not comply with the APA signals that its requirements are optional in some cases, and would encourage agencies to effectively see what they could get away with. To ensure the APA retains its full force and effect, the Secretary should receive more than a mere admonishment that he is violating the law.

C. Flouting the APA in This Case Comes with Significant Harm to the Public Interest and Voters' Confidence in Arizona Elections.

The APA provides important functions that help refine agency proposals and weed out clearly impractical, difficult, or unlawful provisions. *See Carondelet Health Servs.*, 182 Ariz. at 226. Those functions are especially important here, as the Secretary has previously included egregious provisions in the EPM that could have been prevented through adherence to the requirements for "public participation and comment." For example, as recently as last week, the Ninth Circuit affirmed a district court's order that struck down an EPM provision that "prohibit[ed] 'any activities by a person' done with the intent or effect of threatening, harassing, or intimidating voters—including acts such as 'raising one's voice' or using 'offensive'

or ‘insulting language.’” *Am. Encore v. Fontes*, CV-24-01673, 2024 WL 4333202, at *8 (D. Ariz. Sept. 27, 2024), *affirmed in relevant part by Am. Encore v. Fontes*, ___ F.4th ___, No. 24-6703, 2025 WL 2647590, at *17 (9th Cir. Sept. 16, 2025). The district court concluded that the provision “broadly encroache[d] on a substantial amount of constitutionally protected speech.” *Id.* at *23.

Indeed, if the Secretary is allowed to enforce an invalid EPM, it will erode election confidence. *See Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶4 (2020) (“[W]hen public officials ... change the law based on their own perceptions of what they think it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.”). This is because elections for at least the next two years will be administered pursuant to rules that this Court has declared were not adopted according to law, ignoring basic procedural standards. *See id.* (“Election laws play an important role in protecting the integrity of the electoral process.”).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals and hold that because the Secretary did not comply with the APA when issuing the 2023 EPM, the 2023 EPM is invalid. Additionally, the Court should not grant the Secretary’s requested “prospective-only” relief, denying his request to issue an admittedly invalid 2025 EPM.

RESPECTFULLY SUBMITTED this 22nd day of September, 2025.

FUSION LAW, PLLC

By: /s/ Brunn (Beau) W. Roysden III

Brunn (Beau) W. Roysden III

Katlyn J. Divis

7600 N. 15th St., Suite 150

Phoenix, Arizona 85020

beau@fusion.law

(602) 315-7545

*Attorneys for Amicus Curiae Center for Election
Confidence*