

**IN THE SUPREME COURT
FOR THE STATE 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.

Arizona Supreme Court
No. CV-2025-0089-PR

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

Maricopa County Superior Court
No. CV2024-050553

**BRIEF OF AMICUS CURIAE PINAL COUNTY BOARD OF SUPERVISORS
AND PINAL COUNTY RECORDER DANA LEWIS IN SUPPORT OF
RESPONDENTS FILED AS OF RIGHT UNDER ARCAP 16(b)(1)(B) AND
CONSENT OF THE PARTIES UNDER ARCAP 16(b)(1)(A)**

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INTRODUCTION

Pursuant to ARCAP 16(b)(1)(A) and (B), Amici Curae Pinal County Board of Supervisors and Pinal County Recorder Dana Lewis (the “County parties”) file this Amici Curae Brief in support of Respondents to illustrate why the rule-making notice-and-comment period and enforcement procedures set forth in the Administrative Procedures Act (the “APA”) should apply to the Secretary of State’s Elections Procedures Manual (“EPM”).

The County parties have a particular interest in this matter. When drafting the most recent EPM in 2023, the Secretary of State added several last-minute changes to the draft without soliciting meaningful feedback from county officials as required by A.R.S. § 16-452(A). The Secretary has asserted that one of these last-minute additions, Chapter 9, Section VI, Subsection B(1)(f) (the “AVD Provision”), requires Pinal County to abandon its long standing polling place voting system and use voting centers instead—in plain violation of A.R.S. § 16-411(B)(4) (which only permits the “board of supervisors” to authorize the use of voting centers in place of or in addition to specifically designated polling places). The County and the Secretary disputed this matter for months; the Secretary eventually filed a lawsuit against the County seeking to “enforce” his interpretation of the AVD Provision. *See Fontes v. Cavanaugh*, No. CV2024-02541, 2024

WL 6465586 (Pinal Cnty. Super. Ct. Oct. 4, 2024); *Lewis v. Fontes*, No. 2 CA-CV 2024-0310, 2025 WL 1649678 (Ariz. Ct. App. June 11, 2025).¹

The County parties believe that, had the APA notice-and-comment provisions and the “final rule” enforcement provisions applied to the promulgation and enforcement of the EPM, the *Fontes* matter may have been avoided entirely. At the very least, the APA would prevent haphazard and last-minute insertions of substantive changes to the EPM by the Secretary of State and resulting prejudice to county officials.

Finally, should this Court hold the APA rule-making process applies to the EPM, it should not apply that decision prospectively to future EPMs, only. Although the EPM may continue to provide guidance to election officials until a new EPM is adopted, retroactive application of the Court’s decision would ensure that no further enforcement actions are undertaken by the Secretary or Attorney General for alleged violations of the 2023 EPM. This is a legitimate concern of the County parties, based on the Secretary’s prior lawsuit against the County parties to enforce the 2023 EPM and the threat in one of the pleadings in that case by the Arizona Attorney General to do the same.

INTEREST OF AMICI CURIAE

The County parties are responsible for organizing and operating all election day activities in Pinal County—the third most populous county in the State. As ranking county officials charged with elections administration, Amici must, under threat of criminal

¹ Available at <https://www.appeals2.az.gov/Decisions/CV20240310Memo.pdf>.

penalty, follow the lawful provisions in the Secretary of State’s EPM. As such, Amici have a vested interest in ensuring that, consistent with A.R.S. § 16-452(A), the Secretary meaningfully confers with county officials prior to promulgating every draft EPM—a process which unfortunately did not happen when several last-minute additions were made by the Secretary to the 2023 Draft EPM. This would be remedied for future draft EPMs if the rule-making notice requirements in the APA apply to the EPM process. Amici are also interested in ensuring that, prior to facing litigation initiated by the Secretary or Attorney General, the “final decision” enforcement procedures in the APA are followed.

ARGUMENT

I. Applying the APA Rule-Making Notice Requirements to the EPM Is Necessary To Ensure That County Election Officials are Consulted Before Any Substantive Change is Made to the Final EPM.

Arizona counties play a critical role in election administration by performing most of the tasks necessary to manage a successful election. Every odd-numbered year immediately preceding the general election, the Secretary of State is required to adopt rules in the form of an “official instructions and procedures manual” “to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A)–(B).

Because of the counties critical role in administering Arizona’s elections, A.R.S. § 16-452(A) begins by saying that the rules contained within the EPM shall only be prescribed “[a]fter consultation with each county board of supervisors or other officer in

charge of elections.” *See* Ariz. Att’y Gen. Op. I25-007, at 6 n. 5 (observing that the EPM is issued for the benefit of election workers). This requirement has long standing roots: in fact, from 1972 until 1993, the Secretary was required to work “in concert” with all 15 counties in promulgating the EPM. 1972 Ariz. Sess. Laws, ch. 218, § 41 (2nd Reg. Sess.) (HB 2190); A.R.S. § 16-1038(A), (B) (1972).

This consultation requirement is necessary to ensure that the Secretary receives meaningful input from the election officials on the ground who perform the most critical tasks necessary to run a successful election. The County parties’ experience in working with the Secretary of State on the current version of the EPM illustrates why the Secretary’s failure to comply with the notice and comment provisions of the APA directly impacts the counties, creates unnecessary conflict, and undermines the EPM rule-making process.

As discussed above, the Secretary of State and Pinal County have had a long running dispute regarding the AVD Provision, which creates regulations relating to accessible voting devices (“AVD”) that must be placed in each voting precinct in accordance with the federal Help America Vote Act to ensure voting remains accessible to disabled individuals. *See, e.g.*, 52 U.S.C. § 21081(a)(3); A.R.S. §§ 16-442.01(A), 16-447(A). The relevant portions of the AVD Provision read as follows:

If the voter’s name does not appear on that precinct’s signature roster because the voter resides in another precinct . . . an election official shall: Permit the voter to vote a provisional ballot . . . **using an accessible voting device that is programmed to contain all ballot styles**, and inform the voter that their provisional ballot **will be counted** after it is processed and if it is confirmed the voter is otherwise eligible to vote and did not vote

early or at another voting location and had that other ballot counted.

2023 EPM at 190 (emphasis added).²

Importantly, the AVD provision did *not* appear in the draft EPM that the Secretary published on July 31, 2023. In fact, Pinal County did not become aware of this addition to the EPM until around December 21, 2023, *just days* before the final EPM was approved by the Governor and Attorney General and adopted by the Secretary on December 30, 2023.

Almost immediately, a dispute arose between the County parties and the Secretary regarding the AVD Provision. This was because the Secretary took the position that this last-minute addition to the EPM required *every county*—including those that, like Pinal County, use a precinct-style voting system—to: (1) allow out-of-precinct voters to cast “provisional” ballots on AVD devices that corresponded with the voter’s correct precinct and (2) count any “provisional” ballot cast on the AVD device, as long as the vote was cast on the “correct ballot” (i.e., on a ballot that corresponded with the voter’s precinct).

Pinal County recognized, correctly, that this interpretation effectively created de facto “voting centers,” thus depriving counties of their exclusive statutory authority to determine whether to implement “voting centers.” *See* A.R.S. § 16-411(B)(4). This dispute

² Available at https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf. The AVD Provision also appears in the Secretary of State’s draft 2025 EPM, available at <https://azsos.gov/sites/default/files/docs/2025-Elections-Procedures-Manual-Draft-0801.pdf>.

reached its apogee on September 27, 2024—a little over a month before the 2024 general election—when the Secretary of State filed an “emergency”³ petition for mandamus and injunctive relief against the County, seeking to enforce his specific interpretation of the AVD Provision. *See Fontes v. Cavanaugh*, No. CV2024-025412024, WL 6465586 (Pinal Cnty. Super. Ct. Oct. 4, 2024); *Lewis v. Fontes*, No. 2 CA-CV 2024-0310, 2025 WL 1649678 (Ariz. Ct. App. June 11, 2025).

Had the Secretary been required to follow the notice and comment requirements of the APA, this conflict, and the attendant taxpayer costs, would have been avoided because the AVD provision would have properly been omitted from the EPM. This is because the Secretary’s decision to insert the AVD provision into the EPM on December 21, 2023, did not simply modify a proposed rule, but rather promulgated an entirely new rule and procedure that was “substantially different from the proposed rule.” A.R.S. § 41-1025(A) (the rulemaking process may continue only if any modification to the proposed rule after public comment is not “substantially different from the proposed rule”).

Moreover, because the addition of the AVD provision was substantially different from the provisional voting procedures set forth in the draft EPM published for public comment, there was insufficient time to publish a revised draft EPM, given that the

³ As discussed below, the Secretary’s claim that the matter required “emergency” relief was inconsistent with the fact that the Secretary had: (1) been aware that Pinal County disputed his interpretation months prior to September 2024 and (2) did not object when Pinal County did not follow his interpretation of the AVD Provision during the March 2024 presidential preference and July 2024 primary elections.

required thirty-day comment period under A.R.S. § 41-1023(B) would have extended past the December 31, 2023, deadline to finalize the EPM. A.R.S. § 16-452(B). As set forth in the Arizona Agency Handbook, Chapter 11, Section 11.7.8.2,⁴ if the agency decides that changes make a rule substantially different from what was proposed, the agency may prepare and file with the Secretary of State a Notice of Supplemental Rulemaking, and provide for additional public comment under A.R.S. § 41-1023, or file a Notice of Termination of Rulemaking Proceeding with the Secretary of State and comply anew with all requirements of the APA. *See* A.R.S. §§ 41-1022(E), 41-1025(A).

But neither of these options were available to the Secretary given that the insertion of the AVD Provision came days before the EPM had to be finalized. Thus, by inserting new provisions into the EPM without providing an additional thirty-day notice and comment period, the Secretary circumvented both A.R.S. §§ 41-1023(B) and 16-452(A). Had the Secretary complied with A.R.S. §§ 41-1023(B) and 16-452(A), the dispute last year between the Secretary and the County parties, which came at a substantial cost to the Arizona taxpayers, would have been avoided.

II. The Benefits of the APA Is Not Limited to the APA Rule-Making Requirements But Also Extends to Enforcement Proceedings.

There is another benefit to applying the APA to the EPM process. Although this dispute concerns the APA rule-making provisions located in Title 41, Article 3, the APA

⁴ Available at https://www.azag.gov/sites/default/files/2025-05/agency_handbook_chapter_11.pdf.

also contains procedures that state agencies must follow in initiating enforcement proceedings involving “appealable agency actions.” *See* A.R.S. §§ 41-1092 to 41-1092.12. The County parties’ experience with the Secretary in the *Fontes* matter illustrates why the APA also applies to EPM enforcement actions.

As an initial matter, it is not even clear that the Secretary of State has standing to seek an injunction or mandamus requiring a county to “comply” with an EPM provision. When the Legislature intends to designate civil enforcement authority to an agency, it does so explicitly. *See generally* A.R.S. § 16-957(A) (providing the Clean Elections Commission with authority to enforce violations of Clean Elections Act); A.R.S. § 16-938(A) (providing the Secretary with enforcement authority over certain campaign finance laws, while also excluding the Attorney General); *see also State v. Peek*, 219 Ariz. 182, 185 ¶ 19 (2008). But there is no provision in Title 16 that permits the Secretary of State to file suit to “enforce” supposed EPM violations—even though Title 16 *does* grant the Attorney General and County Attorneys authority to enforce EPM violations through civil and criminal actions. *See* A.R.S. § 16-1021. In fact, the County parties believe that the *Fontes* matter was the first time a Secretary of State had ever sued a County to force “compliance” with the EPM.

Making clear that the APA enforcement provisions apply to any EPM dispute would provide the Secretary and counties an opportunity to resolve disputes prior to initiating formal litigation. Under Article 10 of the APA, in the absence of an express exemption,

A.R.S. § 41-1002(A), an agency⁵ must follow specific procedures any time it renders a determination that “determines the legal rights, duties or privileges of a party,” A.R.S. § 41-1092(4). These procedures include filing a notice of appealable agency action, permitting the affected party to request a hearing with the Office of Administrative Hearings, and obtaining a “final administrative decision” before all administrative remedies are deemed exhausted. *See* A.R.S. §§ 41-1092.03, 41-1092.07, 41-1092.08(H). Then, and only then, may a litigant seek judicial relief for a supposed or threatened injury. *Moulton v. Napolitano*, 205 Ariz. 506, 511 ¶ 9 (App. 2003); *McNutt v. Dep’t of Revenue*, 196 Ariz. 255, 265 ¶ 35 (App. 1998) (“A party’s failure to resort to and exhaust administrative remedies deprives the superior court of jurisdiction to hear the party’s claim.”).

Requiring all enforcement actions to only be taken after the process set forth in Article 10 would limit (if not outright prevent) litigation between the Secretary and Counties and help ensure that any such disputes are resolved well before election season. *See Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998) (“In election matters, time is of the essence . . .”). Again the *Fontes* matter illustrates the type of issues that would be avoided:

⁵ An “agency” is broadly defined as “any board, commission, department, officer or other administrative unit of this state, including the agency head . . . whether created under the Constitution of Arizona or by enactment of the legislature.” A.R.S. § 41-1001(1). Moreover, a county is a “party” whose rights, duties and privileges are affected by EPM enforcement actions and a “person” as defined in the APA. *See* A.R.S. § 41-1001(16), (17) (“Party” includes “persons” named as a party in an APA matter; “Person” includes a “governmental subdivision or unit of a governmental subdivision.”).

Although Pinal County’s disagreement with the Secretary over his decision to include the AVD provision was known to the Secretary and his staff as early as February 13, 2024—and the Secretary was aware that Pinal County had not followed the Secretary’s interpretation of the AVD Provision during the March 19, 2024, Presidential Preference Election—the Secretary waited until just before the general election in a presidential year to file suit. Had the APA procedures applied, the Secretary’s action would have had to been initiated well before the general election to be resolved in time. This would well serve the Secretary, the counties, and the courts by ensuring that they are not forced to “steamroll through . . . delicate legal issues” in the context of expedited litigation “in order to meet” election deadlines. *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1984) (citation omitted).

For the same reasons the Secretary cannot promulgate substantial changes to the EPM without consulting the county election officials and providing sufficient notice and comment under the APA, the Secretary must follow the restrictions of the APA when pursuing any enforcement action under the EPM.

III. If This Court Holds the APA Rule-Making Process Applies to the EPM, That Holding Should be Applied Retroactively to Prevent the Secretary or Attorney General From Bringing Any Action to Enforce The EPM.

Finally, the County agrees with the Respondents that, should this Court hold that the APA rule-making process applies to the EPM, it should apply that decision retroactively to the current EPM and prospectively to future EPMs. *See* Resp. Suppl. Brief at 17–20. Not only is retroactive application proper under the law, but it is also necessary to ensure that

the Secretary or Attorney General does not take any enforcement action against Pinal County (or other counties) for supposed violations of the current EPM.

Again, the *Fontes* matter is illustrative here. In response to the County's (correct) argument that the Secretary lacked standing to file suit to "enforce" the EPM, the Arizona Attorney General advised the Pinal County Superior Court that if the court had any concern about the Secretary's authority to bring the EPM challenge, the Attorney General would "join this suit if necessary" pursuant to her enforcement authority under A.R.S. § 16-1021. *See Consolidated Response to Defendants' Motion to Dismiss and Reply in Support of the Secretary's Application for an Order to Show Cause at 10, Fontes v. Cavanaugh*, No. CV2024-02541, 2024 WL 6465586 (Pinal Cnty. Super. Ct. Oct. 4, 2024).⁶

In other words, the Attorney General has explicitly stated the Attorney General's intention to "enforce" the current EPM through civil litigation. The Court should make clear that any such action to enforce the current APA is void because the EPM was promulgated in violation of the APA and that in any future EPM civil enforcement action, the Attorney General must adhere to the APA enforcement procedures. Finally, allowing for the continued enforcement of the EPM against any county or county official despite the Secretary's failure to follow the APA rule-making process and meaningfully consult with

⁶ The Court "may take judicial notice of the records of the superior court." *State v. Valenzuela*, 109 Ariz. 109, 110 (1973); *see also, e.g., State v. Rushing*, 156 Ariz. 1, 4 (1988) (stating it is proper for a court to take judicial notice of its own records or those of another action tried in the same court); *AU Enters. Inc. v. Edwards*, 248 Ariz. 109, 110 ¶ 3 n. 2 (App. 2020) (taking judicial notice of a ruling that was not in the appellate record).

the County parties as required by A.R.S. § 16-452(A), would produce a substantially inequitable result. *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 597 (1990). For this reason, if this Court holds the APA applies to the EPM, the holding should apply retroactively and prospectively.

CONCLUSION

The Court of Appeals' decision correctly held that the EPM is subject to the rulemaking procedure under the APA and that the Secretary did not substantially comply with the APA's rulemaking process in promulgating the EPM. Following the APA rule-making notice requirements ensures that the county election officials are provided sufficient notice and opportunity to review and provide meaningful input on all proposed changes to the EPM as required by A.R.S. § 16-452(A) and prevents the insertion of last-minute substantive changes to the EPM by the Secretary of State.

Moreover, if this Court holds the APA rule-making process applies to the EPM, that holding should be applied retroactively to prevent the Secretary or the Attorney General from bringing any further actions to enforce the EPM. Finally, if the Court decides the EPM is not subject to the APA rulemaking procedure, then the Court should remand this matter to the Court of Appeals to consider whether Chapter 9, § 6(B)(1)(f) of the EPM violates A.R.S. § 16-411(B)(4) and several other state laws by requiring the County parties to adopt de facto voting centers.

Dated: September 22, 2025

Respectfully submitted,

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