

ARIZONA SUPREME COURT

REPUBLICAN NATIONAL COMMITTEE, et
al.,

Plaintiffs/ Appellants/ Respondents,

v.

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

Defendant/ Appellee/ Petitioner,

VOTO LATINO, et al.,

Intervenor-Defendants/ Appellees.

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

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

**BRIEF OF AMICUS CURIAE THE HON. KENNETH BENNETT,
FORMER ARIZONA SECRETARY OF STATE IN SUPPORT OF
PETITIONER FILED WITH CONSENT OF ALL PARTIES**

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INTRODUCTION¹

Arizona's Constitution guarantees its citizens "free and equal" elections. [Ariz. Const. art. 2 § 21](#). To help fulfill that guarantee, Arizona's Secretary of State is charged with prescribing "rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity, and efficiency" for early voting and voting, as well as for the production, distribution, collection, counting, tabulating, and storing of ballots. [A.R.S. § 16-452\(A\)](#). The secretary provides these rules through a manual—the Elections Procedures Manual, or EPM—that the secretary develops in cooperation with elections officials throughout Arizona, and, more recently, with public input. To complete this important task, the secretary follows a mandatory statutory process, *see* [A.R.S. § 16-452](#), that, while rigorous and transparent, also allows the EPM to be complete in time for upcoming elections.

The decision below threatens a secretary's ability to fulfill this obligation by imposing the generally applicable Administrative Procedure

¹ No party's counsel authored this brief, in whole or in part, and no person, party, or party's counsel contributed financial resources to fund the preparation or submission of this brief.

Act rulemaking requirements on this time-sensitive process. To be sure, the APA provides important protections against government overreach by ensuring transparent decision making and robust public participation. Secretary Bennett embraces these goals as well. That is why, when he oversaw the EPM's creation, he changed past practice to include greater public participation in the process—changes that later secretaries have maintained. But while the APA's objectives are laudable, its specific requirements are incompatible with the EPM, which is why the Legislature imposed a separate set of requirements for the EPM in § 16-452.

Although the court of appeals believed complying with both § 16-452 and the APA is feasible, Secretary Bennett wishes to provide his perspective on why that is mistaken. Demanding compliance with the APA risks a secretary's ability to fulfill the obligation to create an EPM based on accurate, up-to-date law and thus compromises a secretary's ability to ensure free and equal elections for all Arizonans.

INTEREST OF AMICUS CURIAE

Amicus Curiae is the Hon. Kenneth Bennett, former Arizona Secretary of State (2009-2015). During his tenure, he oversaw the creation of three different EPMs. When creating these EPMs, and for the first time in the

history of the EPM, Secretary Bennett opened drafts of EPMs to public comment. He did so not out of statutory obligation, but because elections are for all Arizonans, and so all Arizonans should have the ability to see and provide input on how their public officials are going about the important work of the EPM.

As an experienced elections administrator, Secretary Bennett can speak to the thorough processes that govern creation of the EPM and how they operate as a practical matter. Every EPM is the result of collaboration between the secretary, county elections officials, the attorney general, and the governor. The goal of the EPM is to ensure that Arizona's elections are run uniformly, fairly, and efficiently. The process set out in statute, followed for decades, accomplishes just that.

Secretary Bennett can also speak to the negative consequences of layering on to the EPM-creation process an entirely new set of statutory requirements under the APA. The APA, as Secretary Bennett sees it, would seriously hinder this collaborative process, if not make it outright impossible.

ARGUMENT

I. The Elections Procedures Manual requires a lengthy, collaborative process across government to ensure that elections are administered in a uniform, accurate, and fair manner.

The secretary of state, as the state's chief election officer, is charged with protecting and facilitating Arizona's elections. This important duty includes the responsibility of creating a uniform set of rules for the operation of elections throughout the state, from dense urban centers to remote rural locations.

To facilitate this goal, the secretary is required to draft a manual that prescribes "rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity, and efficiency on the procedures for early voting and voting." [A.R.S. § 16-452\(A\)](#). The manual must also set out the rules for "producing, distributing, counting, tabulating, and storing ballots." *Id.* This manual, which has come to be known as the Elections Procedures Manual, must be drafted every other year, [A.R.S. § 16-452\(B\)](#), to ensure that it accounts for recent developments in state and federal law and can address issues that may have occurred in the prior election.

Drafting the EPM is a collaborative process. The beginning stages require "consultation with each county board of supervisors or other officer

in charge of elections” from each of Arizona’s 15 counties. [A.R.S. § 16-452\(A\)](#). This process often involves several drafts prepared by the secretary, which are then transmitted to the counties for their review and comment. The secretary will make adjustments based on the counties’ feedback, then issue a new draft. This process repeats until the secretary and the counties are satisfied that the draft EPM adequately provides guidance to the counties, takes into account relevant federal and state law, and overall provides for “the maximum degree of correctness, impartiality, uniformity, and efficiency” in the upcoming election. *Id.*

This labor-intensive process is also a time-sensitive one: the EPM must be completed by October 1 in the odd-numbered year preceding a general election, as the secretary must also submit the EPM to the governor and attorney general for their approval by that date. [A.R.S. 16-452\(B\)](#). This is all in service of issuing a final, complete, EPM by December 31, *id.*, so that elections officials can begin to train elections workers and implement the requirements and guidance of the EPM in time for the upcoming election year.

The net effect is that the secretary has little time to complete the process – the secretary must update and revise the EPM based on recent case

law and other developments within less than a year from the previous election, as well as adjust for any new statutory language that may be introduced in that year's legislative session. Finishing a complete, high-quality EPM is as demanding as it is important, as election officials throughout the state depend on it to deliver fair and accurate election results.

II. Secretary Bennett introduced public participation into the EPM-process to promote transparency and civic involvement by the voting public, not because the APA required it.

By statute, the secretary is only required to consult with county elections officials when preparing the EPM. See [A.R.S. § 16-452\(A\)](#). Consequently, since the inception of the EPM, secretaries historically did not invite public input when drafting and updating the EPM each election cycle.

However, beginning in 2009, Secretary Bennett introduced a public comment period to the EPM drafting process. Secretary Bennett did not do so because of some legal obligation, such as the APA. Rather, he thought it served the public interest to involve the voting public more directly in the creation of the rules that governed the details of elections. In addition to providing differing perspectives that could improve the EPM, Secretary Bennett believed that greater public involvement in the details of election operations would promote public trust in elections and the integrity of the

voting and tabulating process. The EPM did not *prohibit* additional public involvement, so Secretary Bennett made it part of the office's process.

This proved a worthwhile and popular change. Since Secretary Bennett's time in office, each subsequent secretary of state has included public comment as part of the EPM-drafting process.

III. Forcing the secretary to also follow the APA's rulemaking requirements is unrealistic, undermining the legislative purpose of the EPM.

Although Secretary Bennett fully embraces the value of public involvement in the EPM, the APA's formal notice-and-comment procedures are incompatible with the objectives of the EPM.

In its decision (at ¶ 25), the court of appeals referenced the "potential impracticalities" of imposing the APA's requirements on the EPM drafting process. Likewise, Respondents' supplemental brief asserts (at 14) that secretaries of state would have "ample time to comply with even the longest version of the rulemaking process if it were initiated early in the odd-numbered year or even in the previous even numbered year." These assertions severely underestimate the "impracticalities" that would arise if the APA governed the EPM-drafting process. The Court should not make the same mistake when deciding this important case.

Imposing the APA's generally applicable requirements for agency rulemaking on this process would be more than inconvenient—it would make finishing an EPM in compliance with § 16-452 extremely burdensome and practically impossible.

First, the APA's rigid timing requirements are incompatible with the process for creating an accurate, uniform EPM. As a practical matter, it is already challenging to complete the EPM in the time allotted under statute. The EPM must accommodate new legislation and other changes in the law, which can occur throughout the year. This means officials collaborate on necessary changes throughout the year, up until the EPM is submitted to the governor and attorney general for approval “not later than October 1.” [A.R.S. § 16-452\(B\)](#).

By contrast, the APA prescribes lengthy, inflexible timelines for proposed administrative rules. For instance, the “exact” wording of a rule must be submitted for review, [A.R.S. § 41-1022\(A\)\(4\)](#), and the APA then allows “at least 30 days after publication of the notice of the proposed rule” for public comment, with possible further waiting periods if an oral proceeding is requested, [A.R.S. § 41-1023\(B\)-\(C\)](#), after which the attorney general has up to 60 days to give final approval to the rule. [A.R.S. § 41-](#)

[1044\(D\)](#). Then, if approved, there is another 60-day waiting period for the rule to go into effect. [A.R.S. § 41-1032\(A\)](#).

Taken together, this would have the effect of changing the secretary's December 31 deadline under the EPM statute to a deadline 150 days earlier — effectively, the secretary would need a complete and finalized EPM, in its “exact” final form, by August 3 at the latest.

Moreover, the real deadline could be even earlier in the year. If the governor and attorney general's approval could only occur after the APA timelines were complete rather than overlapping, then that would mean the secretary would need to have a final version ready for APA notice-and-comment procedures by May 4, rather than August 3.

These much earlier deadlines would severely compromise the ability to incorporate changes in the law occurring throughout the year. Even in the smoothest years, legislative sessions often do not conclude until May or well into June, with new legislation going into effect months after that. Consequently, the APA's timing rules would alone prevent the EPM from incorporating new legislation.

Second, and relatedly, the APA will preclude the EPM from incorporating changes to election law for another reason. The APA requires

that the “exact wording of the rule, including the full text of a new rule” be submitted to begin the review process. [A.R.S. § 41-1022\(A\)\(4\)](#). If the result of that review requires “substantial” changes, however, the rule may not move forward—instead, the review process would begin anew. [A.R.S. § 41-1025\(A\)](#).

This procedural loop—where any “substantial changes” restart the process—is irreconcilable with the reality of election law. Year-round litigation and legislation can impact a huge range of election requirements—such as those impacting voter identification, registration, petition circulators, voting equipment, vote-count challenges, and on and on—and each needs to be reflected in an updated EPM. Because these changes can happen throughout the year, the secretary has a tight timeline to consider and implement changes, consult with other election officials, and comply with the other requirements of § 16-452.

But if the secretary must also comply with the APA, this goes from difficult to impossible after the EPM has been submitted for the review process. Any changes made necessary by new court decisions or legislative changes could not be made after a certain point, because this would require that the APA process restart, and there would not be enough time to

complete the restarted process before the statutory deadlines for completing the EPM. As a result, compliance with the APA would mean either no updated EPM, or an EPM that is already outdated by the time it is promulgated and subject to court challenge.

All of this is not just an administrative headache. It would prevent an EPM from timely incorporating changes in the law occurring later in the year, resulting in a less accurate EPM. If the law changed, election officials would have to rely on later supplemental rules or other guidance as a patchwork to ensure the lawful operation of elections. This absurd result is contrary to the core purpose of the EPM, which is “to achieve and maintain the maximum degree of correctness, impartiality, uniformity, and efficiency on the procedures for early voting and voting.” [A.R.S. § 16-452\(A\)](#).

CONCLUSION

Secretary Bennett thanks the Court for considering his input on the real harms that would be created by imposing the APA on the EPM drafting process.

RESPECTFULLY SUBMITTED this 22nd day of September, 2025.

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