NEWS RELEASE

Arizona House of Representatives
Speaker Steve Montenegro (R-29)
1700 West Washington • Phoenix, Arizona • 85007

Monday, September 22, 2025
FOR IMMEDIATE RELEASE

House Republicans Urge Arizona Supreme Court to Require Secretary Fontes to Follow Transparency Laws in Drafting Election Manual

STATE CAPITOL, PHOENIX – Arizona House Speaker Steve Montenegro announced today that House Republicans, along with Senate President Warren Petersen, filed an amicus brief with the Arizona Supreme Court in the case *Republican National Committee v. Fontes*. The filing urges the Court to require Secretary of State Adrian Fontes to comply with Arizona's Administrative Procedures Act (APA) when drafting the Elections Procedures Manual (EPM).

The APA requires a full public notice and comment period before rules take effect. This process provides transparency, ensures accountability, and prevents the EPM from deviating from state election statutes.

"The integrity of Arizona's elections is absolutely vital," said Speaker Montenegro. **"House Republicans are committed to the rule of law and to ensuring that Secretary Fontes stays within the limits of his authority. We already convinced a judge to strike down unlawful provisions in the 2023 EPM in our own lawsuit. We fully support this case, which asks only that Secretary Fontes follow long-standing notice and comment requirements when drafting the manual. Arizonans deserve accountability and transparency from every public officer, especially when it comes to election rules."**

Arizona law already specifies the rules for voter registration, early ballots, polling places, and the tabulation of votes. The Secretary's authority to draft the EPM is narrow, and the APA process is an essential check on that authority.

A copy of the brief is attached.

Steve Montenegro is the Speaker of the Arizona House of Representatives and serves Legislative District 29 in the West Valley, Goodyear, and Surprise. Follow him on X at @SteveMontenegro.

###

IN THE SUPREME COURT
STATE OF ARIZONA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs-Appellants-Respondents, v. ADRIAN FONTES, Defendant-Appellee-Petitioner, -and- VOTO LATINO, *et al.*, Intervenor-Defendants-Appellees.	No. CV-25-0089-PR Court of Appeals, Division Two No. 2 CA-CV 2024-0241 Maricopa County Superior Court No. CV2024-050553

BRIEF OF *AMICI CURIAE* ARIZONA STATE SENATE PRESIDENT WARREN PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES STEVE MONTENEGRO[1]

Kory Langhofer, Ariz. Bar No. 024722
Thomas Basile, Ariz. Bar. No. 031150
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
kory@statecraftlaw.com
tom@statecraftlaw.com
Attorneys for Amici Curiae

[1] This brief is filed pursuant to A.R.C.AP. 16(b)(1)(B).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Warren Petersen, in his official capacity as the President of the Arizona State Senate, and Steve Montenegro, in his official capacity as the Speaker of the Arizona House of Representatives, respectfully submit this brief as *amici curiae* in support of Plaintiffs/Appellants Republican National Committee, Republican Party of Arizona, LLC, and the Yavapai County Republican Party.

INTRODUCTION

For the reasons ably set forth in the Court of Appeals' opinion, *see Republican Nat'l. Comm. v. Fontes*, 566 P.3d 984 (Ariz. App. 2025), and amplified by the Plaintiffs/Appellants' briefing, the Court should affirm that the compendium of election administration rules known as the Elections Procedures Manual ("EPM") is subject to the Arizona Administrative Procedure Act, A.R.S. § 41-1001, *et seq.* ("APA"). Because the EPM is "not expressly exempted" from the APA's strictures by either the APA itself or the authorizing statute (*i.e.*, A.R.S. § 16-452), it must traverse the APA's procedural channels before it can assume the force of law. A.R.S. § 41-1002(A).

The clarity of the statutory language ensures that the Court need go no further. *See Garibay v. Johnson in and for Cnty. of Pima*, 259 Ariz. 248, 243 ¶ 23 (2025) ("If a statute's text is plain or unambiguous, it controls unless it results in an absurdity or a constitutional violation."). If the Court deems the statutes textually indeterminate, though, it may turn to "secondary interpretation methods, including

consideration of the statute's 'subject matter, its historical background, its effect and consequences, and its spirit and purpose.'" *BSI Holdings, LLC v. Ariz. Dept. of Transp.*, 244 Ariz. 17, 19 ¶ 9 (2018) (citations omitted). Similarly, courts read statutes with overlapping ambits *in pari materia*, "even where the statutes were enacted at different times, and contain no reference one to the other." *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970), with the objective of "further[ing] perceived goals of the relevant body of legislation," *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 270 (1994).

With those interpretive maxims in mind, the Legislative Leaders wish to emphasize two critical respects in which the APA's application to the EPM not only is consistent with the statutes' respective texts, but also fortifies the public policy imperatives animating both the EPM and the APA. First, the APA complements rigorous strictures on the Secretary of State's authority, which derive from both the elections code and the Arizona Constitution. Second, the transparency that the APA affords can—if the Secretary receives public comments in good faith—identify both practical and legal flaws in EPM drafts early in the process, potentially preempt later litigation, and fortify public confidence in the integrity of Arizona elections.

INTEREST OF THE *AMICI CURIAE*

Steve Montenegro is the Speaker of the Arizona House of Representatives and Warren Petersen is the President of the Arizona State Senate. The *amici* proffer this

brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on important issues bearing on the application and underlying objectives of statutes it has enacted.

"In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it." *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342 ¶ 5 (1999). Executive branch agencies, such as the Secretary of State's Office, may implement and enforce legislative directives. But an agency "must function in the exercise of its rule-making authority within the parameters of its statutory grant. To otherwise operate would be an administrative usurpation of the constitutional authority of the legislature." *Kennecott Copper Corp. v. Indus. Comm'n. of Ariz.*, 115 Ariz. 184, 186 (App. 1977). Because the EPM is the product of a legislative delegation, ensuring that it is promulgated in compliance with all applicable procedural and substantive statutory limitations is a matter of significant institutional interest for the legislative branch.

Finally, the President and Speaker are plaintiffs in their own ongoing challenge to certain provisions of the 2023 EPM that deviate from controlling statutes. *See Petersen v. Fontes*, No. 1-CA-CV-25-0219 (Ariz. App.). While those proceedings do not include any claim or defense arising under the APA, they

underscore the practical value that the APA's notice and comment processes can impart. *See infra* Section II.

ARGUMENT

I. The APA's Notice and Comment Process Complements and Fortifies Substantive Limitations on the Secretary's Authority

In addition to effectuating the APA's unambiguous text, the Court of Appeals' opinion advances the APA's purpose of tempering agency power with mechanisms for transparency and accountability. The APA's protections are undergirded and illuminated by foundational constitutional concerns. "The roles of each branch of government in Arizona are . . . separate and distinct. 'The legislature has the exclusive power to declare what the law shall be.' In contrast, the executive branch's duty is to carry out the policies and purposes declared by the Legislature." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997) (internal citations omitted). "The separation of powers doctrine is a fundamental principle on which federal, state, and local governments are based," *Matter of Walker*, 153 Ariz. 307, 310 (1987), and is nowhere "more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988). Of course, the practical demands of governance defy hermetical boundaries between the three branches. Because the Legislature cannot anticipate and address with exacting precision every possible contingency or constellation of circumstances, it "may expressly authorize" an administrative agency, "within definite valid limits, to provide rules and regulations

for the complete operation and enforcement of the law." *Duncan v. A.R. Krull Co.*, 57 Ariz. 472, 476 (1941).

This interplay between legislative power and executive implementation, though, is cabined by critical limitations. The first (and most intuitive) is that all administrative actions must be premised on some antecedent legislative grant of authority. Because "[a]dministrative agencies have no common law or inherent powers," all regulatory acts and decisions must derive from "enabling legislation." *Ariz. State Bd. of Regents ex rel. Ariz. State Univ. v. Ariz. State Pers. Bd.*, 195 Ariz. 173, 175, ¶ 9 (1999); *see also Cleckner v. Ariz. Dep't of Health Servs.*, 246 Ariz. 40, 43, ¶ 8 (App. 2019) ("[T]he powers and duties of administrative agencies . . . are strictly limited by the statute creating them."). In addition, all administrative acts—and certainly substantive determinations that directly affect the legal rights and obligations of regulated persons—must be grounded in a delegation that is demarcated by sufficiently discrete and specific terms. *See Sw. Eng'g Co. v. Ernst*, 79 Ariz. 403, 414 (1955) (holding that the absence of "sufficient and definite [terms] to serve as a guide" to the executive branch renders a delegation constitutionally infirm); *Loftus v. Russell*, 69 Ariz. 245, 255 (1949) (agencies cannot be delegated *carte blanche* power to "regulate future conduct and fix[] rights, duties and obligations" of regulated persons).

The exclusive prerogative of the legislative branch to determine the public policies of this State assumes particular salience in the realm of elections. "[T]he Legislature has all power not expressly prohibited or granted to another branch of the government." *Adams v. Bolin*, 74 Ariz. 269, 283 (1952). But the Constitution supplements this general mandate with a specific charge to "enact[] registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12; *see also Ahrens v. Kerby*, 44 Ariz. 269, 341 (1934) (describing Article 7, Section 12 as denoting a "duty" "upon the law-making branch of the government"). To this end, the Legislature has over the decades crafted a comprehensive statutory infrastructure that details with deliberate specificity the contours and mechanics of all facets of election administration, ranging from voter registration and voter list maintenance, *see, e.g.*, A.R.S. §§ 16-121.01, 16-152, 16-165; the requesting and casting of early ballots, *see id.* §§ 16-542, 16-550, 16-550.01, 16-552; the operation of Election Day polling locations, *see id.* §§ 16-410, 16-564, 16-579; and the tabulation and canvassing of votes, *see id.* §§ 16-621, 16-642, 16-646, 16-648.

The EPM accordingly occupies a regulatory lane that is narrow but significant. The Legislature's exhaustive codification of election procedures and transcendent constitutional constraints on delegation permit the EPM to merely "fill up the details" in the interstices of the statutes. *Roberts v. State*, 253 Ariz. 259, 268

¶ 29 (2022) (citation omitted). But, to the extent they conform to the underlying statutes and hew to the Secretary's limited scope of delegated authority, the EPM's edicts are consequential; they carry the force of law and violations are punishable as crimes. *See* A.R.S. § 16-452(C).

In this vein, the APA's notice and comment prerequisites supply a safety brake against improvident or even unlawful EPM provisions, and serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in [the authorizing] legislation." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391 (2024) (internal citation omitted) (referencing analogous provisions in the federal Administrative Procedure Act); *see also Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment) (observing that the federal APA "guards against excesses in rulemaking by requiring notice and comment").

Stated another way, the APA's procedural requirements are not ends in themselves, but rather are means of fortifying substantive constitutional and statutory guardrails on executive authority in the rulemaking context. It is for precisely that reason that agencies can elude the APA's mandates only in those rare contexts that the Legislature has "expressly exempted" from its scope. A.R.S. § 41-1002(A). And because "neither the EPM statute nor the APA expressly exempts the

EPM from the APA's rulemaking process," it applies. *Republican Nat'l Comm.*, 566 P.3d at 991–92 ¶ 22 (internal citations omitted).

In sum, as the Plaintiffs/Appellants have explained, there is no functional incompatibility between the APA and A.R.S. § 16-452. But more fundamentally, the APA process complements and reinforces the constitutional axiom that regulations (such as the EPM) can only implement antecedent "policy choice[s]" of the legislative branch, *Roberts*, 253 Ariz. at 270 ¶ 43—not displace them. By allowing affected parties to scrutinize, critique, and counter proposed regulations before they can assume the force of law, the APA can help contain executive agencies within the boundaries that the Constitution and Legislature have drawn.

II. The Notice and Comment Process Can Facilitate the EPM's Improvement, Avoid Litigation, and Enhance Public Confidence

Aligning the EPM's promulgation with the APA's mandates is not only a matter of jurisprudential importance; it can beget significant benefits for the effective and compliant administration of Arizona elections. While the APA's prerequisites, especially the notice and comment period, are primarily checks on the misuse of agency power, they also offer agencies the chance to avail themselves of probative information and to build trust with regulated communities. Notice and comment is intended to be a dialectical and educational undertaking; the agency must "invite" the public "to comment on [the proposed rule's] shortcomings, consider and respond to their arguments, and explain its final decision." *Perez*, 575

U.S. at 109 (Scalia, J. concurring in the judgment). "The important purposes of this notice and comment procedure cannot be overstated. The agency benefits from the experience and input of comments by the public, which help 'ensure informed agency decisionmaking.' The notice and comment procedure also is designed to encourage public participation in the administrative process. Additionally, the process helps ensure 'that the agency maintains a flexible and open-minded attitude towards its own rules,' because the opportunity to comment 'must be a meaningful opportunity.'" *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (internal citations omitted); *see also N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (noting that APA procedures "were designed to assure fairness and mature consideration of rules of general application"). By eliciting diverse perspectives, inviting scrutiny of proposed rules, and facilitating the refinement of agencies' work product, the APA process conduces better public policy outputs.

The evolution of the 2023 EPM underscores how bypassing these vetting mechanisms can cause an agency to wander into legal missteps. Following a truncated public comment period, the Secretary submitted the EPM to the Governor and Attorney General on September 30, 2023. *See Republican Nat'l. Comm.*, 566 P.3d at 988 ¶ 4. The final version that was unveiled three months later, however,

contained almost a dozen new pages of new rules that had never previously been presented to the public—some of which are dubious at best and unlawful at worst.

Take two examples. The Legislature has instructed that, if an individual who informed the jury commissioner that she is not an Arizona resident fails to respond within 35 days to a request by the county recorder for confirmation of her address, "the county recorder shall cancel the person's registration." A.R.S. § 16-165(A)(9)(b). While refashioning the EPM behind closed doors, the Secretary effectively rewrote the statute to instead instruct the county recorders to merely change such voters' status to "inactive," which allows them to remain on the voter rolls for up to four additional years, *see* Ariz. Sec'y of State, ELECTIONS PROCEDURES MANUAL (Dec. 2023) ["2023 EPM"] at 41.[2] Declining to stay the Superior Court's injunction against its implementation, the Court of Appeals observed that "the EPM provision . . . is inconsistent with state law in multiple ways," and the Secretary "has not shown a strong likelihood of success" in defending it. Order re: Motion for Stay Pending Appeal, *Petersen v. Fontes*, No. 1-CA-CV-25-0219 (Ariz. App. May 1, 2025).

[2] *Available at* https://tinyurl.com/534ccma8 [last accessed Sept. 22, 2025]. The draft EPM that was submitted on September 30, 2023, after the close of public comments, is available on the Secretary's website at: https://tinyurl.com/yna7w84f [last accessed Sept. 22, 2025]. *See Arizonans for Second Chances, Rehabilitation, & Public Safety v. Hobbs*, 249 Ariz. 396, 403 ¶ 12 n.1 (2020) ("We may take judicial notice of the Secretary's website.").

In a second last-minute policy innovation, the Secretary inserted a consequential footnote decreeing that "[t]he requirement to list certain information on the [petition circulator registration submission] does not mean that a circulator's signatures shall be disqualified if the circulator makes a mistake or inconsistency in listing that information (e.g., a phone number or email address that is entered incorrectly; a residential address that doesn't match the residential address listed on that circulator's petition sheets; etc.)." 2023 EPM at 119 n.58. That directive is, of course, irreconcilable with both legislative and judicial determinations that all aspects of a statewide ballot measure petition effort must comply "strictly" with all applicable statutory mandates. *See* A.R.S. §§ 19-101.01, 19-102.01(A); *W. Devcor v. City of Scottsdale*, 168 Ariz. 426, 429 (1991); *Mussi v. Hobbs*, 255 Ariz. 395, 398–400, ¶¶ 16, 21–23 (2023) (affirming disqualification of signatures associated with circulator registrations that had omitted or contained inaccurate contact information). For that reason, the Superior Court found "multiple problems with the language of footnote 58," most notably that it "directly conflicts with Arizona statutes." Under Advisement Ruling, *Petersen v. Fontes*, Maricopa County Superior Court No. CV2024-001942 (Dec. 16, 2024) at 10.

If the Secretary had presented these provisions for public examination and feedback—as the APA required him to do—perhaps he could have been induced to disavow or at least substantially revise them, and hence avert litigation; perhaps not.

But the point is that the notice and comment process is not (or at least should not be) a rote ministerial exercise. If the agency approaches the public in good faith, it can reap the benefits of varied perspectives and new insights. Those virtues carry particular value in the context of elections, where public confidence "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 4 (2020) (cautioning that when public officials abruptly "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"). The Court of Appeals' reasoning accordingly not only comports with the letter of the APA, but vindicates the policy objectives of transparency and accountability that underlie it.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 22nd day of September, 2025.

STATECRAFT PLLC

By: */s/ Thomas Basile*

Kory Langhofer
Thomas Basile
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Amici Curiae Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Steve Montenegro