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22 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

23 **IN AND FOR THE COUNTY OF MARICOPA**

24 Adrian Fontes, in his official capacity as the
25 Maricopa County Recorder,

26 Plaintiff,

vs.

State of Arizona; Katie Hobbs, in her
official capacity as Arizona Secretary of
State,

Defendants.

Case No: CV2020-011845

**STATE'S EMERGENCY MOTION FOR
SPECIAL ACTION OR INJUNCTIVE
RELIEF**

[EXPEDITED ELECTION CASE]

1 State of Arizona, ex rel. Mark Brnovich,
2 Arizona Attorney General,

3 Counterclaimant and
4 Cross Claimant

5 vs.

6 Adrian Fontes, in his official capacity as
7 Maricopa County Recorder,

8 Counterdefendant

9 and

10 Katie Hobbs, in her official capacity as
11 Arizona Secretary of State,

12 Cross Defendant.

13
14 The State of Arizona, through Mark Brnovich, the Attorney General, (“State”) hereby
15 files this emergency motion seeking special action relief, or in the alternative injunctive relief,
16 against Arizona Secretary of State, Katie Hobbs (the “Secretary”), and Maricopa County
17 Recorder, Adrian Fontes (“Recorder”). The State respectfully requests that the Court stop them
18 from unilaterally altering Arizona law on the eve of an election to allow for virtual voting.

19 **INTRODUCTION**

20 In no area of law do rules and procedures matter more than with elections. The U.S.
21 Constitution provides the states “by the Legislature thereof” with the power to prescribe “[t]he
22 Times, Places, and Manner of holding Elections for Senators and Representatives.” U.S. Const.
23 art. I, § 4, cl. 1. The Arizona Constitution provides that “[a]ll elections by the people shall be
24 by ballot, or by such other method as may be prescribed by law[.]” Ariz. Const. art. VII, § 1.
25 Moreover, “[t]here shall be enacted registration and other laws to secure the purity of elections
26 and guard against abuses of the elective franchise.” *Id.* art. VII, § 12.

1 The Executive Branch also plays a role in prescribing election rules through the
2 Elections Procedures Manual (“EPM”). The Arizona Legislature has delegated to the Secretary
3 the power to “prescribe rules to achieve and maintain the maximum degree of correctness,
4 impartiality, uniformity and efficiency on the procedures for early voting and voting.” A.R.S. §
5 16-452(A). The Legislature, however, put an express condition on that delegation: the
6 Secretary is required to consult with the fifteen counties and, prior to issuance, the Governor
7 and Attorney General must approve the EPM. *See id.* § 16-452(B). The current version of the
8 EPM was issued at the end of 2019.

9 The Arizona Legislature has discharged its election duties and adopted extensive and
10 detailed statutes setting forth the procedures for elections in Arizona. To its credit, the Arizona
11 Legislature has made it extremely easy to vote here. Qualified voters may vote in person or by
12 mail, and there are myriad options for the timing of doing either. The Arizona Legislature also
13 created what was supposed to be a limited option for those voters who are confined or
14 physically unable to vote in person and who do not wish to vote by mail. To address that
15 situation, counties are permitted to create Special Election Boards (“SEBs”) comprised of two
16 individuals, one each from the two major political parties, to travel to the voter and assist in
17 casting a ballot. The statute setting forth the procedure for SEBs couldn’t be clearer about what
18 is required for the voter to cast a valid ballot. These procedures include that the ballot must be
19 “personally delivered to the elector by the special election board at the elector’s place of
20 confinement within the county or other political subdivision.” *See* A.R.S. § 16-549(C). The
21 ballot affidavit on the outside of the envelope must be signed or marked by the voter. *Id.* § 16-
22 549(E); A.R.S. § 16-548(A). And, “the marked ballot in the sealed envelope shall be handed
23 by the elector to the special election board.” A.R.S. § 16-549(E).

24 So with only very limited exceptions, the three ways to vote in Arizona are in person, by
25 mail, or through an SEB. The Secretary and Recorder seek to add a fourth option—vote by
26 videophone. Mere weeks before the election, the Secretary and Recorder seek to implement

1 new voting procedures requiring SEBs to conduct voting using videoconferencing technology
2 (the “Virtual Voting Procedures”). Under this novel approach, SEBs will conduct FaceTime
3 calls with voters. *See* State’s Counterclaim and Crossclaim (“Counterclaim”) ¶ 41. The SEBs
4 will not deliver the ballot and the voter will never touch the ballot, mark the ballot, physically
5 return the ballot, or sign the ballot. Instead, at the beginning of the remote FaceTime call, the
6 voter will hold up identification (which doesn’t need to be photo identification), and the SEBs
7 will mark the ballot according to the voter’s selections. The SEBs will then confirm the voter’s
8 selections and mark the ballot affidavit “voter unable to sign due to COVID-19 rules.” *Id.* ¶ 37.
9 Although not entirely clear why, the SEBs will place the ballot in a plastic bag and deliver it for
10 counting (the Secretary suggests quarantining the bag for three days). *Id.* ¶ 38.

11 Not only are the Virtual Voting Procedures facially inconsistent with Arizona law, they
12 are unprecedented. Neither Arizona law nor the EPM allows for “Virtual Special Elections
13 Boards.” Neither Arizona law nor the EPM allows for the use of videoconferencing technology
14 to allow voters to receive, mark, or return their ballots virtually. Neither Arizona law nor the
15 EPM allows voters to vote using their own videoconferencing device. Neither Arizona law nor
16 the EPM allows a voter to receive a ballot by presenting his or her identification through virtual
17 means. Neither Arizona law nor the EPM allows a voter to cast a ballot by having a third party
18 write “voter unable to sign due to COVID-19 rules” on the ballot affidavit. And, therefore,
19 neither the Secretary nor the Recorder are empowered to unilaterally create and implement the
20 Virtual Voting Procedures (only the Legislature is).

21 The Virtual Voting Procedures are also unnecessary. The Secretary and Recorder try to
22 justify the new procedures on the basis that SEBs may not be able to visit certain voters with
23 disabilities because of access restrictions in congregate care settings. This ignores that the
24 Arizona Department of Health Services has made clear that congregate care facilities are,
25 regardless of the level of community spread of COVID-19, required to provide access to
26 “professionals assisting individuals with disabilities.” *Id.* ¶ 24.

1 The Secretary and Recorder suggest that the Virtual Voting Procedures have only
2 limited application to a narrow subset of voters. But the Virtual Voting Procedures themselves
3 belie that characterization. The Recorder’s procedures apply any time physical distancing of
4 six feet is not possible, without explaining how that mandate squares with the requirement that
5 in all cases SEB’s must personally deliver and receive ballots. *Id.* ¶ 44. Otherwise, the Virtual
6 Voting Procedures apply every time a voter states that he or she is physically unable to mark a
7 ballot, regardless of reason, and restricted access to meeting in person exists, including when
8 the voter is not comfortable because of COVID-19. *Id.* ¶ 33. If the Secretary and Recorder
9 have their way, if a voter wants to vote by FaceTime, the voter will vote by FaceTime.

10 Attorney General Brnovich, Governor Ducey, and other election officials have expressed
11 serious misgivings about these eleventh-hour procedures. A little over three weeks ago, the
12 Arizona Supreme Court explained why it refused to set aside an “in person” signature
13 requirement due to COVID-19. The Court remarked that “[a]pplying a rule of necessity here,
14 we would justify setting aside other laws and constitutional protections whenever a crisis or
15 emergency arises.” *Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*,
16 --P.3d--, 2020 WL 5265545, *2 ¶9 (Ariz. Sep. 4, 2020). For the same reason, the Court should
17 reject the Recorder’s request for declaratory relief and grant the State special action or
18 injunctive relief, prohibiting the Secretary and the Recorder from implementing or
19 disseminating the Virtual Voting Procedures.

20 **FACTUAL BACKGROUND**

21 In mid-September, the Attorney General’s Office (“AGO”) obtained a copy of the
22 Recorder’s Early Voting Plan, which mentioned that certain voters will be permitted to “cast
23 their vote , . . . on a video call.” Counterclaim ¶ 17. Concerned, the AGO asked the Recorder to
24 explain, by September 23, 2020, “how this procedure will work and the authority you believe
25 authorizes qualified voters to vote in this manner.” *Id.*

1 Meanwhile, on September 20, 2020, the Yuma County Recorder contacted Governor
2 Ducey’s office to express serious concerns about similar procedures that the Secretary had
3 circulated for review and comment. She explained that “[a]s all counties have faced challenges
4 due to the COVID-19, security and integrity remain a priority and I feel strongly that the
5 recommendations diminish security and integrity and I do not feel I’m able to accommodate
6 any such requests for the recommended procedures.”

7 Understandably concerned, Governor Ducey wrote the Secretary the next day,
8 explaining that “[t]he reports received by my office regarding the proposed election policies
9 and procedures . . . appear in conflict with state law and the election procedures manual.”
10 Governor Ducey believed the new procedures were required to be enacted through the
11 legislative process or through the process for amending the EPM: “Substantive policy changes
12 . . . should endure legislative scrutiny or approval by the attorney general and the governor
13 through the rigorous election procedures manual process prescribed in state law.” Therefore,
14 “[t]hese policy changes should be suspended immediately so that Arizonans can continue to
15 have confidence and faith in the integrity of our election system.” *Id.* ¶ 19.

16 The Secretary responded that the Virtual Voting Procedures are consistent with state
17 law. The Secretary, however, asked Governor Ducey “to promptly (1) issue an Executive
18 Order authorizing such a practice where necessary due to COVID-19; (2) order ADHS to issue
19 emergency directives to safely facilitate voting in long term care, residential care, and hospital
20 facilities under A.R.S. § 26-307; (3) designate my Office to issue emergency orders regarding
21 SEBs under A.R.S. § 26-307; or (4) otherwise authorize another solution” *Id.* ¶ 20.

22 Governor Ducey rightly refused to accede to the Secretary’s after-the-fact request for
23 approval. Governor Ducey correctly explained that last-minute experimentation with election
24 procedures harms election integrity: “[T]he only way we can assure the electorate of the
25 integrity of our election system is to refrain from changes in the middle of the election cycle.
26 This isn’t the time to experiment.” *Id.* ¶ 21.

1 That same day, September 22, the Secretary responded again. The Secretary agreed that
2 “when I say that election officials have a responsibility to act ‘within the contours of our
3 constitution and laws,’ I do mean exactly that, no exceptions.” *Id.* ¶ 22. The Secretary
4 continued to take the position, however, that the new policies are legal. *Id.* On September 23,
5 2020, Governor Ducey wrote to Attorney General Brnovich, attaching the prior correspondence
6 between Governor Ducey and the Secretary, and indicating that “[w]e remain concerned about
7 the referenced policies and procedures and request your office look into this matter.” *Id.* ¶ 23.

8 On September 23, 2020, the Arizona Department of Health Services (“ADHS”) issued
9 “Updates to COVID-19 Guidance for Visitation at Congregate Care Setting for Vulnerable
10 Adults and Children” (the “Update”). *Id.* at ¶ 24. The Update explained that all congregate
11 care facilities with vulnerable adults or children, including nursing care institutions, residential
12 care institutions, nursing supported developmental disability group homes, and ICF-IID’s,
13 “should immediately allow for compassionate care visits regardless of the level of community
14 spread.” *Id.* The Update makes clear that such visits “include visits by . . . professionals
15 assisting individuals with disabilities, including the use of licensed sign language interpreters
16 and other communication service providers.” *Id.*

17 On September 23, 2020, the Secretary issued a press release announcing that she had
18 issued new guidance allowing certain voters to use videoconferencing technology to vote
19 remotely. *Id.* ¶ 25. At about 5:00 p.m. on September 24, 2020, for the first time, the AGO
20 received (from the Recorder’s counsel) a copy of the Secretary’s issued procedures for
21 videoconference voting. The document is entitled “Assisting Voters in Caregiving and
22 Hospital Facilities During the COVID-19 Pandemic” (“the Secretary’s Procedures”). The
23 Secretary’s Procedures provide “recommendations from the Arizona Secretary of State’s Office
24 to county election officials for assisting voters in long term care facilities (including nursing
25 homes and intermediate care facilities), residential health care facilities (including assisted
26 living center/homes and behavioral health residential facilities), and hospitals during the

1 COVID-19 pandemic.” *Id.* ¶ 28. They also provide “rules for assisting residents, patients, and
2 family members” that “facilitat[e] the exercise of the right to vote[.]” *Id.* ¶ 29.

3 The Secretary’s Procedures contain a section entitled “Virtual Special Election Boards
4 Using Videoconferencing Technology.” The Secretary’s Procedures recommend that SEBs
5 develop procedures for facilitating virtual assistance with the aid of videoconferencing
6 technology. *Id.* ¶ 31. The Secretary’s Procedures state that SEBs should use
7 videoconferencing technology where a voter “needs physical assistance in marking their
8 ballot,” does not have a qualified third party to assist in marking the ballot, and where the
9 Special Election Board “is not permitted to enter a caregiving facility or hospital due to
10 COVID-19 visitation and access restrictions (*or the voter is not comfortable receiving*
11 *assistance through an in-person meeting due to COVID-19).*” *Id.* ¶ 33. Under the Secretary’s
12 Procedures, SEBs can use county-issued devices, but they “may also permit voters to conduct a
13 virtual SEB appointment using the voter’s own device.” *Id.* ¶ 34. If the voter chooses to use
14 his or her own device, then the SEB can remain at the County Recorder’s Office while assisting
15 the voter. *Id.* The SEB need not deliver a ballot in person and the voter need not return the
16 ballot in person. *Id.* ¶ 35.

17 According to the Secretary’s Procedures, the SEB may confirm the voter’s identity by
18 merely having the voter hold up his or her identification to the camera on his or her device. *Id.*
19 ¶ 36. Under A.R.S. § 16-579(B), this could include two forms of identification that do not bear
20 the voter’s photo identification. Once the SEB has indicated the voter’s selections on the
21 ballot, “the SEB should write ‘voter unable to sign due to COVID-19 rules’ in the voter
22 signature box.” *Id.* ¶ 37. The SEB should seal the envelope in a plastic bag and “[i]f time
23 permits, the plastic bag containing the ballot envelope should be stored in a secure area and
24 quarantined for three days before being retrieved for processing and tabulation.” *Id.* ¶ 38.

25 Just one day after the Secretary issued the Secretary’s Procedures, the Recorder
26 implemented them. On September 24, the Recorder issued a “policy and procedure” entitled

1 “Expanding Voting Platforms for Voters with Physically (sic) Limitations” (the “Recorder’s
2 Policies”). *Id.* ¶ 39. Both the Recorder and the Secretary have stated that the Recorder’s
3 Policies are consistent with the Secretary’s Policies. *Id.* ¶ 40.

4 The Recorder’s Policies explain that they are intended to “describe[] the expansion to
5 the traditional in-person services to include smart device technology. The options available to
6 voters will include voting in-person, courier service or the use of this newly proposed video
7 meeting service (FaceTime).” *Id.* ¶ 41. The Recorder’s Policies explain that “the voter shall
8 select their preferred method for voting and notify the SEB if they need a device or if they
9 prefer to use their own. The SEB will use iPads to conduct the video meeting.” *Id.* ¶ 42.

10 The Recorder’s policies explain that Arizona law requiring physical delivery and receipt
11 of ballots will only be used “if physical distancing of the six feet requirement is possible.” *Id.* ¶
12 44. Similarly, according to the Recorder’s Procedures, a voter can vote virtually by video
13 technology if “they meet the criteria of being physically unable to mark their ballot and
14 restricted access to meeting in-person exists (i.e. care facility, nursing home, etc.).” *Id.* ¶ 45.
15 The Recorder provides absolutely no guidance or detail on when a voter is “physically unable
16 to mark their ballot” or when sufficient “restricted access to meeting in-person exists.” *Id.*
17 Under the Recorder’s Procedures, like under the Secretary’s Procedures, voters are required
18 only to show identification virtually and the voter will not sign the ballot affidavit. Instead, the
19 SEB will “write ‘voter unable to sign due to COVID-19 rules’ in the signature box.” *Id.* ¶ 47.

20 On September 24, 2020, after retaining outside counsel, the Recorder confirmed to the
21 AGO that he plans to implement the Recorder’s Procedures beginning on October 7, 2020. *Id.*
22 ¶ 48. On September 25, 2020, the Recorder responded in substance to the AGO’s September
23 18 inquiry letter and (unsuccessfully) attempted to justify the Recorder’s Procedures. *Id.* ¶ 49.
24 No less than half an hour after providing his explanation, the Recorder filed this lawsuit.

1 **ARGUMENT**

2 The State is entitled to special action relief prohibiting the Secretary and Recorder from
3 further disseminating or implementing the Virtual Voting Procedures. Alternatively, the State
4 is entitled to injunctive relief enjoining the Secretary and Recorder from doing the same.

5 **I. The Legal Standard.**

6 Under Special Action Rule 3(b), a claimant is entitled to special action relief where “the
7 defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or
8 legal authority.” Under Rule 3(c), a claimant is entitled to special action relief where “a
9 determination was arbitrary and capricious or an abuse of discretion.” “An error of law
10 constitutes an abuse of discretion.” *State v. Bernstein*, 237 Ariz. 226, 229 ¶9 (2015). Under
11 Rule 4(c), “[t]he special action may be instituted with or without an application for an order to
12 show cause why the requested relief should not be granted.”

13 The party seeking a preliminary injunction is required to establish (1) a strong likelihood
14 that he will succeed at trial on the merits; (2) the possibility of irreparable injury to him not
15 remediable by damages if the requested relief is not granted; (3) a balance of hardships favors
16 himself; and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App.
17 1990). “To meet this burden, the moving party may establish either 1) probable success on the
18 merits and the possibility of irreparable injury; or 2) the presence of serious questions and the
19 balance of hardships tip sharply in his favor.” *Id.*

20 **II. The Secretary and Recorder Are Proceeding In Excess of Legal Authority And**
21 **Have Abused Any Discretion.**

22 **A. The Virtual Voting Procedures Are Unlawful.**

23 The Virtual Voting Procedures conflict with several election statutes, and they are
24 therefore unlawful. It is axiomatic that a government official may not issue a rule or regulation
25 that is inconsistent with statute. *See Ferguson v. Ariz. Dep’t of Econ. Sec.*, 122 Ariz. 290, 292,
26 (App.1979) (“[A] rule or regulation of an administrative agency should not be inconsistent with

1 or contrary to the provisions of a statute, particularly the statute it seeks to effectuate.”);
2 *McCarrell v. Lane*, 76 Ariz. 67, 70 (1953) (“It is fundamental that [an administrative agency]
3 could not enact a regulation nor make an order that would conflict with the proper
4 interpretation of the statute.”).

5 Here, the Virtual Voting Procedures conflict with state statute in myriad ways, including
6 the following:

- 7 • A.R.S. § 16-452 requires the Secretary to **consult** with each county board of
8 supervisors and **obtain approval** from the Governor and Attorney General before
9 promulgating new election rules. The Secretary did not do so prior to issuing the
10 Virtual Voting Procedures. *See infra* p. 15.
- 11 • A.R.S. § 16-549(C) twice states that the SEB shall deliver the ballot to the voter
12 “**in person.**” The Virtual Voting Procedures dispense with this requirement.
- 13 • A.R.S. § 16-549(E) requires that “the sealed envelope shall be **handed** by the
14 elector to the special election board.” The Virtual Voting Procedures dispense
15 with this requirement.
- 16 • A.R.S. § 16-549(E) states that “[t]he manner and procedure of [SEB] voting shall
17 be as provided in § 16-548.” A.R.S. § 16-548 provides that “[t]he early voter
18 shall make and **sign the affidavit** and shall then mark his ballot in such a manner
19 that his vote cannot be seen.” The Virtual Voting Procedures dispense with this
20 requirement.
- 21 • A.R.S. § 16-549(C) requires that SEB voting take place “**at the elector’s place of**
22 **confinement within the county** or other political subdivision.” The Virtual
23 Voting Procedures do not require or allow SEBs to confirm that the voter is
24 located “within the county.”
- 25 • Under A.R.S. § 16-550, election officials may only count a ballot when the
26 **signature on the ballot affidavit envelope** matches the signature on the voter’s
registration record. The Virtual Voting Procedures dispense with this
requirement.
- Under A.R.S. § 16-552(B), the early election board must check the voter’s ballot
affidavit envelope to make sure it is sufficient (i.e., signed). The Virtual Voting
Procedures dispense with this requirement.

- Under A.R.S. § 16-579(A), to receive a ballot, a voter must physically present sufficient identification. The Virtual Voting Procedures dispense with this requirement.
- Under the Arizona Constitution, “secrecy in voting shall be preserved.” The Virtual Voting Procedures violate this command by allowing voting through insecure means such as FaceTime.

If the Virtual Voting Procedures suffered from even one of these maladies, they would be unlawful. But the Virtual Voting Procedures suffer from all of them, so the State is entitled to special action relief prohibiting implementation of the Virtual Voting Procedures.

The Recorder and the Secretary have offered several defenses of the Virtual Voting Procedures. None withstands even slight scrutiny.

First, the Recorder argues that even if the letter of the law requires the SEB to deliver a ballot in person, the spirit of the law does not. In Arizona, however, it is the letter of the law that controls, not the spirit. *See State v. Patchin*, 125 Ariz. 501, 502 (App.1980) (“[T]his court is not at liberty to rewrite the statute under the guise of judicial interpretation.”). While courts can resort to other indications of meaning, like statutory purpose, when a statute is ambiguous, none of the foregoing statutes with which the Virtual Voting Procedures interfere is ambiguous. *See State v. Burbey*, 243 Ariz. 145, ¶7 (2017) (“When the text is clear and unambiguous, we apply the plain meaning and our inquiry ends.”). Because § 16-549(C) is clear on two occasions that the SEB must personally deliver a ballot to the voter, it matters not what “spirit” the Recorder believes lurks behind that requirement. Moreover, the Recorder ignores the multiple other statutory provisions that are inconsistent with the Virtual Voting Procedures.

Second, the Secretary has argued that “in person” doesn’t really mean “in person” based on prior Attorney General Opinions having nothing to do with ballots or elections. Those Opinions instead deal with Arizona’s open meeting law, which expressly allows a “meeting” to

1 occur “in person or through technological devices.”¹ See A.R.S. § 38-431(4)(a). This cuts
2 against the Secretary’s argument—the Legislature knows how to grant permission to use
3 technological devices if it so desires. The Legislature has not permitted SEBs to discharge their
4 duties “through technological devices.” And in *Second Chances*, the Arizona Supreme Court
5 rejected that technological devices could be used in place of in-person requirements, even
6 during a pandemic. See 2020 WL 5265545 at *7 ¶35 (“[T]echnological advancement and
7 common practice do not justify rewriting the text of the Constitution.”).

8 The Recorder spends much of his Complaint in this case explaining that the Virtual
9 Voting Procedures are “necessary” due to COVID-19 and Governor Ducey’s executive orders
10 limiting access to congregate care facilities. The Recorder claims that if he had not acted, those
11 executive orders may have limited SEB access in a way that violated voters’ rights under the
12 Americans with Disabilities Act (“ADA”) and the Voting Rights Act (“VRA”). He even seeks
13 attorneys’ fees under the ADA and VRA. One problem with this argument is that the Recorder
14 does not have standing to assert ADA or VRA rights on behalf of voters. The other is that the
15 Early Voting Procedures are in no way tailored to ADA or VRA issues. The final problem is
16 that the argument is simply incorrect. ADHS has made clear that, regardless of the level of
17 community spread of COVID-19, congregate care facilities should allow “visits by . . .
18 professionals assisting individuals with disabilities.” The Recorder’s argument that new
19 procedures are necessary and statutory requirements should be ignored because of COVID-19
20 should fare no better than the similar argument recently rejected in *Second Chances*.

21 Finally, the Secretary and the Recorder both assert that the Virtual Voting Procedures
22 are only available as a “last resort.” In reality, they are quite broad and will be widely
23

24
25 ¹ The Secretary also relies on an Attorney General Opinion from 1985 concluding that parole
26 hearing can occur through technological means. That Opinion was only discussing the due
process requirements for parole hearings as contained in U.S. Supreme Court decisions. Ariz.
Attorney General Op. No. I85-125, 1985 WL70374 (Ariz. 1984). The Opinion did not interpret
any statutory language, let alone for elections.

1 available. Neither the SEB law nor the Virtual Voting Procedures can legally constrain the
2 Virtual Voting Procedures to a specific group of individuals. The SEB laws permit *any* elector
3 to request an SEB, and while the law states it is limited to those confined due to illness or
4 disability, the ADA disallows requiring proof of disability in order to obtain a reasonable
5 accommodation. *See* 28 C.F.R. § 35.136 (f) (“[a] public entity shall not ask about the nature or
6 extent of a person's disability”). Similarly, nothing in the SEB laws require the elector be
7 physically unable to mark their ballot to utilize the SEB. The only requirements are that the
8 elector is confined, unable to go to the polls on Election Day, and does not wish to vote by
9 mailed early ballot. The language of the Virtual Voting Procedures is highly amorphous and
10 extremely broad. The Recorder, for example, wants to require the Virtual Voting Procedures to
11 be followed any time physical distancing of six feet cannot be maintained. And the Virtual
12 Voting Procedures are available to any voter who cannot physically mark a ballot (Does this
13 include voters who forgot to register to vote by mail in time? Or voters who lost their mail-in
14 ballot?) and are subject to access restrictions, including because they are uncomfortable
15 receiving in-person assistance due to COVID-19. The State is entitled to special action relief to
16 stop the confusion and abuse that will ensue if the Virtual Voting Procedures are implemented.

17 **B. The Secretary And Recorder Do Not Have The Power To Unilaterally**
18 **Promulgate The Virtual Voting Procedures Even If They Are Lawful.**

19 Even if the Virtual Voting Procedures are fully consistent with Arizona law, neither the
20 Secretary nor the Recorder has the legal authority to unilaterally issue them. The Recorder only
21 has those powers prescribed by law. *See* Ariz. Const. art. XII, § 4 (powers of county officers
22 are limited to those “prescribed by law”); A.R.S. § 11–201(A) (“The powers of a county shall
23 be exercised only by the board of supervisors or by agents and officers acting under its
24 authority and authority of law.”). “[T]he burden is on the county to point out the constitutional
25 or statutory power that permits the conduct.” *Southwest Gas Corp. v. Mohave County*, 188
26 Ariz. 506, 509 (App. 1997). Arizona law does not grant the Recorder authority to unilaterally

1 create new election procedures, let alone prescribe rules that amend, supplant, and/or reinterpret
2 long-established Arizona election law. That the Recorder’s Procedures are based on the
3 Secretary’s Procedures (also created without authority) provides no cover for the Recorder.
4 This is not the first time the Recorder has attempted to unilaterally create new election
5 procedures. In March 2020, the Recorder attempted to unilaterally convert the presidential
6 preference election into a full mail-in election, until the AGO obtained a temporary restraining
7 order. Just two weeks ago, the Supreme Court enjoined the Recorder from unilaterally
8 including unlawful ballot instructions with mail-in ballots. *Arizona Public Integrity Alliance v.*
9 *Fontes*, CV-20-0253-AP/EL, Amended Order (Sept. 10, 2020).

10 As to the Secretary, she is a constitutional officer with only those duties “prescribed by
11 the constitution and as may be provided by law.” Ariz. Const. art 5, § 1(C). While the
12 Secretary is Arizona’s chief election officer (A.R.S. § 16-142(A)), she has no independent rule
13 making authority. *See e.g.*, A.R.S. § 16-452. Although the Legislature expressly delegated to
14 the Secretary the duty to “prescribe rules to achieve and maintain the maximum degree of
15 correctness, impartiality, uniformity and efficiency on the procedures for early voting and
16 voting,” that authority may be exercised only “[a]fter consultation with each county board of
17 supervisors or other officer in charge of elections” and implemented only after obtaining the
18 Governor’s and the Attorney General’s approval. A.R.S. § 16-452(A),(B). The Virtual Voting
19 Procedures were issued without the approval (and even over the objection of) Governor Ducey
20 or Attorney General Brnovich.

21 To the extent the Secretary claims the Virtual Voting Procedures are simply guidelines,
22 the procedures clearly evidence substantive changes to long-standing Arizona election law (and
23 county recorders are implementing them). As explained, the Virtual Voting Procedures contain
24 numerous procedures previously unknown under Arizona election law. The Secretary cannot
25 skirt the statutory prerequisites for creating election procedures, and exponentially increase her
26 own authority, by simply mis-characterizing “procedures” as “guidelines.”

1 **C. The Virtual Voting Procedures Are An Abuse Of Any Discretion.**

2 Even if the Virtual Voting Procedures are legal, they are bad policy, so much so that
3 they are unlawful. As explained, the Virtual Voting Procedures are significantly lacking in
4 detail. One cannot review them without coming away with numerous questions about who
5 qualifies for the Virtual Voting Procedures, how qualification will be verified (if at all), and
6 how the secrecy and security of ballots will be maintained.

7 The timing of the issuance of the Virtual Voting Procedures is problematic. The
8 Recorder and Secretary have had years to suggest new procedures for the upcoming election,
9 and have known for months about COVID-19, and yet waited until less than two weeks before
10 the election to try to issue Virtual Voting Procedures. Implementation of the Virtual Voting
11 Procedures for the first time during a general election, when they were not used for the
12 presidential preference election or the primary election, will result in significant voter
13 confusion and likely raise questions about the integrity of the election.

14 The Virtual Voting Procedures also risk producing erroneous or mistaken votes. To the
15 extent an elector is unable to mark his own ballot, the Virtual Voting Procedures do not permit
16 the elector to meaningfully inspect the whole of the ballot before it is sealed in the ballot
17 affidavit envelope. Given the dozens of candidates and a variety of local and statewide
18 initiatives, ballots are necessarily complex. Electors are entitled to personally inspect their
19 ballot to ensure accuracy and to prevent miscast votes. This is one reason why the Legislature
20 requires SEB ballots to be personally delivered. While the Virtual Voting Procedures instruct
21 SEBs to virtually show the ballot after votes are marked, that hardly allows an elector to
22 conscientiously review their ballot to ensure there are no mistakes, accidental or otherwise.

23 The Virtual Voting Procedures are also subject to fraud and abuse. Requiring SEBs to
24 travel to the elector's place of confinement to deliver the ballot enables election officials to
25 confirm eligibility and prevents false claims of confinement. Nothing in the Virtual Voting
26 Procedures enables the county recorder to confirm the elector is eligible for the SEB, is in fact

1 confined or disabled in any manner, or even physically located in the county, let alone the
2 country. Because the Virtual Voting Procedures permit electors to use personal devices with
3 the SEB remotely located, it fails to provide any safeguards to prevent bad actors, wherever
4 located, from making a request for, and receiving help from, a virtual SEB. The Secretary and
5 Recorder (perhaps unintentionally) have created a set of procedures that can be easily abused.

6 The Virtual Voting Procedures permit SEBs to simply write on the ballot affidavit,
7 “voter unable to sign due to COVID-19 rules[.]” The early ballot is then comingled with the
8 general population of early ballots, and in Maricopa County the ballot will be subject to the
9 ordinary process of verifying ballot signatures through electronic scan and review. Yet, the
10 Virtual Voting Procedures provide no requirement that the signature verification board
11 (different from the SEBs) confirm that ballots stating “voter unable to sign due to COVID-19
12 rules” were actually cast through an SEB. Accordingly, nothing prevents bad actors from
13 fraudulently submitting early votes by simply writing “voter unable to sign due to COVID-19
14 rules” on the ballot affidavit—gutting the signature requirement and eliminating any need to
15 forge an elector’s signature to cast a fraudulent vote.

16 **III. The State is Entitled To Injunctive Relief.**

17 While the State doesn’t believe that it is required to satisfy the injunctive relief factors in
18 order to obtain final special action relief on an emergency basis, the State easily satisfies those
19 factors. For the reasons explained above, the Virtual Voting Procedures are unlawful and,
20 therefore, the State will prevail on the merits of its claims.

21 In contrast to the Secretary and Recorder’s speculative harm to voters, the State is
22 certain to suffer irreparable harm. The Secretary and Recorder’s attempt to prevent the State
23 “from conducting this year’s elections pursuant to . . . statute[s] enacted by the Legislature”—
24 where no party has shown those statutes to be unconstitutional—“would seriously and
25 irreparably harm the State” and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).
26 Similarly, any time a state is prevented from “effectuating statutes enacted by representatives of

1 its people, it suffers a form of irreparable injury.” *See Maryland v. King*, 567 U.S. 1301 (2012)
2 (Roberts, C.J., in chambers); *McCluskey v. Sparks*, 80 Ariz. 15, 20-21 (1955) (holding
3 injunction was appropriate where plaintiffs sought to require officials “to comply with the
4 statutes and constitutions of Arizona and of the United States”); *Boruch v. State ex rel.*
5 *Halikowski*, 242 Ariz. 611, 616, ¶ 16 (App. 2017) (courts grant injunctive relief “when a public
6 officer enforces a public statute in a manner that exceeds the officer’s power”).

7 This is particularly so given the State’s compelling interest in detecting fraud and
8 safeguarding voter confidence and election integrity. *Crawford v. Marion County Election Bd.*,
9 553 U.S. 181, 196–97 (2008). The “in person” requirement helps ensure that the voter is
10 properly located “within the county or other political subdivision” and is eligible for voting
11 under A.R.S. § 16-549. Likewise, the signature requirement is necessary to confirm the
12 identity of voters. Signed ballot affidavits not only confirm identity, they provide the
13 attestations needed to prosecute a bad actor. Lacking a signature, the person who cast the vote
14 has made no attestations under penalty of perjury affirming they are in fact a registered voter
15 entitled to vote, have not voted in this election in any other county or state, and that they
16 personally voted the ballot. *See* A.R.S. § 16-547. The “in person” and signature requirements
17 in A.R.S. § 16-549, therefore, promote “public confidence in the integrity of the electoral
18 process,” which is critical to “encourag[ing] citizen participation in the democratic process.”
19 *See Crawford*, 553 U.S. at 197.

20 The balance of hardships also strongly favors the State. The Virtual Voting Procedures
21 strips A.R.S. § 16-549 of all meaning (and enforceability) by allowing any voter who is “not
22 comfortable” with the personal delivery and signature requirements to bypass these
23 requirements. They also risk delaying or calling into question election results and could lead to
24 post-election challenges. In contrast, any conceivable harm that a voter might suffer is
25 negligible (if not nonexistent). As explained, ADHS requires congregate care facilities to
26 provide access to professionals assisting residents with disabilities. Any discomfort a voter

1 might otherwise have in utilizing the SEB procedure can be avoided by taking advantage of
2 Arizona’s robust early ballot voting options, or by utilizing SEBs present at the place of
3 confinement but distanced during the marking procedures.

4 For the same reasons, the public interest requires injunctive relief. Moreover, the
5 Arizona Legislature has definitively spoken on the public interest by passing A.R.S § 16-549.
6 Following long-established Arizona election law—especially on the eve of hotly contested
7 national elections—is thus in the public interest. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32
8 (1954) (“Subject to specific constitutional limitations, when the legislature has spoken, the
9 public interest has been declared in terms well-nigh conclusive.”); *Virginian Ry. Co. v. Sys.*
10 *Fed’n No. 40*, 300 U.S. 515, 552 (1937) (holding that legislation “is in itself a declaration of the
11 public interest”). Adhering to established law in the shadow of an imminent election promotes
12 certainty and protects against “voter confusion and consequent incentive to remain away from
13 the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *see also Tedards v. Ducey*, 398 F.Supp.3d
14 529, 548 (D. Ariz. 2019) (state has a “substantial interest[.]” in “lessening voter confusion”).

15 **CONCLUSION**

16 The State respectfully requests that the Court grant it special action (or injunctive) relief
17 prohibiting the Recorder and the Secretary from further disseminating or implementing the
18 Virtual Voting Procedures. Because the Recorder has indicated that he plans to implement the
19 Recorder’s Procedures beginning October 7, the State respectfully requests that the Court grant
20 such relief on or before October 2.

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1 RESPECTFULLY SUBMITTED this 29th day of September, 2020.

2 **MARK BRNOVICH**
3 **ATTORNEY GENERAL**

4 By */s/ Michael S. Catlett* _____

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