ARIZONA SUPREME COURT

ARIZONA REPUBLICIAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of the Arizona Republican Party and Arizona voter and taxpayer, Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State; and STATE OF ARIZONA, a body politic, Respondents.	No. CV-22-0048-SA **(Expedited Consideration Requested)**

ARIZONA SECRETARY OF STATE'S MOTION TO STRIKE STATE OF ARIZONA'S RESPONSE TO APPLICATION FOR ISSUANCE OF WRIT UNDER EXERCISE OF ORIGINAL JURISDICTION AND BRIEF AMICUS CURIAE OF ARIZONA ATTORNEY GENERAL MARK BRNOVICH

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Introduction

Petitioners filed a Petition for Special Action against Respondents Katie Hobbs, in her official capacity as Arizona Secretary of State ("Secretary"), and the State of Arizona. On the response deadline, Arizona Attorney General Mark Brnovich ("AG") filed a single brief combining (1) his "Response" to the Petition for Special Action on behalf of the State and (2) an "Amicus Brief" on his own behalf. The brief doesn't differentiate between the State's arguments and the AG's, and it runs afoul of basic rules of appellate procedure and practice. First, the AG's brief inserts new issues into the case and, incredibly, even asks for new affirmative relief against the Secretary. Second, the brief violates the rules requiring the independence of amicus.

Under ARCAP 6(a), the Secretary moves to strike the AG's pleading, except argument Section IV [at 21-29]. Indeed, Section IV is the only proper "response" to the Petition. It properly includes arguments opposing this Court's jurisdiction over Petitioner's constitutional claim. Every other argument in the AG's brief is an impermissible use of a response or amicus brief. The Court should strike them; failing to do so will result in an improper enlargement of issues and request for relief

without the requisite filing of a separate petition and opportunity to respond.

Argument

I. The State, a Respondent, Cannot Request Affirmative Relief Against the Secretary, Another Respondent, in its Response to Petitioners' Claims.

The State's so-called Response to the Petition improperly asks the Court to "accept jurisdiction," decide issues not raised in the Petition, and provide affirmative relief Petitioners didn't ask for. But a "response" to a special action petition in this Court is for "[o]bjections to [the petitioner's] relief." R. P. Spec. Act. 7(d). A respondent "cannot seek affirmative relief via a response to a special action petition[.]" *Costa v. Mackey*, 227 Ariz. 565, 568 ¶ 1 (App. 2011). Instead, a litigant who seeks "affirmative relief" in a special action must request it "via a special action petition." *Id.* at 572 ¶ 14; *see also State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527 ¶ 5 n.3 (App. 2007) (declining to consider request for affirmative relief where party failed to file a cross-petition for special action); *State v. Super. Ct., In and For Pima Cty.*, 26 Ariz. App. 482, 485 (App. 1976) ("If the real parties in interest wanted [affirmative relief], it was incumbent upon

them to cross-petition for special action relief.").[1]

The State didn't file a petition for special action. Yet it argues [at 18-21] that the EPM's drop-box procedures (which the AG approved)[2] and the Secretary's signature verification guidance violate Arizona law. And it asks the Court to "accept jurisdiction to determine whether the 2019 EPM remains valid" [at 21], "hold that the 2019 EPM . . . is no longer valid" [at 3], and "order the Secretary to . . . provid[e] a valid draft EPM to the AG and Governor by a certain date" [at 17, 20, 21]. None of these claims against the Secretary is proper.

The State's use of its Response to request affirmative relief is even more egregious here because it raises potential cross-claims against its co-respondent, and it does so under an expedited briefing schedule. The State's failure to raise these claims in a procedurally proper petition thus deprives the Secretary of an opportunity to respond under Rule 7, R. P.

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[1] The Rules of Special Action Procedure do not authorize a "cross-petition," but instead require parties to seek relief in an initial petition. *See Costa*, 227 Ariz. at 572 ¶ 14. In any event, a respondent cannot request affirmative relief in a response to a special action petition. *Id.*; *State ex rel. Thomas*, 216 Ariz. at 527 ¶ 5 n.3; *Super. Ct., In and For Pima Cty.*, 26 Ariz. App. at 485.

[2] Not only did the AG approve the EPM with the drop-box security procedures, he also declared that he reviewed the EPM and it "complies with Arizona's election statutes." [APP157]

Spec. Act. Though the Secretary may respond to amici, that doesn't give her a meaningful opportunity to defend the AG's new claims. For one thing, the Secretary must file a combined response to all amici with a 3,500 word limit. [Court's Feb. 28, 2022 Order] The AG's brief is 7,304 words – more than double the amicus brief word limit. [*Id.*] And in all events, the AG's amicus brief is improper and should be stricken for the reasons explained below.

In short, the AG cannot be petitioner and respondent at the same time. The Court should strike the State's attempt to use its "response" to the Petition as a Trojan Horse seeking additional and distinct relief against the Secretary.

II. The Court Should Strike the AG's Improper Amicus Brief.

1. The AG's Amicus Brief violates Rule 16.

Under ARCAP 16(a), an "[a]micus curiae . . . must be independent of any party to the appeal." *See also* Ariz. R. P. Spec. Act. 7(f) ("An amicus curiae brief . . . shall conform to the requirements of Rule 16, ARCAP"). And "[c]ounsel for a party may not author an amicus curiae brief in whole or in part." ARCAP 16(a). The AG's purported Amicus Brief violates both requirements.

The AG is not "independent" of the State here because he is representing the State in this case. The ordinary meaning of "independent" is "not influenced or controlled in any way by[.]"[3] Here, the same lawyers are representing the State and the AG, those lawyers drafted and filed a combined brief for both the State and the AG, and they made no effort to distinguish the State's arguments from the AG's amicus arguments.[4] It's hard to imagine a more obvious lack of independence.

The AG also claims [at 1] that he filed his amicus brief under A.R.S. § 12-1841, but that statute doesn't authorize the AG's filing here. Under Section 12-1841, when a litigant claims in a pleading that a statute is unconstitutional, "the attorney general . . . shall be served with a copy of the pleading . . . and shall be entitled to be heard." A.R.S. § 12-1841(A). Yet the AG's Amicus brief doesn't even respond to Petitioners' constitutional claim. [Resp./Amicus Br. at 22 (the brief "does not address

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[3] *Cambridge Dictionary,* https://dictionary.cambridge.org/us/dictionary/english/independent.

[4] Raising indistinguishable arguments in a combined brief of both a party and an amicus is inappropriate for yet another reason: an amicus brief "should not duplicate the briefs of the parties." ARCP 16, cmt. to 1998 Amendments; *see also Ryan Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (when amici "duplicate the arguments made in the litigants' briefs," they "should not be allowed"); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) (same).

the merits of Petitioners' constitutional claim")] Section 12-1841 doesn't apply here, and it cannot excuse the AG's violation of Rule 16(a).

Beyond that, the AG's amicus brief was "author[ed]" by counsel for a party. ARCAP 16(a); [Resp./Amicus Br. at 1 ("Attorneys for Respondent State of Arizona and Amicus Curiae Arizona Attorney General Mark Brnovich"); and 35 (signature block)]. And it far exceeds the word limit for amicus briefs under this Court's February 28 Order. [Resp./Amicus Br. Cert. of Compliance (certifying that the brief is "7,304 words")]

The Amicus Brief of the AG – counsel for a party – blatantly violates both Rule 16 and this Court's order, and the Court should strike it.

B. The AG's Amicus Brief improperly expands the scope of the case.

Finally, the Court should strike the AG's purported amicus brief because it raises new issues Petitioners didn't raise. This Court consistently holds that "amicus curiae are not permitted to create, extend, or enlarge the issues" before the Court. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4 ¶ 7 n.2 (2013) (quotation omitted); *see also City of Tempe v. Prudential Ins. Co. of Am.*, 109 Ariz. 429, 432 (1973) (rejecting amicus' attempt "to raise an issue that . . . was not raised nor argued by the parties"); *State ex rel. McDougall v. Strohson (Cantrell)*,

190 Ariz. 120, 121 (1997) ("We do not permit amici to inject new issues into a case on appeal.").

The AG tries to inject various arguments into this case, including allegations [at 4-12] that the 2019 EPM is invalid, a request [at 12] to compel the Secretary to "provid[e] a valid draft EPM to the AG and Governor by a date certain," and a claim [at 18-20] that the Secretary's signature verification guidance violates Arizona law. These arguments weren't raised by the parties, and the Court should disregard them.

Conclusion

The AG's request to insert new issues into the case and seek affirmative relief against a co-respondent is a shameful misuse of the State's "response" to a petition for special action. Even worse, his attempt to frame the same brief as his personal "amicus brief" violates multiple rules and this Court's order. The Court should strike the AG's filing, except argument Section IV.

RESPECTFULLY SUBMITTED: March 15, 2022.

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