

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

JUSTIN HEAP, in his official capacity as
the Maricopa County Recorder,

Petitioner,

v.

THOMAS GALVIN, in his official
capacity as a member of the Maricopa
County Board of Supervisors;
MARK STEWART, in his official capacity
as a member of the Maricopa
County Board of Supervisors;
KATE BROPHY MCGEE, in her official
capacity as a member of the
Maricopa County Board of Supervisors;
DEBBIE LESKO, in her official
capacity as a member of the
Maricopa County Board of Supervisors;
STEVE GALLARDO, in his official
capacity as a member of the Maricopa
County Board of Supervisors,

Respondents.

Arizona Supreme Court
No. CV-26-0189-SA

Court of Appeals
Division One
No. 1 CA-CV 26-0446

Maricopa County
Superior Court
Nos. CV2025-020621;
CV2025-022266

BRIEF OF *AMICUS CURIAE* MARICOPA COUNTY ATTORNEY
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INTEREST OF AMICUS CURIAE

Maricopa County Attorney Rachel Mitchell (the “County Attorney”) files this brief as *amicus curiae* given to address the unauthorized retention of Maricopa County Recorder Justin Heap’s (the “Recorder”) counsel—James K. Rogers of America First Legal Foundation. Because America First Legal was not appointed by the County Attorney, any litigation activities that America First Legal has taken on the Recorder’s behalf are *ultra vires* and void. For that reason, the County Attorney has filed a separate action seeking to enjoin the Recorder from using counsel other than the one appointed to him by the County Attorney, *see Mitchell v. Heap*, No. 1 CA-CV 26-0165, which the Petition itself (at 8) describes as a “related case[.]”

The County Attorney takes absolutely no position on the merits of the permanent injunction entered by the superior court, the Court of Appeals Order Granting the Maricopa County Board of Supervisors’ (the “Board”) Emergency Motion for Stay Pending Appeal, or the arguments contained in the Recorder’s Petition for Special Action. *See* APP033–44, 126–31. This legal dispute is between two of the County Attorney’s agency-clients, and her ethical duties compel her to refrain from taking a position on the merits of that dispute.

However, the County Attorney writes separately to emphasize that because she has not approved the Recorder’s retention of America First Legal, a public

interest law firm devoted to furthering particular ideological causes, and the Recorder has no independent statutory authority authorizing him to retain counsel without the County Attorney's approval, the Petition is itself an unauthorized filing and should be dismissed on that basis. These underlying legal issues have been fully briefed in *Mitchell v. Heap*, No. 1 CA-CV 26-0165, currently pending before the Court of Appeals.

The County Attorney stands ready to appoint counsel other than America First Legal for the Recorder to litigate his dispute with the Board. In fact, if properly appointed counsel determines that the Petition should be re-filed in the exact same form, raising the exact same arguments, the County Attorney would have no objection. The County Attorney's only position is that the counsel retention process for the parties' dispute must flow through her office in this instance as required by law. She seeks to reiterate that authority here and that the Recorder's counsel is not authorized by law to submit briefs to this Court.

ARGUMENT

I. The Recorder Lacks Statutory Authority to Retain Litigation Counsel in this Matter.

The Arizona Constitution creates a horizontal row of county officers. Ariz. Const. art. XII, § 3; *see also Sanchez v. Maricopa County*, 572 P.3d 101, 107 ¶¶ 14, 16 (Ariz. 2025). It then provides that “[t]he duties, powers, and qualifications of such officers shall be as prescribed by law.” Ariz. Const. art. XII, § 4. As this

Court has long held, the phrase “prescribed by law” refers to “the statutory law of the state and not the common law.” *Arizona State Land Dep’t v. McFate*, 87 Ariz. 139, 142 (1960), *abrogated on other grounds by State ex rel. Brnovich v. Arizona Board of Regents*, 250 Ariz. 127, 131–32 ¶¶ 14–16 (2020).

That command sets a clear limitation on the boundaries of county officers’ powers, and the Recorder is no exception. “The Recorder’s authority is limited to those powers expressly or impliedly delegated to him by the state constitution or statutes. Thus, like all public officials, the Recorder may be ‘enjoined from acts’ that are beyond his power.” *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62 ¶ 14 (2020) (citation omitted). Thus, when a county officer claims authority to act exists, the court must ask: “what constitutional or statutory authority” supports the “questioned conduct?” *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996).

Arizona caselaw going back to the territorial era makes abundantly clear that this principle applies to the retention of counsel. In *Santa Cruz County v. Barnes*, the territorial supreme court upheld the validity of a county board’s retention of attorneys to pursue litigation, with the county attorney’s consent, based on the statutory authority conferred by the precursor to A.R.S. § 11-251(14). 9 Ariz. 42, 48–49 (1904) (explaining that the power to retain counsel is “obviously embraced in the general power ‘to control the prosecution and defense of all suits to which

the county is a party” (citation omitted)); *see also Pima County v. Grossetta*, 54 Ariz. 530, 539–40 (1939) (reaffirming county boards’ ability to retain litigation counsel under its statutory authority to “direct and control the prosecution and defenses of all actions to which the county is a party, and compromise the same.”). This Court reaffirmed those core holdings in *Board of Supervisors v. Woodall*, again citing A.R.S. § 11-251(14) in holding a county board could retain litigation counsel when the county attorney was unavailable but could not retain general counsel to advise the board and other county officers in the county attorney’s stead. 120 Ariz. 379, 381–83 (1978).

The Court of Appeals has followed these holdings ever since. In *Romley v. Daughton*, the court held (1) county boards may only retain outside counsel to provide advice at the conclusion of a three-step process to determine the county attorney’s unavailability and (2) county boards may only retain outside counsel to pursue litigation under certain circumstances and on a case-by-case basis. 225 Ariz. 521, 524–26 ¶¶ 11–18, 23–25 (App. 2010). “[A] county board of supervisors would exceed its authority in effectively divesting the county attorney of his power to represent the county and its agencies without the requisite determination on a case-by-case basis” of the county attorney’s unavailability. *Id.* at 526 ¶ 25.

On the other hand, the court has made clear that county officials without independent statutory authority to retain litigation counsel “must use counsel

obtained by the County Attorney to represent their interests.” *Romley v. Arpaio*, 202 Ariz. 47, 54 ¶ 27 (App. 2002). In *Arpaio*, a former employee of the county sheriff brought an administrative action against the sheriff. *Id.* at 49 ¶ 3. Because that employee “intended to call the Maricopa County Attorney as a witness ... the County Attorney had a conflict of interest in representing the Sheriff” and appointed private counsel for him. *Id.* The sheriff spurned “the chosen attorney’s services,” asserting the county attorney “should have no input in choosing counsel in light of its conflict of interest” and assigned the representation to an existing employee of the sheriff’s office. *Id.* at 49–50 ¶ 4.

Notwithstanding the county attorney’s conflict in accepting the representation or the fact that the employee’s services would have cost the county nothing additional, the court *required* the sheriff to use the counsel appointed for him. “Because the Sheriff lacks statutory authority to make this choice, and because neither the Board nor the County Attorney approved the Sheriff’s selection of counsel,” he could not “choose independent counsel to represent him.” *Id.* at 55 ¶ 29.

Like the sheriff in *Arpaio*, no statute expressly or impliedly authorizes the Recorder to retain litigation services. Title 11 only confers that authority on county boards, A.R.S. § 11-251(14), and county attorneys who are the “public prosecutor[s]” for their counties. A.R.S. § 11-532(A). The power to “prosecute”

encompasses “both the initiation and continuation of litigation in both the criminal and civil contexts.” *Brnovich*, 250 Ariz. at 131 ¶ 15. An aspect of that power is the ability to appoint outside counsel in “conflict of interest situations and problems requiring special expertise.” 1977 Ariz. Att’y Gen. Op. 154.

The legislative choice to confer the authority to retain counsel upon only two county officers is deliberate and must be respected. *Estate of Dominguez v. Dominguez*, 567 P.3d 81, 86 ¶ 19 (Ariz. 2025); *Stambaugh v. Killian*, 242 Ariz. 508, 511 ¶ 15 (2017). It evinces a legislative decision that the power does not exist for any other county office and cannot be filled in with vague notions of “common law” authority. *McFate*, 87 Ariz. at 142. Yet in the entire history of the County Attorney’s lawsuit (*Mitchell v. Heap*) seeking to enjoin the Recorder from using unauthorized counsel, he has only ever relied on a supposed common-law right to counsel under A.R.S. § 1-201 and a single opinion, *Maricopa County v. Biaett*, that has no bearing on the issue because the retention of counsel was channeled through the county attorney’s office. 21 Ariz. App. 286, 287 (1974) (county attorney delegated task of finding outside counsel to Attorney General, who “then told the recorder he should secure private counsel”).¹

¹ For the Court’s convenience, the appellate briefing in *Mitchell v. Heap* is included in a supplemental appendix to this amicus brief.

The Petition was filed by counsel who is not properly authorized to represent the Recorder in his dispute against the Board. The absence of a statute authorizing the Recorder to unilaterally retain private counsel means that America First Legal's retention is *ultra vires*. For that reason alone, the Petition should be dismissed without prejudice to be re-filed by properly authorized counsel.

II. Real-World Consequences Demand Intervention From this Court on the Recorder's Ability to Retain Counsel to Litigate *Heap v. Galvin*.

As the Court of Appeals' Order recognized, this case involves "no mere backroom dispute over accounting principles or organizational charts. It is, by everyone's assessment, a live conflict hurtling toward real-world consequences in elections about to begin." APP129. That observation applies equally to the issue in *Mitchell v. Heap*, as America First Legal's attempt to exercise the County Attorney's statutory duties and responsibilities has thrown a wrench into county governance right on the eve of the election.

When "the public elects an officer who is to perform all duties of an attorney for a governmental entity, they expect that that person will perform all duties within the scope of that office unless disabled from doing so by some ethical or legal rule." *Salt Lake Cnty. Comm'n v. Short*, 985 P.2d 899, 907 (Utah 1999). Yet America First Legal, through the Petition presented to this Court, is now acting as a *de facto* county attorney for the Recorder's election administration duties to the exclusion of the officer elected by county voters to be "the public prosecutor of the

county,” pursue civil claims on behalf of county officers, and appoint counsel for them when she cannot personally handle the litigation. A.R.S. § 11-532(A). The election’s proximity heightens the stakes, as it is untenable for the Recorder (or other county recorders) to bypass county attorneys’ offices, retain their own litigation counsel, and pursue eleventh-hour litigation to alter the conduct of the election. *See Richer v. Fontes*, 2024 WL 4299099, at *3 (Ariz. Sept. 24, 2024) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)); *see also Mi Familia Vota v. Fontes*, 111 F.4th 976, 984 (9th Cir. 2024).

By claiming to exercise the powers statutorily assigned to county attorneys—and pointedly not conferred upon county recorders—America First Legal’s actions constitute an institutional injury to the County Attorney’s office. *See Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 418 ¶ 9 (2014) (“[T]he legislature as a body suffers a direct institutional injury ... when an invalid gubernatorial veto improperly overrides a validly enacted law.”); *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487 ¶ 15 (2006) (a governmental body suffers “direct injury to its authority” when a separate body illegally attempts to abrogate or nullify its actions); *Montenegro v. Fontes*, 576 P.3d 692, 700 ¶ 34 (Ariz. 2025) (“The legislative power belongs solely to the Legislature ... [i]f it is given away, in whole or part, it presents an institutional injury.”).

America First Legal’s attempt to arrogate for itself the powers and duties of the County Attorney’s office are part and parcel of the real-world consequences cited by the Court of Appeals’ stay order. The County Attorney’s role as a provider of neutral legal advice to the Board and the Recorder—each of which have statutory election-administration responsibilities and duties—cannot be extricated from the election-administration process. This Court should restore the County Attorney to her proper role and dismiss the Recorder’s Petition as unauthorized by law.

CONCLUSION

The matters in dispute in *Heap v. Galvin* are of paramount importance, regardless of the outcome. That is all the more reason why they must be litigated by counsel appointed through authorized statutory channels, as opposed to a partisan firm devoted to furthering particular ideological causes. For that reason, the Court should dismiss the Petition as an unauthorized filing without prejudice to authorized counsel’s re-filing of the Petition. That is the sole extent of the County Attorney’s objection to the Petition.

RESPECTFULLY SUBMITTED this 25th day of June 2026.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

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