

**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

**Petitioner's Opposition to Rachel Mitchell's Motion for Leave to
File Amicus Curiae Brief and Response to Her Amicus Brief**

James K. Rogers (No. 027287)
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave., SE #231
Washington, DC 20003
(202) 964-3721
James.Rogers@aflegal.org

Attorney for Petitioner

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	6
I. Mitchell's Amicus Should Be Rejected Because It Raises an Issue Not Before This Court.	6
II. Mitchell's Characterization of AFL's Scope Is Both Factually Wrong and Currently Being Litigated Before the Superior Court.	7
III. Mitchell is Not a Proper Amicus Under ARCAP 16.....	8
A. ARCAP 16(a) bars the filing.	8
B. Mitchell is not independent of the parties.	11
C. Mitchell is at least arguably a party to the consolidated case, and that doubt alone counsels against leave.	13
D. The filing creates serious ethical concerns.	14
IV. Mitchell's Amicus is an Improper End Run Around the Court of Appeals and the Operative Superior Court Ruling.....	15
A. The same issues are already fully briefed in Mitchell v. Heap. ...	15
B. Mitchell's filing disregards the operative law of the consolidated case.	17
C. Mitchell's requested remedy is disproportionate and disruptive.	18
V. Mitchell is Wrong on the Merits.....	19
A. Biaett controls the core issue.....	19
B. The Briefing in Biaett Demonstrates That Mitchell's Arguments Have Already Been Raised and Rejected.....	22
C. Woodall and Daughton confirm that the County Attorney's authority is not absolute.	24
D. A.R.S. § 11-532 does not give Mitchell veto power over the Recorder's litigation counsel.	26
E. Romley v. Arpaio is materially different.....	28
F. Conflict and lack of harmony independently justify independent counsel.	29
G. Mitchell's "ideological," "partisan," and election-timing objections cannot save her argument.	31
VI. The Court Should Not Allow Mitchell to Obtain Relief That Would Benefit the Board While Claiming Neutrality.	33
VII. The Court Should Impose Sanctions and Award Attorney Fees..	34
CONCLUSION	39

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Arizona Public Integrity Alliance v. Fontes</i> , 250 Ariz. 58 (2020).....	28
<i>Bd. of Supervisors of Maricopa Cnty. v. Woodall</i> , 120 Ariz. 379 (1978).....	25
<i>Cave Creek Unified Sch. Dist. v. Ducey</i> , 233 Ariz. 1 (2013).....	1, 6, 7
<i>Maricopa County v. Biaett</i> , 21 Ariz. App. 286 (1974).....	Passim
<i>Riley, Hoggatt & Suagee, P.C. v. English</i> , 177 Ariz. 10 (1993).....	5, 20, 21, 24
<i>Romley v. Arpaio</i> , 202 Ariz. 47 (App. 2002).....	28, 29
<i>Romley v. Daughton</i> , 225 Ariz. 521 (App. 2010).....	25, 30, 32
 Statutes	
A.R.S. § 1-201	28
A.R.S. § 11-532	Passim
A.R.S. § 11-601(2).....	20, 28
A.R.S. § 12-350	37
A.R.S. § 12-349(A), (B)	40
A.R.S. § 12-349(B)	40
A.R.S. § 12-349(A)(1).....	36
A.R.S. § 12-349	36, 35, 37
A.R.S. § 12-350	37, 38
 Rules	
ARCAP 16.....	Passim
ARCAP 25.....	35, 40
Ariz. R. Sup. Ct. 42	3, 14, 31

INTRODUCTION

The Court should deny Maricopa County Attorney Rachel Mitchell’s motion for leave to file an amicus brief. Her filing is not a proper amicus submission.

As a threshold matter, Mitchell’s brief should be rejected for two independent reasons. *First*, the only question she actually addresses—whether the Recorder may retain AFL as litigation counsel—is not an issue in this special action; amici 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), and Mitchell herself disclaims any position on the questions the Recorder’s petition actually presents. *Second*, her central factual premise—that AFL has been acting as a “de facto county attorney” beyond its litigation role—is both demonstrably false and currently being litigated before the superior court on her own Motion for a Temporary Restraining Order (“TRO”). AM-APP355-59, AM-APP395-98. The record shows that the Recorder’s Office exchanged more than 1,100 emails with the County Attorney’s Office in the five months following the January 30, 2026 Order, which is flatly incompatible with

the displacement narrative she been trying to advance. AM-APP381 ¶ 43, AM-APP383 ¶ 6.

Furthermore, Mitchell’s brief should be rejected because it violates the requirements of ARCAP 16. It is an effort by an active litigant in the consolidated case, and by a lawyer who claims continuing authority over the legal representation of both county actors, to obtain from this Court the very relief she is pursuing in a separate appeal now pending in the Court of Appeals. That is not the function of an amicus curiae.

ARCAP 16(a) is direct: “Amicus curiae is not a party to the appeal, and must be independent of any party to the appeal. Counsel for a party may not author an amicus curiae brief in whole or in part.” Mitchell fails that rule three times over.

First, on her own theory, she is counsel to both the Board and the Recorder; she therefore may not file an amicus brief in an appeal involving those parties.

Second, she is not independent of the parties. She claims an ongoing attorney-client relationship with them, she asserts authority to control the Recorder’s counsel, and she seeks dismissal of the Recorder’s petition.

Third, because *Mitchell v. Heap* and *Heap v. Galvin* were consolidated below and remain related proceedings arising from the same operative dispute, it is at least an open question whether she is technically a party to this special action. At minimum, she is too intertwined with the parties and the relief requested to qualify as an amicus.

The ethical problem is equally serious. Mitchell says this dispute is between two of her “agency-clients” and that her ethical duties prevent her from taking a position on the merits. Mitchell Br. 1. But she then asks this Court to dismiss the Recorder’s petition, deprive him of counsel, and require that any renewed filing proceed only through counsel she approves. That is not neutrality. If Mitchell is correct that she is counsel for the Recorder, then using an amicus brief to seek dismissal of his petition implicates the duty of loyalty and Arizona Rule of Professional Conduct 1.7. *See* Ariz. R. Sup. Ct. 42, ER 1.7(a), cmt. 10.

The Court need not decide any disciplinary issue to deny leave. The point is narrower: a filing that would itself deepen a lawyer-client conflict should not be accepted as an amicus brief.

The substance of Mitchell’s request confirms the procedural defect. The very questions she raises—whether the Recorder may use America

First Legal and whether *Biaett*, *Woodall*, *Daughton*, and *Arpaio* permit or preclude the Recorder’s counsel—are already fully briefed before the Court of Appeals in *Mitchell v. Heap*, No. 1 CA-CV 26-0165. Mitchell appended those Court of Appeals briefs to her proposed amicus filing. She asks this Court to short-circuit that appeal and grant her dispositive relief without the ordinary appellate process, without full merits briefing in this Court, and without the developed record from the case in which the issue actually arises. That is improper.

Mitchell’s filing also attempts to evade the operative law of this consolidated case. The superior court dismissed her complaint for lack of standing. It held that A.R.S. § 11-532 does not give the County Attorney “veto power over the County Recorder’s ability to choose an attorney to represent the Recorder in litigation initiated by the Recorder.” AM-APP352. That ruling has not been reversed, and the superior court case was not stayed. Mitchell’s dismissed claims have not been revived, and she should not be given leave to re-litigate them as an amicus in this Court. It is extraordinary for a county attorney who lost on standing to step outside the ordinary appellate track and ask a different court, in a

different appellate posture, to dismiss her purported client's petition on the same rejected theory. The Court should not permit that end run.

Even if the Court considers the lodged brief, Mitchell is wrong. Arizona precedent does not leave a county recorder at the mercy of the Board and County Attorney when he must protect his statutory authority from usurpation. The Court of Appeals held in *Maricopa County v. Biaett*, 21 Ariz. App. 286 (1974) that a Recorder's private litigation expenses in a suit against the Board were necessary expenses incurred in the conduct of the Recorder's office, *id.* at 290, and therefore, by necessity, it also held that the recorder's retention of outside private counsel was lawful and proper. This Court later cited *Biaett* with approval and explained that *Biaett* found, as a matter of law, that the public officer acted properly in procuring legal services. *Riley, Hoggatt & Suagee, P.C. v. English*, 177 Ariz. 10, 15–16 (1993). *Woodall* and *Daughton* confirm that the County Attorney's authority is not absolute when conflict or lack of harmony exists. And *Arpaio* involved a defensive merit-commission proceeding in which the County Attorney had appointed conflict counsel; it did not involve an elected county officer suing to protect his statutory powers after

the County Attorney prohibited appointed counsel from litigating and then sued the officer herself.

The Court should deny leave, strike or disregard the lodged brief, and deny Mitchell's request to dismiss the petition.

ARGUMENT

I. Mitchell's Amicus Should Be Rejected Because It Raises an Issue Not Before This Court.

As a threshold matter, Mitchell's amicus brief should be rejected because it does not address any issue actually presented in this special action. "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) (cleaned up). The sole question Mitchell addresses—whether the Recorder may retain America First Legal as his litigation counsel without her approval—is not an issue in this special action. The Recorder's petition raises a single question: whether the Court of Appeals erred in staying the superior court's April 16, 2026, Order in *Heap v. Galvin* restoring the Recorder's statutory authority over ballot replacement sites and early voting administration and requiring the Board to fund the Recorder's necessary expenses. Mitchell herself acknowledges this, stating that she "takes absolutely no position on the merits of the permanent injunction entered by the superior court, the Court of Appeals Order Granting the . . . [Board's] Emergency Motion for Stay

Pending Appeal, or the arguments contained in the Recorder’s Petition.” Mitchell Amicus Br. 1. Having disclaimed any position on the only questions actually before this Court, she has no proper amicus role here at all.

The question of who may represent the Recorder is already the subject of a separate, fully briefed appeal—*Mitchell v. Heap*, No. 1 CA-CV 26-0165—currently pending before the Court of Appeals. Mitchell appended that appellate briefing to her proposed amicus filing, confirming that she is simply asking this Court to short-circuit that separate appeal and grant her dispositive relief in a proceeding where the issue does not arise. That is precisely what the rule against creating or enlarging issues forbids. *Cave Creek*, 233 Ariz. at 4 ¶ 7 n.2. The Court should deny leave to file and disregard the lodged brief on this basis alone.

II. Mitchell’s Characterization of AFL’s Scope Is Both Factually Wrong and Currently Being Litigated Before the Superior Court.

Mitchell’s central factual claim—that AFL has been acting as a “de facto county attorney” exercising powers beyond its litigation role—is not only wrong, but it is a question currently before the Maricopa County Superior Court. Mitchell filed a TRO in the consolidated superior court proceeding specifically claiming that AFL’s post-April 16, 2026, actions exceed the permissible scope of litigation representation. That proceeding is pending. AM-APP355-59, AM-APP395-98. It is therefore doubly improper for Mitchell to ask this Court to resolve that contested factual

question—collaterally, via an amicus brief, in a special action to which she is not a proper party—when the superior court is already actively considering it.

In any event, Mitchell is wrong on the facts. As documented in the Recorder’s Pre-Hearing Statement filed in the superior court proceedings, AM-APP360-94, AFL has only represented Recorder Heap with regard to protecting the Recorder’s litigation interests in *Heap v. Galvin* and *Mitchell v. Heap* and enforcing the superior court’s April 16, 2026 Order. Far from displacing the County Attorney, the record shows that the Recorder’s Office sent 595 emails to the County Attorney’s Office and received 548 emails from between January 30, 2026—when it issued its order dismissing County Attorney Mitchell’s claims and June 16, 2026 — a volume of ongoing communication utterly incompatible with Mitchell’s claim that AFL has shut her office out of the legal affairs of the Recorder’s Office. AM-APP381 ¶ 43, AM-APP383 ¶ 6.

III. Mitchell is Not a Proper Amicus Under ARCAP 16.

A. ARCAP 16(a) bars the filing.

ARCAP 16(a) supplies the threshold rule for what constitutes a proper amicus: “Amicus curiae is not a party to the appeal, and must be independent of any party to the appeal. Counsel for a party may not author an amicus curiae brief in whole or in part.” The rule is not a formality. It protects the adversarial process from disguised party briefing and

prevents counsel from using amicus status to evade ordinary limits on party participation.

Mitchell's proposed role as amicus violates the rule's text. She insists that the County Attorney is the legal representative of county officers, including the Recorder, and that any litigation counsel for the Recorder must flow through her office. Mitchell Br. 1–2, 9. She also claims that this dispute is between two of her “agency-clients.” *Id.* at 1. Those assertions are incompatible with amicus status. If she is counsel for the Recorder, she may not file an amicus brief seeking dismissal of the Recorder's petition. If she is counsel for the Board, she may not file an amicus brief supporting a result that functionally preserves the Board's stay and deprives the Recorder of appellate review. If she is counsel for both, the problem is compounded.

Nor can Mitchell avoid Rule 16(a) by saying that outside lawyers authored the brief. Rule 16(a) bars “counsel for a party” from authoring an amicus brief “in whole or in part.” Mitchell filed the brief in her official capacity, through retained counsel, to vindicate what she claims is her own statutory authority as counsel for the county actors. The rule would

be meaningless if a lawyer disqualified from filing an amicus brief could do so by retaining separate counsel to present the lawyer's argument.

Mitchell's motion for leave makes the contradiction explicit. She says she "appointed counsel for the Board, attempted to appoint counsel for the Recorder, has remained neutral in the dispute, and has taken no position on the merits." Mot. for Leave 4. But her amicus asks this Court to dismiss the Recorder's petition, disqualify his counsel in practical effect, and require any future filing to pass through her office. Mitchell Br. 2, 9. A request to dismiss one party's petition is a position in the dispute. It is not neutral legal background. Furthermore, as explained above, Mitchell's claims to neutrality are a matter of dispute below. Recorder Heap has presented ample evidence and arguments demonstrating that she is actually adverse to the Recorder in *Heap v. Galvin*. For example, she has engaged in ex parte communications with litigation counsel for the Board in *Heap v. Galvin* about that case and has refused to disclose the content of those communications. AM-APP344-45, AM-APP372-77, AM-APP387-90; she has betrayed client confidences and disclosed privileged communications, AM-APP037 ¶ 61.b, AM-APP039 ¶ 65.b, AM-APP308-9; refused to appoint litigation counsel to allow Recorder Heap

to pursue his claims against the Board, AM-APP031 ¶¶ 22-23, 26, AM-APP033 ¶ 33, AM-APP037 61.a, AM-APP038 ¶ 64.a, AM-APP269, AM-APP307; coordinated with Recorder Heap’s litigation adversaries AM-APP310, AM-APP328-37, AM-APP372-77, AM-APP387-90; and she decided to sue her own client, creating an unwaivable global conflict under ER 1.7 Comment 10. AM-APP003-22.

B. Mitchell is not independent of the parties.

Rule 16(a) independently requires that an amicus “must be independent of any party to the appeal.” Mitchell is not independent. She claims legal authority over the Recorder’s representation. She claims a continuing role as legal advisor to the Board and the Recorder. She has sued the Recorder in the consolidated superior court case. She is the appellant in *Mitchell v. Heap*, a related Court of Appeals case in which she seeks substantially the same relief she asks this Court to grant by amicus brief. She asks this Court to decide a question that would directly affect her own pending appeal and her claimed institutional power. And, as explained above, she has chosen to make herself directly adverse to Recorder Heap in *Heap v., Galvin*.

That is not independence. It is direct interest. Rule 16(b)(1)(C)(ii) permits some amici to participate when they have “an interest in another case that the decision in the present case may affect.” But that provision does not override Rule 16(a)’s independence requirement. A nonparty may have a cognizable interest in related litigation and still be independent. Mitchell is different. She is the litigant in the related case, the official who claims power over the Recorder’s counsel, and the lawyer who says she represents the county actors whose dispute is before this Court.

Her lack of independence is not cured by disclaiming a position on the merits of the April 16 injunction. The relief she seeks—dismissal of the petition—would decide whether the Recorder can obtain immediate review of the stay order through his chosen counsel. That relief is not collateral to the merits; it would determine whether this Court reaches the merits at all. If this Court grants the relief sought by the County Attorney, Recorder Heap will not have enough time to procure new counsel, get him up to speed, and refile this special action in enough time for this Court to grant the relief the Recorder seeks. In other words, the County Attorney is seeking relief that would deprive Recorder Heap of exercising his statutory duties for administering the 2026 primary

election. She has taken a side in the merits of the dispute, and she is acting against her own client, the Recorder.

C. Mitchell is at least arguably a party to the consolidated case, and that doubt alone counsels against leave.

Rule 16(a) also states that an amicus “is not a party to the appeal.” Mitchell is a party in *Mitchell v. Heap*, which was consolidated with *Heap v. Galvin* by stipulation in the superior court. AM-APP023-26. She argues that consolidation did not merge the cases. Mot. for Leave 4–5. However, the proceedings share a consolidated superior court docket, arise from the same operative dispute over the Recorder’s ability to litigate against the Board, and have overlapping appellate consequences. Mitchell herself invokes that relationship as the reason her amicus should be accepted.

At minimum, the consolidated posture creates an open question whether Mitchell is a proper “amicus” rather than a party seeking to participate under another label. The Court need not resolve that question in the abstract. Rule 16(a) is designed to avoid exactly this problem. A litigant in a related, consolidated proceeding who seeks relief affecting her own pending appeal should proceed through the ordinary appellate process, not through an amicus filing in another party’s special action.

D. The filing creates serious ethical concerns.

Mitchell's position also implicates the Ethical Rules. ER 1.7(a) prohibits representation when "the representation of one client will be directly adverse to another client" unless the requirements for consentable conflicts are satisfied. Ariz. R. Sup. Ct. 42, ER 1.7(a). Comment 10 addresses government lawyers specifically: "A government lawyer cannot provide advice to, or represent, the client representative in one matter, and act as an advocate against the client representative in another matter, even when the matters are unrelated."

Mitchell has sued the Recorder. She asks this Court to dismiss his petition. She claims she is the official through whom his counsel must be chosen. She also says the Board and Recorder are both her "agency-clients." Mitchell Br. 1. Those positions cannot coexist without severe tension. If the Recorder is her client, she may not seek dismissal of his petition while claiming authority over his legal representation. If she is adverse to the Recorder, she cannot control his choice of counsel. And if she is not counsel for either party because the conflict prevents representation, then she lacks the current client-protective role on which her proposed amicus depends.

The Court need not decide whether discipline is warranted. But the possibility that the filing itself violates duties of loyalty and conflict avoidance reinforces why leave should be denied. Rule 16 exists to ensure that amici assist the Court as independent voices. Mitchell’s filing instead asks the Court to bless an ongoing conflict.

IV. Mitchell’s Amicus is an Improper End Run Around the Court of Appeals and the Operative Superior Court Ruling.

A. The same issues are already fully briefed in *Mitchell v. Heap*.

Mitchell is forced to admit in her amicus brief that the “underlying legal issues have been fully briefed in *Mitchell v. Heap*, No. 1 CA-CV 26-0165, currently pending before the Court of Appeals.” Mitchell Br. 2. Her appendix consists of the appellate briefing from that case. Mitchell.App003–157. That should end the matter.

The Court of Appeals is already considering whether it has appellate jurisdiction, whether the superior court correctly dismissed Mitchell’s complaint for lack of standing, whether *Biaett* permits the Recorder to retain litigation counsel, whether *Woodall* and *Daughton* apply, whether *Arpaio* is distinguishable, whether conflict or lack of harmony exists, and whether Mitchell can obtain injunctive relief against the

Recorder. Those questions are the merits of a separate appeal and should not be decided as mere ancillary matters in this special action.

It is highly inappropriate for Mitchell to ask this Court to grant dispositive relief in that appeal through an amicus brief in this special action. She seeks to bypass the ordinary sequence: decision by the Court of Appeals, petition for review if necessary, and full merits briefing in this Court if review is granted. She instead asks for immediate dismissal of the Recorder's special action, even though the Court of Appeals has not resolved her appeal, and this Court did not request briefing on whether the Recorder's counsel should be disqualified or whether Mitchell's dismissed claims should be revived.

This is not a harmless procedural shortcut. Dismissal would provide Mitchell with the practical relief she seeks in the Court of Appeals and would afford the Board the benefit of a stay while the Primary Election proceeds. The timing makes the request especially troubling. A dismissal "without prejudice" would still inflict prejudice by consuming critical election time and forcing the Recorder to proceed, if at all, through counsel chosen by the official who sued him and who has been coordinating with his litigation opponents for the last 12 months.

B. Mitchell's filing disregards the operative law of the consolidated case.

Mitchell's amicus also violates the law of this consolidated case. The superior court granted the Recorder's motion for judgment on the pleadings and dismissed Mitchell's complaint for lack of standing. AM-APP350-54. The court held that Mitchell had not established "the exclusive right to represent the County Recorder and/or the exclusive right to decide who the County Recorder may retain as his attorney in litigation." AM-APP353. It also explained that A.R.S. § 11-532 does not give the County Attorney "veto power over the County Recorder's ability to choose an attorney to represent the Recorder in litigation initiated by the Recorder." AM-APP352.

That ruling is operative. It has not been reversed. It has not been stayed. Yet Mitchell asks this Court to proceed as though the superior court never ruled. She asks this Court to accept the premise that she possesses the very authority the superior court determined that she lacks.

That is not how appellate review works. A party who loses on standing may appeal through the proper channel. She may not use amicus status in a related special action to circumvent the ruling while her appeal

remains pending. The Court should be particularly reluctant to entertain that maneuver where the proposed amicus is the Recorder's claimed lawyer who is seeking relief directly adverse to him.

C. Mitchell's requested remedy is disproportionate and disruptive.

Even if the Court believed the question of the Recorder's counsel was properly retained did warrant further attention, dismissal of the petition would be the wrong remedy. Mitchell asks the Court to dismiss "without prejudice" so that counsel appointed through her office may refile the same petition if that counsel agrees. Mitchell Br. 2, 9. That formulation minimizes the real effect. This dispute is time-sensitive. The Court is considering the administration of an *ongoing* Primary Election and the continuing effect of a stay order. Refiling later, through counsel selected by the official who is actively litigating against the Recorder, is not equivalent relief. The County Attorney's maneuver is transparent: as she has done throughout this case, she is taking the Board's side in this dispute and is seeking relief to assist in its usurpation of the Recorder's authority.

The remedy also assumes the answer to the merits. It presupposes that Mitchell has the authority to choose the Recorder's counsel. That is

precisely the issue on appeal in *Mitchell v. Heap*, and the superior court has already rejected Mitchell’s standing to assert it. The Court should not grant the remedy first and leave the legal basis to be sorted out later.

V. Mitchell is Wrong on the Merits.

A. *Biaett* controls the core issue.

Mitchell’s merits argument begins from a false premise: that a county recorder categorically lacks authority to retain litigation counsel unless the County Attorney approves. The Court of Appeals already rejected that position in a dispute from the 1970s that is almost identical to this one.

In *Maricopa County v. Biaett*, a dispute arose between the Maricopa County Recorder and the Board over the Board’s alleged usurpation of the Recorder’s statutory powers regarding voter registration. 21 Ariz. App. at 287. The Recorder used private counsel to defend his office from this usurpation. *Id.* After the Recorder prevailed on the merits, the Board argued that the legal expenses were not a county charge because the Recorder had not obtained the Board’s approval. *Id.* at 288. The Court of Appeals rejected that argument, holding that the legal expenses were “necessary expenses incurred in the conduct of the office of a county

official” under A.R.S. § 11-601(2). *Id.* at 290. The court emphasized the structural point: “To hold otherwise would leave the recorder at the complete mercy of those desirous of improperly usurping his functions.” *Id.*

Biaett is not merely a fee case. The fee holding necessarily depended on the lawfulness of the Recorder’s procurement of legal services. If retaining private counsel to sue the Board were *ultra vires*, the fees could not have been necessary expenses incurred in the conduct of the Recorder’s office. The court instead held that the Recorder’s legal expenses were incurred in performing official duties and were chargeable to the county.

This Court confirmed that understanding in *Riley, Hoggatt & Suagee, P.C.*, when it cited *Biaett* with approval as an example of an officer hiring counsel to assert the officer’s position in litigation against other branches of government. 177 Ariz. at 13. This Court then rejected an attempt to convert *Biaett*’s procedural history into mandatory prerequisites, explaining: “we do not read the procedural history of *Biaett* as setting forth ‘required steps’ for recovery.” *Id.* at 15. And it reiterated that “*Biaett* found, as a matter of law, that the recorder acted properly in procuring legal services.” *Id.* at 16.

That defeats Mitchell’s central point. She says *Biaett* “has no bearing” because counsel there was “channeled through the county attorney’s office.” Mitchell Br. 6. But *Riley* specifically held that *Biaett*’s procedural history did not establish required steps. 177 Ariz. at 15. Mitchell identifies no statute making Attorney General or County Attorney authorization a prerequisite for retaining outside litigation counsel. Indeed, in *Biaett*, the County Attorney did not appoint the Recorder’s chosen private counsel or approve that particular representation. The operative holding in *Biaett* is that the Recorder’s legal expenses in litigation to protect his statutory powers were necessary expenses of the office. *Biaett*, 21 Ariz. App. at 290.

This case presents the same structural concern in sharper form. The Recorder sued the Board to protect statutory election duties after the County Attorney’s appointed counsel was not authorized to litigate. AM-APP031 ¶¶ 22-23, 26, AM-APP033 ¶ 33, AM-APP037 61.a, AM-APP038 ¶ 64.a, AM-APP269, AM-APP307.

The superior court later agreed with the Recorder on the merits of *Heap v. Galvin* and entered declaratory and injunctive relief against the Board. Mitchell now seeks to dismiss the very petition by which the

Recorder asks this Court to review the Court of Appeals’ stay of that relief. Accepting her position would leave the Recorder exactly where *Biaett* said he could not be left: at the complete mercy of officials alleged—and now found by the superior court—to have usurped his functions.

B. The Briefing in *Biaett* Demonstrates That Mitchell’s Arguments Have Already Been Raised and Rejected.

Mitchell’s arguments against the Recorder’s authority to retain litigation counsel are not new. They are the same arguments that the Maricopa County Board of Supervisors made—and the Court of Appeals rejected—in *Biaett* more than fifty years ago. A comparison of the briefs in that case with Mitchell’s arguments here is instructive.

In *Biaett*, the Board’s opening brief presented the following question: “may a County officer such as the County Recorder employ private attorneys in a suit against the County and make these attorneys’ fees a County charge?” *Biaett* Appellant’s Opening Br. at 11 (July 31, 1972) (“*Biaett* Opening Br.”). That antecedent question—whether the Recorder was even authorized to employ private attorneys—was the very premise the Court of Appeals necessarily resolved when it held that the legal expenses were properly “incurred in the conduct of the office of the county recorder.” *Biaett*, 21 Ariz. App. at 290. The fee holding was predicated on

the lawfulness of retaining counsel in the first place; no court can award expenses for unauthorized conduct.

The Board's brief in *Biaett* argued that the Recorder had "No Implied Authority to Retain Outside Attorneys," *Biaett* Appellant's Reply Br. at 28 (Sept. 14, 1972), a heading substantively identical to the heading in Mitchell's amicus brief here: "The Recorder Lacks Statutory Authority to Retain Litigation Counsel in this Matter." Mitchell Amicus Br. 2. The Board also argued in *Biaett* that "if the Legislature intended that County officers, at their own discretion, could employ private counsel . . . it would have done so." *Biaett* Opening Br. at 15. Mitchell makes the same argument today, asserting that the legislative "choice to confer the authority to retain counsel upon only two county officers is deliberate" and that the absence of express authority for the Recorder must mean it does not exist. Mitchell Amicus Br. 6. But *Biaett* rejected that inference fifty years ago, and this Court confirmed that inference in *Riley, Hoggatt & Suagee, P.C.*, 177 Ariz. at 16.

The Board in *Biaett* also advanced the same argument about Board control that Mitchell raises here: it argued that "prior to employment of counsel in this case the recorder was required to secure the approval of

the board.” *Biaett*, 21 Ariz. App. at 288. And crucially, the County Attorney did not appoint the Recorder’s counsel in *Biaett*, as she demands the power to do here. In fact, the Maricopa Board’s brief in *Biaett* said that the Recorder’s private “attorneys had not been employed pursuant to the statutory procedure necessary.” *Biaett* Opening Br. at 2; *see also id.* at 6 (“At no time was the employment of attorneys *Biaett & Bahde* submitted to the Board of Supervisors”). Yet the Court of Appeals held in *Biaett* that the Recorder’s legal expenses were necessary expenses of the office. Neither Board approval nor County Attorney authorization was a legal prerequisite to the Recorder’s retention of counsel in *Biaett*.

C. *Woodall* and *Daughton* confirm that the County Attorney’s authority is not absolute.

Mitchell treats the County Attorney’s authority as exclusive and nearly unreviewable. Arizona law does not. *Woodall* distinguished between general in-house legal advice and active litigation. This Court held that a board may not employ independent in-house counsel to advise the board and county officers in place of the County Attorney when the County Attorney is available. *Bd. of Supervisors of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 381–82 (1978). But this Court also separately held that the Board could retain independent counsel for prosecuting and

defending legal actions to which the county is a party. *Id.* at 382–83. This Court reasoned that the public interest requires that the officials with final authority over the action be allowed to choose the counsel who actually handles its legal phases. *Id.* at 383.

Daughton likewise rejected a wholesale displacement of the County Attorney, but recognized the legality and propriety of county officers retaining independent counsel when the County Attorney is unavailable because of conflict or lack of harmony concerning a particular matter. *Romley v. Daughton*, 225 Ariz. 521, 524–26 ¶¶ 13, 19, 21, 24–25 (App. 2010). It explained that lack of harmony concerns disagreement over legal strategy in a particular case and that the county officer—not the County Attorney—decides when such disharmony exists. *Id.* at 526 ¶ 24.

Those principles apply here. The Recorder has not appointed general in-house counsel to replace the County Attorney for all county matters. AM-APP382-87. He retained litigation counsel to pursue a specific special action against the Board, then to defend the judgment and obtain appellate review of the stay. That is precisely the type of litigation context in which *Biaett*, *Woodall*, and *Daughton* recognize the need for independent representation.

D.A.R.S. § 11-532 does not give Mitchell veto power over the Recorder's litigation counsel.

Mitchell fails to identify any statute that gives her the authority to choose Recorder Heap's lawyer for him. Rather, she locates it as an implied power located in the penumbras of A.R.S. § 11-532, expanding that statute far beyond its text. Section 11-532(A)(7) requires the County Attorney, when required, to give written opinions to county officers on matters relating to the duties of their offices. Section 11-532(A)(9) requires the County Attorney to act as legal advisor to the Board and to oppose claims against the county that she deems unjust or illegal. Those provisions do not say that the County Attorney has exclusive authority to choose counsel for every county officer in affirmative litigation initiated by that officer to protect statutory powers.

The superior court correctly recognized that absence. It held that A.R.S. § 11-532 does not give Mitchell "veto power over the County Recorder's ability to choose an attorney to represent the Recorder in litigation initiated by the Recorder." AM-APP352. Mitchell's amicus asks this Court to read into § 11-532 a veto power that does not exist and that the superior court already found absent.

Mitchell relies on the phrase “public prosecutor of the county” in § 11-532(A). Mitchell Br. 7-8. But that phrase cannot bear the weight she places on it. The statute enumerates specific powers and duties. It gives the County Attorney authority over public prosecutions, written opinions, Board advice, and opposing claims against the county. It does not expressly give her authority to sue her own client and then select the client’s lawyer in the same consolidated dispute. The Superior Court comprehensively analyzed the meaning of the term “public prosecutor” and correctly found that it does not mean what County Attorney Mitchell thinks it means. AM-APP352-53.

Nor does *Arizona Public Integrity Alliance v. Fontes* help Mitchell. That case says public officials may exercise only powers expressly or impliedly delegated by law. 250 Ariz. 58, 62 ¶ 14 (2020). The principle applies to Mitchell as well as to the Recorder. She has no express statutory authority to veto a Recorder’s litigation counsel in a suit initiated by the Recorder against the Board. And *Biaett, Riley, Woodall, Daughton*, A.R.S. § 11-601(2), and A.R.S. § 1-201 supply the express and implied authority necessary for the Recorder to obtain counsel to protect the complete exercise of his statutory duties.

E. *Romley v. Arpaio* is materially different.

Mitchell relies heavily on *Romley v. Arpaio*, 202 Ariz. 47 (App. 2002). That case does not control this one. *Arpaio* involved the *defense* of an administrative appeal before the Maricopa County Employee Merit System Commission. *Id.* at 49 ¶ 3. The County Attorney had a conflict because the complainant intended to call the County Attorney as a witness, so the County Attorney appointed private counsel to *defend* the Sheriff. *Id.* at 49–50 ¶¶ 3–4. The Sheriff refused that appointed counsel and attempted to use his own employee. *Id.* at 50 ¶ 4. The Court of Appeals held that, in that context, the Sheriff could not unilaterally select counsel. *Id.* at 54–55 ¶¶ 27–29.

Arpaio expressly did not decide “the role of the County Attorney in retaining attorneys to represent county officials when the County Attorney cannot provide counsel due to a conflict of interest.” *Id.* at 55 ¶ 28. It also involved defensive employment litigation, not affirmative litigation by an elected officer to protect statutory powers from alleged Board usurpation. And unlike here, the County Attorney in *Arpaio* had actually appointed conflict counsel to represent the official in the proceeding.

Here, Mitchell did not provide litigation counsel authorized to sue the Board. AM-APP031 ¶¶ 22-23, 26, AM-APP033 ¶ 33, AM-APP037 61.a, AM-APP038 ¶ 64.a, AM-APP269, AM-APP307. The appointed counsel's engagement was limited to negotiation of the Shared Services Agreement, and the Recorder's pleadings plausibly alleged that litigation authority was not provided. *Id.* Thus, the Recorder obtained pro bono counsel who filed sued on his behalf. Mitchell then sued the Recorder herself.

The structural conflict is therefore the opposite of *Arpaio*. This is not a case in which an officer spurned available conflict counsel. It is a case in which the County Attorney prohibited appointed counsel from litigating, filed suit against the officer, and now claims exclusive control over his replacement counsel.

F. Conflict and lack of harmony independently justify independent counsel.

This Court's precedent establishes that, at a minimum, county officers "may retain outside counsel when the County Attorney has a conflict of interest, and therefore is unavailable to represent the [office], or when there is a 'lack of harmony' . . . regarding the handling of a particular legal matter." *Daughton*, 225 Ariz. at 526 ¶ 24 (citation omitted).

And “it is for the [office] alone to decide when such a lack of harmony exists and its decision in this regard is not subject to judicial review.” *Id.*

Both a conflict and a lack of harmony exist here. Mitchell is directly adverse to the Recorder because she sued him. She seeks to enjoin him from using his chosen counsel. She asks this Court to dismiss his petition. Yet she also still claims that somehow she is entitled to represent both the Recorder and the Board in the broader county-government structure as if none of her ongoing adverse actions against the Recorder exist.

ER 1.7 confirms the conflict. A lawyer generally may not represent a client when the representation is directly adverse to another client. Ariz. R. Sup. Ct. 42, ER 1.7(a). Comment 10 makes the government-lawyer rule especially clear: a government lawyer cannot advise or represent a client representative in one matter and act as an advocate against that client representative in another, even if the matters are unrelated. Here, the matters are not unrelated. They are consolidated and arise from the same dispute.

Mitchell’s own pleading further undermines her position. Her verified complaint acknowledged: “There is no dispute that, when an actual legal conflict exists between the County Attorney and the Recorder (such

as in this litigation), the Recorder is entitled to select his preferred attorney to represent him.” AM-APP010 ¶ 34. She now tries to avoid the consequence of that admission by defining conflict narrowly and by insisting that she alone controls the appointment process. But an attorney who is directly adverse to a client cannot retain unilateral control over that client’s representation. That would preserve through appointment authority the very control the conflict rules are designed to prevent.

At minimum, there is lack of harmony. The Recorder reasonably determined that Mitchell’s actions—not allowing appointed counsel to sue the Board, suing the Recorder, publicly attacking his chosen counsel, coordinating with the Board’s side of the dispute, and asking courts to enjoin his chosen representation—created a fundamental disagreement about legal strategy and loyalty. Under *Daughton*, that determination is not for the County Attorney to veto. 225 Ariz. at 526 ¶ 24.

G. Mitchell’s “ideological,” “partisan,” and election-timing objections cannot save her argument.

Mitchell repeatedly characterizes America First Legal as “ideological” and falsely characterizes it as “partisan.”¹ Mitchell Br. 2, 9. That

¹ It is perplexing that, despite repeated corrections, Mitchell continues to make the false representation that America First Legal is partisan. It is not. It is a non-partisan 501(c)(3) nonprofit organization—an error that has been corrected in nearly every

rhetic is legally irrelevant. The question is whether the Recorder may retain counsel to protect his statutory authority. Mitchell’s idiosyncratic preferences about institutional identity or ideological orientation do not provide a lawful or reasonable basis for deciding the legal question about the Recorder’s authority to retain counsel. Indeed, allowing the County Attorney to require other coequal elected county officers to discriminate against conservatives based solely on Mitchell’s preferences itself an “ideological” position.

Furthermore, Mitchell’s argument about the imminence of the election, Mitchell.Br. 7-9, cuts against her requested relief. She asks this Court to dismiss a time-sensitive special action concerning the administration of an ongoing Primary Election so that a lawyer selected through her office may decide whether to refile the same petition. That is a recipe for delay. If the matter is important enough for Mitchell to

filing the Recorder has submitted, and yet which the County Attorney persists in repeating. Mitchell has been corrected on this point in filing after filing and continues to repeat the mischaracterization. That pattern—whether from carelessness or deliberate misrepresentation—is not consistent with the candor to the tribunal that Arizona’s Rules of Professional Conduct require. Her consistent misrepresentations on this point are particularly ironic because County Attorney Mitchell was herself elected to her office as a candidate of a political party, in a partisan election. Indeed the County Recorder, Attorney, and Board majority are members of the *same* political party.

seek extraordinary amicus relief, it is important enough for the Court to decide the petition on the merits rather than dismiss it on a disputed counsel-authorization theory already pending in another appellate case.

VI. The Court Should Not Allow Mitchell to Obtain Relief That Would Benefit the Board While Claiming Neutrality.

Mitchell says she takes no position on the merits of the Recorder-Board dispute. Mitchell Br. 1. But the practical effect of her requested relief is unmistakable. Dismissing the petition would preserve the Court of Appeals' stay, delay review of the April 16 injunction, and give the Board continued control during the election period. The Board would obtain a substantial litigation benefit. The Recorder would lose immediate access to this Court through counsel he selected to protect his statutory office.

That effect matters. A lawyer claiming neutrality between two clients cannot ask a court to impose a remedy that predictably benefits one client and injures the other. Nor can a county attorney who lost on standing ask, as an amicus, to effectively nullify the Recorder's appellate filings in a matter where her own power is already on appeal.

The safer and legally correct course is straightforward. Deny leave. Disregard the lodged brief. Let *Mitchell v. Heap* proceed in the Court of

Appeals. Decide this special action on the questions the petition presents: whether the Court of Appeals erred in staying the superior court's April 16 Order and what tailored interim relief is appropriate for the Primary Election.

VII. The Court Should Impose Sanctions and Award Attorney Fees.

Because of Mitchell's procedural abuses and the substantive groundlessness of her filing, the Court should impose sanctions under ARCAP 25 and award attorney fees and expenses under A.R.S. §§ 12-349 and 12-350.

ARCAP 25. Under ARCAP 25, an appellate court “may impose sanctions on an attorney or a party if it determines that an appeal or a motion is frivolous, or was filed solely for the purpose of delay” or “for a violation of these Rules.” ARCAP 25. Mitchell's proposed amicus filing is frivolous under any fair reading of the rule. It raises no issue presented by the Recorder's petition. It is authored, in substance, by a lawyer who claims ongoing counsel authority over one of the parties and who is an active adverse litigant in related proceedings—squarely violating ARCAP 16(a)'s prohibition on counsel for a party authoring an amicus brief. It asks this Court to grant the same relief Mitchell is seeking through the

ordinary appellate process in *Mitchell v. Heap*, No. 1 CA-CV 26-0165, thereby enlisting this Court's authority as a shortcut around the Court of Appeals. A filing that violates ARCAP 16, raises no issue before the Court, and seeks to circumvent a pending appellate proceeding is not a legitimate amicus brief—it is a sanctionable misuse of amicus procedures.

A.R.S. § 12-349. Mitchell's filing also satisfies multiple grounds for a mandatory fee award under A.R.S. § 12-349(A)(1), which entitles a party to a fee award when his opponent “[b]rings or defends a claim without substantial justification.” Section 12-349(F) defines “without substantial justification” as a claim that is “groundless and is not made in good faith.” Mitchell's filing is groundless in at least three independent respects: ARCAP 16(a) plainly bars it as filed by a non-independent party who is also effectively counsel to the parties; the *Cave Creek* rule flatly forbids amici from creating issues not before the Court; and the superior court has already held—in an operative, unstayed ruling—that Mitchell lacks standing to control the Recorder's choice of counsel. A filing premised on a theory that a competent court has already rejected is, by definition, groundless. *See* A.R.S. § 12-349(A)(1).

Fees are also warranted under A.R.S. § 12-349(2), which applies when a party “[b]rings or defends a claim solely or primarily for delay or harassment.” Mitchell expressly acknowledges that the “underlying legal issues have been fully briefed in *Mitchell v. Heap*.” Mitchell Amicus Br. 2. Yet she is trying to bypass that appeal and asks this Court to grant her the same relief—dismissal of the Recorder's petition with practical effect of reinstating the stay—in a different proceeding, in a different court, without the full record and briefing that the court of appeals will have. The most reasonable inference is that the filing is intended to drain time and resources from the Recorder and his counsel during active election administration and litigation to defend the Recorder's authority during that litigation. It is reasonable to infer that the purpose of Mitchell's filing is also to influence this Court's handling of the stay during active election administration. A motion or brief filed to obtain a strategic litigation advantage, rather than to present legitimately disputed legal issues for the Court's consideration, is precisely what § 12-349(A)(2) is designed to deter.

A.R.S. § 12-350 factors. Under A.R.S. § 12-350, the Court may consider enumerated factors in setting a fee award. Several weigh heavily in favor of a substantial award here.

First, regarding the extent of effort made to determine validity before filing (§ 12-350(1)): the grounds for rejecting this amicus brief are apparent on the face of ARCAP 16(a) and from the superior court's January 30, 2026, ruling that Mitchell lacked standing, both of which are publicly available. No reasonable inquiry into validity would have missed them. If there were any doubt, counsel for Recorder Heap explained them to counsel for Mitchell, as she acknowledges in her motion for leave. Mot. for Leave 3.

Second, regarding efforts to reduce invalid claims after filing (§ 12-350(2)): Mitchell has not withdrawn or modified her brief despite its obvious procedural defects.

Third, regarding the availability of facts to assess validity (§ 12-350(3)): the superior court's operative standing ruling and the text of ARCAP 16(a) were fully available to Mitchell and her counsel before filing.

Fourth, regarding bad faith (§ 12-350(5)): the pattern of conduct in this consolidated case collectively establishes that the amicus brief is part

of a continuing effort to frustrate the Recorder's ability to protect his statutory authority through counsel of his choosing and to undermine the exercise of his statutory duties delegated to him by the Legislature:

- ex parte communications with the Board's litigation counsel, AM-APP344-45, AM-APP372-77, AM-APP387-90;
- Mitchell's mischaracterization as "facts" things that are still very much in dispute, such as the claim she has made in her brief that counsel for the Recorder has been providing general legal advice to the Recorder rather than providing legal services related to the *Heap v. Galvin* litigation, when that is a matter of factual dispute raised by her TRO motion in the superior court that has not yet been adjudicated, AM-APP355-59, AM-APP382-87, AM-APP395-98;
- seeking relief that the superior court already denied and her failure to acknowledge the law of the case, in which a superior court ruling that has not been stayed has already determined she lacks standing to assert the claims she asserts here and that she lacks authority to select counsel for the Recorder, AM-APP350-AM-APP354;

- attempting to improperly circumvent the Court of Appeals.

The Court should impose sanctions appropriate to deter similar conduct, including an award of the Recorder's reasonable attorney fees and expenses incurred in opposing this amicus brief. *See* ARCAP 25; A.R.S. § 12-349(A), (B). The Court may assess fees jointly and severally against Mitchell and her retained counsel. A.R.S. § 12-349(B).

CONCLUSION

The Court should deny Attorney Mitchell's motion for leave to file an amicus brief, strike or disregard the lodged brief, and deny her request to dismiss the petition. If the Court does consider the filing, it should reject Mitchell's merits arguments and issue a decision in favor of the Recorder. *Biaett, Riley, Woodall, Daughton*, the superior court's operative ruling, and basic conflict principles all foreclose her attempt to control the Recorder's counsel while actively litigating against him.

Dated: July 3, 2026

By: /s/ James K. Rogers
James K. Rogers (No. 027287)
America First Legal Foundation
611 Pennsylvania Ave., SE #231
Washington, DC 20003
(202) 964-3721
James.Rogers@aflegal.org

Attorney for Petitioner