MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

May 12, 2016

Thomas Ryan
Law Office of Thomas M. Ryan
565 West Chandler Blvd., Suite 210
Chandler, AZ 85225

Re: Election Challenge Request Submitted May 10, 2016

Dear Mr. Ryan,

The Attorney General's Office has reviewed your May 10 request for a challenge to the May 17 statewide special election for Propositions 123 and 124. At issue is the Secretary of State's failure to follow the law regarding the publicity pamphlet provisions of Title 19 of Arizona Revised Statutes.

A.R.S. § 19-123 tasks the Secretary of State with mailing publicity pamphlets to registered voters in sufficient time "to be delivered to households before the earliest date for receipt by registered voters of any requested early ballots." Your letter includes a litany of charges against Secretary of State Reagan, but the essence of your complaint is that the Secretary failed to comply with this legal requirement for the conduct of elections.

A.R.S. § 19-123(B) dictates that the Secretary "shall" make a timely delivery of the pamphlets. The Secretary of State's job to deliver publicity pamphlets in a timely manner to all voting households is not subject to discretion; rather it is a duty. On the basis of its own admissions, the Secretary of State's Office did not comply with this requirement. It appears that over 400,000 voters received their early ballots prior to receiving their publicity pamphlets.

Many of these voters may have submitted their ballots prior to receiving a publicity pamphlet. Perhaps some of this group would have voted without reviewing the publicity pamphlet in any event. Perhaps other voters were able to review the publicity pamphlet published on the Secretary of State's website. But to be sure, there are ballots now in the County Recorders' offices across Arizona from pre-pamphlet delivery voters who would have reviewed the pamphlet had the law been faithfully executed. While we consider some of your other specific charges below, these conditions together constitute a prima facie and arguably actionable

election law violation. Moreover, it is not clear that any "substantial compliance" defense by the Secretary of State would survive these circumstances.

Because we have concluded that the violations complained of are not remediable in the manner you've requested, additional discussion of the underlying merits of the case is unnecessary. Since no statutory remedy exists for violating A.R.S. § 19-123(B), the courts would be forced to apply equitable principles in search of a remedy. *See McComb v. Superior Court In & For County of Maricopa*, 189 Ariz. 518, 526 (App. 1997), as amended (July 25, 1997) ("The fashioning of a remedy is an exercise of equitable power within the trial court's discretion." (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)). But in this case there is no possible remedy to the election process that would be more equitable than the unfortunate *status quo*.

The clear purpose of A.R.S. § 19-123(B) is to provide early voters the opportunity to be as fully informed as possible before casting a ballot. Of the more than 400,000 early ballots that beat the publicity pamphlets to the mailbox, we agree that some of those ballots were voted without the benefit of the pamphlet. The remedial conundrum arises from the difficulty in determining a means of making such voters whole *without harming other voters*. To date, hundreds of thousands of early ballots have been returned statewide, nearly twice the number of ballots that predated the pamphlet delivery.

Any remedy that changed the election date would necessarily, as you acknowledge, spoliate these already voted early ballots. As obvious as it is that some "would have used the pamphlet," it is just as obvious that as many or more early voters would not, for a variety of reasons, submit a vote "the second time around." In the former case, the Secretary's failure to faithfully execute the publicity pamphlet law led to voters being unacceptably deprived of their duly enacted voters' rights. In the latter case, voters would be completely disenfranchised.

Likewise, potential intermediate equitable remedies also fail. For example, the notion of extending the time for return of early ballots past election day would itself create a panoply of problems, not the least of which would be confusion among the electorate. It would also be putting the form of an arbitrary period of time with the pamphlet itself over the substance of access to the information contained in the pamphlet. Again, the clear purpose of the law is to give voters a chance to be educated. Presently, absent any unknown additional delinquencies, publicity pamphlets have been delivered to all early voters. Thus, there are no remaining early ballots to be cast without the benefit of the publicity pamphlet.

The Attorney General's Office certainly understands your frustration, but we have concluded that the action you've requested would only make matters worse. Therefore, the Office must decline to file an election challenge. Of course you or any other voter is free to disagree with our conclusions and independently seek judicial relief. Nevertheless, the Attorney General's Office believes that an inquiry into the events surrounding the Secretary of State's failure, and the subsequent delay in reporting that failure, is absolutely necessary.

Even if the Secretary of State's failure was the result of mere neglect, one thing is certain – the Secretary violated Arizona law. Questions abound; not only as to how the Secretary of State

failed to fulfill her duties in connection with this election, but also as to why there was no public disclosure regarding the failure to timely mail the publicity pamphlets until mere days before the initial counting of early ballots. Could immediate disclosure have helped prevent early voters from submitting ballots prior to the arrival of their publicity pamphlets, or have allowed for better corrective action? For example, could greater steps have been taken to notify the public—particularly in the counties where voters were affected—to turn to the version of the pamphlet on the Secretary of State's website? Could pamphlets have been made available to early voters at county recorders' offices or other easily accessible locations in the affected counties?

These questions demand answers. Arizona voters, especially those who were deprived of publicity pamphlets, deserve to know why this failing occurred and what can be done to protect them in the future.

Sincerely,

Mark Brnovich