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19 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
20 **IN AND FOR THE COUNTY OF MARICOPA**

21 THE STATE OF ARIZONA, *ex rel.* MARK
22 BRNOVICH,

23 Plaintiff,

24 v.

25 ADRIAN FONTES, in his official capacity as
26 Maricopa County Recorder, and RUNBECK
ELECTION SERVICES, INC.

Defendants.

No: _____

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND MOTION
FOR ORDER SETTING HEARING ON
PRELIMINARY INJUNCTION**

Under Ariz. R. Civ. P. 65(d), Plaintiff, State of Arizona ex rel. Mark Brnovich, hereby moves this Court for the issuance of:

1. A Temporary Restraining Order (“TRO”) prohibiting Defendant Adrian Fontes (“Recorder Fontes”), in his official capacity as Maricopa County Recorder, and Runbeck Election Services, Inc. (“Runbeck”), and their officers, managers, agents, servants, affiliates,

1 employees, and attorneys, and those persons in active concert or participation with them from
2 mailing ballots to registered Democrats who have not yet cast ballots in connection with the
3 March 17, 2020, Presidential Preference Election (“PPE”);

4 2. An Order to Set Hearing on Preliminary Injunction (“Order”) providing
5 Defendant Adrian Fontes, in his official capacity, and Runbeck Election Services with notice of
6 the date and time of the hearing on Plaintiff’s Application for a Preliminary Injunction as to
7 why a preliminary injunction should not be issued in the same force and effect as the TRO.

8 This Motion is supported by the following Memorandum of Points and Authorities and
9 the Complaint for Injunctive and Declaratory Relief.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. FACTUAL BACKGROUND**

12 Arizona law permits ballots for a PPE to be mailed to electors under two circumstances.¹
13 First, an elector can make a one-time request no later than 5:00pm on the eleventh day
14 preceding the election to have a ballot mailed. A.R.S. § 16–542(A), (E). Second, an elector
15 may request to be included on the permanent early voter list (“PEVL”), to automatically receive
16 a ballot by mail for all elections. A.R.S. § 16–544. The request must be made by “a verbal or
17 signed request to the county recorder.” A.R.S. § 16-542.

18 In both of those discrete circumstances—where an elector has made a specific request to
19 receive the ballot by mail—the County Recorder or other officer in charge of elections has not
20 only the statutory authority, but the statutory duty, to mail a PPE ballot to those electors. *See*
21 A.R.S. §16–542(C), A.R.S. § 16–544(F). Arizona law does not confer legal authority on
22
23
24

25 ¹ Under Arizona law, a PPE “shall be conducted and canvassed in the same manner as... the
26 primary election.” A.R.S. § 16-241(C). Therefore, the early voting laws promulgated under
Article 8 of Title 16 are applicable to PPEs.

1 county recorders to mail PPE ballots to any elector. Only those electors who have made a
2 specific request may be mailed a ballot.²

3 Recorder Fontes has publicly stated that he is imminently causing to be mailed early
4 ballots for the March 17, 2020 PPE to voters who did not request such early ballot. See Jessica
5 Boehm, Arizona Republic, *Unprecedented: Maricopa County will mail ballots for Tuesday’s*
6 *election amid coronavirus concerns* (March 13, 2020).³ On information and belief, Runbeck is
7 the vendor who would actually mail such ballots.

8 **II. LEGAL ARGUMENT**

9 “Crafting a preliminary injunction is an exercise of discretion and judgment, often
10 dependent as much on the equities of a given case as the substance of the legal issues it
11 presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The
12 purpose of interim relief “is not to conclusively determine the rights of the parties, but to
13 balance the equities as the litigation moves forward.” *Id.* (internal citation omitted). Courts
14 “must also ‘consider[r] ... the overall public interest’” in awarding a preliminary injunction. *Id.*
15 (quoting *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

16 A plaintiff is entitled to a preliminary injunction when he establishes “1) A strong
17 likelihood that he will succeed at trial on the merits; 2) The possibility of irreparable injury to
18 him not remediable by damages if the requested relief is not granted; 3) A balance of hardships
19 favors himself; and 4) Public policy favors the injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63
20 (App. 1990). In evaluating these factors, “[t]he scale is not absolute, but sliding.” *Smith v. Ariz.*
21

22 ² Notably, Senate Bill 1077, introduced during the current legislative session, would alter
23 Arizona law to grant county recorders authority to “conduct a mail ballot election for any
election administered by that county.” S.B. 1077, 54 Leg., 2d Sess. (Ariz. 2020).

24 ³ Available at [https://www.azcentral.com/story/news/local/phoenix/2020/03/13/maricopa-](https://www.azcentral.com/story/news/local/phoenix/2020/03/13/maricopa-county-mailing-ballots-democratic-presidential-preference-tuesday-election-coronavirus/5044933002/)
25 [county-mailing-ballots-democratic-presidential-preference-tuesday-election-](https://www.azcentral.com/story/news/local/phoenix/2020/03/13/maricopa-county-mailing-ballots-democratic-presidential-preference-tuesday-election-coronavirus/5044933002/)
[coronavirus/5044933002/](https://www.azcentral.com/story/news/local/phoenix/2020/03/13/maricopa-county-mailing-ballots-democratic-presidential-preference-tuesday-election-coronavirus/5044933002/); see also Danny Shapiro, *Maricopa County to mail ballots to voters*
26 *for Election Day due to virus* (March 13, 2020), available at
[https://ktar.com/story/3020399/maricopa-county-to-mail-ballots-to-voters-for-election-day-due-](https://ktar.com/story/3020399/maricopa-county-to-mail-ballots-to-voters-for-election-day-due-to-virus/)
[to-virus/](https://ktar.com/story/3020399/maricopa-county-to-mail-ballots-to-voters-for-election-day-due-to-virus/)

1 *Citizens Clean Elections*, 212 Ariz. 407, 410, ¶10 (2006); *Ariz. Ass’n of Providers for Persons*
2 *with Disabilities v. State*, 223 Ariz. 6, 12, ¶12 (App. 2009). Based on this sliding scale, a
3 plaintiff may receive a TRO upon showing of either (1) a combination of probable success on
4 the merits and the possibility of irreparable harm, or (2) the existence of serious questions going
5 to the merits and “the balance of hardships tipped sharply” in the plaintiff’s favor. *See Shoen*,
6 167 Ariz. at 63; *see Smith*, 212 Ariz. at 411, ¶10 (“The greater and less reparable the harm, the
7 less the showing of a strong likelihood of success on the merits need be. Conversely, if the
8 likelihood of success on the merits is weak, the showing of irreparable harm must be
9 stronger.”).

10 Injunctive relief is appropriate as a matter of law when a public official violates Arizona
11 law in a manner that exceeds his authority. *See McCluskey v. Sparks*, 80 Ariz. 15, 20–21
12 (1955) (holding injunction was appropriate where plaintiffs sought to require “officials to
13 comply with the statutes and constitutions of Arizona and of the United States”); *Boruch v.*
14 *State ex rel. Halikowski*, 242 Ariz. 611, 616, ¶ 16 (App. 2017) (injunctive relief is appropriate
15 “when a public officer enforces a public statute in a manner that exceeds the officer’s power”).

16 **A. Plaintiff Is Likely To Succeed On the Merits**

17 “Confidence in the integrity of our electoral processes is essential to the functioning of
18 our participatory democracy.” *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006); *see Yick Wo v.*
19 *Hopkins*, 118 U.S. 356, 370 (1886) (recognizing voting “as a fundamental political right,
20 because [it is] preservative of all rights”).

21 Plaintiff has a “strong likelihood of success on the merits” of its claims for declaratory
22 relief, injunctive relief, and quo warranto relief. *See Smith*, 212 Ariz. at 410–11, ¶ 10. All of
23 these claims derive from Recorder Fontes’ attempt to exceed his statutory authority as described
24 above. The Complaint presents issues that are purely legal in nature. Recorder Fontes cannot
25 show, as a matter of law, that he has legal authority to mail ballots for the PPE in contravention
26 of established Arizona law.

