



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>INVESTIGATIVE REPORT</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>August 26, 2021</p>	<p>No. 21-002</p> <p>Re: Whether MCBOS violated ARS §§ 41-1151, 41-1153, 41-1154, and/or 16-624.</p>
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To: The Honorable Doug Ducey, Governor of Arizona  
The Honorable Karen Fann, President of the Arizona Senate  
The Honorable Rusty Bowers, Speaker of the Arizona House of Representatives  
The Honorable Sonny Borrelli, Requesting Member of the Arizona Legislature  
The Honorable Katie Hobbs, Secretary of State of Arizona

**I. Summary**

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-194.01, the Attorney General’s Office (“Office”) has investigated the Maricopa County Board of Supervisors’ (“MCBOS”) official actions regarding a legislative subpoena the Arizona Senate (“Senate”) issued to MCBOS on July 26, 2021. In prior litigation between MCBOS and members of the Senate relating to a previous legislative subpoena, the Maricopa County Superior Court held in a partial judgment binding on MCBOS that “the Senators have the power to subpoena material as part of an inquiry into election reform measures.” *Maricopa County et al. v. Fann, et al.*, CV2020-016840, Minute

Entry at 15 (Maricopa Cnty. Super. Ct. 3/1/2021) (“Minute Entry”).<sup>1</sup> The broad legal holdings set forth in that Minute Entry remain binding on MCBOS with respect to the Senate’s July 26, 2021 subpoena. MCBOS does not dispute that it has not fully complied with the Senate’s July 26, 2021 subpoena. Thus, based on a review of relevant authorities and materials during the limited 30-day period in § 41-194.01(B), the Attorney General has determined that the failure of MCBOS to fully comply with the Senate’s legislative subpoena **violates** state law. Nothing in this written report should be read as suggesting that MCBOS cannot “resolve the violation” within the next 30 days for purposes of § 41-194.01(B)(1) by producing the required materials; reaching a negotiated settlement with the Senate, including an agreement as to the treatment of confidential or sensitive data that is turned over; or obtaining a judicial resolution with the Senate. MCBOS, however, has done none of these, and therefore its actions violate state law.

## **II. The Office’s Investigation**

On August 3, 2021, the Office received a request from Senator Borrelli, pursuant to A.R.S. § 41-194.01, for legal review of MCBOS’ official actions regarding a legislative subpoena the Senate issued to MCBOS on July 26, 2021 (the “Request”). The Office asked MCBOS to provide a voluntary response. MCBOS fully cooperated with the Office’s review, including by providing a voluntary response and supporting materials on August 18, 2021. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities.

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<sup>1</sup> This case was filed on December 21, 2020. The Court later consolidated a second case with it. *See Maricopa County et al. v. Fann et al.*, CV2021-002092 (Maricopa Cnty. Super. Ct. filed, 2/5/2021).

The Office’s legal conclusions are set forth below. The facts recited in this report serve as a basis for those conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01.

### **III. Relevant Background**

On December 15, 2020, the Arizona Senate Judiciary Committee issued two subpoenas to MCBOS for materials related to the 2020 general election. MCBOS subsequently filed a lawsuit against President Karen Fann and Senator Eddie Farnsworth asking the Maricopa County Superior Court to declare the subpoenas illegal and unenforceable. President Fann and Senator Farnsworth filed counterclaims seeking enforcement of the subpoenas, as well as a separate complaint seeking relief in the nature of mandamus. *See also Fann et al. v. Maricopa County Board of Supervisors et al.*, CV2020-016904 (Maricopa Cnty. Super. Ct. filed, 12/21/2020).<sup>2</sup> The Attorney General filed an amicus brief supporting the Senate’s authority to issue legislative subpoenas. *See Maricopa County v. Fann*, CV2020-016840, Amicus Curiae Brief of Arizona Attorney General Mark Brnovich, at 4-8 (filed 12/30/2020). At a hearing on January 13, 2021, the Superior Court concluded that the dispute over the subpoenas was moot due to the start of the new legislature.

On January 12, 2021, President Fann and Senator Warren Petersen (collectively, the “Senators”) issued new subpoenas to MCBOS, the Maricopa County Recorder, and the Maricopa County Treasurer. While MCBOS stated it produced 11.32 gigabytes of data, MCBOS did not provide all of the subpoenaed materials, including ballots from the election. MCBOS again asked the Superior Court to declare the subpoenas illegal and unenforceable. President Fann and Senator Petersen asked the Court to declare the opposite—that the subpoenas were legal and

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<sup>2</sup> This case was dismissed in full on February 9, 2021.

enforceable. MCBOS filed a motion for summary judgment, and President Fann and Senator Petersen filed a motion for judgment on the pleadings.

The Court declared that the subpoenas were legal and enforceable and granted the Senators' motion for judgment on the pleadings. The Court concluded that the Senators had the power to issue legislative subpoenas, the subpoenas had a proper legislative purpose (investigating and examining election reform matters), the subpoenas do not violate separation of powers principles, and production of the subpoenaed materials would not violate confidentiality laws. Minute Entry at 15. The Court entered its Minute Entry as a final partial judgment, thereby allowing MCBOS to appeal. MCBOS chose not to appeal and instead produced additional materials responsive to the subpoenas.

On July 26, 2021, the Senators issued a new subpoena to MCBOS, enumerating six separate categories of items for production by August 2, 2021. [See MCBOS Response at Exh. A.] On August 2, 2021, MCBOS provided the Senators with written responses and objections to the subpoenas. While MCBOS claimed therein that for certain of the Senate's requests it had already provided all responsive documents or had no documents to produce, MCBOS does not appear to have produced any new information or documents in response to the subpoena and expressly refused to do so with respect to certain of the requests. [See MCBOS Response at Exh. C.] Senator Borelli thereafter made the Request.

#### **IV. Legal Analysis**

The legal issue the Office must resolve is whether MCBOS is violating Arizona law by admittedly failing to fully comply with a legislative subpoena. As explained, the Superior Court previously decided, under circumstances materially similar to those here, that the Senators' subpoenas were valid and enforceable under Arizona law. That partial judgment, which

MCBOS chose not to appeal, remains binding on MCBOS and has preclusive effect between MCBOS and the Senate. *See Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 9 (App. 2003) (discussing the requirements for issue preclusion); *see also Wetzel v. Ariz. State Real Est. Dep't*, 151 Ariz. 330, 334 (App. 1986) (finding “offensive” use of issue preclusion “appropriate under the circumstances here” where one public proceeding was benefitting from the factual findings underlying another).<sup>3</sup>

As the Superior Court explained in the Minute Entry, “[t]he statutes of this State give the Senators the right to issue subpoenas and to enforce those subpoenas.” Minute Entry at 5. A.R.S. § 41-1151 authorizes “the presiding officer of either house or the chairman of any committee” to issue a subpoena. [See MCBOS Response at 3 (“The statutory scheme of A.R.S. § 41-1151 *et seq.* governs the issuance and enforcement of legislative subpoenas”).] As the plain language of that statute indicates, the power to issue legislative subpoenas is vested in individual Senators (*i.e.*, the President and committee chairs) in addition to the Senate as a body. Minute Entry at 8. In addition to “books, records, or documents,” legislative subpoenas can command production of electronically-stored information: “[T]he statute does not somehow immunize information from being subpoenaed simply because the information is electronically stored.” *Id.* at 7. “As long as the Subpoenas were issued for a proper legislative purpose and do not violate Constitutional protections, the Subpoenas are valid and enforceable.” *Id.* at 8.

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<sup>3</sup> Whether issue preclusion technically applies is not dispositive; instead, the legal test here is whether “existing law clearly and unambiguously compels *th[e]* conclusion.” *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 595 ¶25 (2017) (emphasis added). A final partial judgment between the Senate and MCBOS in a court of record regarding the validity of subpoenas issued in the same, ongoing Senate investigation certainly meets that standard for purposes of this statutory report under §41-194.01(B), and as noted above, nothing herein should be read as suggesting that MCBOS cannot “resolve the violation” within the next 30 days for purposes of § 41-194.01(B)(1) by obtaining a judicial resolution with the Senate. *See supra* at 1.

Regarding legislative purpose, “[i]f there is a conceivable proper purpose, the Court must construe the Subpoenas as valid.” *Id.* at 10. Assessing electoral integrity, examining potential legislative reforms to the electoral process, confirming the accuracy and efficacy of vote tabulation systems, investigating whether to modify or improve powers delegated to a county, and evaluating the competence of county officials in performing their election duties each constitute a valid legislative purpose. *Id.* at 9-11. “Even if one of the original purposes of the 2020 subpoenas was to see if the election could somehow be challenged, there still is a perfectly valid legislative purpose for the Subpoenas.” *Id.* at 10. “An investigation of the 2020 election, however, clearly could be of assistance in investigating election administration and possible reforms.” *Id.* at 10 n.10.

Neither confidentiality nor burden nor overbreadth can excuse MCBOS from responding to a legislative subpoena for purposes of this report. As to confidentiality, “[t]he Subpoenas are, in essence, the equivalent of a Court order, requiring production of certain information. The County cannot avoid a subpoena based on statutes that require that the material being subpoenaed be kept confidential.” *Id.* at 15. As to the breadth and burden of a subpoena, “[t]he Senators have broad discretion in determining what information is needed.” *Id.* at 15 n.27. Thus, the Superior Court observed that it “is in no position to determine if specific requests are unduly burdensome.” *Id.* The Court also refused to resolve disputes between the parties regarding breadth and burden: “Disagreements about the breadth and burdensomeness of the Subpoenas should be worked out between the Senators and the County and their counsel.” *Id.*

Applying the foregoing binding principles to the current legislative subpoena, MCBOS is in violation of state law by admittedly refusing to comply with that subpoena. The Senate has the same authority to issue the current subpoena as it had to issue the January 2021 subpoenas.

Similarly, the current subpoena is supported by the same legislative purposes as those supporting the January 2021 subpoenas. MCBOS cannot avoid producing the requested materials based on confidentiality, even if there are statutes requiring the requested material to be kept confidential. The Senate has broad discretion to determine what additional information is still needed. And the Office, in the context of a request for investigation under A.R.S. § 41-194.01, is in no better position than the Court was (*i.e.*, no position at all) to determine if specific requests are overbroad or unduly burdensome.

MCBOS' sole argument in response to the Request is that the Senate cannot currently hold MCBOS in contempt because the Senate is not in session. That argument, which addresses only the possible remedy for violating a legislative subpoena, is irrelevant to whether MCBOS is in violation of state law in the first place. Thus, the Office need not take a position on that argument to resolve the Request. Even if MCBOS is correct that the Senate cannot currently hold MCBOS in contempt for failing to fully comply with a legal and enforceable subpoena because it is not in session, that does not mean that MCBOS is not acting in violation of the principles of state law set forth in the Minute Entry, which is a binding partial judgment. It also does not mean that MCBOS' violation of state law cannot be remedied through means other than contempt, including through a determination under § 41-194.01 that MCBOS is in violation of state law, resulting in the remedy of withholding and re-distribution of state shared monies if the violation is not cured within thirty days.<sup>4</sup> *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588,

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<sup>4</sup> Because Senator Fann is one of the officers listed in A.R.S. § 41-1151 who can issue a subpoena and since she continues to hold office even between the First and Second Regular Sessions of the Senate, the Subpoena was validly issued on July 26 even though the Senate was not in session. This is because Senator Fann is a statutory officer of the Senate as its President. See A.R.S. § 41-1102(A). And the relevant statutes provide that the each of the houses of the legislature elect their officers “[a]t the hour of assemblage of the first regular session next after the general election.” A.R.S. § 44-1101(B). Based on these statutes, even if the Senate is not

593 ¶16 (2017) (“[T]he legislature’s apparent objective in S.B. 1487 was not to usurp executive or judicial authority but rather to require and incentivize political subdivisions to comply with state law [and] the practical consequence of S.B. 1487 is to encourage compliance with state law[.]”). MCBOS does not explain why its failure to comply with a subpoena is not a violation of state law or why § 41-194.01 does not provide an alternative remedy for violation of the state law principles set forth in the Minute Entry. The Office, therefore, concludes that the failure of MCBOS to comply with the Senate’s legislative subpoena violates state law.<sup>5</sup>

## **V. Conclusion**

The Office concludes under A.R.S. § 41-194.01(B) that MCBOS’ failure to comply with the Senate subpoena issued on July 25, 2021 violates state law. Pursuant to A.R.S. § 41-194.01(B)(1), MCBOS has thirty days from the issuance of this written report to resolve the violation. MCBOS can “resolve the violation” within the next 30 days by, among other things, producing the required materials; reaching a negotiated settlement with the Senate, including an agreement as to the treatment of confidential or sensitive data that is turned over; or obtaining a judicial resolution with the Senate. If MCBOS fails to resolve the violation within thirty days, the Attorney General will, pursuant to A.R.S. § 41-194.01(B)(1), “[n]otify the state treasurer who shall withhold monies from the county, city or town as provided by section 42-5029, subsection L and from the city or town as provided by section 43-206, subsection F.” Given that the thirtieth day falls on a Saturday, the Attorney General will calculate the thirtieth day as

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currently in session, Senator Fann is still serving as a statutory officer of the Senate until such time as she were to be replaced or there is a new “hour of assemblage” following a general election. *See also, e.g.*, Rule 2(K), (M) of the Rules of the Senate (expressly providing that the Senate President may act “between sessions of the legislature” and “when the senate is not in session”).

<sup>5</sup> In the Request, Senator Borrelli mentions A.R.S. § 16-624. The Office agrees with MCBOS that § 16-624 is irrelevant to the Office’s current investigation.

**Monday, September 27, 2021**, and MCBOS has to and including that date to resolve the violation for purposes of A.R.S. § 41-194.01(B)(1). Please provide any further information to [beau.roysden@azag.gov](mailto:beau.roysden@azag.gov) or 602-542-8958.

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