

1 **MARK BRNOVICH**  
2 **ATTORNEY GENERAL**

(Firm Bar No. 14000)

3 PAUL N. WATKINS (BAR NO. 32577)

MATTHEW DU MEE (BAR NO. 28468)

4 BRUNN W. ROYSDEN III (BAR NO. 28698)

5 ORAMEL H. SKINNER (BAR NO. 32891)

EVAN G. DANIELS (BAR NO. 30624)

6 JOHN HEYHOE-GRIFFITHS (BAR. NO. 31807)

ASSISTANT ATTORNEYS GENERAL

7 1275 West Washington Street

8 Phoenix, Arizona 85007

Telephone: (602) 542-7731

9 Facsimile: (602) 542-4377

10 Paul.Watkins@azag.gov

Matthew.duMee@azag.gov

11 Beau.Roysden@azag.gov

O.H.Skinner@azag.gov

12 Evan.Daniels@azag.gov

13 John.Griffiths@azag.gov

14 *Attorneys for State of Arizona*

15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

16 **IN AND FOR THE COUNTY OF MARICOPA**

17 **ADVOCATES FOR AMERICAN**  
18 **DISABLED INDIVIDUALS, LLC, and**  
19 **David Ritzenthaler, dealing with Plaintiff's**  
sole and separate claim,

20 Plaintiff,

21 vs.

22 1639 40TH STREET LLC,

23 Defendant,

24 STATE OF ARIZONA,

25 Limited Purpose Defendant.

Case No: CV2016-090506 (consol.)

**STATE'S RESPONSE TO PLAINTIFFS'  
MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT AND MOTION  
TO ALLOW ALTERNATIVE SERVICE**

(Assigned to the Hon. David M. Talamante)

1 Limited Purpose Defendant State of Arizona *ex rel.* Mark Brnovich, Attorney General  
2 (“the State”) hereby responds to Plaintiffs’ Motion for Leave to File Amended Complaint and  
3 Motion to Allow Alternative Service (the “Motion”).<sup>1</sup> Attached to the Motion was a proposed  
4 universal amended complaint for all of the consolidated cases, which was materially amended  
5 further through a subsequent “Notice of Errata.” (As used in this Response, “UAC” refers to the  
6 amended complaint attached as Exhibit A to Plaintiffs’ Notice of Errata).

7 ***First***, the State does not object to the proposed amendments in the UAC regarding the  
8 claims of existing Plaintiffs and events that occurred before the filing of the original complaints.  
9 These particular amendments presumably represent Plaintiffs’ best attempt to establish standing  
10 in connection with their existing claims, and accepting these amendments will aid the Court in  
11 considering the common issues presented by these consolidated actions and whether to dismiss  
12 Plaintiffs’ complaints without leave to amend them further. However, to preserve the rights of  
13 the each Consolidated Defendant to later object in its own case (should these cases survive this  
14 consolidated proceeding), the Court should approve these amendments solely for purposes of  
15 this consolidated proceeding.

16 ***Second***, the State opposes those particular amendments that seek to add allegations about  
17 events post-dating the original complaints. These primarily, if not entirely, relate to proposed  
18 new plaintiff Fernando Gastelum (“Gastelum”), who Plaintiffs have attempted to add through  
19 their Notice of Errata. (Gastelum replaces the originally proposed new plaintiffs, Jason and  
20 Danny Thomas, a proposal which lasted only days before Plaintiffs abandoned it.) Like the  
21 Thomases’ alleged injuries, Gastelum’s alleged injuries, or possible future injuries, do not arise  
22 from the same transactions or occurrences as the original complaints. This Court should  
23 conclude that such supplementation cannot now create a justiciable case when none existed at

---

24  
25 <sup>1</sup> Plaintiffs refers to the existing plaintiffs—Advocates for American Disabled Individuals LLC  
26 (“AADI LLC”), Advocates for Individuals with Disabilities LLC (“AID LLC”), Advocates for  
Individuals with Disabilities Foundation, Inc. (“AIDF”) and David Ritzenthaler (“Ritzenthaler”).  
AADI LLC and AID LLC appear to be the same entity; AID LLC is its current name.

1 the time of filing. Alternatively, even if the Court could permit this, it is within the Court's  
2 discretion to deny these amendments under Rule of Civil Procedure 15(d). And the Court  
3 should do so because allowing the unprecedented supplementation Plaintiffs seek would  
4 countenance the mass filing of over 1,700 invalid complaints with subsequent attempts being  
5 made to manufacture standing only after the fact in those cases that did not result in quick cash  
6 settlements.

7 *Third*, the State also opposes adding to this consolidated proceeding a claim for  
8 mandamus and declaratory relief relating to the Attorney General's periodic compliance reviews  
9 under the Arizonans with Disabilities Act. The purpose of consolidation is to allow consistent  
10 adjudication of common issues. Here, adding this claim would not serve efficiency or  
11 consistency. The claims against the State do not arise from the same transactions or occurrences  
12 as the claims against the Consolidated Defendants and have no relevance to the consolidated  
13 issues. Instead, the Court should allow this amendment only to the case in which the State has  
14 intervened, CV2016-090506, and then sever the claim pursuant to Rules 20(b), 21, and/or 42(b).  
15 Alternatively, the court should deny Plaintiffs' request, with leave to file a separate lawsuit.

16 *Finally*, subject to certain modifications, the State does not oppose Plaintiffs' request to  
17 allow alternative service of the Motion, and suggests the Court enter a standing order permitting  
18 alternative service by the State and Plaintiffs in this consolidated proceeding (expanding on its  
19 9/26 Minute Entry). The entry of such an order is important because Plaintiffs have delayed  
20 providing alternative service, and are pursuing settlement negotiations while misleading parties  
21 as these cases' current status.

22 A proposed order granting in part leave to amend for purposes of this consolidated  
23 proceeding and issuing a standing order permitting alternative service is attached as Exhibit A.  
24  
25  
26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Factual and Procedural Background**

3 As the Court is now well aware, beginning in February, Plaintiffs filed over 1,700  
4 lawsuits against businesses in Maricopa County alleging violations of the Americans with  
5 Disabilities Act (“ADA”) and Arizonans with Disabilities Act (“AZDA”). While the complaints  
6 differed in some respects, they were largely copied and pasted from each other. *See* 8/30 Mtn.  
7 to Consolidate at 3-6. They each sought attorneys’ fees of at least \$5,000 per case, money  
8 damages (in some cases demanding at least \$5,000), as well as declaratory and injunctive relief  
9 and costs. *Id.* at 5. After filing and serving a complaint, Plaintiffs’ counsel would contact a  
10 defendant and make a standard offer of \$7,500 in every case. *Id.* at 9. Many settled, and  
11 Plaintiffs stated their average settlement amount was \$3,900. *Id.* Plaintiffs recently reported  
12 settlement revenue of approximately \$1.2 million and continue to pursue cash settlements.<sup>2</sup>

13 On August 24, the State moved to intervene in the earliest filed active case as a limited-  
14 purpose defendant, and on August 30, it moved to consolidate approximately 1,300 cases still  
15 pending in Maricopa County Superior Court. The common issues on which the State sought  
16 consolidation were “(1) considering whether the complaints filed by these Plaintiffs should be  
17 dismissed on the basis of common issues of law and fact; and (2) considering whether the Court  
18 should issue any sanctions or other remedial orders.” Mtn. to Consolidate at 2.

19 The Court granted intervention and ordered consolidation. 9/8 Order; 9/26 Minute Entry  
20 at 2. It also stayed the deadlines in these cases; ordered no further filing of similar actions by  
21 Plaintiffs without prior court approval; stayed the cases as to all parties except Plaintiffs and the  
22 State; and set an upcoming status conference for the Plaintiffs and the State. 9/26 Minute Entry  
23 at 2. On October 19, Plaintiffs filed the Motion, and on October 27, they filed their “Notice of  
24 Errata.”

25 \_\_\_\_\_  
26 <sup>2</sup> <http://www.wpsdlocal6.com/story/33392891/aid-foundation-association-membership-grows-as-attorney-general-intervention-gains-publicity>.

1 Argument

2 **I. This Court Should Permit Amendment of Portions of the Plaintiffs’ Complaints,**  
3 **But Only for Purposes of this Consolidated Proceeding.**

4 **A. The State Does Not Object to Amendments Related to Pre-Complaint Events.**

5 The State does not object to Plaintiffs amending, for purposes of this consolidated  
6 proceeding, their existing claims with information about pre-complaint events. Specifically, this  
7 refers to UAC paragraphs 1-2, 4-6, 8-9, 17-21, 23-32, 34-43, and Prayer for Relief a-c and f.<sup>3</sup>  
8 The State also does not object to including, for purposes of this consolidated proceeding, the  
9 audit reports attached as Exhibit B to the UAC, to the extent that they purport to document  
10 inspections performed prior to the filing of the complaints.

11 The purpose of consolidation is to bundle together common questions of law or fact,  
12 ensuring that legal questions affecting multiple cases are resolved consistently. *See, e.g.,*  
13 *Behrens v. O’Melia*, 206 Ariz. 309, 310-11 (App. 2003). Consolidation “does not merge the  
14 suits into a single cause, or change the rights of the parties.” *Yavapai Cnty. v. Superior Court In*  
15 *and For Yavapai Cnty.*, 13 Ariz. App. 368, 370 (1970) (internal citations and quotation marks  
16 omitted). Instead, consolidation is done “for limited purposes or for the trial of certain issues  
17 only.” *Torosian v. Paulos*, 82 Ariz. 304, 315 (1957).

18 Here, where a critical issue is whether Plaintiffs lack standing or their complaint should  
19 otherwise be dismissed, allowing Plaintiffs to put forward their best attempt at a valid  
20 complaint—which they have now done, twice—is proper, and will aid the Court in resolving the  
21 motion to dismiss, specifically whether to dismiss without leave to amend further. In addition,  
22 the State agrees that in some of the cases that have been consolidated, Plaintiffs still had their  
23 one amendment “as a matter of course” under Rule 15(a)(1), which these portions of the UAC

24 \_\_\_\_\_  
25 <sup>3</sup> To be clear, where Plaintiffs add vague allegations that are ambiguous as to time—such as the  
26 claim in ¶ 23 that unidentified members of AID and Ritzenthaler “have visited many of the  
Consolidated Defendants’ public accommodation parking lots,” such allegations should be  
limited to events occurring prior to the filing of the complaints.

1 will satisfy. *See Graham v. Goodyear Aerospace Corp., Arizona Div.*, 120 Ariz. 275, 277  
2 (App.), *aff'd*, 120 Ariz. 272 (1978) (recognizing “unnecessary” motion to amend, where  
3 amendment as a matter of course was available); Daniel J. McAuliffe & Shirley J. McAuliffe,  
4 *Arizona Civil Rules Handbook* 273 (2016 ed.) (“A party need not wait until a responsive  
5 pleading is filed before amending its pleading as a matter of course.”).

6 The State notes that its non-objection to this amendment is without prejudice to  
7 challenging through a motion to dismiss and motion for judgment on the pleadings whether the  
8 UAC actually establishes standing and states a claim for relief—that is the entire purpose of this  
9 consolidated proceeding. *See Mtn.* at 3-4 (explaining that purpose of the UAC is to “properly  
10 and simply frame[]” the issues for resolution by this Court). The State continues to believe that  
11 the UAC should be dismissed, and will argue the same in its upcoming motion.

12 Finally, the State does not object to removing AID LLC (formerly known as AADI LLC)  
13 as a party for purposes of the UAC, but that entity should not be excused from this proceeding  
14 for purposes of sanctions. Under Rule 21, which governs the removal of parties, “[p]arties may  
15 be dropped or added by order of the court on motion of any party or of its own initiative at any  
16 stage of the action and *on such terms as are just.*” Ariz. R. Civ. P. 21 (emphasis added). A just  
17 term would include requiring AID LLC to remain in the case for purposes of adjudicating  
18 whether its conduct warranted sanctions.<sup>4</sup>

19 **B. If these Cases Survive Dismissal, then Plaintiffs Should Have to Actually**  
20 **Submit a Verified Amended Complaint for Each Individual Case, Subject to**  
21 **Any Objections from Each Defendant.**

22 Although the State has no objection to the amendments described in Part I(A), *supra*,  
23 Consolidated Defendants still must be given an opportunity to object to any amendment as it  
24 relates to their particular case. But requiring the Consolidated Defendants to bring these case-

---

25 <sup>4</sup> In any event, the Court has discretion to impose sanctions for conduct occurring in cases even  
26 when the underlying claim is no longer at issue. *See Britt v. Steffen*, 220 Ariz. 265, 271-72  
¶¶ 24-26 (App. 2008). For the same reasons, removed parties could be subject to sanctions for  
conduct that occurred in the litigation’s course while the removed party was active.

1 by-case challenges now, when the cases were consolidated to consider motions regarding global  
2 deficiencies that could obviate the need for any such challenges, would be wasteful. Instead, the  
3 Court should require Plaintiffs to move for leave to amend in the individual cases, if the cases  
4 survive this consolidated proceeding. This is the optimal course not just for the efficiency of  
5 this consolidated proceeding but also the protection of Consolidated Defendants' rights.

6 As the consolidated proceeding currently stands, it is unclear that Consolidated  
7 Defendants could respond to the Motion and it is also doubtful that they have all received notice.  
8 When the Court granted the State's motion for consolidation and stay, it directed that the  
9 consolidated cases were stayed "except as to the Plaintiffs and the Intervener, State of  
10 Arizona." 9/26 Minute Entry at 2. In light of this order, most of the Consolidated Defendants  
11 have been "standing down" and avoiding incurring additional legal costs until the State's  
12 motions are decided by the Court. But those defendants now face a quandary—do they need to  
13 pay lawyers to respond to Plaintiffs' Motion? Can they respond, in light of the Court's stay  
14 order? And if they do not respond, do they risk losing their right to object to the motion?

15 These concerns are particularly acute for those defendants with especially strong defenses  
16 against the Motion—such as defendants who fixed any compliance issues months ago,  
17 defendants in cases where Plaintiffs have already amended their complaint, and defendants in  
18 cases where the federal claims have already been dismissed and Plaintiffs are attempting to add  
19 the same claims again. In addition, Plaintiffs have apparently failed to serve their Motion, their  
20 Notice of Errata, or their UAC on the Consolidated Defendants, through alternative service or  
21 otherwise. *See* Part IV, *infra*. The State, of course, does not represent any of the Consolidated  
22 Defendants, and cannot consent or object on their behalf.

23 The solution to these issues is straightforward. To the extent the Court grants the Motion,  
24 it should do so solely for the purposes of the consolidated proceedings. In other words, the  
25 Court should preserve the rights of the Consolidated Defendants to object to the Motion in their  
26 own cases, in the event that the stay is later lifted. This will allow the State to respond to

1 Plaintiffs’ amended complaint without prejudicing the rights of the Consolidated Defendants or  
2 forcing them to incur additional expenses to defend deficient claims. It will also preserve  
3 several additional safeguards—the requirement of verifying a complaint for injunctive relief; the  
4 signature of counsel under Rule 11 as to the good faith basis of the allegations and claims  
5 against a particular Defendant; and the Rule 15(a)(2)’s requirement of a redline.

6 Plaintiffs will not be prejudiced by this course of action. If anything, this would benefit  
7 them for several reasons. It saves them from having to move now for leave to file in over 1,000  
8 cases; it allows consistent adjudication of their rights on the common, most fundamental issues,  
9 while not having to expend resources on the specific factual issues of each case; and if Plaintiffs  
10 lose, they can file a single appeal rather than incur the expense of over 1,000 appellate filings.  
11 *See* Motion at 3-4 (discussing benefits of adjudicating consolidated issues in UAC).

12 **II. The Court Should Not Allow Portions of the UAC Adding New Claims About**  
13 **Proposed New Plaintiff Gastelum or Other Post-Filing Events.**

14 This Court should not allow supplementation to add new claims about events occurring  
15 after the complaints were filed. These primarily, if not exclusively, relate to proposed new  
16 plaintiff Gastelum—*see, e.g.* **Exhibit B** to this Response, which highlights in yellow UAC’s  
17 caption and prefatory paragraph, and ¶¶ 3, 22, and 33.<sup>5</sup> In addition, any other paragraphs that  
18 are ambiguous as to time (such as Paragraph 23, alleging unspecified visits to unspecified  
19 defendants by unspecified members at unspecified times) should be limited to only relate to pre-  
20 complaint events. The Court should deny Plaintiffs leave to add allegations of post-complaint  
21 events either based on standing and ripeness, or by exercising its discretion under Rule 15(d).

22  
23  
24  
25 <sup>5</sup> The State is not conceding that Gastelum has valid claims. If the Court permits amendment to  
26 add these post-complaint allegations, then the State will still challenge standing in its  
forthcoming motion to dismiss/motion for judgment on the pleadings.

1           **A.     A Party Lacking Standing Cannot Add Claims About Subsequent Conduct**  
2           **by New Plaintiffs to Obtain Standing.**

3           This Court should conclude, under principles of standing and ripeness, that adding  
4 proposed new plaintiff Gastelum is improper. It is a well-established principle that jurisdiction  
5 “depends upon the state of things at the time of the action brought.” *Rockwell Intern. Corp. v.*  
6 *United States*, 549 U.S. 457, 473 (2007) (quoting *Mullan v. Torrance*, 22 U.S. 537, 539 (1824)).  
7 For example, in *Lane v. Hognason*, the Court found that a landlord’s suit against a tenant,  
8 brought less than a month before the landlord regained the right to possession, was “fatally  
9 defective as premature.” 12 Ariz. App. 330, 333 (1970); *see also Wright v. Dougherty Cnty.,*  
10 *Ga.*, 358 F.3d 1352, 1356 (11th Cir. 2004) (If a party has no standing to assert a claim, “it does  
11 not have standing to amend the complaint and control the litigation by substituting new  
12 plaintiffs, a new class, and a new cause of action.”) (quoting *Summit Office Park, Inc. v. United*  
13 *States Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir.1981)); *Fulton v. Woodford*, 17 Ariz. App.  
14 490, 497 (1972) (suits without damages or ripe claims are “premature” and “fatally defective”).

15           Here, Plaintiffs never had standing to bring their original claims, which were based on  
16 inspections by individuals without disabilities, with the inspection reports later viewed by  
17 someone with a disability. Response to Mtn. to Intervene at 4. Plaintiffs now attempt to base  
18 claims not on any facts in existence at the time the complaints were filed, but instead upon the  
19 recent conduct of one proposed *new* plaintiff—Fernando Gastelum. Gastelum, of course, was  
20 never mentioned in any of over 1,700 original complaints, nor even in Plaintiffs’ first attempt at  
21 the UAC, filed only a few days ago. And Plaintiffs do not allege that Gastelum conducted  
22 inspections or was a member of AID prior to the filing of any original complaint.<sup>6</sup> Instead,  
23

---

24 <sup>6</sup> Plaintiffs have publicly admitted that they were not even aware of the Thomases until “a few  
25 months ago,” and that the Thomases recently “asked” AID if they could be plaintiffs and do  
26 inspections. *See* AID October 27, 2016 Press Release, *available at*  
[http://www.marketwired.com/press-release/aid-saves-lives-of-brothers-with-disabilities-  
regardless-of-troubled-past-2170494.htm](http://www.marketwired.com/press-release/aid-saves-lives-of-brothers-with-disabilities-regardless-of-troubled-past-2170494.htm). And the Thomases were supposedly going to visit the

1 Plaintiffs openly acknowledge that Gastelum is only now starting to visit the Consolidated  
2 Defendants, months after all of the complaints were filed, and hopes to complete his visits  
3 sometime in December. UAC ¶ 22. None of this recent or future conduct could possibly give  
4 Plaintiffs standing for complaints they filed months ago. Gastelum’s claims are also not ripe,  
5 and thus are fatally defective, because he has not even visited many businesses and does not  
6 identify the businesses he has visited or allege any injuries.

7 Moreover, Gastelum’s conduct (and future conduct) differs substantially from what  
8 Plaintiffs previously alleged. Plaintiffs have told the Court that their process in filing the  
9 original complaints consisted of hiring inspectors to photograph parking lots and later presenting  
10 the evidence to Ritzenthaler, who then authorized the filing of the lawsuit. Response to Mtn. to  
11 Intervene, at 4. Plaintiffs have never alleged that their inspectors had a disability, or that anyone  
12 with a disability ever encountered the alleged violations. Now, Plaintiffs try to allege that  
13 through the upcoming actions of Gastelum, someone with a mobility-related disability has  
14 actually visited (or will eventually visit) every defendant. Plaintiffs also include a vague  
15 allegation that Ritzenthaler and other unidentified members of AID with a mobility-related  
16 disability “have visited many of the Consolidated Defendants’ public accommodation parking  
17 lots, and intend to continue to do so.” UAC at ¶ 23. The Court should make clear that any  
18 allegations related to post-complaint events are excluded.

19 Under the guise of “clarifying” their standing to bring the Consolidated Complaints,  
20 Plaintiffs are attempting to bring claims based largely on new inspections by a new plaintiff with  
21 a disability, performed months after the original complaints were filed and perhaps weeks after  
22 the UAC was filed. Under principles of standing, such an amendment would be improper. If (as  
23 the State contends) Plaintiffs lacked standing to bring the original complaints, they also lack  
24

---

25 Consolidated Defendants by the second week of November, while Gastelum will not visit them  
26 until December.

1 standing to bring an amended complaint based on events related to other Plaintiffs that occurred  
2 months after the original complaints were filed.

3 **B. Even If This Court Considers the UAC, It Should Exercise Its Discretion**  
4 **Under Rule 15(d) and Not Allow Allegations of Post-Complaint Events.**

5 Even if the Court could permit such a supplementation, it should exercise its discretion  
6 not to do so because it would prejudice Consolidated Defendants by permitting the filing of over  
7 a 1,700 invalid complaints, and then the later amendment of such complaints to try to cure the  
8 defects by manufacturing standing based on the post-complaint conduct of additional plaintiffs.  
9 Supplementation of allegations related to post-complaint events is governed by Arizona Rule of  
10 Civil Procedure 15(d), not Rule 15(a), because the events occurred *after* the filing of the  
11 Complaint. The Court always has broad discretion whether to allow such supplementation, and  
12 Courts have properly exercised their discretion to deny supplementation. *See, e.g., Rand v.*  
13 *Porsche Financial Servs.*, 216 Ariz. 424, 435 ¶¶ 40-41 (App. 2007).

14 Moreover, the Court may only allow supplementation “on reasonable notice and upon  
15 such terms as are just.” Reasonable notice has not been given here, *see infra* Section IV, but  
16 more fundamentally allowing supplementation would be unjust for three reasons.

17 First and foremost, it would not be just to allow Plaintiffs to attempt to engage in new  
18 conduct to paper over standing deficiencies universally present in over 1,700 complaints they  
19 filed. Plaintiffs lacked standing to file any of those complaints, yet Plaintiffs openly boast in  
20 press releases that they have collected approximately \$1.2 million by settling those cases. *See*  
21 *note 2, supra*. Even after state and federal court orders holding that Plaintiffs lacked standing,  
22 they extracted settlements, and continue to try to do so to this day. Only now, when the Court  
23 has consolidated all of Plaintiffs’ open cases for the purpose of considering issues including  
24 Plaintiffs’ standing, do Plaintiffs make any attempt to remedy this deficiency.

25 Second, adding claims related to post-complaint conduct would frustrate the purposes of  
26 the consolidation proceeding. These cases were consolidated for consideration of common

1 issues of law and fact, and for possible dismissal and sanctions. Now, Plaintiffs are not only  
2 attempting to assert post-complaint conduct, but are trying to do so in a way that will alter some  
3 of their claims. Some of Plaintiffs' claims going forward would likely be based on whatever  
4 "injuries" were or will be allegedly suffered by Gastelum. But undoubtedly, Gastelum will also  
5 encounter businesses that are in compliance. Plaintiffs appear determined to maintain claims  
6 against those businesses, and their amended complaint demands relief "irrespective of whether  
7 Consolidated Defendants have already achieved removal of the barrier(s)." UAC ¶ 36. But  
8 standing for claims against those businesses could be based solely on whatever "injuries" were  
9 produced by the original inspection.

10 Third, Plaintiffs demonstrate no prejudice. Plaintiffs threaten to re-file "all of the same  
11 lawsuits again" if the Court denies leave to amend and dismisses the original complaints "due to  
12 defects that could be cured by amendment." Motion at 4-5. They then argue that this threat  
13 weighs in favor of amendment. It does not. As the UAC demonstrates, and as the State will  
14 later argue, the defects in the original complaints cannot be cured by amendment. Additionally,  
15 the State intends to ask the Court for sanctions prohibiting Plaintiffs from filing such lawsuits  
16 without leave of Court. Finally, any prejudice to Plaintiffs is purely self-inflicted. Plaintiffs  
17 filed over 1,700 cases without standing, and Plaintiffs' counsel told this Court in August that  
18 Plaintiffs would "probably file 8,000 cases in the next two months." Oral Argument on August  
19 12, 2016 in CV2016-090503. Now, Plaintiffs complain that it would be "burdensome, time-  
20 consuming, and expensive" to file 1,700 more cases in which they allegedly have standing. The  
21 burden, time, and expense of filing and pursuing a lawsuit typically forces plaintiffs to carefully  
22 consider doing so. The fact that these Plaintiffs would have to think twice before engaging in  
23 such conduct again is hardly a reason to allow amendment.

24 Nor do the cases cited by Plaintiffs in their Motion support granting leave to supplement  
25 their Complaint by adding plaintiffs whose cause of action accrued after the filing of the original  
26 Complaint. Plaintiffs cite *Owen v. Superior Court*, 133 Ariz. 75, 79 (1982); *Green Reservoir*

1 *Flood Control Dist. v. Willmoth*, 15 Ariz. App. 406, 409 (App. 1971); and *Cullen v. Auto-*  
2 *Owners Ins. Co.*, 218 Ariz. 417, 419 (2008) to demonstrate the liberal standards under which the  
3 court grants leave to *amend* under Rule 15(a). *See* Mtn. at 2-3. But Plaintiffs are attempting to  
4 incorporate facts occurring *after* the filing of the Complaint, which is governed by Rule 15(d).  
5 *See Southwest Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, 443, ¶ 19 (App. 2001).  
6 While Rule 15(a) provides that leave to amend “shall be freely given,” Rule 15(d) “is clear that  
7 the court *may* permit a supplemental pleading setting forth changed circumstances.” *Burns v.*  
8 *Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998). Therefore, Plaintiffs reliance on those cases is  
9 inapposite.

10 Moreover, Plaintiffs’ argument that the court’s decision to grant the State’s Motion to  
11 Intervene “necessarily implies that no prejudice will result from granting Plaintiffs leave to  
12 amend” is unconvincing. *See* Mtn. at 5. Plaintiffs ignore that the State intervened only as a  
13 “Limited Purpose Defendant” to raise issues that were already present in the litigation, namely,  
14 Plaintiffs’ standing to maintain their actions. On the other hand, the addition of Gastelum and  
15 his upcoming visits inserts claims into over 1,000 cases that did not exist at the time the case  
16 was filed. As such, Plaintiffs cannot credibly analogize the addition of Gastelum to the case  
17 with the State’s intervention as a Limited Purpose Defendant.

18 In sum, allowing Plaintiffs to add post-complaint conduct to their claims at this point  
19 would be unjust. As such, the State submits that any allegations in the UAC that relate to post-  
20 complaint conduct (whether by the Gastelum, Ritzenthaler, or AIDF’s other, unidentified  
21 members) should not be allowed.

22 **III. The Court Should Not Allow Plaintiffs to Add A Mandamus and Declaratory Relief**  
23 **Claim Against the Attorney General as Part of this Consolidated Proceeding or**  
24 **1,100 Cases.**

25 The State opposes adding to this consolidated proceeding a claim for mandamus and  
26 declaratory relief relating to the Attorney General’s periodic compliance reviews under the  
Arizonans with Disabilities Act. This refers to the following amendments, which **Exhibit B** to

1 this Response, which highlights in blue: the reference to Mark Brnovich in the caption and  
2 prefatory paragraph of the Complaint; ¶¶ 7, 10-16, and the entirety of Count 3 (¶¶ 44-51); and  
3 the Prayer for Relief at d and e. The Court should allow these amendments only to the case in  
4 which the State has intervened, CV2016-090506, and then sever the claim pursuant to Rules  
5 20(b), 21, and/or 42(b). Alternatively, the Court should deny Plaintiffs’ request with leave for  
6 Plaintiffs to file a separate lawsuit, which they readily admit they could bring. *See* Mtn. at 5 n.4.

7 A mandamus and declaratory judgment claim against the Attorney General has no place  
8 in consolidated proceedings for over 1,100 individual complaints against private businesses. As  
9 noted above, consolidation is done “for limited purposes or for the trial of certain issues only.”  
10 *Torosian*, 82 Ariz. at 315. It allows the courts to bundle together common questions of law or  
11 fact, ensuring that legal questions affecting multiple cases are resolved consistently. *See, e.g.,*  
12 *Behrens*, 206 Ariz. at 310-11. Given these purposes, it makes no sense for Plaintiffs to inject a  
13 non-common claim seeking a single order against a single Defendant (Attorney General  
14 Brnovich) into these consolidated proceedings. The claim does not even arise from the same  
15 transactions or occurrences as the claims against specific Consolidated Defendants, suggesting  
16 that joinder of separate claims against Attorney General Brnovich in his official capacity—a  
17 new party<sup>7</sup>—is impermissible. Ariz. R. Civ. P. 20(a) (governing when persons may be joined in  
18 one action as defendants). But more fundamentally, it has no relevance to Plaintiffs’ standing  
19 and any sanctions—the issues for which consolidation was granted. Adding this claim would  
20 not only fail to serve efficiency or consistency but would affirmatively prejudice the speedy and  
21 just disposition of Consolidated Defendants’ individual cases. For all of these reasons, this  
22 claim should not be part of the UAC and this consolidated proceeding.

23 Instead, Plaintiffs should be granted leave to make this amendment in the sole case in  
24 which the State intervened, CV2016-090506, and the Court should then sever the claim based on

25 \_\_\_\_\_  
26 <sup>7</sup> Contrary to Plaintiffs’ assertion in the Motion (at 2, line 7), Attorney General Brnovich is not  
an intervenor. The State of Arizona intervened as a limited-purpose defendant.

1 its authority under Rules 20(b), 21, and/or 42(b). Rule 21 provides in part, “[a]ny claim against  
2 a party may be severed and proceeded with separately.” *See, e.g., Rodriguez v. Winski*, 973 F.  
3 Supp. 2d 411, 429-30 (S.D.N.Y. 2013) (granting severance under Federal Rule 21 where  
4 plaintiffs attempted to add claims against municipal transportation authority to multiple  
5 unrelated allegations against the police and private parties). Moreover, severance will not result  
6 in delay, inconvenience or added expense to Plaintiffs.

7 Alternatively, the court could reject leave to file in any of the consolidated cases, and  
8 simply allow Plaintiffs to bring a separate action. Indeed, Plaintiffs admit at (5 n.4) that they  
9 could file a separate action, but added it here out of an abundance of caution.

10 **IV. The State Does Not Object to Alternative Service, But Notes that Plaintiffs Have**  
11 **Delayed Any Service, Potentially Prejudicing Consolidated Defendants.**

12 Plaintiffs’ Motion asks for leave to provide alternative service through three routes: (1) e-  
13 filing the Motion under CV2016-090506, (2) “emailing a copy of it to all counsel for  
14 Consolidated Defendants who have appeared in any of the Consolidated Actions,” and  
15 (3) ”posting the Motion online at the ‘aid.org’ website (in such a way that it may be easily  
16 accessed).” Generally, the State does not object to this framework, which is similar to what the  
17 Court approved for the State’s motion to consolidate, although the State believes that AID  
18 should—instead of only emailing counsel who have entered an appearance—email all  
19 Consolidated Defendants and their counsel of which AID is aware. The larger issue is that, as of  
20 today, over a week after the filing of Plaintiffs’ Motion and with time running out for any  
21 responses, **Plaintiffs still have not emailed their Motion to defendants or their counsel and**  
22 **still have not posted the Motion on their website.**

23 Instead, starting on Monday, October 24, Mr. Strojnik (on behalf of AIDF) sent new  
24 form-letter settlement offers to multiple Consolidated Defendants, dropping their settlement  
25 offer once again, this time to \$1,750, but only if defendants take the offer within 10 (or 5)  
26 business days. The correspondence makes no mention of the fact that Plaintiffs have filed a

1 motion for leave to amend. In fact, it expressly represents that because of the stay, “[t]here will  
2 be no motion practice from either side for now.” Exhibit C.

3 This letter is deceptive and misleading. There *is* motion practice, and AIDF filed a  
4 motion last week asking to amend the complaint against these same Defendants. Plaintiffs are  
5 not only failing to email the Motion or the UAC, they are actively representing in settlement  
6 offers that there “will be no motion practice” due to the stay.

7 After receiving reports of these settlement letters, the State confirmed with reporting  
8 defendants that they had received no correspondence from Plaintiffs regarding the Motion. The  
9 State also diligently searched AID’s website to find the promised copy of the Motion, and could  
10 not. The State raised this issue with Plaintiffs’ counsel yesterday, but as of today, the Motion is  
11 still not on AID’s website, and has still not been sent to the Consolidated Defendants.

12 Make no mistake—the State emailed Plaintiffs’ Motion to the State’s entire distribution  
13 list last Friday, and emailed the Notice of Errata today. But Plaintiffs did not ask the State to do  
14 so, and undoubtedly have counsel on their email list of which the State is not aware. Plaintiffs’  
15 failure to email their list and post the motion to their website thus results in at least some  
16 defendants being kept in the dark about a motion to amend a complaint filed against them. This  
17 further counsels in favor of preserving the rights of the Consolidated Defendants by allowing  
18 any amendment to be for the purposes of this consolidated proceeding only.

### 19 **Conclusion**

20 For the foregoing reasons, the State requests that the Court allow the Plaintiffs to amend  
21 their complaints to add allegations about pre-complaint events, reject Plaintiffs’ attempt to  
22 supplement their complaint with allegations about post-complaint events, reject Plaintiffs’  
23 attempt to add a mandamus claim to every consolidated case, and set forth standards for  
24 Plaintiffs to provide alternative service to the Consolidated Defendants. A proposed order  
25 consistent with this request is filed herewith as Exhibit A.

1 RESPECTFULLY SUBMITTED: October 28, 2016.

2 MARK BRNOVICH,  
3 ATTORNEY GENERAL

4 BY: /s/ Matthew du Mée

5 Paul N. Watkins  
6 Matthew du Mée  
7 Brunn W. Roysden III  
8 Oramel H. Skinner  
9 Evan G. Daniels  
10 John Heyhoe-Griffiths  
11 Assistant Attorneys General

*Attorneys for State of Arizona*

11 Document electronically transmitted  
12 to the Clerk of the Court for filing, using  
13 AZ TurboCourt, this 28th day of October, 2016.

14 **COPY** of the foregoing HAND DELIVERED  
15 this 28th day of October, 2016, to:

16 Peter Strojnik, Esq.  
17 **STROJNIK, P.C.**  
18 1 East Washington Street, Suite 500  
19 Phoenix, AZ 85004  
20 [ps@strojnik.com](mailto:ps@strojnik.com)  
21 *Attorney for Plaintiffs*

22 Dennis I. Wilenchik, Esq.  
23 John D. Wilenchik, Esq.  
24 Brian J. Hembd, Esq.  
25 **WILENCHIK & BARTNESS**  
26 The Wilenchik & Bartness Building  
2810 N. 3<sup>rd</sup> Street  
Phoenix, AZ 85004  
[admin@wb-law.com](mailto:admin@wb-law.com)  
*Attorneys for Plaintiffs*

1 **COPY** of the foregoing EMAILED to  
2 the State's list of counsel and defendants that  
3 have contacted the State this 28th day of October  
4 and POSTED on state's website, [www.azag.gov](http://www.azag.gov),  
5 by this 31st day of October or as soon thereafter  
6 as is practicable.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
s/ *Brunn W. Roysden III*