

1 MARK BRNOVICH
2 ATTORNEY GENERAL
3 Firm State Bar No. 14000
4 Joseph A. Kanefield (Bar No. 15838)
5 *Chief Deputy & Chief of Staff*
6 Brunn (Beau) W. Roysden III (Bar No. 28698)
7 *Solicitor General*
8 Michael S. Catlett (Bar No. 25238)
9 *Deputy Solicitor General*
10 Jennifer J. Wright (Bar No. 27145)
11 *Assistant Attorney General*
12 2005 North Central Avenue
13 Phoenix, Arizona 85004
14 Telephone: (602) 542-8958
15 beau.roysden@azag.gov
16 michael.catlett@azag.gov
17 jennifer.wright@azag.gov

18 *Attorneys for Attorney General Mark Brnovich*

19 ARIZONA SUPERIOR COURT
20 MARICOPA COUNTY

21 MARICOPA COUNTY, et al.,
22
23 Plaintiffs,
24
25 v.
26 KAREN FANN, in her official capacity as
27 President of the Arizona Senate, et al.,
28
29 Defendants.

Case No: CV2020-016840
**AMICUS CURIAE BRIEF OF
ARIZONA ATTORNEY GENERAL
MARK BRNOVICH**

(Assigned to the Honorable Timothy Thomason)

30 KAREN FANN, in her official capacity as
31 President of the Arizona Senate, et al.,
32
33 Plaintiffs-in-
34 Counterclaim,
35
36 v.
37 MARICOPA COUNTY, et al.,
38
39 Defendants-in-
40 Counterclaims.

1 **INTRODUCTION**

2 Plaintiffs, Maricopa County and the individual members of the Maricopa County
3 Board of Supervisors (collectively, the “County”), challenge subpoenas issued by the
4 President of the Arizona Senate and the Chairman of the Arizona Senate Judiciary
5 Committee relating to the County’s administration of the 2020 general election. (*See*
6 *Compl. Exhs. 1, 2.*) The subpoenas issued following a full-day hearing held by the
7 Senate Judiciary Committee, which was joined by the future Chairwoman of the Senate
8 Government Committee, the Senate Committee that moving forward will initially hear
9 future election legislation in the upcoming session. The subpoenas required the County
10 to respond by close of business on December 18, 2020. Rather than respond at all to the
11 subpoenas, the County filed this action seeking declaratory relief that the subpoenas are
12 unlawful. Among the grounds the County asserts are that the subpoenas are legally
13 invalid and violate the separation of powers. (*See Compl. Counts 1, 2.*) The Senate
14 President and the Chair of the Senate Judiciary Committee chairman have filed an
15 answer and verified counterclaims, and moved for a preliminary injunction based on the
16 counterclaims. The purpose of this amicus brief is to provide additional legal
17 background and the perspective of the Attorney General to the Court on the proper legal
18 framework for analyzing those assertions.

19 **DISCUSSION**

20 As explained below: (1) the Arizona Legislature has broad constitutional and
21 statutory authority to issue legislative subpoenas, (2) the Court’s review of legislative
22 subpoenas should be deferential, (3) the presiding officer of either house or the chairman
23 of any committee have the power to issue subpoenas to the County related to the
24 County’s election administration, and (4) subpoenas issued to political subdivisions, like
25 the County, do not present separation of powers issues.

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1 **I. The Arizona Legislature Has Broad Constitutional and Statutory Authority**
2 **To Issue Legislative Subpoenas.**

3 Any decision the Court issues should recognize the Arizona Legislature’s broad
4 authority to issue and enforce legislative subpoenas. The County incorrectly takes a
5 narrow view of the legislative subpoena power.

6 The legislative power to issue subpoenas is inherent in the power to legislate. *See*
7 *Watkins v. U.S.*, 354 U.S. 178, 187 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 161
8 (1927) (the legislative “power of inquiry—with power to enforce it—is an essential and
9 appropriate auxiliary to the legislative function”). ““Without information, Congress
10 would be shooting in the dark, unable to legislate wisely or effectively.” *Trump v.*
11 *Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020). Consequently, the legislative
12 subpoena power is “broad” and “encompasses inquiries concerning the administration of
13 existing laws as well as proposed or possibly needed statutes.” *Watkins*, 354 U.S. at 187.
14 That power may be exercised by a committee acting on behalf of a legislative body.
15 *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 505 (1975). Ultimately, it is the duty
16 of all citizens “to respond to subpoenas, to respect the dignity of the Congress and its
17 committees[,] and to testify fully with respect to matters within the province of proper
18 investigation.” *Id.* at 187-88.

19 Legislative subpoenas are not of recent vintage—the County’s position that the
20 legislative subpoena power is cramped runs counter to centuries of tradition and practice.
21 In *Trump v. Mazars USA, LLP*, decided just last term, Chief Justice Roberts recounted a
22 request for documents that a House committee made to President Washington in 1792
23 and a congressional request for documents made to President Jefferson in 1807. *See* 140
24 at 2029-30. The power to compel testimony or evidence “was well known to the English
25 Parliament, where it was frequently employed.” 1 Sutherland on Statutory Construction
26 § 12:2 (7th ed.). As the U.S. Supreme Court observed in 1927, the power to secure
27 needed information through compulsory process was regarded as inherent in the power
28 to legislate “in the British Parliament and in the colonial Legislatures before the

1 American Revolution, and a like view has prevailed and been carried into effect in both
2 houses of Congress and in most of the state Legislatures.” *McGrain*, 273 U.S. at 161.

3 Thus, at the time of Arizona statehood, the legislative subpoena power was well
4 established and long utilized. Like the federal framers, Arizona’s framers structured our
5 state government such that the will of the people is exercised primarily through the state
6 legislature. When the Arizona Constitution provides that “[t]he legislative authority of
7 the state shall be vested in the legislature,” there can be little doubt that such authority
8 includes the power to issue compulsory process in furtherance of legislative functions.
9 *See* Ariz. Const. art. 4, pt. 1 § 1. This is particularly so because the Legislature is
10 presumed to have all power not granted to another branch of government or expressly
11 prohibited in the Constitution. *See Adams v. Bolin*, 74 Ariz. 269, 283 (1952) (“[T]he
12 Legislature has all power not expressly prohibited or granted to another branch of the
13 government.”). The power to issue legislative subpoenas has not been expressly granted
14 to another branch of government and legislative subpoenas are not expressly prohibited.

15 Long ago, the Arizona Legislature went one step further and codified part of its
16 inherent legislative subpoena power at A.R.S. § 41-1151; *see also* Ariz. Const. art. 22,
17 § 21 (“The Legislature shall enact all necessary laws to carry into effect the provisions of
18 this Constitution.”). That statutory provision states that “[a] subpoena may be issued by
19 the presiding officer of either house or the chairman of any committee before whom the
20 attendance of a witness is desired.” A.R.S. § 41-1151; *State v. Burbey*, 243 Ariz. 145, ¶7
21 (2017) (“When the text is clear and unambiguous, we apply the plain meaning and our
22 inquiry ends.”). Consistent with this textual confirmation of implied legislative
23 authority, the Arizona Supreme Court later confirmed that “[i]t is within the powers of
24 legislative committees to conduct investigations . . . and to issue subpoenas and to
25 summon witnesses generally and punish them for contempt if they refuse to answer
26 relevant questions or produce records.” *Buell v. Super. Ct. of Maricopa Cnty.*, 96 Ariz.
27 62, 66 (1964).

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1 The County’s position on the general scope of the Legislature’s subpoena power
2 is, therefore, inconsistent with constitutional structure, governmental tradition and
3 practice, the plain meaning of an Arizona statute, and binding Arizona Supreme Court
4 case law. The Court’s decision on the merits of this case, regardless of the ultimate
5 outcome, should recognize the long-established, necessary, and broad power of the
6 Legislature to issue subpoenas in furtherance of legislative functions.

7 **II. The Court’s Review Of Legislative Subpoenas Should Be Deferential.**

8 The County’s position in this case is also contrary to the deference that courts
9 should exercise when passing on the enforceability of a subpoena issued by a coordinate
10 branch of government. Like all government authority, the Legislature’s power to issue
11 and enforce subpoenas is not unlimited. One limitation is found in the allowable scope
12 of legislative subpoenas—the information sought through legislative subpoena must be
13 for legislative purposes. But the U.S. Supreme Court has taken a broad view of
14 legislative purpose. The Court has explained that a subpoena is issued for a legislative
15 purpose if “the subject was one on which legislation could be had and would be
16 materially aided by the information which the investigation was calculated to elicit.”
17 *McGrain*, 273 U.S. at 177; *cf. State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588,
18 601 ¶52 (2017) (explaining that the Court would look no further than the *subject matter*
19 of legislation in deciding whether it touches upon a matter of statewide concern).

20 If there is a conceivable, legitimate legislative purpose for the subpoena, courts
21 should presume that is the purpose for the subpoena when determining its validity.
22 *McGrain*, 273 U.S. at 178 (“The only legitimate object the Senate could have in ordering
23 the investigation was to aid it in legislating, and we think the subject-matter was such
24 that the presumption should be indulged that this was the real object”); *Eastland*, 421
25 U.S. at 506 (“The courts should not go beyond the narrow confines of determining that
26 a committee's inquiry may fairly be deemed within its province.”); *cf. Cave Creek*
27 *Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶11 (2013) (“[W]e presume the statute is
28 constitutional and will uphold it unless it clearly is not.”). Courts should not presume ill

1 motive on the Legislature’s part. *McGrain*, 273 U.S. at 178 (“We are bound to presume
2 that the action of the legislative body was with a legitimate object, if it is capable of
3 being so construed, and we have no right to assume that the contrary was intended.”
4 (citation omitted)). “So long as Congress acts in pursuance of its constitutional power,
5 the Judiciary lacks authority to intervene on the basis of the motives which spurred the
6 exercise of that power.” *Barenblatt v. U.S.*, 360 U.S. 109, 132 (1959).

7 A legislative subpoena is valid even if one of several objectives for the subpoena
8 is alleged to be unlawful. In other words, so long as the subpoena can be construed to
9 relate to a subject upon which legislation might be had, the subpoena is valid. *McGrain*,
10 273 U.S. at 180 (“But we do not assent to the view that this indefinite and untenable
11 suggestion invalidates the entire proceeding. The right view in our opinion is that it takes
12 nothing from the lawful object avowed in the same resolution and rightly inferable from
13 the earlier one.”). The Legislature need not include an express avowal about the purpose
14 for the subpoena and it need not point to actual legislation that it plans to enact. *Id.* at
15 178 (“An express avowal of the object would have been better; but in view of the
16 particular subject-matter was not indispensable.”); *In re Chapman*, 166 U.S. 661, 670
17 (1897) (“[W]e think it affirmatively appears that the senate was acting within its right,
18 and it was certainly not necessary that the resolutions should declare in advance what the
19 senate meditated doing when the investigation was concluded.”).

20 Finally, legislative subpoenas may be validly issued in connection with an
21 authorized investigation. *Buell*, 96 Ariz. at 64, 66 (1964) (in case involving investigation
22 being conducted by a committee of Arizona House of Representatives, stating “[i]t is
23 within the powers of legislative committees to conduct investigations such as the one
24 here involved....”); *Eastland*, 421 U.S. at 505 (“The issuance of a subpoena pursuant to
25 an authorized investigation is similarly an indispensable ingredient of lawmaking.”).
26 Legislative purpose is fulfilled even when the purpose of the subpoena is to investigate
27 whether a particular governmental entity properly discharged its functions. *McGrain*,
28 273 U.S. at 177 (finding valid legislative purpose when the investigation was intended to

1 determine whether government officials “were performing or neglecting their duties in
2 respect of the institution and prosecution of proceedings to punish crimes and enforce
3 appropriate remedies against the wrongdoers....”); *Eastland*, 421 U.S. at 506 (“Inquiry
4 into the sources of funds used to carry on activities suspected by a subcommittee of
5 Congress to have a potential for undermining the morale of the Armed Forces is within
6 the legitimate legislative sphere.”). And it is not a valid objection that the investigation
7 might also reveal a crime or wrongdoing by a government official. *McGrain*, 273 U.S.
8 at 179-80.¹

9 It appears, based on the County’s Complaint, that it would have the Court take a
10 circumspect approach to the subpoenas here at issue. But, based on the foregoing, the
11 Court should do no such thing. Instead, the Court should treat the subpoenas with the
12 deference and respect owing a coordinate branch of government.

13 **III. The Legislature Has The Power To Issue Subpoenas To The County Related**
14 **To The County’s Election Administration.**

15 The Arizona Legislature has broad power to issue subpoenas regarding election
16 administration in connection with the 2020 general election, both to review how the
17 County discharged its duties during that election and to craft future election legislation.
18 Any argument by the County otherwise should fail.

19 The U.S. Constitution grants plenary power to each state legislature to set the
20 times, places, and manner of holding elections. *See* U.S. Const. art. I, § 4, cl. 1 (“The
21 Times, Places and Manner of holding Elections for Senators and Representatives, shall
22 be prescribed in each State by the Legislature thereof[.]”). The U.S. Constitution also
23 grants state legislatures the power to decide the manner in which electors for President of
24 the United States will be chosen. *Id.* art. II, § 1, cl. 4; *Bush v. Palm Beach Cty.*
25 *Canvassing Bd.*, 531 U.S. 70, 76 (2000) (“[I]n the case of a law enacted by a state

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27 ¹ This is not meant to suggest that the Attorney General believes either that (1) the
28 subpoenas at issue in this case were issued for an improper purpose or (2) that the
County has engaged in any wrongdoing. This explanation is merely intended to establish
the deference the Court should employ in passing on the legality of the legislative
subpoenas at issue.

1 legislature applicable not only to elections to state offices, but also to the selection of
2 Presidential electors, the legislature is not acting solely under the authority given it by
3 the people of the State, but by virtue of a direct grant of authority made under Art. II, §
4 1, cl. 2, of the United States Constitution.”). Similarly, the Arizona Constitution grants
5 the Legislature power to enact “laws to secure the purity of elections and guard against
6 abuses of the elective franchise.” Ariz. Const. art. 7, § 12.

7 The Arizona Legislature has exercised its federal and state constitutional authority
8 to enact a detailed set of statutes contained in Title 16 related to election administration.
9 Those statutes prescribe how ballots in Arizona shall be provided, cast, and counted, and
10 how elections shall be canvassed, certified, and challenged. These statutes also delegate
11 some rulemaking and administrative authority to the counties and the Secretary of State
12 (if such rules are approved by the Governor and Attorney General). *See, e.g.*, A.R.S.
13 § 16-452 (procedure for promulgating elections procedure manual). The Arizona
14 Legislature should be permitted to issue subpoenas to determine whether government
15 officials who have been delegated authority to administer elections have faithfully
16 discharged those duties and to determine whether current law regarding election
17 administration should remain the same or be amended. The Arizona Legislature has the
18 power to keep election laws the same or to change those laws, and the Court should
19 recognize that the Arizona Legislature has the authority to issue subpoenas to obtain
20 information to help it choose the best path forward for Arizona.

21 Here, Counterclaimants plead they issued the subpoenas at issue because “[i]n
22 addition to ascertaining the accuracy and authenticity of the Maricopa County election
23 returns, the results of the investigation and audit will inform pending and future
24 legislative proposals designed to fortify the security and integrity of Arizona elections, to
25 include assessing the legislatively assigned duties and responsibilities of the county
26 board of supervisors and county recorders.” (Answer and Verified Counterclaim ¶ 25.)
27 They also argue that the subpoenas are necessary to decide whether “to prospectively
28 change the statutory responsibilities of the Secretary and/or county officials.” (Plaintiffs-

1 in-Counterclaim’s Mot. For Preliminary Injunction, p. 11). As established above, these
2 legislative purposes are owed considerable deference and the subject matter implicated—
3 election administration—falls squarely within the broad legislative subpoena authority,
4 particularly because that particular subject matter implicates the Legislature’s plenary
5 power to administer elections. The County’s attempt to attribute ill will, or even
6 alternative motives, to the Legislature should be rejected. *See McGrain*, 273 U.S. at 177;
7 *Eastland*, 421 U.S. at 506; *Mazars*, 140 S. Ct. at 2031; *Bean LLC v. John Doe Bank*, 291
8 F. Supp. 3d 34, 44 (D.D.C. 2018).

9 **IV. Legislative Subpoenas To The County Do Not Create Separation Of Powers**
10 **Issues.**

11 The subpoenas at issue here do not implicate separation of powers concerns
12 because they relate solely to authority legislatively delegated to the County. That
13 delegated authority is subject to legislative oversight, including through the legislative
14 subpoena power.

15 As discussed, the Arizona Legislature has plenary power over election
16 administration under the U.S. and Arizona Constitutions. The County, on the other hand,
17 owes its powers in this area to the Arizona Legislature. *See* Ariz. Const. art. 12, § 4
18 (“The duties, powers, and qualifications of [county] officers shall be as prescribed by
19 law.”); *see also City of Tucson v. State*, 229 Ariz. 172, 178 ¶35 (2012) (recognizing that
20 even for charter cities “election dates, other administrative aspects of elections, and the
21 various examples listed in § 9–821.01(A)” are matters of statewide concern and subject
22 to legislative oversight). Thus, the Legislature may grant or take away power from a
23 county, or its governing officers, as the Legislature sees fit. For example, the Legislature
24 may require additional protections related to use of electronic tabulating machines, such
25 as modifying the hand-count audit procedures to require a higher percentage of ballots be
26 hand counted. *See, e.g.,* A.R.S. § 16-602(B)(1). “The boards of supervisors of the
27 various counties of the state have only such powers as have been expressly or by
28 necessary implication, delegated to them by the state legislature.” *Assoc. Dairy Prods.*
Co. v. Page, 68 Ariz. 393, 395-96 (1949); *State v. Payne*, 223 Ariz. 555, 561 ¶15 (App.

1 2009) (“A county’s ‘authority is limited to those powers expressly, or by necessary
2 implication, delegated to [it] by the state constitution or statutes”). While the
3 Legislature has granted the County the authority to oversee various aspects of election
4 administration, the County’s apparent position that the Legislature thereby forfeits all
5 oversight, including through the issuance of subpoenas, is untenable.

6 In *Trump v. Mazars*, which dealt with legislative subpoenas to third parties for the
7 President’s personal records, Chief Justice Roberts set forth certain limitations on the
8 legislative subpoena power when separation of powers concerns arise relating to the
9 unitary executive. *See* 140 S. Ct. at 2035-36. While those same limitations may arise
10 with respect to a legislative subpoena for the personal records of members of Arizona’s
11 executive branch—for example, the Governor, Attorney General, or Superintendent of
12 Public Instruction—they do not arise with respect to a legislative subpoena for records
13 related to the County’s discharge of its delegated duty to administer the 2020 general
14 election consistent with Arizona and federal law.

15 Separation of powers prevents one branch of government from usurping powers
16 of another coordinate branch of government or delegating power to another coordinate
17 branch. *See* Ariz. Const. art. 3. Separation of powers would be violated, for example, if
18 the Court were to impose onerous requirements upon the legislative subpoena power.
19 Separation of powers does not, however, insulate a subordinate division of government
20 (like the County), which derives its powers from the Legislature, from oversight in the
21 administration of something as fundamental to American democracy as elections.

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CONCLUSION

In 1885, before becoming president, Woodrow Wilson commended the power of Congress to investigate as follows:

“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.”

Wilson, CONGRESSIONAL GOVERNMENT, 303 (1885). One hundred and thirty-five years later, President Wilson’s words still ring true.

The Arizona Legislature has broad authority to investigate the County’s administration of the 2020 general election to determine whether Arizona law regarding election administration should remain the same or be changed. In resolving this matter, the Court should (1) recognize the Arizona Legislature’s broad authority to issue legislative subpoenas, (2) exercise deferential review of the subpoenas at issue, (3) hold that the presiding officer of either house or the chairman of any committee have the authority to issue subpoenas reviewing the County’s administration of elections, and (4) reject any effort by the County to interpose separation of powers concerns.

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Respectfully submitted this 30th day of December, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

/s/ Michael S. Catlett

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn (Beau) W. Roysden III
Solicitor General
Michael S. Catlett
Deputy Solicitor General
Jennifer J. Wright
Assistant Attorney General

Attorneys for Arizona Attorney General Mark Brnovich

1 I hereby certify that the foregoing document was
2 e-filed via TurboCourt this 30th day of December, 2020.

3 I further certify that copies of the foregoing were
4 e-delivered via TurboCourt this 30th day of December, 2020 on:

5 Steven W. Tully
6 **Hinshaw & Culbertson LLP**
7 2375 East Camelback Road, Suite 750
8 Phoenix, Arizona 85016
9 stully@hinshawlaw.com

10 Thomas P. Liddy, Deputy County Attorney
11 **Maricopa County Attorney's Office**
12 225 West Madison Street
13 Phoenix, Arizona 85003
14 liddy@mcao.maricopa.gov

15 *Attorneys for Plaintiffs/Defendants in Counterclaim*

16 Kory Langhofer, Ariz. Bar No. 024722
17 Thomas Basile, Ariz. Bar. No. 031150
18 **Statecraft**
19 649 North Fourth Avenue, First Floor
20 Phoenix, Arizona 85003
21 kory@statecraftlaw.com
22 tom@statecraftlaw.com

23 *Attorneys for Defendants/Plaintiffs in Counterclaim Fann and Farnsworth*

24 James Barton
25 Jacqueline Mendez Soto
26 **Barton Mendez Soto PLLC**
27 401 West Baseline Road, Suite 205
28 Tempe, Arizona 85283
29 james@bartonmendezsoto.com
30 jacqueline@bartonmendezsoto.com

Attorneys for the Democratic Members of the Senate Judiciary Committee

1 Howard Kleinhendler
2 369 Lexington Ave. 12th Floor
3 New York, New York 10017
4 howard@kleinhendler.com

4 Alexander M. Kolodin
5 Christopher A. Viskovic
6 Kolodin Law Group PLLC
7 3443 N. Central Ave. Ste. 1009
8 Phoenix, Arizona 85012
9 alexander.kolodin@kolodinlaw.com
10 cviskovic@kolodinlaw.com
11 satkinson@kolodinlaw.com

10 Bryan James Blehm
11 Blehm Law PLLC
12 3443 N. Central Ave. Ste. 1009
13 Phoenix, Arizona 85012
14 Bryan@BlehmLegal.com

14 *Attorneys for Proposed Intervenors*

15 /s/ Michael S. Catlett

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