HOLTZMAN VOGEL

Washington, D.C.
Virginia
Florida
Arizona
New York
holtzmanvogel.com

May 6, 2026

Via Email
Hon. Kris Mayes
Arizona Attorney General
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, Arizona 85004

Re: Eligibility of David Marshall to Hold Public Office as the Navajo County Recorder

Dear Attorney General Mayes,

I represent David Marshall, the duly appointed and sworn Navajo County Recorder, and write to you today in response to your letter dated April 24, 2026.

Your letter asserts that Mr. Marshall is "ineligible" to hold public office as the Navajo County Recorder under Article IV, Part 2, Section 5 of the Arizona Constitution, notwithstanding his resignation from the Arizona House of Representatives before he was appointed and sworn in as the Navajo County Recorder. Your letter further threatens a quo warranto action if Recorder Marshall does not resign.

Respectfully, your Office's position is incorrect. The constitutional text, its historical purpose, the relevant Arizona authorities, applicable statutes, and persuasive decisions from other jurisdictions all strongly support the conclusion that Recorder Marshall is lawfully holding the office of Navajo County Recorder and that no quo warranto action lies.

I. Factual Background

The material facts are undisputed. Representative Marshall was reelected to the Arizona House of Representatives to represent Legislative District 7 for the term beginning in January 2025. Following a vacancy in the office of Navajo County Recorder, the Navajo

County Board of Supervisors ("Board"), acting pursuant to its statutory duty under A.R.S. § 16-230(A)(2), conducted a selection process to fill the vacancy.

At its regular meeting on April 14, 2026, the Board took up the appointment of the County Recorder.[1] The agenda included a Call to the Public on the appointment, at which several community members appeared in support of Mr. Marshall's candidacy. The Chairman and a Councilwoman of the White Mountain Apache Tribe expressed their support and recommended appointment of Mr. Marshall. One lifelong resident of Navajo County noted that Mr. Marshall "would bring a steady hand, a clear sense of duty, and a commitment to serving all Navajo County residents with professionalism and fairness." The Board then convened a second round of interviews of three finalists, including Mr. Marshall, in executive session.

Upon reconvening in open session, the Board voted by individual ballot tabulated by the Clerk. The Board's minutes reflect the following:

> Each Board member was provided with a voting sheet by the Clerk of the Board with the name of each candidate, Suzanne Hudspeth, Jose [] Lerma, David Marshall, and an additional selection to Continue. The Clerk collected the voting sheets from the Board and tabulated the votes as follows: Chairman Seymore selected Continue; Vice-Chair Whitesinger selected David Marshall; Supervisor Benally selected David Marshall; Supervisor Peshlakai selected Jose Lerma; and Supervisor Whiting selected David Marshall. The information was provided to Chairman Seymore. Chairman Seymore stated that the Board has made a selection of David Marshall.

The Board's appointment of Mr. Marshall was made with the assistance and presence of the County Attorney, the Board's legal advisor. *See* A.R.S. § 11-532(A)(9).

The next day, Mr. Marshall tendered his resignation from the Arizona House of Representatives, effective Friday, April 17, 2026. He was sworn in as the Navajo County Recorder on Tuesday, April 21, 2026. *See* A.R.S. § 38-232 (providing that the oath of

[1] The Board's minutes from the April 14 meeting (cited above) are available here: https://public.destinyhosted.com/public/publish/print_minutes.cfm?seq=305&id=62825&mode=External&reloaded=true&CFID=6336256&CFTOKEN=a314d4d4cec7e23e-87C1326C-C0CB-29AB-CF07A2CA4084E89D

office for appointed public officials shall be taken "at or before commencement of the term of office").

At no point did Mr. Marshall simultaneously hold both offices. He is not currently "a member of the Legislature" and he was not "a member of the Legislature" when he took office as the Navajo County Recorder.

II. The Text and Purpose of Article IV, Part 2, Section 5 Confirms that Recorder Marshall Lawfully Holds Public Office as the Navajo County Recorder

Your letter cites Article IV, Part 2, Section 5 of the Arizona Constitution, which states as follows:

> No member of the legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the state of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment as a teacher or instructor in the public school system.

This provision is a classic dual-office-holding and "incompatibility" clause, common in state constitutions. Its purpose is to prevent corruption and self-dealing by legislators. As the Arizona Supreme Court explained in *State ex rel. Pickrell v. Myers*, 89 Ariz. 167, 169 (1961), "[t]he evil sought to be avoided is the participation by a legislator in the deliberations and enactments pertaining to a public office which might subsequently be held by him during his term as a legislator." The concern is straightforward: a sitting legislator should not be able to use his legislative power to create or enhance an office for his own benefit, trade votes for positions, or otherwise exploit his seat for personal gain. That concern animated the original adoption of Section 5 and its subsequent amendment in 1938 (discussed in further detail below).

The prohibition, by its terms, applies only to a "member of the legislature." The text does not apply to a "person elected to the legislature." The word "member' is a status-based qualifier. It describes a person who currently holds that status, not someone who once held it. *See State ex rel. Nelson v. Yuma Cnty. Bd. of Supervisors*, 109 Ariz. 448, 449 (1973) ("[T]he most reasonable interpretation of the subject provision is to hold that 'member of the Legislature' is the office with which section 5 is concerned."). Accordingly, the evil that Section 5 was designed to prevent simply does not exist when a legislator, like former Representative Marshall, has resigned from the legislative body before assuming the new office.

The historical evolution of Section 5 confirms this interpretation. Section 5, adopted at the 1910 Constitutional Convention, initially prohibited a legislator from being "appointed or elected to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased" during the term for which he was elected. Ariz. Const. art. IV, Pt. 2, § 5 (amended 1938). In 1938, the People of Arizona amended Section 5 to broaden its scope. The 1938 amendment replaced "appointed or elected to any civil office of profit" with "eligible to hold any other office or be otherwise employed by the State of Arizona." Ariz. Const. art. IV, pt. 2, § 5. The amendment appears to be designed to close loopholes that had been identified in cases like *Winsor v. Hunt*, 29 Ariz. 504 (1926), and *McCluskey v. Hunter*, 33 Ariz. 513 (1928), which had given narrow readings to the phrase "civil office of profit." The amendment broadened the types of positions covered, but it did not alter the fundamental predicate of the prohibition: that the person must be a "member of the Legislature" for the provision to apply to that person.

The ballot title for the 1938 initiative read: "Members of Legislature Not Eligible for Public Appointment During Term of Office to Which Elected." *See* Initiative and Referendum Publicity Pamphlet 1938, Proposed Amendments to the Constitution Proposed by Initiative Petition, "Members of Legislature Not Eligible for Public Appointment During Term of Office to Which Elected," presented to and ratified by voters in general election of Nov. 8, 1938. The subject is "Members of Legislature," not "persons elected to the Legislature." The voters were told that "Members" would be ineligible. A person who resigns from the Legislature, however, is no longer a "Member." If the People had intended to prohibit anyone elected to the Legislature from ever holding another office during the calendar term—irrespective of whether they had resigned—they could have made the provision applicable to any "person elected to the Legislature." They did not.

The interpretive canon *expressio unius est exclusio alterius* reinforces this conclusion. *See City of Surprise v. Ariz. Corp. Comm.*, 246 Ariz. 206, 211 ¶ 13 (2019) (explaining that this canon means that "the expression of one item" intentionally "implies the exclusion of others" and "is appropriate when one term is reasonably understood as an expression of all terms included in the statutory [] prohibition"). If Arizona had intended to impose a continuing, post-resignation restriction tied to legislative service, it could have said so directly as other jurisdictions have done. Alaska, for example, expressly extends its restriction beyond active service by providing that "[d]uring the term for which elected and for one year thereafter" a legislator may not be nominated, elected, or appointed to certain offices. Alaska Stat. § 24.05.040. Arizona has no comparable constitutional provision or statute. The absence of such an expansive restriction is telling. The drafters of the 1938 amendment knew how to impose temporal restrictions, and they chose the word "Member" rather than a broader formulation that would encompass resignations.

Notably, other states have enacted laws that expressly contemplate resignation as the mechanism by which a legislator becomes eligible to hold another office. Kentucky law provides that a legislator is prohibited from accepting certain appointments "unless the legislator first resigns from the General Assembly." Ky. Rev. Stat. § 6.764. Montana law states that "[a] member of the legislature who is elected to another public office shall resign from the legislature prior to assuming the office to which the member is newly elected." Mont. Code Ann. § 5-2-104. Under Ohio law, any member of the general assembly who accepts a covered appointment "immediately shall resign from the general assembly, and, if he fails or refuses to do so, his seat in the general assembly shall be deemed vacant." Ohio Rev. Code Ann. § 101.26. Virginia law states that "[t]he qualification for and taking of the oath for a second elected office by any person shall operate to vacate any other elected office held by him." Va. Code Ann. § 2.2-2807. These statutes reflect the common understanding that a legislator's disqualification from holding another office is cured by the legislator's resignation, and that the "term" for purposes of such provisions does not persist as an irrevocable bar after the legislator has resigned from the legislative body.

In fact, Arizona's vacancy law expressly contemplates that a "term" can end early, before its expiration date, by "[r]esignation of the person holding the office and the lawful acceptance of the resignation." A.R.S. § 38-291(4); *see also infra,* Section III. Section 38-291 lists resignation and lawful acceptance thereof as one of several events that causes an office to be "deemed vacant from and after" its occurrence. *Id*. If the Legislature and the People understood that a legislative term could not be shortened by resignation for purposes of Section 5, then the vacancy statutes would not treat resignation as creating a vacancy. The two provisions must be read together, and a harmonious reading leads to the logical conclusion that resignation ends membership, creates a vacancy, and removes the predicate for Section 5's prohibition.

Here, Mr. Marshall resigned from the Arizona House of Representatives before he was sworn in as Navajo County Recorder. When he assumed the Recorder's office, he was not a "member of the Legislature." He could not participate in legislative deliberations. He could not vote on legislation. He could not influence the creation or emoluments of any office. In sum, the evil sought to be prevented by Section 5 is entirely absent. As a result, the constitutional prohibition in Section 5, by its terms, did not apply to Mr. Marshall when he took office as the Navajo County Recorder and does not currently apply to Recorder Marshall.

III. At Least Three Arizona Supreme Court Decisions Support the Conclusion that Recorder Marshall Lawfully Holds Public Office

Consistent with the text of Article IV, Part 2, Section 5, Arizona Supreme Court precedent supports the legal conclusion that resignation from the Legislature removes the constitutional impediment to holding another office.

Specifically, at least three Arizona Supreme Court decisions, although arising under different facts, confirm that Section 5 must be interpreted as a status-based provision tied to actual membership in the Legislature, not as an irrevocable disqualification that attaches to the calendar period of a legislative term.

First, in *State ex rel. Nelson v. Yuma Cnty. Bd. of Supervisors*, 109 Ariz. 448 (1973), the Attorney General sought to bar the appointment of a sitting House member to a Senate vacancy, advancing the same theory articulated in your April 24 letter that the constitutional bar attaches to the legislative term, not to the legislator's status. The Arizona Supreme Court denied relief, holding that "the most reasonable interpretation of the subject provision is to hold that 'member of the Legislature' is the office with which section 5 is concerned." *Id.* at 449. The Court further observed that the 1938 amendment was driven by concern "that members of the Legislature might create positions for their own gain, or otherwise be subjected to pressures from the executive branch," and reasoned that the legislator's move from the Arizona House to the Arizona Senate did not implicate "the evil sought to be prevented" by Section 5. *Id. Nelson* thus reinforces that the text of Section 5 must be interpreted in light of its purpose.

Although *Nelson* involved a move from one legislative chamber to another, rather than a move from the Legislature to an office within the executive branch, the Court's reasoning applies with equal or greater force to Mr. Marshall's appointment as Navajo County Recorder. The *Nelson* Court rejected a rigid, calendar-based reading of Section 5 and grounded its analysis in the word "member" and the purpose of the provision. If Section 5 did not bar a sitting House member from being appointed to a Senate seat, where the individual remained in the Legislature and could continue to vote on legislation, then *Nelson* strongly supports the conclusion that a former House member who has resigned from the Legislature and can no longer vote on any legislation is likewise not barred from appointment to a county office.

Second, in *State ex rel. Pickrell v. Myers*, 89 Ariz. 167 (1961), the Arizona Supreme Court considered whether a person elected to the Legislature but who never took the oath of office or was seated was barred from appointment as a superior court judge. The Court held that Myers "did not then and never has become a member of the Twenty-fifth Legislature and was, therefore, not within the constitutional disqualification against

holding another public office of the state or county during the term for which he was elected." *Id.* at 170. Critically, the Court grounded its holding in the word "member," holding that "the disqualification does not apply simply by reason of election to the office of State Representative." *Id.* at 169. The Court further explained: "[w]here, as here, an individual could not influence the course of legislation we would not be inclined to extend the scope of the constitutional prohibition unless the literal language permits of no other fair interpretation." *Id.*

Pickrell confirms that a person must be a "member" to trigger Section 5's prohibition. *Pickrell* concerned a person who never became a member, unlike Recorder Marshall who served in the Legislature before resigning; but the principle *Pickrell* articulated is not limited to the facts of that case. The Court grounded its analysis in the word "member" and in the question of whether the individual could "influence the course of legislation." A person who has resigned from the Legislature is in the same position as a person who never took the oath for purposes of Section 5: neither can participate in legislative proceedings, and neither poses the risk of self-dealing that Section 5 was designed to prevent.

Your letter appears to read *Pickrell* as supporting a broader, term-based interpretation because the Arizona Supreme Court cited *In re Advisory Opinions to Governor*, 94 Fla. 620, 113 So. 913 (1927), and *Baskin v. State*, 107 Okla. 272, 232 P. 388 (1925), for the proposition that the constitutional bar may attach to the term as a whole. But *Pickrell* referenced those decisions in describing the general scope of ineligibility provisions. The Court's holding, however, turned on whether the defendant was a "member" of the Legislature. The Court did not need to decide, and did not decide, whether resignation by an existing member would cure any potential disqualification under Section 5. The Florida and Oklahoma cases the Court cited are therefore informative of the Court's general understanding of ineligibility provisions, but do not constitute a holding on the resignation question presented here. The *Nelson* Court, writing twelve years after *Pickrell*, did not follow the rigid temporal reading those early opinions suggested, instead grounding the analysis in the office of "member of the Legislature."

Third, in *Laos v. Arnold*, 141 Ariz. 46 (1984), the Supreme Court considered the constitutionality and enforcement of Article XXII, Section 18 of the Arizona Constitution, which prohibits an incumbent of a salaried elective office from offering himself for nomination or election to another salaried office, except during the final year of his term. Article XXII, Section 18 addresses the act of "offering" oneself for another office, while Article IV, Part 2, Section 5 addresses eligibility to "hold" another office. Nonetheless, *Laos*'s reasoning regarding the relationship between resignation and quo warranto is instructive. The Court explained that the appropriate enforcement device, a quo warranto action under A.R.S. § 12-2041, arises only where "an incumbent does not resign as he is

required to" before offering himself for another position. *Id*. at 49. The Court specifically held that "A.R.S. § 12-2041, existing at the time art. 22, § 18 was adopted, provides the necessary enforcement tool to implement the constitutional provision. Section 12-2041 grants the attorney general authority to bring a quo warranto action against anyone who usurps, intrudes into, or unlawfully holds a public office in this state. If an incumbent does not resign as he is required to upon offering himself for another position, he is unlawfully remaining in and holding his office. Quo warranto pursuant to § 12-2041 is the proper method to effect his removal." *Id.*

Laos illustrates when a quo warranto action is appropriate and confirms that resignation from one office before holding another public office is relevant to an analysis under Section 5. The Court framed the entire enforcement structure around the question of whether the officeholder had resigned: if he had not resigned, he was "unlawfully remaining in and holding" his office, and quo warranto was appropriate. The Court did not squarely address the converse, but *Laos* cannot be reconciled with treating resignation as irrelevant. Mr. Marshall resigned from the Legislature before assuming the Recorder's office. He is not "unlawfully remaining in and holding" any office. He is not a member of the Legislature.

In conclusion, *Nelson* indicates that Section 5 must be read in light of its purpose, and the word "member" is the status with which the provision is concerned. *Pickrell* demonstrates that a person who is not a "member" of the Legislature is not subject to the prohibition. Under *Laos*, resignation is a critical fact in any quo warranto analysis. Mr. Marshall resigned from the Legislature before assuming the Recorder's office. All three authorities point to the same result: Mr. Marshall is lawfully holding the office of Navajo County Recorder.

IV. Other Arizona Authorities, Including Arizona Attorney General Opinion No. I17-003, Confirm that Recorder Marshall Complied with Arizona Laws by Resigning Before Taking Office as the Appointed Navajo County Recorder

Arizona's statutory framework also independently confirms that resignation from one office permits the holder to assume another, and that Arizona's resign-to-run law does not apply to legislators like former Representative Marshall, who seek an appointment to a salaried office.

Section § 38-296(A), Arizona's resign-to-run law, provides that "[e]xcept during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment may offer himself for nomination or election to any salaried local, state or federal office." In 2017, your Office interpreted this law and opined that "an elected salaried official may legally submit an application to the Governor without

resigning from office." Ariz. Att'y Gen. Op. No. I17-003 (May 4, 2017), 2017 WL 1901893. Your Office explained, consistent with its earlier Opinion No. I82-001, that "Arizona's resign-to-run law is designed to assure that an incumbent's attention is not diverted by campaigning" and that "seeking an appointment to a salaried state office is not the same thing as seeking nomination or election to a salaried state office" within the meaning of A.R.S. § 38-296(A). Ariz. Att'y Gen. Op. No. I17-003 at 1.

Accordingly, the restrictions of § 38-296(A) do not apply to Mr. Marshall. He appropriately sought an appointment to a salaried county office and resigned from his legislative office before taking office as the Navajo County Recorder, prompting a vacancy in his legislative district pursuant to A.R.S. § 38-291(4). That vacancy has been filled by Sylvia Allen, who was sworn in to the Arizona House of Representatives on April 29, 2026. Arizona law, and your Office's 2017 Opinion, thus confirms that Mr. Marshall complied with relevant laws and was not required by any Arizona law to wait until the expiration of his original legislative term before seeking or holding his appointed position.

V. The Attorney General's 1977 Advisory Opinions Are Non-Binding and Unpersuasive

The sole authority on which your letter rests, two 1977 Attorney General Opinions, does not bind any court and does not warrant the aggressive enforcement action your letter threatens.

Attorney General opinions are advisory only. They are not law; they bind no court and they bind no successor Attorney General. In *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465, ¶14 (Ct. App. 2007), the Court of Appeals explained that "[i]t is the responsibility of the courts to declare existing law," while the Attorney General's responsibility is "to advise state government concerning the law when requested to do so." The Attorney General's institutional function is to advise state officials upon request, not to declare what the law is.

Your letter relies almost exclusively on Ariz. Op. Att'y Gen. No. I77-216 (Nov. 15, 1977), which stated that the constitutional provision "on its face, clearly prohibits the taking of any other office or employment during the elective term, whether or not the legislator resigns," and its companion, Ariz. Op. Att'y Gen. No. I77-221 (Nov. 29, 1977), which stated that a legislator who assumes another office "would be subject to ouster in a quo warranto proceeding."

These opinions suffer from several critical deficiencies. First, these opinions were issued in 1977, predating the Arizona Supreme Court's decision in *Laos v. Arnold*, 141 Ariz. 46 (1984), which premised quo warranto liability on the failure to resign, directly

contradicting the 1977 opinions' assertion that resignation is irrelevant. *See supra*, Section II. Second, the 1977 opinions did not address the *Nelson* decision, which twelve years earlier had adopted the narrow, status-based reading of Section 5 that the opinions purported to reject. *See id*. Third, the 1977 opinions did not address *Pickrell*, which grounded the constitutional analysis in the word "member" and the purpose of the provision, i.e., whether the individual has an ability to influence legislation. *See id*. Fourth, it bears repeating that Attorney General opinions are issued to specific requesters for specific fact patterns and are not subject to the adversarial testing, briefing, and deliberation that characterize judicial decisions. They represent one lawyer's view of the law and nothing more.

Your letter states that "[t]his office has consistently interpreted this constitutional provision" in a particular way, but even assuming that is true, consistency does not equal correctness, and no number of advisory opinions can override a contrary holding of the Arizona Supreme Court. The *Nelson* and *Pickrell* decisions are binding judicial authority; the 1977 opinions are advisory and, for the reasons stated, unpersuasive.

The 1977 opinions do not support a quo warranto action against Recorder Marshall. They are non-binding, they did not engage with the controlling case law that existed at the time they were issued, and their reasoning is further undermined by Arizona law, subsequent decisions, and your Office's 2017 Opinion. *See supra*, Section III. Whatever weight those opinions may carry as expressions of one Attorney General's view, they do not provide a sufficient legal basis to seek the extraordinary remedy of ousting a duly appointed public officer from his office. *See infra*, Section V.

VI. A Quo Warranto Action Against Recorder Marshall Is Not Supported by Law

In addition to the lack of constitutional authority, your Office also lacks statutory authority to pursue a quo warranto action under A.R.S. § 12-2041 against Recorder Marshall.

In *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 253 Ariz. 6 (2022), the Arizona Supreme Court held that A.R.S. § 12-2041 confers narrow, not plenary, authority to the Attorney General. The Court "decline[d] to adopt a broader reading of § 12-2041(A) than is supported by its text," explaining that "the verb 'exercises' is qualified by the word 'unlawfully.' Thus, the Attorney General may challenge only unlawful exercises of a public office or franchise; in other words, to initiate such a quo warranto action, the Attorney General must identify a law that has been violated and allege a relevant, ultra vires act." *Id*. at 11.

The Arizona Supreme Court anchored its holding in its earlier decision in *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 (2020), which rejected the notion that the Attorney General is "generally … free to initiate legal challenges against other state officers and agencies any time he concludes they are violating the law."

Your April 24 letter does not satisfy the *Brnovich* standard. It identifies no statute that Recorder Marshall has violated, and the undisputed facts do not show that any violation of Arizona law occurred. *See supra*, Section III. Your letter does not identify any ultra vires act. The Navajo County Board of Supervisors acted within its express statutory authority to fill a vacancy in the Recorder's office, and Mr. Marshall took the oath only after resigning from his legislative position. Your letter rests entirely on your Office's flawed reading of a constitutional provision, through the lens of an outdated and nonbinding 1977 advisory opinion. The *Brnovich* cases establish that any authority exercised under § 12-2041 requires identification of a law that has been violated and a relevant, ultra vires act. Those allegations are absent here.

It appears that no Arizona court has ever held that a legislator who resigned before assuming another appointed office was subject to ouster through a quo warranto action or any other legal proceeding. To our knowledge, every reported case in which ouster resulted involved a public officer who failed to resign or failed to cure a disqualification before assuming office. In short, the facts here present a poor vehicle for attempting to extend the reach of Arizona's quo warranto statute.

* * *

For all of the reasons discussed above, I am optimistic that your Office will agree to withdraw its threat of a quo warranto action against Recorder Marshall. If this letter has not addressed your concerns, I would welcome the opportunity to discuss the matter further and respond to any other authority or allegations on which the Office continues to rely.

Sincerely,

Linley Wilson

cc: Navajo County Board of Supervisors
Hon. Brad Carlyon, Navajo County Attorney
Hon. Steve Montenegro, Speaker of the Arizona House of Representatives