



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 24, 2020</p>	<p>No. I20-004 (R20-004)</p> <p>Re: Candidate Filing Deadlines at the Secretary of State's Office</p>
---	---

To: The Honorable Karen Fann
President
Arizona State Senate

Question Presented

Can the Secretary of State require all candidate petitions be filed only by mail or must she provide the ability for a candidate to file their petitions in person by 5:00 p.m. on the deadline date?

Summary Answer

No, the Secretary of State cannot prohibit in-person filing and require that candidate petitions be mailed. Pursuant to A.R.S. § 38-401, state offices must be kept open for the transaction of public business. Accepting candidate filings and providing receipts for those filings are statutorily required business transactions performed by the Secretary of State's Office. A.R.S. §§ 16-311, 16-322, 41-124. Prohibiting in-person filing closes the office to statutorily required business transactions.

Background

The Arizona Secretary of State (the “SOS”) is an elected constitutional State Officer with powers “prescribed by law” under Title 41, Chapter 1, Article 2 of the Arizona Revised Statutes.¹ In addition, the state law provides that the SOS is the filing officer for candidates running for U.S. Congress, President, State Legislature, and other statewide or multi-county offices. A.R.S. § 16-311(E).

In response to concerns amid the COVID-19 pandemic,² the SOS issued a press release on March 20, 2020, stating that “[a]spirating candidates who wish to appear on the Primary or General Election ballot in federal, statewide, and legislative races, must now mail their [candidate] filing to our office.”³ According to the press release, all in-person appointments were deemed canceled and walk-in filings would not be accepted. On the SOS website, candidates were warned that the SOS’s “office can take no responsibility over the timeliness or delivery of candidate filings by mail.”⁴ On March 24, 2020, the SOS issued an updated press release allowing candidates to “drop [candidate filings] off in the designated drop box ... located at the security station in the first floor lobby of the Executive Tower.”⁵ According to the SOS website, the drop boxes will “remain available as long as the building remains open and ... team

¹ Ariz. Const. art. 5 §§ 1, 9; A.R.S. §§ 41-121 *et seq.*

² On March 11, 2020, Governor Doug Ducey issued a Declaration of Emergency declaring a State of Emergency throughout Arizona due to the COVID-19 outbreak. Governor Doug Ducey, *Declaration of Emergency: COVID-19*, (Mar. 11, 2020), https://azgovernor.gov/sites/default/files/declaraton_0.pdf. On March 13, 2020, President Donald Trump issued a Proclamation declaring a National Emergency concerning the COVID-19 outbreak. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 18, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

³ Press Release, Ariz. Sec. of State, Secretary of State’s Office Moving to All Mail-in Candidate Filings (Mar. 20, 2020), *available at* <https://azsos.gov/about-office/media-center/press-releases/1134>.

⁴ *Candidate Filing*, ARIZ. SEC. OF STATE, <https://azsos.gov/elections/candidate-filing> (last visited Mar. 23, 2020).

⁵ Press Release, Ariz. Sec. of State, Secretary of State’s Office Accepting Candidate Filings By Mail and Drop Box (Mar. 24, 2020) *available at* <https://azsos.gov/about-office/media-center/press-releases/1154>.

members [are] available to check [the drop box] ... [but] we cannot guarantee that this option will be available [if the health situation changes.]”⁶

Also on March 23, 2020, Governor Doug Ducey issued Executive Order 2020-12, “Prohibiting the Closure of Essential Services,” indicating that it was “necessary to ensure essential services continue to be provided” and defined essential services to include “Essential Government Functions” including “all services provided by the State ... and needed to ensure the continuing operation of the government agencies.”⁷

This Opinion answers whether the SOS, under statutory authority, and in light of currently issued executive orders, may prohibit candidate petitions from being filed in person.

Analysis

According to Arizona law, candidate nomination papers “shall be filed with the secretary of state no later than 5:00 p.m. on the last day of filing.” A.R.S. § 16-311(E). Further, candidates “shall file ... with [the filing officer] a nomination petition” with “the required number of signatures” not less than 120 days before the primary election. A.R.S. § 16-314(A), (B).

In order to qualify to have their name on the ballot, candidates must submit a statutorily prescribed number of qualified signatures. A.R.S. §§ 16-314(B), 16-322. Individuals who file candidate papers or petitions late or who submit petition sheets with an inadequate number of qualified signatures are barred from being placed on the ballot. *See* A.R.S. §§ 16-311(A), 16-314(A); *see also Bohart v. Hanna*, 213 Ariz. 480, 482 (2006) (“time elements in election statutes [must] be strictly construed”). When candidates file their nominating paperwork, including their petition sheets, they are statutorily entitled to a receipt which includes “the number of documents delivered, to whom delivered and the date of delivery.” A.R.S. § 41-124.

⁶ *Candidate Filing*, *supra* note 4.

⁷ Exec. Order No. 2020-12, Prohibiting the Closure of Essential Services (March 23, 2020).

The receipt provides a definitive timestamp for the filing, as well as confirmation of the number of petition papers submitted, providing the candidate confirmation that they have met their statutory obligations and, unless successfully challenged pursuant to A.R.S. § 16-351, entitled to be placed on the ballot.

Pursuant to A.R.S. § 38-401, “State offices shall be kept open for transaction of business from [8:00] a.m. until [5:00] p.m. each day from Monday through Friday” with limited exceptions. While the Governor recently issued a Declaration of Emergency, state agencies are only permitted to “make, amend and rescind orders, rules and regulations necessary for emergency functions” when so ordered by the Governor. A.R.S. § 26-307(A). Further, the Governor has recently defined services provided by the State as an “Essential Government Function” and such functions are “needed to ensure the continued operation of the government agencies” during the State of Emergency. Exec. Order 2020-12.

Although the SOS is statutorily permitted to expand the means in which candidate filings are accepted, Arizona law requires state offices to be kept open for the transaction of business during regular business hours. A.R.S. § 38-401. Neither providing a drop box in the lobby of the Executive Tower nor accepting filings by mail enables the candidate to obtain a contemporaneous receipt confirming the “number of documents delivered, to whom delivered and the date of delivery.” A.R.S. § 41-124. While candidates may choose to utilize the mail and drop box options, they cannot be completely prohibited from transacting business with the Secretary of State. Given that the candidate’s ability to be placed on the ballot is completely dependent on not only the time the candidate filings are received (no later than 5:00 p.m. on April 6 of this year), but also on how many signatures submitted (as generally reflected by the

number of petition sheets), candidates cannot be prohibited from receiving a contemporaneous confirmation of their submission to the appropriate filing officer.

Conclusion

There is no doubt that the COVID-19 outbreak has created a significant disruption to how businesses operate and necessitates statutorily permitted flexibility in the performance of essential functions. It is useful and necessary in this time of uncertainty to provide contingency plans to enable critical functions, such as political candidate filings, to continue to operate in the midst of the State of Emergency while protecting essential employees from harm. However, prohibiting in-person candidate filings goes beyond contingency planning and results in an unauthorized closure of a state office “for the transaction of business.” Accordingly, prohibiting in-person filing is impermissible under Arizona law.

Mark Brnovich
Attorney General