Clerk of the Superior Court
*** Electronically Filed ***
T. Hays, Deputy
11/30/2020 2:55:52 PM
Filing ID 12270392

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)
Joseph A. Kanefield (#15838)
Chief Deputy & Chief of Staff
Brunn W. Roysden III (#28698)
Solicitor General
Michael S. Catlett (#25238)
Deputy Solicitor General
Kate B. Sawyer (#34264)
Assistant Solicitor General
2005 N. Central Ave
Phoenix, AZ 85004-1592
Beau.Roysden@azag.gov
Michael.Catlett@azag.gov
Kate.Sawyer@azag.gov
ACL@azag.gov
Phone: (602) 542-5025
Fax: (602) 542-8308

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CHARLENE FERNANDEZ, Minority leader of the Arizona House of Representatives, in her official capacity; and DAVID BRADLEY, Minority leader of the Arizona Senate, in his official capacity, Plaintiffs, v. COMMISSION ON APPELLATE COURT APPOINTMENTS, Defendant.	Case No.: CV2020-095696 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** **(EXPEDITED BRIEFING AND CONSIDERATION REQUESTED)** (Assigned to the Hon. Janice Crawford)

Defendant, Commission on Appellate Court Appointments ("Commission") hereby files its Reply in support of its Motion to Dismiss First Amended Complaint ("Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should dismiss Plaintiffs' Amended Complaint in its entirety under Rules 12(b)(1) and 12(b)(6) of the Arizona Rules of Civil Procedure for three distinct reasons. First, Plaintiffs lack standing because their alleged injuries are not redressable. Motion at 5-8. Second, Plaintiffs' claims are moot because Plaintiffs have each made their appointment to the Independent Redistricting Commission ("IRC") from the pool of nominees. *Id*. at 8-9. Third, Plaintiffs fail to state a claim upon which relief can be granted because the Commission's inclusion of Robert Wilson and Thomas Loquvam in the pool of eligible IRC nominees satisfied article IV, part 2, § 1(3) of the Arizona Constitution. *Id*. at 9-18.

Plaintiffs' Response to the Commission's Motion fails to overcome any of these reasons justifying dismissal. Despite Plaintiffs' insistence to the contrary, Plaintiffs' alleged injuries would not be redressable by a favorable judicial decision because this Court is not empowered to remove the four appointed IRC members.[1] Tellingly, Plaintiffs do not even acknowledge that they appointed two of the four IRC members whom they are now seeking to remove through this lawsuit. Plaintiffs' recent appointments render their claims moot without

[1] Notably, neither of the Plaintiffs will retain their leadership positions in the Legislature for the new two-year term beginning in January 2021. *See* Kevin Stone, KTAR News, *Arizona House, Senate Democrats select new leadership* (Nov. 11, 2020) (stating Arizona Senate Democrats selected Rebecca Rios and Democrats in the House of Representatives selected Reginald Bolding for the 2021 session), *available at* https://ktar.com/story/3690093/arizona-house-democrats-select-rebecca-rios-as-minority-leader/. And Senator Bradley cannot serve another term in the Legislature. It is likely that this recent change of legislative leadership would deprive Leader Fernandez and Leader Bradley of any ability to make a future IRC appointment for this cycle, regardless of the outcome in this case. Thus, as a legal *and* practical matter, Plaintiffs' claims are not redressable.

exception. Lack of standing and mootness aside, Plaintiffs' claims lack merit because Wilson and Loquvam are eligible for appointment to the IRC.

II. ARGUMENT

A. Plaintiffs Lack Standing And Their Claims Are Now Moot.

Plaintiffs' Amended Complaint should be dismissed at the outset for lack of standing and mootness. The arguments in Plaintiffs' Response are either irrelevant or lacking in merit.

1. The Court Cannot Grant The Relief Plaintiffs Request.

To establish the redressability prong of standing,[2] a claimant must establish that "the court has the power to right or prevent the claimed injury." *Ry. Labor Execs. Ass'n v. Dole*, 760 F.2d 1021, 1023 (9th Cir. 1985). Plaintiffs now ask the Court to remove from office the four individuals who have already been appointed to the IRC (including two members that Plaintiffs each appointed) and to order the Commission to start the nomination process from scratch. The Court is powerless to do so. The Arizona Constitution states that removal of a member of the Commission must be commenced by the Governor with approval from the Legislature and only when certain enumerated conditions are met. *See* Ariz. Const. art. IV, pt. 2, § 1(10). The Court cannot grant the relief Plaintiffs request without running afoul of this provision. Plaintiffs' arguments otherwise do not hold up.

Plaintiffs argue that the Arizona Supreme Court held in *Arizona Redistricting Commission v. Brewer*, 229 Ariz. 347 (2012), that the Governor does not have the sole power to remove members of the IRC. This is incorrect. In reality, that opinion merely rejected the Governor's argument that her removal decision was an unreviewable political question. *See* 229 Ariz. at 353 ¶25 ("These factors suggest that Section 1(10) removal is not exclusively political or beyond judicial review."). The opinion nowhere suggested that courts have an independent and freewheeling power to remove members of the IRC contrary to the

[2] Plaintiffs spend several pages addressing other elements of standing that the Commission has not challenged. *See* Resp. at 4-6.

Constitutional restraints on such removal. In fact, the opinion implicitly rejected such a power by limiting its review of the removal at issue to the grounds for removal of a member of the IRC actually set forth in the Constitution.

Plaintiffs also cite *Smith v. Arizona Citizens Clean Elections Commission*, 212 Ariz. 407 (2006), for the proposition that one method of removal does not exclude other methods of removal. Plaintiffs read *Smith* far too broadly. What *Smith* actually held is that the Legislature is free to adopt additional methods for removing legislators pursuant to an express grant of authority from the public through the initiative process. *See* 212 Ariz. at 411 ¶14 ("In this case, the public, acting in its legislative capacity, authorized removal from public office as a sanction for serious violations of the campaign finance laws."). Plaintiffs cite to no express grant of authority, statutory or otherwise, for the court to unilaterally remove members of the IRC.[3]

Plaintiffs also argue, based on *McComb v. Superior Court In and For County of Maricopa*, 189 Ariz. 518 (App. 1997), that "[t]he Court is capable of invalidating even elections when they are based on unconstitutional actions." Resp. at 8. Plaintiffs misread that opinion. In *McComb*, the appellate panel issued three separate opinions. Judge Lankford wrote the lead opinion, but the portion of his opinion stating that he would invalidate the prior election did not garner votes from either of the other two members of the panel. Instead, a majority of the panel, composed of Judges Kleinschmidt and Fidel, refused to invalidate the prior election. *See* 189 Ariz. at 527 (Kleinschmidt, J., concurring in part) ("The only proper remedy under the facts of this case is to give nothing more than prospective effect to the invalidation of the statute."); 189 Ariz. at 536 (Fidel, J., concurring in part and dissenting in part) ("Because I believe that laches bars this suit, I agree with Judge Kleinschmidt's conclusion

[3] As the Intervenor Defendants have pointed out, the Legislature has created such a legislative remedy in the *quo warranto* statute. *See* A.R.S. § 12-2041(B). But Plaintiffs do not fall within the narrow class of plaintiffs that could bring a *quo warranto* action under these circumstances. *See id.* § 12-2043.

that the trial court abused its discretion in setting aside the 1996 election."). Thus, *McComb* does not actually stand for the proposition for which Plaintiff cite it. The opinion supports the Commission's position here.

Finally, Plaintiffs point to *Adams v. Commission on Appellate Court Appointments*, 227 Ariz. 128 (2011), and the Supreme Court's order in that case that the Commission identify two alternative nominees for the pool, as support for what Plaintiffs would have the Court do here. But, as the Court has already observed, *Adams* involved a significantly different situation because the Plaintiffs there sought relief prior to the appointment of any member to the IRC. *See* 10/29/20 Minute Entry ("Plaintiffs have not offered any persuasive argument to show why the Motion for Temporary Restraining Order could not have been filed before the Speaker made his appointment to AIRC."). Here, the Plaintiffs waited until after a selection had already been made—and now all four selections have been made—and, thus, *Adams* does not further Plaintiffs' quest to convince the Court that it can dispossess the current members of the IRC of their offices and require the selection process to begin anew.[4] To the extent any constitutional infirmity existed with respect to the pool of nominees (the Commission believes strongly there was no such infirmity), the Court was without power to remedy such infirmity once selections were made.

2. Plaintiffs' Claims Are Moot.

Plaintiffs do not dispute (nor could they) that they have each appointed one nominee to the IRC since filing this lawsuit. This change of circumstances renders Plaintiffs' claims

[4] Plaintiffs attempt to utilize the Commission's replacement of one independent nominee who withdrew from the process soon after the Commission transmitted the pool of 25 nominees to cast doubt on how much time they had to challenge Mr. Loquvam's and Mr. Wilson's qualifications. *See* Response at 2. But Plaintiffs have already admitted that they knew the legal basis for their claims contesting Wilson's and Loquvam's qualifications at least nine days before they initiated this action. Moreover, the Commission did not transmit "a second pool of candidates" as Plaintiffs suggest. *See id*. The Commission merely sent each legislative leader a letter stating that candidate Nicole Cullen had withdrawn from consideration and nominating Megan Carollo in Cullen's place. *See* Exh. A.

here—challenging the qualifications of two other nominees—moot. *See WildEarth Guardians v. Pub. Serv. Co. of Colorado*, 690 F.3d 1174, 1182 (10th Cir. 2012) (mootness describes the standing doctrine "set in a time frame" and results when a plaintiff loses an element of standing during litigation). Plaintiffs do not argue that any exception to the mootness doctrine applies. Instead, Plaintiffs allege their claims are not moot because they "were forced to select from a constitutionally deficient pool of candidates." Resp. at 5.

Plaintiffs misunderstand the mootness doctrine and appear to conflate the doctrine with the separate standing requirement that a plaintiff must demonstrate a particularized injury. *See id*. (arguing that Plaintiffs suffered "a particularized injury"). The Commission has not argued that Plaintiffs' injury was not sufficiently particularized at some point in time. Instead, "Plaintiffs lost any standing they may have otherwise had to challenge the qualifications of Loquvam and Wilson" when Plaintiffs appointed Dr. Shereen Lerner and Derrick Watchman to the IRC. *See* Motion at 8-9. Because Plaintiffs can no longer exercise their appointment privilege under the Arizona Constitution, there is no "live controversy" for the Court to decide. And Plaintiffs do not allege or argue that they would have selected anyone other than Dr. Lerner or Mr. Watchman even if Wilson and Loquvam had not been included. In other words, if the Court were to conclude that Loquvam and/or Wilson are qualified or not qualified to serve on the IRC, this legal determination will have no effect on Plaintiffs—who have already appointed other individuals to the IRC.

Plaintiffs unpersuasively argue that their "injury" is not "abstract," but their backward-looking argument misses the point of the mootness doctrine. The doctrine applies when a party asks the court "to determine an abstract question which does not arise upon existing facts or rights." *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229 (App. 1985). At this moment in the litigation, Plaintiffs cannot point to any existing facts or rights that would warrant a judicial decision addressing the qualifications of Loquvam or Wilson.

This Court should refrain from issuing an advisory opinion on the merits of Plaintiffs' moot claims.

B. Plaintiffs Have Not Stated A Claim That Wilson Or Loquvam Are Constitutionally Ineligible.

Even taking the allegations contained in Plaintiffs' Amended Complaint as true, Plaintiffs have not stated a claim that Wilson or Loquvam are ineligible to serve on the IRC.

1. Plaintiffs Admit That Wilson Satisfies The Constitutional Prerequisites To Serve On The IRC.

Plaintiffs do not contest that Wilson has been registered to vote as an independent for more than three years. Wilson is, therefore, eligible for the IRC. Plaintiffs insist, however, that the Commission's nomination of Wilson violates the "intent and purpose" of article IV, part 2, § 1(5) of the Arizona Constitution, and now go so far as to allege that Wilson "has perpetrated a fraud against the State." Resp. at 10-11. But this Court should look no further than the plain text of the Arizona Constitution, which confirms that Wilson is qualified to serve on the IRC. *See* Motion at 9-11. In any event, Plaintiffs' arguments lack merit.

Plaintiffs suggest that the Arizona Supreme Court in *Adams* found "the standard manageable as to whether a nominee was constitutionally qualified[.]" Response at 12. But in *Adams*, the plaintiffs argued three nominees were ineligible "because they hold other public office" within the plain meaning of the constitutional provision. 227 Ariz. at ¶ 7; *see also* Ariz. Const. art. IV, pt. 2, § 1(3) (prohibiting IRC members from having been "appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer"). The Supreme Court was not asked in *Adams* to consider any nominees' political activities, as Plaintiffs propose here. The Court simply interpreted the text of the Arizona Constitution. Accordingly, *Adams* did not find any judicially-manageable standard that would govern Plaintiffs' novel theory challenging Wilson's eligibility to serve on the IRC.

Plaintiffs' heavy reliance on election challenges that involved allegations of fraud, or alleged attempts by candidates to dilute the vote, is also misplaced. Election challenges are inapplicable because such challenges implicate express provisions in the Arizona Constitution.[5] *See* Ariz. Const. art. II, § 21 (guaranteeing "free and equal" elections); Ariz. Const. art. VII, § 12 (protecting the "purity of elections" and "guard against abuses of the elective franchise"). They also have been held to have an express statutory basis. *See* A.R.S. § 16-351(B) ("Any elector may challenge a candidate for any reason relating to qualifications for the office sought as prescribed by law[.]"). Here, no constitutional or statutory provision permits a challenge based on a nominee's subjective political beliefs. Moreover, Plaintiffs have not alleged in their Amended Complaint that Wilson was engaged in any fraudulent scheme or deception, let alone with the specificity required under Rule of Civil Procedure 9(b).

Plaintiffs also cite *People ex rel. Scott v. Grivetti*, 277 N.E.2d 881 (Ill. 1971), *see* Resp. at 10-11, but *Grivetti* does not help them. In *Grivetti*, the Illinois Supreme Court held that two legislators who appointed themselves and their own legislative aides to the eight-member redistricting commission was "a subversion" of the requirement that the Illinois commission be composed of four legislators and four public members. *See* 227 N.E.2d at 885-86. The Illinois Supreme Court reasoned that "[t]he net result of this action was, in our judgment, the same as though six members of the legislature had been appointed, for, although the aides were not technically members of that body, it is obvious that, as its employees and assistants to its leaders, they could scarcely be thought to be independent of it." *Id.* at 886. Accordingly, the *Grivetti* court's use of the word "independent" was made in the context of reasoning that the legislative aides could not be appointed as "public" members because they essentially worked

[5] In making this argument, Plaintiffs improperly rely exclusively on three unpublished trial court rulings, each pre-dating January 1, 2015. *See* Ariz. R. Sup. Ct. R. .111(c)(1)(C) (permitting citation to unpublished memorandum decisions of Arizona courts but only where they were issued on or after January 1, 2015).

for the legislature and therefore, "were not representative of the general public." *Id.* Plaintiffs' argument here that Wilson is not a true "independent" voter because of his political activities has no semblance to *Grivetti*'s reasoning or holding.

The Commission thoroughly vets each IRC candidate by conducting due diligence and interviewing all nominees during meetings open to the public. The four legislative leaders are free to do their own due diligence in selecting members of the IRC. The four current members of the IRC will no doubt conduct their own due diligence in selecting the fifth member. Plaintiffs' complaint as to Wilson fails as a matter of law under the plain language of the Arizona Constitution.

Plaintiffs also fail to propose any legal standard by which a court should decide whether Wilson or any other nominee "is sincere in his pursuit of appointment" to the IRC. *See* Resp. at 13. This Court should decline Plaintiffs' invitation to consider Wilson's political activities to resolve what is a political question. *State v. Maestas*, 244 Ariz. 9, 12, ¶ 9 (2018) ("Flowing from 'the basic principle of separation of powers,' a non-justiciable political question is presented when 'there is … a lack of judicially discoverable and manageable standards for resolving it.'") (quoting *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶¶ 11-12 (2007)).

2. Plaintiffs Do Not Set Forth Facts Establishing That Loquvam Is Ineligible.

Plaintiffs have not set forth facts stating a claim that Loquvam has served as a lobbyist, is registered as a lobbyist, or has been paid as a lobbyist, as each of those terms are used in the Arizona Constitution. Plaintiffs do not dispute that the Supreme Court in *Adams* instructed courts that, in applying a provision regarding the IRC, they should determine "how the term . . . has been interpreted in Arizona law before the adoption of Proposition 106." 227 Ariz. at 133 ¶20. Plaintiffs do not dispute that, in 2000, the public understood "registered" to mean registered to lobby for legislation. Plaintiffs do not dispute that the public understood the term

"lobbying" to mean the act of influencing legislation or formal rulemaking. And they do not dispute that they have not alleged that Loquvam has been registered to lobby for legislation or otherwise has engaged in the act of influencing legislation or formal rulemaking or has been paid to do so.

Instead, Plaintiffs first argue that because they have alleged that Loquvam was ethically required to register with the Arizona Corporation Commission, ("ACC") he is ineligible. In so arguing, however, Plaintiffs do not address any of the Commission's arguments about why such registration, standing alone, is insufficient to establish ineligibility, including that mere registration with the ACC does not mean that one has actually "served as a paid registered lobbyist" as that term was understood when placed in the Constitution. Even under a notice pleading regime like Arizona's, one must still set forth actual facts, and not mere legal labels, to state a claim. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶7 (2008) ("Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted."). Thus, that Plaintiffs label Loquvam a "lobbyist" is not sufficient to state a claim that he has actually "served as a paid registered lobbyist" and is therefore ineligible.

Next, Plaintiffs rely on the Legislative Council Analysis for Proposition 106 and make hay of the fact that it did not discuss registration at all. Plaintiffs do not explain why this matters when the Constitution itself includes "registered" as a condition for disqualification. And perhaps the Legislative Council Analysis did not discuss registration because the public understood that "registered" referred to the only lobbyist registration in existence in 2000—the Secretary of State's system for registering to lobby about legislation.

Plaintiffs also rely on a statement by the Arizona School Board Association in support of the passage of Proposition 106. Resp. at 15. That statement merely observes that "lobbyists" will not be permitted to serve on the IRC. The statement just begs the question the Court must answer here: who qualifies as a "lobbyist" under the Constitution? Plaintiffs do not explain

why automatic disqualification should result from mere ethical registration with the ACC, especially when ACC registration did not exist in 2000, the individual nominee (here, Loquvam) is not alleged to have actually engaged in any lobbying activities or been paid to do so, and when ACC commissioners are not affected at all by redistricting.

Finally, Plaintiffs make the confusing statement that "[w]hen a term is redefined following the passage of a measure, the terms new meaning—not the meaning when the measure was passed—controls the interpretation of the statute." Resp. at 16. Tellingly, Plaintiffs cite no support for this statement, likely because there is no such support. The statement is inconsistent with the Court's statement in *Adams* discussed above and its earlier observation in *Brain* that "[o]ur primary objective in construing [enactments] adopted by initiative is to give effect to the intent of the electorate." *Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 330 ¶36 (2014); *see also Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994) ("When interpreting the scope and meaning of a constitutional provision . . . [courts'] primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it."). Plaintiffs do not come close to establishing that the electorate in 2000 would have intended for Loquvam to be disqualified as a result of mere registration with the ACC.

III. CONCLUSION

Based on Plaintiffs' response, it is clear that Plaintiffs' claims relating to Wilson and Loquvam are nothing more than an attempt to discredit and embarrass two individuals the Commission deemed qualified, but who Plaintiffs have decided for political reasons they don't want serving on the IRC. This Court is not the appropriate forum for Plaintiffs' belated political attacks. The Commission respectfully requests that the Court dismiss Plaintiffs' amended complaint in full and with prejudice.

RESPECTFULLY SUBMITTED this 30th day of November, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

By */s/ Michael S. Catlett*
Joseph A. Kanefield
Brunn W. Roysden III
Michael S. Catlett
Kate B. Sawyer
Attorneys for Defendant Commission on Appellate Court Appointments

COPY of the foregoing FILED
with the Court this 30th day of November, 2020.

COPY of the foregoing EMAILED this 30th day of November, 2020 to:

James E. Barton II
Jacqueline Mendez Soto
Torres Law Group, PLLC
239 West Baseline Road
Tempe, Arizona 85283
(480) 588-6120
James@TheTorresFirm.com
Jacqueline@TheTorresFirm.com
Attorneys for Plaintiffs

Kory Langhofer
Thomas Basile
Statecraft PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602)382-4078
kory@statecraftlaw.com
tom@statecraftlaw.com
Attorneys for Intervenor Defendants

/s/ Michael S. Catlett