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

**IN AND FOR THE COUNTY OF MARICOPA**

CHARLENE R. FERNANDEZ, *et al.*,

Plaintiffs,

v.

COMMISSION ON APPELLATE COURT APPOINTMENTS,

Defendant,

and

KAREN FANN, in her official capacity as President of the Arizona Senate, and RUSSELL BOWERS, in his official capacity as the Speaker of the Arizona House of Representatives,

Intervenors-Defendants.

No. CV2020-095696

**RESPONSE OF INTERVENORS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

(Before the Hon. Janice Crawford)

Intervenors Karen Fann, President of the Arizona Senate, and Russell Bowers, Speaker of the Arizona House of Representatives (together, the "Intervenors") respectfully submit this Response in support of Defendant Commission on Appellate Court

Appointments' ("CACA") Motion to Dismiss the First Amended Complaint ("FAC"), and join it in its entirety. Intervenors write separately to emphasize particularly flagrant flaws in the FAC that render the Plaintiffs' amendments futile[1] and impel the FAC's summary dismissal pursuant to Arizona Rule of Civil Procedure 12(b)(6).

## INTRODUCTION

The second iteration of the Plaintiffs' complaint only compounds the defects of its predecessor. Absent still are any facts that, if proven, would establish the ostensible ineligibility of Thomas Loquvam or Robert Wilson to serve on the Arizona Independent Redistricting Commission ("AIRC"). And a more consequential deficiency pervades the second incarnation of this lawsuit: the Plaintiffs—who have already made their appointments to the AIRC and have not alleged any intention or desire to reconsider their selections—lack any extant legal "injury" that could be remedied by a judgment in their favor.

Further, even if the Plaintiffs could salvage some viable redressable claim in the FAC, the remedy they now seek, *i.e.*, the nullification of previously made appointments, finds no constitutional or statutory predicate. Not only does the FAC never allege that any of Commissioners Mehl, Lerner, York, or Watchman is actually unqualified to serve, but the removal of incumbent Commissioners is governed exclusively by the impeachment procedures prescribed in Article IV, Part 2, Section 1(10). And even assuming that the Court possesses some residual authority to remove a sitting Commissioner from office, such a claim could be advanced and adjudicated only in a *quo warranto* proceeding, which these Plaintiffs lack standing to initiate.

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[1] For this reason—and because Plaintiffs' newfound embrace of a remedy they previously had explicitly disclaimed (*see infra* Section II.A) prejudices the Intervenors—the Intervenors intended to file a response in opposition to the Plaintiffs' motion for leave to file an amended complaint on or before the November 30 deadline for responsive submissions. *See* Ariz. Civ. P. 15(b)(1) (leave to amend should be denied if it "would unfairly prejudice [the opposing] party's claim or defense on the merits"); *Tumacacori Mission Land Dev., Ltd. v. Union Pacific R. Co.*, 231 Ariz. 517, 520, ¶ 12 (App. 2013) (denying leave to amend on grounds of futility).

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## ARGUMENT

### I. <u>The Plaintiffs Are Not Suffering Any "Injury" That This Court Can Remedy Because They Have Already Exercised Their Right of Appointment and Have Not Alleged Any Intention to Reconsider Their Selections</u>

The judicial power can be invoked only to remediate articulable and particularized injuries to specific named plaintiffs. *See generally Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998) ("To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury."); *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 244, ¶ 8 (App. 2006) ("Standing is established with the showing of a personal, palpable injury.").[2] To be sure, legislative officers (such as the Plaintiffs) do maintain a judicially enforceable right to make their appointments to the AIRC from a properly constituted pool of nominees. *See Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128 (2011). In relying on *Adams* to propel the FAC, however, the Plaintiffs elide two pivotal distinctions differentiating that case from the present circumstances.

***First***, the legislative officers in *Adams* presented a live claim susceptible of judicial resolution; because no appointees to the AIRC had yet been designated, the court could fashion a prospective remedy—to wit, reconstitution of the nominee pool from which the appointments would be made. Here, by contrast, all four legislative leaders—including the Plaintiffs—have duly executed their right of appointment, thereby extinguishing any ongoing injury capable of judicial remediation.

***Second***, and relatedly, the crux of *Adams* is that a legislative leader can incur a legal "injury" if his or her right to select a satisfactory appointee to the AIRC is actually constricted by the inclusion of ineligible individuals in the pool. But the Plaintiffs' respective appointments to the AIRC inarguably are qualified to sit on the Commission. More importantly, the FAC nowhere alleges that either Plaintiff would have selected a different appointee had the applicant pool been different, or would select different

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[2] Questions of standing are appropriately resolved on a motion to dismiss. *See, e.g.*, *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138 (2005).

appointees if the Court somehow reconstituted the pool. Indeed, the letters of appointment issued by Leaders Fernandez and Bradley are devoid of any caveat, proviso, or reservation of rights.[3] To the contrary, Leader Fernandez lauded her appointee as "uniquely qualif[ied]" for the AIRC and expressed that she was "very proud to appoint" Commissioner Lerner. More generally, both Plaintiffs' appointees were drawn from the roster of ten undisputedly eligible Democratic nominees, while Loquvam and Wilson were included in a separate list of five unaffiliated or "independent" nominees. *See* Ariz. Const. art. IV, pt. 2, § 1(5). Because neither Plaintiff has alleged that s/he intends to designate a different nominee, much less an independent nominee, the FAC supplies no basis for inferring that the Plaintiffs' right of appointment has been abridged at all, even if one or both of Loquvam or Wilson are ineligible. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-64 (1992) (finding lack of standing where plaintiffs were unable to articulate "actual or imminent" adverse effect on them personally as a result of the challenged conduct).

At bottom, the FAC appears to be animated not by a solicitude for the Plaintiffs' own right of appointment, but rather by a preoccupation that the Commissioners (or, alternatively, the CACA) might choose Loquvam or Wilson as the AIRC's chairman. *See* Ariz. Const. art. IV, pt. 2, § 1(8) (requiring the four Commissioners (or, if they cannot reach an agreement, the CACA) to elect a chairman who is not a member of any political party already represented on the AIRC). Such a distended conception of standing, however, finds no sustenance in *Adams*, which recognized only a temporally limited and substantively discrete interest in the CACA's initial promulgation of a pool of eligible nominees prior to the first AIRC appointment. If fewer than the requisite number of qualified nominees were elevated to the legislative leaders, they could seek ***prospective*** judicial relief ***before*** making

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[3] Copies of the appointment letters are attached hereto as Exhibit A. While motions to dismiss generally are adjudicated solely by reference to the face of the complaint, "public records regarding matters referenced in a complaint, are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012); *see also Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 14 (App. 2010) (noting the "exception to the conversion rule that applies to matters that, although not appended to the complaint, are central to the complaint").



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their appointments. This, of course, comports with the settled precept that to establish standing, "cognizable injury personal to those seeking redress would have to be shown." *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 17 (2003); *see also Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116, ¶ 7 (App. 2007) (recounting that standing requires "a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome").

Although Plaintiffs did have an interest in making their appointments, that prerogative has been fully exercised. Again, there is no allegation in the FAC that either Plaintiff was compelled to designate an unsatisfactory appointee or that a reconstituted roster would result in different selections. Thus, the gravamen of Plaintiffs' claims is essentially an apprehension that the AIRC or the CACA may elect a chairman whom Plaintiffs believe is ineligible to hold the office. But a generalized "interest in seeing that the law is obeyed," *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998), does not engender the concrete and personalized "injury" upon which standing must be premised. *See Sears*, 192 Ariz. at 69, ¶ 16 ("An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (holding that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create . . . standing").[4] Nothing in Article IV—either on its face or as construed in *Adams*—empowers legislative leaders to act as roving monitors of the Commission's compliance with governing constitutional provisions.

## II. **This Court Lacks Any Authority to Remove Any of the Four Sitting Commissioners**

Even if the Plaintiffs could contrive some personal "injury" to themselves that is traceable to Loquvam and Wilson's continued presence in the pool of potential AIRC chairmen, the Court must, for at least two reasons, dismiss the Complaint's request that the

[4] Although standing is a prudential doctrine and not a jurisdictional prerequisite in Arizona, the courts of this state will dispense with it only in extraordinary circumstances. *See Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 15 (2005) ("We are . . . reluctant to waive the standing requirement and have done so only on rare occasions.").

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Court invalidate the appointments of the four incumbent Commissioners.

### A. Plaintiffs Waived the Argument That the Court Can Set Aside Existing AIRC Appointments

Plaintiffs, through counsel, expressly waived at the October 29, 2020 hearing on their motion for preliminary relief any argument that the Court may or should oust Commissioners who have already been appointed to office. *See generally Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 22 (App. 2008) ("Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment.") (quoting *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53 (1980)).

Addressing Speaker Bowers' appointment of Commissioner Mehl, counsel for the Plaintiffs emphasized that "we haven't sought" the removal of any sitting Commissioner, explaining that "if he [presumably Speaker Bowers] wants to say he deserves a chance to select from the new pool if he wants. But our position, the relief that we're seeking is just that the Plaintiffs in this case have the opportunity to select from a constitutionally constituted pool." Tr. 7:3-10.[5] Counsel later crystallized this position in more unequivocal terms, asserting that "after [Leader Fernandez] makes her selection it becomes set in stone. She can't go back and undo a selection that she's already made." *Id.* 16:4-6.

The Court subsequently elicited confirmation of Plaintiffs' position on this point, recounting that "at the very beginning you appeared to concede that the Speaker's selection is valid and it can, he doesn't have to choose again. We can recreate a pool, and then it can just simply go to the – to the next representative that selects." *Id.* 28:10-14. Plaintiffs' counsel responded in the affirmative, indicating that the Court should instead provide that "the remainder" of the legislative leaders "pick from [a] constitutionally proper pool." *Id.* 28:15-29:1.

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[5] A copy of the transcript of the October 29, 2020 hearing is attached hereto as Exhibit B. *See In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4 (App. 2000) ("It is proper for a court to take judicial notice of its own records or those of another action tried in the same court.").

In short, Plaintiffs themselves conceded that whatever prospective remedies the Court might fashion, it could not displace duly eligible AIRC Commissioners whose right to office had already vested. They cannot now belatedly resurrect a position they previously disclaimed.

### B. The Sole Method For Removing an Appointed Commissioner is Impeachment, and Even if a *Quo Warranto* Proceeding Were Available, Plaintiffs Lack Standing to Bring It

Their prior waiver of the argument notwithstanding, there is no mechanism for the Plaintiffs to obtain a court order removing any of the four incumbent Commissioners from office. The Plaintiffs' challenge, as encapsulated in the FAC, carries a far different complexion than *Adams*, where the Supreme Court was asked to disqualify only certain *nominees* to the AIRC, none of whom possessed any consummated claim to the office. Here, by contrast, the Plaintiffs seek the expulsion of all four sitting AIRC members, all of whom undisputedly satisfy the substantive qualifications to hold their position. As set forth in the CACA's Motion to Dismiss, the framers of the AIRC furnished one—and only one—method for the removal of Commissioners. Specifically, an AIRC member may be removed "by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." Ariz. Const. art. IV, pt. 2, § 1(10). While applications of this impeachment provision certainly can present justiciable questions amenable to judicial resolution, *see Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347 (2012) (adjudicating whether AIRC chairman had in fact engaged in the requisite malfeasance), the constitutional text does not admit, and the Supreme Court has never recognized, any alternative right of action or remedial scheme that could sustain the judicially-ordered removal of an incumbent Commissioner.[6]

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[6] The court in other contexts has acknowledged ***the Legislature's*** constitutional authority to promulgate additional ***statutory*** means of removing a public officer. *See Smith v. Arizona Clean Elections Comm'n*, 212 Ariz. 407, 411, ¶¶ 12-15 (2006); *State ex rel. DeConcini v. Sullivan*, 66 Ariz. 348, 356-57 (1948). Whether and to what extent the Legislature in the future could supplement the constitutionally prescribed method for

Assuming *arguendo* that Section 1(10) is not the exclusive rubric for ousting a sitting Commissioner, the only remaining cognizable vehicle for securing a judicial removal is a *quo warranto* proceeding. *See Crouch v. City of Tucson*, 145 Ariz. 65, 67 (App. 1984) ("Quo warranto has been held to be the exclusive remedy for testing a franchise." (citing *Faulkner v. Board of Supervisors,* 17 Ariz. 139 (1915)). Despite its common law genesis, a *quo warranto* must conform to statutory strictures and is not susceptible to the malleability of equitable remedies. *See Garcia v. Sedillo*, 70 Ariz. 192, 200 (1950) ("We find the law to be that the remedy of quo warranto is of legal rather than of equitable cognizance.").

In this vein, standing to initiate a *quo warranto* action against a state officer is reserved to the Attorney General "when he has reason to believe that any such office or franchise is being usurped, intruded into or unlawfully held or exercised." A.R.S. § 12-2041(B). Should the Attorney General decline to exercise this prerogative, the purported claimant to the contested office—and only that individual—may seek leave of the court to commence a proceeding in his or her own name. *See id.* § 12-2043; *see also State ex rel. Sullivan v. Moore*, 49 Ariz. 51, 57 (1937) (when a *quo warranto* is brought by someone other than the Attorney General, "there must be some person claiming the office or franchise which is being unlawfully held"). Here, neither Plaintiff does or could assert an entitlement to hold the office of AIRC Commissioner; hence, even if the requisite procedural prerequisites to a private *quo warranto* action had been observed and even if such a claim were ripe, the Plaintiffs could not prosecute it in any event. *See Tracy v. Dixon*, 119 Ariz. 165, 165-66 (1978) (dismissing *quo warranto* action brought by private plaintiff against city court judges, explaining that "quo warranto can only be maintained by a private person when he can show that he is entitled to the office," and adding that "a claimant to an office may have judgment only on the strength of his own title and not upon any infirmity or

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removing an AIRC member, however, is not germane to this proceeding; there currently exist no controlling statutes that the Plaintiffs could purport to enforce in this Court, even if they had standing to do so.

weakness in the defendant's title"). Because there is no right of action to seek the removal of a public officer outside the confines of a properly initiated *quo warranto* proceeding, the Plaintiffs' requested remedy—*i.e.*, the removal of the incumbent Commissioners and the reconstitution of the pool of nominees—is unviable as a matter of law.[7]

**CONCLUSION**

For the reasons stated herein and in the CACA's Motion to Dismiss, the Court should dismiss the First Amended Complaint in its entirety, with prejudice, pursuant to Ariz. R. Civ. P. 12(b)(6). In the alternative, the Court should dismiss the First Amended Complaint to the extent it seeks the removal from office of any sitting member of the Arizona Independent Redistricting Commission.

RESPECTFULLY SUBMITTED this 24th day of November, 2020.

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[7] Further, the notion that the Commissioners' appointments are "invalid" because *other* (as-yet unappointed) nominees are supposedly ineligible, *see* FAC Prayer for Relief, ¶ C, is foreign to Arizona law and intuitively untenable. If this principle were sound, a duly appointed appellate judge (for example) could be expelled from office upon evidence that *another* applicant in the roster of finalists transmitted by the CACA to the Governor had been actually ineligible for office. The same fate could befall an elected official who had appeared on the ballot alongside other candidates who turned out not to qualify for the office they sought. If the complete dearth of any supporting authority is not enough to defeat this proposition, it succumbs to common sense.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

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