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ARIZONA SUPERIOR COURT
MARICOPA COUNTY

CHARLENE FERNANDEZ, et al., Plaintiffs, v. COMMISSION ON APPELLATE COURT APPOINTMENTS, Defendant, KAREN FANN, et al., Intervenor-Defendants.	Case No.: CV2020-095696 **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** Assigned to the Hon. Janice Crawford

Plaintiffs Charlene Fernandez and David Bradley (the "Minority Leaders"), by and through undersigned counsel, urge the Court to deny Defendant's motion to dismiss the First Amended Complaint.

MEMORANDUM OF POINTS AND AUTHORITY

The Arizona Constitution requires that the Commission on Appellate Court Appointments (the "CACA") adhere to certain requirements in developing the pool of candidates from which members of the Arizona Independent Redistricting Commission

(the "AIRC") are chosen. Ariz. Const. art. IV, pt. 2 § 1(3)-(5). This process was established by Arizona voters weary of politicians playing procedural games around redistricting that created a system wherein the elected did not represent the electorate. AZ Secretary of State, 2000 Publicity Pamphlet: Proposition 106, 54 (2000) (attached hereto as Ex. A). The voters made numerous restrictions on who is eligible to serve on the AIRC. Ariz. Const. art. IV, pt. 2 § 1(3). These limitations must be construed strictly to effectuate the will of the voters. "Our primary objective in interpreting a voter-enacted law is to effectuate the voters' intent." *Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 324-25 ¶ 11 (2014) (citing *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 470 ¶ 10, 212 P.3d 805, 808 (2009)).

This year, in two instances, the CACA disregarded these constitutional restrictions, and transmitted the name of a paid, registered lobbyist and a sham independent to legislative leaders tasked with selecting AIRC Commissioners. The CACA transmitted its first defective pool of candidates on October 13, but due to a withdrawal transmitted a second pool of candidates, which left in the unqualified candidates but replaced the candidate who had withdrawn, on October 20.[1] Two days later the Speaker made his appointments. Less than twenty-four hours after that, the Minority Leaders filed this action.

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[1] Unfortunately, the Supreme Court's website containing the official documents of the CACA has been down for some time. Nonetheless, the Majority Leaders believe there will be no dispute that the final pool was not submitted until October 20, despite their omission of this fact in the Motion at page 3. *See also* Arizona Mirror, *available at* https://www.azmirror.com/blog/independent-irc-chair-candidate-withdraws-from-consideration/ (last viewed Nov. 24, 2020). *See also,* the CACA Agenda for Oct. 20 attached hereto as Ex. E.

The Minority Leaders have stated a claim that demands a full hearing before this Court. Despite the efforts by the CACA to explain away the voters' prohibition on paid lobbyists, Mr. Loquvam is plainly ineligible to serve on the AIRC and the CACA violated the Constitution by transmitting his name. As for Mr. Wilson, the CACA argues that regardless of an individual's political affiliations or regardless of an individual's intentions to defraud the electorate a pose as an independent when he in fact is not, so long as he registers as an independent the Court is powerless to review his qualifications. This hyper legalistic position stands in conflict with Arizona case law that recognizes that political fraud can reach the level that requires action by the Court. The Court should not ignore this branch of Arizona law, and should instead allow discovery to proceed so that the matter can be decided with a full record.

The CACA's appeal to standing seeks to stretch the doctrine of redressability to the breaking point. The use of redressability as a means of ignoring constitutional violations has been criticized because of its reliance on courts' characterization of the plaintiff's remedy. *See, e.g.*, ERWIN CHERMERINKSY, FEDERAL JURISDICTION (4th ed.) at 75-83. The invitation to expand the doctrine to prohibit to prevent courts from making difficult factual determination or responding to political gamesmanship should be rejected. There is no question that the Court is empowered to enjoin unconstitutional actions by other branches of government. The fact that this action was brought after the Speaker of the House made his unexpected first appointment does not relieve the Court of its obligation, let alone authority, to prevent an unconstitutional process from continuing once it has been properly put before the Court. The Court expressed concern about writing "a new process" of

Commissions selection in denying the Minority Leaders' motion for a temporary restraining order, but it is the CACA that has violated the process by including a paid lobbyist and a sham independent in the pool of candidates. The Minority Leaders were injured in fact when they were compelled to make their selection from a constitutionally defective pool of candidates; this can and must be remedied by ordering the CACA to create a constitutionally compliant pool of candidates from which all designator selectors will choose AIRC Commissioners.

A. Minority Leaders Fernandez and Bradley Were Injured When Forced to Choose Commissioners from an Unconstitutionally Constituted Pool of Candidates, the CACA's Actions Caused the Injury, and a Favorable Ruling will Remedy It.

The appointments made to date are invalid because the pool from which they were made was unconstitutionally constituted. The Minority Leaders urge the Court to acknowledge this invalidity and compel the CACA to provide a constitutionally valid pool of candidates from which all members of the ARIC may be selected. Contrary to the CACA's assertion, the Minority Leaders have standing to put these unconstitutional appointments before this Court and to ask the Court's assistance in compelling the CACA to comply with the Arizona Constitution.

1. Minority Leaders Fernandez and Bradley's being forced to choose a Commissioner from an unconstitutionally constituted pool of candidates was an injury that does not make their claim moot.

Minority Leaders Fernandez and Bradley have identified a particularized injury that they suffered as a result of the CACA's failure to perform its statutory duty. *See Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 131 ¶ 9, 254 P.3d 367, 370

(2011) ("We agree that Petitioners, as the persons entitled to make the first and third appointments to the IRC, have standing to challenge the legality of the Appointment Commission's list of nominees.") The injury is that they were deprived of selecting a Commissioner from a complete list of qualified candidates. [FAC ¶¶ 42, 48, 53, 60.] The Arizona Supreme Court recognized that forcing state official engaged in a selection process to participate in an unconstitutional process is a particularized injury. *Dobson v. State ex rel., Comm'n on Appellate Court Appointments*, 233 Ariz. 119, 122, ¶¶ 10-11, 309 P.3d 1289, 1292 (2013). In *Dobson v. CACA*, four CACA members objected to a state statute that violated Arizona's merit selection process for superior court judges. *Id.* There, as here, the plaintiffs did not claim to assert an injury for all members involved in the selection process, but for themselves as individual participants who had been injured. *Id.*

The CACA notes that "[a] case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights." [Mot. at 8 quoting *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229 (App. 1985).] There is nothing abstract about the Minority Leaders' injury. They were forced to select from a constitutionally deficient pool of candidates. Until they are provided a constitutionally compliant pool from which to choose, their injury is ongoing. The live controversy in this case is whether the Minority Leaders are powerless to insist on a constitutionally constituted pool of applicants. The matter is not moot.

2. Defendant caused Minority Leaders Fernandez and Bradley's injury.

Prior to the Supreme Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984), cause and redressability were considered together. CHERMERINKSY at 75. In *Allen*, Justice

O'Connor decoupled the consideration to focus on whether the IRS's failure to enforce its regulations was itself the direct cause of plaintiffs' suffering the ill effects of *de facto* segregation from discriminatory institutions unlawfully receiving tax-exempt status. 468 U.S. at 753 n.19. Justice O'Connor explained, "Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of the law." *Id.* In the case before this Court, however, the violation of the constitution is the direct cause of the injury: an unconstitutionally constituted pool of candidates from which the Minority Leaders are forced to select a Commissioner.

Defendant transmitted two unqualified candidates to the Minority Leaders, and thereby deprived them of a complete pool of qualified candidates from which to choose. Defendant is directly responsible for having two-unqualified candidates in the pool. *See Armer v. Superior Court*, 112 Ariz. 478, 480, 543 P.2d 1107, 1109 (1975) (recognizing standing for those who are the intended beneficiary of a constitutionally mandated action).

This case is utterly unlike *Karbal v. Ariz. Dept. of Revenue*, 215 Airz. 114, 118 ¶ 20 (App. 2007), wherein a two-step process was required: a decision on taxation that favored plaintiffs and a decision by rental car companies and hotels to pass that value on to consumers. Here, there is no question that the CACA's sending an unconstitutionally constituted pool of candidates was the direct cause of the injury in fact, and ordering them to comply with the constitution will completely remedy the injury.

3. Minority Leaders Fernandez and Bradley seek relief that is within the Court's power.

The relief sought in this matter is that the CACA provide a pool of candidates from which Minority Leaders Fernandez and Bradley may select AIRC members that is compliant with the restrictions on that pool put in place by Arizona voters. When the government takes action that violates the Constitution, the Court is empowered to recognize that unconstitutionality and enjoin it. *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803). There is nothing unusual about a Court declaring that a pool of candidates created in violation of the constitution is invalid. Nor is there anything unusual about compelling the CACA to comply with the Constitutional restrictions.

In an action in the nature of mandamus requiring a public official to perform non-discretionary duties, even members of the public for whose benefit the duties are required, have standing to bring an action in the nature of mandamus to require the action to be taken. *Armer v. Superior Court*, 112 Ariz. at 480, 543 P.2d at 1109.

In the course of litigating the Minority Leaders' request for a TRO, the CACA argued that all of the elected officials would need to select from the same pool of candidates—that it created an insurmountable problem if the Speaker selected from a pool containing two unconstitutional candidates, but the others selected from a constitutionally constituted pool. The Minority Leaders find that a perplexing position given the Speaker's insistence at the hearing that he was happy with his selection regardless of the rest of the pool; nonetheless, that argument devolves into nonsense under the Amended Complaint that seeks to have all selectors choose from the same pool.

The CACA writes that the "the pool used must be uniform across all five selections," [Mot. at 6-7], which is precisely what will happen when the CACA provides a new, constitutionally constituted pool of candidates for all five selections. Furthermore, because the pool has already changed once due to the withdrawal of a candidate, it cannot be said that the pool may not change in order to ensure that the selectors choose from a constitutionally mandated pool of twenty-five candidates. Indeed, that has already happened.

The Court is capable of invalidating even elections when they are based on unconstitutional actions. *See McComb v. Superior Court In and For County of Maricopa*, 189 Ariz. 518, 527, 943 P.2d 878, 887 (1997). In the instant case, the Court is asked to take a much less dramatic step. The appointment of the first four commissioners were all defective. There is no reason that the Court cannot direct the CACA to do its job and follow the constitutional requirements for candidates.

The CACA argues that the Court does not have the power to remove the presently appointed AIRC members and restart the process of creating a constitutionally qualified pool. [Mot. at 7.] According to the CACA, "an IRC member may only be removed by the governor." *Id.* The governor's authority to remove AIRC members is limited to specific circumstances: "for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." Ariz. Const. art. 4, pt. 2 § 1(10). The governor's authority to remove an AIRC member does not apply in the instant matter. Indeed, the Supreme Court when finding that two of the 25 candidates in the pool were ineligible to serve as commissioners, ordered the CACA to "promptly identify two alternative nominees" for

appointments to be made "from a pool of twenty-five qualified nominees." *Adams* , 227 Ariz. at137 ¶ 44, P.3d at 376.

Further, the courts have already addressed the issue of whether the governor's authority over the removal of AIRC members is subject to judicial review. *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 352-353 ¶¶ 19-25, 275 P.3d 1267, 1272-1273 (2012). The Supreme Court determined that nothing in section 1(10) of article 4, part 2 of the constitution granted the governor sole power to remove AIRC members. *Id.* at ¶ 21. The purpose of the AIRC—"to *remove* redistricting from the political process"—in and of itself support that the governor does not possess the sole authority to remove commissioners. *Id.* at ¶ 24. (Emphasis in original). Thus, the CACA's position that the presence of one method of removal excludes removal for any other reason is not supported, even if the members had been properly appointed. *See also, Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407, 411, ¶ 13, 132 P.3d 1187, 1191 (2006) (rejecting the notion that one constitutional method of removal preempted all other methods and collecting cases doing likewise).

B. Minority Leaders Fernandez and Bradley Demand that the Will of the Voters be Given Effect States a Case Upon Which Relief May be Granted.

The Amended Complaint asks the Court to find the pool of candidates unconstitutionally constituted because candidate Thomas Loquvam was a registered paid lobbyist during the previous three year to his potential appointment and Candidate Robert Wilson is a Republican and not as he has fraudulently claimed, an independent. "The Constitution should be construed so as to ascertain and give effect to the intent and purpose

of the framers and the people who adopted it." *Biggs v. Betlach*, 243 Ariz. 256, 258 ¶ 10, 404 P.3d 1243, 1245 (2007) (quoting *Brewer v. Burns*, 222 Ariz. 234, 239 ¶ 26, 213 P.3d 671, 676 (2009)). The purpose of these limitations is to remove political professionals such as paid registered lobbyists from the candidate pool, and to ensure a politically balanced Commission. The Court needs the benefit of a full record before it to ensure that it is performing its duty to protect the will of the voters in this case.

1. AIRC eligibility requirements must effectuate Proposition 106's intent and purpose.

In interpreting the law, the court must examine its language and considering underlying policy and "the evil it was designed to remedy." *Carrow Co. v. Lusby*, 167 Ariz. 18, 20-21, 804 P.2d 747, 749-50 (1990). "The constitutional provisions creating and governing the IRC …were designed to *remove* redistricting from the political process[.]" *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 110 ¶ 21, 290 P.3d 1226, 1233 (App. 2012) (quoting *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 353 ¶ 24, 275 P.3d 1267, 1273 (2012) (emphasis in original).

> Our primary purpose in construing a constitutional amendment is to effectuate the intent of those who framed it and the electorate that approved it. We first examine the plain language of the provision and, if it is clear and unambiguous, we **generally** subscribe to that meaning. If, however, the constitutional language is ambiguous, **or a construction is urged which would result in an absurdity**, **a court may look behind the bare words** of the provision to determine the conditions which gave rise to it and the effect which it was intended to have.

Id. at ¶ 19 (internal citations omitted) (emphasis added).

In Illinois, where redistricting may also be done by commission, the Illinois Supreme

Court has found the commission to be illegally composed. Despite literal compliance with the state's constitutional requirements for appointment to the commission, the court found that the appointment of certain members was a subversion of the constitutional intent because they were not considered independent members of the public. *People ex rel. Scott v. Grivetti*, 50 Ill.2d 156, 163, 277 N.E.2d 881, 886 (1971). Not ordering the CACA to recreate a pool of qualified candidates and allowing Loquvam or Wilson to proceed to potential appointment "would sanction an impermissible violation of the constitution's commands" and produce an invalid redistricting plan from the AIRC. *Id.* at 164, 277 N.E. at 886; *see also McComb*, 189 Ariz. at 527, 943 P.2d at 887 (affirming the removal of school board members elected under an unconstitutional system and ordering the incumbents to remain in office until a re-election).

2. Arizona law recognizes the possibility of sham candidates.

The CACA suggests that there is literally *nothing* that a prospective candidate can do to be disqualified based on party affiliation if the prospective candidate is registered as an independent or a member of a recognized political party. The CACA seeks to prevent discovery into the extent to which Mr. Wilson has perpetrated a fraud against the State. Our case law rejects this effort.

"The courts must be alert to preserving the purity of elections and its doors must not be closed to hearing charges of deception and fraud that in any way impede the exercise of a free elective franchise. The contesters are entitled to an opportunity to prove their charges." *Griffin v. Buzard*, 86 Ariz. 166,173, 342 P.2d 201 (1959). The court in *Buzard*, found a possibility of a fraudulent election scheme by intentionally confusing the voters by

including two candidates with nearly identical names (William A. (Bill) Brooks and William T. (Bill) Brooks). The court found that the importance of preserving the purity of elections was so strong that contestants are entitled to prove any fraudulent allegations. This can only be done through the discovery process. Thus, Plaintiffs are entitled to the opportunity to the discovery process in cases like this with such overt fraud. Candidate Wilson's nomination as an independent candidate not politically affiliated with either major party is simply a sham on the part of the candidate and the Minority Leaders are entitled to prove these charges.

Although the question of whether one is genuinely qualified for an office or is a sham candidate is fact-intensive and carries with it the high burden of any fraud claim, it is not as the CACA suggests a non-justiciable political question, [*cf.* Mot. at 10]. The *Adams* Court found the standard manageable as to whether a nominee was constitutionally qualified and the following cases directly addressed the question of affiliation and fraud on the electorate.

In *Jordan v. Bennett*, CV 2010-026564 (Ariz. Sup. Ct. Sept. 14, 2010) (attached hereto as Ex. B), the Superior Court closely examined the motives behind running particular candidates for office from both the perspective of their backers and encouragers and from the perspective of the candidates themselves. After taking testimony on the matter the Superior Court held with regard to one challenged candidate, "plainly he was a willing accomplice to a scheme to perpetrate a fraud on voters by engendering confusion," and although he had withdrawn, and his effort to undo his withdrawal were futile, "[b]ased on this evidence, the Court finds that it would have

granted contestants' request to remove [that candidate's] name from the ballot." *Jordan*, at 4-5. The court ultimately concluded that because the other challenged candidates themselves were sincere in their intentions to represent the Green Party in office, the fact that their backers encouraged them to run to dilute the votes of liberals was immaterial. A conclusion that could only be reached after taking evidence on the topic.

Whether Candidate Wilson is sincere in his pursuit of appointment to the AIRC as an independent or a Republican Trojan horse is a justiciable issue which can only be determined through the discovery process. The Minority Leaders are entitled to the opportunity to obtain discovery to prove their claim that Mr. Wilson is the latter.

A similar conclusion was reached by the Maricopa Superior Court considering the candidacy of Olivia Cortes—another distraction candidate run with the intention of diluting the vote of the incumbent's more prominent opponent. *Boettcher v. Bennet*, CV 2011-015853 (October 3, 2011) (attached hereto as Ex. C). In that matter, Judge Burke noted that Cortes herself was sincere in her desire to hold office.

> Cortes testified that she now intends to campaign, has a website, gave one interview to the press on September 27, 2011, and plans to appear at a candidates' forum this week. Whether that is because of her desire to serve in the Arizona Senate or because plaintiff has alerted her, only she knows for sure and it is not this court's job decide this case by speculating on her motive.

Id. at 5. The court found a scheme but only denied plaintiff's motion because Cortes's testimony was found to be credible. The Minority Leaders are entitled to discovery for the Court to determine Mr. Wilson's credibility.

Finally, the court did not find the issue of one candidate attempt to defraud an

election to be a non-justiciable case in controversy in the example of Scott Fistler. Mr. Fistler was a Republican who re-registered as a Democrat and changed his name to Cesar Chavez, and while the court ultimately decided his position on other grounds, it did not rule that Fistler's efforts to defraud the electorate were non-justiciable. *See Chavez v. Chavez*, CV 2014-008793, (June 17, 2014) (attached hereto as Ex. D).

Taken together these cases establish the difficulty in uncovering sham candidates to be sure. But this difficulty does not equate to denying parties the opportunity to make their case. The Minority Leaders must be afforded the opportunity to show by clear and convincing evidence that Mr. Wilson's registration as an independent is not genuine, but is a part of a cynical effort to undermine the independent redistricting process passed by Arizona voters two decades ago.

3. The Constitution unambiguously prohibits Mr. Loquvam from serving as a member of the AIRC.

The bulk of the CACA's argument is spent reducing the reach of the voters' limitation on lobbyists. As a preliminary matter, the motion to dismiss flatly misstates the allegations in asserting that "Plaintiffs Do Not Allege That Loquvam Is 'Registered' As A Lobbyist," "Plaintiffs Do Not Allege That Loquvam Has 'Served As A Lobbyist,'" and "Plaintiffs Do Not Allege That Loquvam Was 'Paid' As A Lobbyist." [Mot. at 11,15, 17.] Paragraph 40 of the Amended Complaint provides: "Loquvam served as a registered paid lobbyist within three years of his placement, thus he was an unqualified applicant." The CACA's misstatements regarding the content of Amended Complaint betray the fact that

they can simply not meet the legal standard of assuming all facts in the complaint to be true and still claim that the Minority Leaders have not plead a cause for relief.

The terms in Proposition 106 on their face plainly apply to Mr. Loquvam. As he admitted in his application, his job—that is the place that pays him in exchange or the services he provides—requires that he register as a lobbyist, which he has done.

Although the Minority Leaders maintain that there is no call to resort to extra statutory sources when the words of the Constitution are so plain, the Proposition 106 publicity pamphlet makes clear that voters and supporters wanted to remove redistricting from the hands of insiders and political professionals. The Legislative Council Analysis made no reference to *state* registration—or indeed even registration at all—when it noted that individuals would only be eligible to serve if "they have not been a paid lobbyist." Pub. Pamphlet at 3. The Arizona School Board Association lauded the measure because "[n]o current elected officials, lobbyists or officers of a political party or precinct committeemen are eligible to serve as candidates." Pub. Pamphlet at 4. ASBA did not suggest any modification of the term lobbyist, and emphasized the dramatic steps to exclude outsiders including low level participants including precinct committeemen. Nothing in the language of the Proposition nor the Publicity Pamphlet supports the dissection and diminution of the anti-lobbyist restriction proffered by the CACA.

Rather than point to some evidence that Proposition 106 was intended to only apply to lobbyist registered to lobby the state legislature, the CACA relies on the fact that Mr. Loquvam would not have been required to register as a lobbyist when Proposition 106 was passed. This is insufficient to disregard the unambiguous language of the Constitution.

When assessing whether a term's definition is voter protected, Arizona courts have held that only terms defined with the proposition are protected. *See Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 322 P.3d 139 (2014); *Arizona Advocacy Network Found. v. State*, 1 CA-CV 19-0489, 2020 WL 5793080 (App. Sept. 29, 2020), as amended (Nov. 9, 2020). Contrary to the CACA's claim, the Arizona Constitution does not define lobbying. [*Cf.* Mot. at 16.] Nor does it define registered lobbyist. When 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. Mr. Loquvam is a political professional explicitly barred from service on the AIRC.

For the foregoing reasons, Minority Leaders Fernandez and Bradley urge the Court to deny the CACA's motion to dismiss.

DATED this 24th day of November, 2020.

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