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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 MOTION TO DISMISS FIRST AMENDED COMPLAINT** **(EXPEDITED BRIEFING AND CONSIDERATION REQUESTED)** (Assigned to the Hon. Janice Crawford)

Defendant, Commission on Appellate Court Appointments ("Commission") moves for dismissal in full of the First Amended Verified Complaint for Special Action ("Amended Complaint") pursuant to Rules 12(b)(1) and 12(b)(6) of the Arizona Rules of Civil Procedure.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Arizona Constitution empowers a five-member Independent Redistricting Commission ("IRC") to draw Arizona's congressional and state legislative districts. Ariz. Const. art. IV, pt. 2 § 1(3). Creation of the IRC occurs through a specific process outlined in detail in the Constitution. The Constitution requires the Commission to establish a "pool of candidates"—ten republicans, ten democrats, and five independents not registered with either major political party—by January 8th every ten years. *Id*. § 1(4), (5). Arizona's four legislative leaders make the first four appointments to the IRC "from the pool of nominees[.]" *Id*. § 1(6). The appointment process begins when the Speaker of the House of Representatives ("Speaker") makes the first appointment, which triggers rolling 7-day deadlines by which the remaining three leaders must each make their respective appointments. *Id*. The four appointed IRC members then select the fifth IRC member and chair at a meeting called by the Arizona Secretary of State. *Id*. §1(8). Once appointed, an IRC member may only 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[,]" after receiving written notice and having an opportunity to respond. *Id*. § 1(10).

[1] While the Court has not yet granted Plaintiffs leave to file their First Amended Complaint, the arguments contained herein apply equally to their original complaint. In fact, the Court has already determined that the claims contained therein are not redressable. 10/29/20 Minute Entry at 5. Thus, should the Court deny Plaintiffs leave to file their First Amended Complaint, the Commission requests that the Court dismiss their original complaint for the reasons set forth herein.

This cycle, on October 13, 2020, the Commission transmitted a list of 25 nominees to the Legislature. *See* Amended Complaint at ¶ 9.[2] On October 22, Speaker Rusty Bowers appointed a republican nominee to the IRC. Plaintiffs—House Minority Leader Charlene Fernandez ("Leader Fernandez") and Senate Minority Leader David Bradley ("Leader Bradley")—then filed this lawsuit against the Commission seeking a temporary restraining order to stop the selection process. After the Court denied Plaintiffs' TRO request, the remaining three legislative leaders made their picks, meaning there are now four IRC members.

Nonetheless, Plaintiffs persist in alleging that the Commission failed to execute its duty under article IV, pt. 2, § 1, because two independent nominees, Thomas Loquvam ("Loquvam") and Robert Wilson ("Wilson"), are allegedly not eligible to serve on the IRC. Amended Complaint, ¶¶ 40, 47. Plaintiffs seek an extraordinary remedy: a judicial declaration "that the pool of applicants transmitted to the Legislature by the Commission was unconstitutionally constituted and the nominations made from that pool are invalid as a result thereof." *Id*. at 12.

Plaintiffs' claims should be dismissed for several reasons. *First*, the courts cannot redress Plaintiffs' alleged injury, and they therefore lack standing, because four members who everyone agrees are constitutionally qualified have already been appointed to the IRC.[3] The Arizona Constitution requires that all five members of IRC be selected from the same pool of nominees. As this Court has already acknowledged, the Court cannot "fundamentally rewrite . .

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[2] *See also* Commission on Appellate Court Appointments, *News Release* (Oct. 13, 2020), https://www.azcourts.gov/Portals/75/IRC/News%20and%20Meetings/NewsRelease-NomineesforRedistrictingCommission.pdf?ver=2020-10-13-101357-357. This Court may take judicial notice of the Commission's public records that are not subject to dispute on the Arizona Supreme Court's website. *See* Ariz. R. Evid. 201(b)(2); *Arizonans for Second Chances*, 249 Ariz. 396, n.1 (taking judicial notice of the Secretary of State's website).

[3] *See* Jeremy Duda, Arizona Mirror, *Former Navajo gaming official is fourth redistricting commissioner* (Nov. 5, 2020), https://www.azmirror.com/2020/11/05/former-navajo-gaming-official-is-fourth-redistricting-commissioner/ ("Now that the four partisan members have been selected, they must choose someone from the five-person list of independent finalists to serve as chair").

. the language under which all appointments are made from a single pool of nominees sent by the CACA." 10/29/20 Minute Entry at 5. Moreover, removal of IRC members is governed by article IV, part 2, § 1(10) of the Arizona Constitution and requires action by the governor and the legislature and good cause. This Court cannot remove the four existing IRC members and order the appointment process to begin anew without violating § 1(10).

Second, Plaintiffs' claims are now moot because each has made their selection for the IRC. Leader Fernandez appointed Dr. Shereen Lerner on October 29, announcing that Dr. Lerner "was far and away the most qualified candidate we interviewed," and, "I'm proud to select her for this vital role in our state's history." Exh. A (Arizona House Democrats, Oct. 29, 2020 Press Release). Leader Bradley appointed Derrick Watchman on November 5, stating Mr. Watchman would bring "a unique and vital perspective that will be an essential contribution to the [IRC]." Exh. B (Arizona State Senate Democrats Press Release). In light of these appointments, Plaintiffs cannot still contest the qualifications of Loquvam or Wilson. The Constitution now empowers the four IRC members (Dr. Lerner and Mr. Watchman included)—not Plaintiffs—to decide whether to appoint Loquvam, Wilson, or one of the other three eligible nominees as the fifth IRC member. Because this action does not qualify for any exception to the mootness doctrine, this Court should refrain from issuing an advisory opinion about the merits of Plaintiffs' abstract claims. *See* Ariz. Const. art. III.

Third, Plaintiffs fail to state a claim upon which relief can be granted on the merits of their claims. As to Wilson, the Court has already observed that "[i]t is undisputed that Mr. Wilson has been registered as an Independent for three or more years prior to appointment." 10/29/20 Minute Entry at 5. That is all that is constitutionally required for Wilson to serve on IRC. The Court should reject Plaintiffs' attempt to have the Court judicially impose an additional political-activities test. As to Loquvam, Plaintiffs allege only that he has registered as a lobbyist with the Arizona Corporation Commission. They do not allege that he has ever been registered or paid to influence legislation or formal rulemaking, and thus that he is

disqualified for having "served as a registered paid lobbyist." Plaintiffs' claim fails because Loquvam is an eligible candidate. Because the Commission performed its duty to establish a pool of qualified candidates, Plaintiffs are not entitled to relief.

II. LEGAL STANDARD

In evaluating a motion to dismiss under Rule 12(b)(6), Arizona courts "look only to the pleading itself and consider the well-pled factual allegations contained therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). "[M]ere conclusory statements are insufficient to state a claim upon which relief can be granted." *Id.*

III. ARGUMENT

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

Plaintiffs' Amended Complaint should be dismissed for lack of standing because the Court cannot, after four selections have been made to the IRC, remove existing members and start with a new pool of nominees. Plaintiffs' claims are also now moot because they have made their selections to the IRC and do not allege that they would have selected other candidates had Loquvam and Wilson not been included in the pool.

1. Plaintiffs' Alleged Injury Is Not Redressable.

As a matter of judicial restraint, parties must generally establish standing in Arizona courts. *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, ¶22 (2020) (collecting cases); *see also Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16 (2003) ("[A]s a matter of sound judicial policy, [Arizona courts have] required persons seeking redress in the courts first to establish standing, especially in actions in which constitutional relief is sought against the government"). To do so, "a party invoking the court's jurisdiction 'must allege personal injury [1] fairly traceable to the defendant's allegedly unlawful conduct and [2] likely to be redressed by the requested relief.'" *Bennett*, 206 Ariz. at 525, ¶18 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Arizonans for Second Chances*, 249 Ariz. at ¶25 (to show an injury

is redressable, "a party must show that their requested relief would alleviate their alleged injury").

Plaintiffs' alleged injury is not redressable. Plaintiffs ask for a judicial declaration that the "candidate pool [is] unconstitutional" and that the nominations made from that pool are "invalid," and for an order requiring the Commission to "reconvene and transmit a candidate pool of qualified candidates." Amended Complaint, ¶¶ 53, 60.

Plaintiffs' request to start the appointment process over, using a different pool of candidates that excludes Wilson and Loquvam, would require the Court to remove the four current IRC members. The Court is powerless to award this relief because, to do so, would violate the Arizona Constitution in two ways.

First, when Plaintiffs initially brought this action, Speaker Bowers had already made his selection for the IRC, but Plaintiffs requested a TRO stopping the time deadlines for the remaining picks and requiring the Commission to transmit a new pool of candidates without Loquvam and Wilson. The Court, in rejecting that request, commented that "[t]he Court finds persuasive the arguments made by Defendant that the claims are not redressable." 10/29/20 Minute Entry at 5. One argument the Court found persuasive is that the Constitution requires all IRC appointments to be made from the same pool of nominees. The Court would not grant Plaintiffs' requested relief because it would require "the Court to fundamentally rewrite the specific . . . language under which all appointments are made from a single pool of nominees sent by the [Commission]." *Id.*

But Plaintiffs' newly-framed relief—removing all four IRC members and starting from scratch with a new pool of nominees—suffers the same defect. The Arizona Constitution requires that the first member of IRC be chosen "from the pool of nominees." Ariz. Const. art. IV pt. 2, § 1(6). The next three members must be chosen "from the pool." *See id.* And the fifth member, also the chair, must be selected by the four other IRC members "from the nomination pool." *See id.* § 1(8). This language clearly requires that the pool used must be

uniform across all five selections, other than the elimination of those candidates already selected. Thus, the Court cannot, without running afoul of the Constitution, now order the creation of a new pool without Wilson and Loquvam.[4]

Second, this Court cannot order that the selection process begin anew because doing so would require it to remove the four existing IRC members, a power the Court does not possess. Under the Constitution, an IRC member may only be removed by the governor with concurrence of two-thirds of the senate for specific grounds and after providing the IRC member with notice and an opportunity to respond. Ariz. Const. art. IV, pt. 2, § 1(10). Plaintiffs' alleged injury is, therefore, not redressable because even assuming the pool of candidates was unconstitutionally constituted (it was not), removal of IRC members for this reason is not an option under the plain language of the Arizona Constitution. *See Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 354, ¶ 32 (2012) (emphasizing, "[t]he gubernatorial removal power derives from the Constitution, not statute[,]" and a court's power is "to review whether removal of an independent commissioner meets constitutional requirements"). Because there is no constitutional mechanism for this Court to remove the four appointed IRC members (whose qualifications Plaintiffs do not contest), and no provision that would allow the appointment process to begin anew, Plaintiffs' alleged injury is not redressable. *See W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 432 (1991) (refusing the requested relief because otherwise "we would be reading out of existence a constitutional provision that the framers saw fit to include"); *cf. Karbal v. Ariz. Dept. of Revenue*, 215 Ariz. 114, 118, ¶ 20 (App. 2007) (holding that a consumer plaintiff failed to establish redressability

[4] As the Commission pointed out previously, Plaintiffs had ample time prior to the initiation of the selection process to seek equitable relief, as the plaintiffs did in *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 133 (2011). As the Court observed, "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 the AIRC." 10/29/20 Minute Entry at 5.

because "although a favorable decision could lead to a refund for the rental car companies and hotels charged with the taxes, there is no requirement that they pass along the refund to the plaintiff class"); *Ry. Labor Execs. Ass'n v. Dole*, 760 F.2d 1021, 1023 (9th Cir. 1985) ("Redressability . . . requires the court to examine whether 'the court has the power to right or prevent the claimed injury.'").[5]

2. Once Plaintiffs Made Their Selections, Their Claims Contesting The Eligibility Of Non-Chosen Nominees Became Moot.

Plaintiffs' claims are also moot. "Mootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation; thus, courts have sometimes described mootness as 'the doctrine of standing set in a time frame.'" *WildEarth Guardians v. Pub. Serv. Co. of Colorado*, 690 F.3d 1174, 1182 (10th Cir. 2012) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). "A case is moot when it seeks 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).

As noted above, both Plaintiffs have now exercised their appointment privilege. Leader Fernandez happily appointed registered democrat Dr. Shereen Lerner to the IRC on October 29. *See* Exh. A. Leader Bradley happily appointed registered democrat Derrick Watchman on November 5. *See* Exh. B. Notably, Plaintiffs do not allege that the presence of Loquvam or Wilson in the pool of nominees prevented them from appointing another nominee who did not make the list. And Plaintiffs do not allege that if the process were to be re-started, they would pick any one other than who they have already picked. At this point, therefore, Plaintiffs' claims present only an abstract question about constitutional eligibility. With their selections, Plaintiffs lost any standing they may have otherwise had to challenge the qualifications of

[5] Although in certain narrow circumstances, lack of standing is forgiven, that cannot occur when the relief requested would require the Court to violate the Constitution.

Loquvam and Wilson, who remain in the pool of nominees for the four appointed IRC members—not Plaintiffs—to now consider for appointment as the fifth member to chair IRC. *See* Ariz. Const. art. IV, pt. 2, § 1(8). The mootness doctrine therefore independently requires dismissal of this lawsuit. *See Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, ¶¶ 9-13 (App. 2014) (dismissing plaintiff's claim against sheriff's office's handling of a writ of restitution as moot in light of property occupants' eviction, noting "the undisputed absence of a live controversy"); *Contempo-Tempe*, 144 Ariz. at 229 (courts "will not decide a question which is unrelated to an actual controversy or which by a change in condition of affairs has become moot" and do not "act as a fountain of legal advice").

B. Plaintiffs' Claims Fail On The Merits As A Matter Of Law.

Plaintiffs' claims should also be dismissed under Rule 12(b)(6) for failure to state a claim. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012) (dismissal under Rule 12(b)(6) is appropriate when, "as a matter of law," a plaintiff is not entitled to relief "under any interpretation of the facts susceptible of proof").

1. Plaintiffs Fail To State A Claim That Wilson Is Not Qualified

The Constitution requires that each IRC member "shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding the appointment." Ariz. Const. art, IV, pt. 2, § 1(3). Plaintiffs admit that Wilson has been registered as unaffiliated with a political party for three or more years, and thus their claim that he is not qualified for IRC fails as a matter of law. *See* Amended Complaint, ¶ 25; 10/29/20 Minute Entry (concluding that the claim regarding Wilson is "not likely to be successful on the merits").

According to Plaintiffs, however, the Commission's nomination of Wilson "violates the spirit and the intent of" article IV, part 2, § 1(5). Plaintiffs claim that the Court should ignore Wilson's political registration and instead judge whether he is actually independent. Plaintiffs

do not explain why Wilson is being singled out for extra political scrutiny. But they take umbrage at the fact that Wilson owns a gun store, has allowed his business to be used for a campaign event for the President of the United States in the parking lot of his business, has pulled Republican primary ballots on a couple of instances (which is his right as an independent voter in Arizona), and once donated to Senator John McCain. These are clear signs, according to Plaintiffs, that Wilson is actually a Republican, not an independent. *See* Amended Complaint, ¶ 46 ("Wilson's voter record and political activities establish that he is closely aligned with the republican party.").

The Court need not consider the spirit and intent of § 1(5), because its language is quite clear. The "spirit" of a law is just "the unhappy interpretive conception of a supposedly better policy than can be found in the words of [the] authoritative text." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 344 (2012). Fortunately, Arizona courts follow the text of the law when clear. *State v. Burbey*, 243 Ariz. 145, 147 ¶7 (2017) ("When the text is clear and unambiguous, we apply the plain meaning and our inquiry ends."). The constitutional provision here could not be clearer that all that matters for qualification is registration as unaffiliated.

Plaintiffs would have the Court ignore the clear constitutional registration requirement and instead delve into Wilson's political activities and voting history to determine his true political loyalties. This request is quite dangerous. If Wilson is subject to such review, in some future case, why wouldn't all 25 nominees be subject to political scrutiny? Perhaps one day republican leadership will be unsatisfied with the Republican bona fides of the ten republican nominees. According to Plaintiffs, the Court would be required to review the background of all ten of those individuals to determine whether they are conservative enough to pass as actual republicans (whatever that means). If not, the Commission must start from scratch.

There is absolutely no manageable standard by which the Court can judge the political question of whether an individual nominee is republican, democrat, or independent enough, or

even answer the preliminary questions raised by such a claim. Which activities count as political activities versus business activities or networking activities? Which political activities count as republican political activities versus democrat political activities or independent political activities? How much political activity for one party or another is too much? There are no "judicially discoverable and manageable standards" that could govern resolution of these political questions and thus no manageable standard for resolving Plaintiffs' claim. *State v. Maestas*, 244 Ariz. 9, 12, ¶ 9 (2018) (quoting *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192, ¶¶ 11-12 (2007)); *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) ("[F]ederal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so."). The Court should reject Plaintiffs' request to have it enter this political thicket.

2. Plaintiffs Fail To State A Claim That Loquvam Is Not Qualified.

Plaintiffs' claims regarding Loquvam fail because they have not alleged that he has "served as a registered paid lobbyist" within the meaning of the Constitution.[6] *See* Ariz. Const. Art. IV, part 2, § 1(3).[7] Plaintiffs assert that Loquvam's registration as a lobbyist with the Arizona Corporation Commission ("ACC") renders him ineligible for the IRC. *Id*. Plaintiffs are incorrect.

a. Plaintiffs Do Not Allege That Loquvam Is "Registered" As A Lobbyist.

Loquvam is not "registered" as a lobbyist as that term is used in the Arizona Constitution. In other words, being registered with the ACC does not make one "registered" as a paid lobbyist as that term was used and understood in § 1(3).

[6] Plaintiffs have conceded in correspondence that Loquvam's eligibility is a legal issue.

[7] The Constitution also includes a requirement that "[a] commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible … for registration as a paid lobbyist." Ariz. Const. Art. IV, part 2, § 1(13).

"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." *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994); *see also Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 330, ¶ 36 (2014) ("Our primary objective in construing [enactments] adopted by initiative is to give effect to the intent of the electorate." (internal quotation omitted)). Also, "[e]ach word, phrase, clause, and sentence [of a constitutional provision] must be given meaning so that no part will be void, inert, redundant, or trivial." *Cain v. Horne*, 220 Ariz. 77, 80, ¶ 10 (2009) (*quoting City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949)). In determining the meaning of the constitutional provisions regarding the IRC, the Court must determine "how the term . . . has been interpreted in Arizona law before the adoption of Proposition 106." *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 133, ¶20 (2011).

Although the Constitution does not define the term "registered," that term was understood before Proposition 106 (creating the IRC) passed to mean registered to lobby the Arizona Legislature or members of Congress. *See State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398 (1953) ("[N]o constitutional provision is to be construed piece-meal, and regard must be had to the whole of the provision and its relation to other parts of the Constitution"). Well before Proposition 106 passed, the Arizona Constitution granted plenary power to the Arizona Legislature to regulate lobbying: "The Legislature shall enact laws and adopt rules prohibiting the practice of lobbying on the floor of either House of the Legislature, and further regulating the practice of lobbying." Ariz. Const. art. XXII, § 19. Pursuant to that power, the Legislature enacted a detailed statutory scheme that regulates the practice of lobbying. *See* A.R.S. §§ 41-1231–1239.

In 1994, the Arizona Legislature created a statute requiring all lobbyists, as that term is defined under statute, to register with the Arizona Secretary of State. *See* A.R.S. § 41-1232.05. Specifically, the Arizona Legislature required that "[a] person who is listed by a principal or

public body on a registration form pursuant to § 41-1232 or 41-1232.01 as a lobbyist for compensation, designated lobbyist or designated public lobbyist shall file a lobbyist registration form with the secretary of state[.]" *Id.* § 41-1232.05(A). In 2000, when Proposition 106 passed, the Secretary of State's registration system was the only registration system covering lobbying activities with members of the Arizona Legislature, who, along with members of Congress, are the elected officials directly impacted by redistricting.[8] Thus, in 2000, when Proposition 106 passed, the public understood "registered" to mean registered to lobby for legislation with the Secretary of State or with the U.S. House of Representatives. *See State v. Jones*, 235 Ariz. 501, 502 ¶6 (2014) ("In interpreting statutes, we seek to effectuate the intent of the legislature that enacted them."); *see also Adams*, 227 Ariz. at 134, ¶¶ 27-29 (relying on usages of the term "public officer" in various Arizona statutes in construing meaning of this phrase in the context of Proposition 106).

Plaintiffs do not allege that Loquvam is, or ever has been, "registered" as a lobbyist with the Secretary of State or the U.S. House of Representatives. Nor could they. Epcor, Loquvam's employer and the entity for which he registered with the ACC, lists others as its registered lobbyists with the Secretary of State. *See* Exh. C.

The Legislature had no hand in creating the ACC's registration system or in setting the criteria to trigger mandatory registration. Instead, the ACC unilaterally created the registration requirement, which is reflected in ACC Code of Ethics Rule 5.2. The ACC's comment to Rule 5.2 expressly states that its registration process is not the same as the statutorily required registration with the Secretary of State. https://azcc.gov/code-of-ethics ("Lobbyist registration is administered by the Commission and is separate from other statutory lobbyist registration requirements[.]").

[8] State, county, and city elections are not impacted by redistricting.

Moreover, the term "registered" in Proposition 106 could not have meant registration with the ACC because the ACC's registration scheme was not in existence when voters added the IRC process to the Constitution. It was not until almost two decades later (in 2018) that the ACC created its lobbyist registration system.[9] In 2000, the public could not have understood that "registered" meant future, non-statutory registration systems created by governmental agencies whose elected officials are not impacted at all by redistricting. To the contrary, the public understood "registered" to mean the statutorily-created registration system in existence at the time of Proposition 106 and which applies to those who lobby elected officials directly impacted by redistricting, which is still the registration systems maintained by the Secretary of State and the U.S. House of Representatives.

There is also no limiting principle inherent in Plaintiffs' argument. If ACC registration is sufficient to disqualify a candidate, so too would registration with any other governmental agency. Many municipalities, including the City of Phoenix, the City of Tempe, the City of Glendale, and the City of Peoria, have established lobbyist registration requirements pursuant to city ordinance. Now that the ACC has established its own registration, other state regulatory agencies could follow suit. And if registration with the ACC is sufficient, then presumably registration with an out-of-state political organization would be as well. Of course, there are hundreds, if not thousands, of such organizations. If any lobbyist registration is enough, the pool of eligible candidates will get smaller and smaller as registration systems become more and more prevalent. This cannot be what voters intended when they used the term "registered" in 2000. Because "registered" could not, in 2000, have meant registered with the ACC, Plaintiffs' claim regarding Loquvam fails as a matter of law.

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[9] An ACC press release on June 21, 2018 notes the following: "The Arizona Corporation Commission today released its lobbyist registration system, a requirement of the recently adopted Code of Ethics. It is mandatory for anyone who interacts with Commissioners on behalf of clients who have business before the Commission to register using our online system." https://azcc.gov/news/2018/06/21/code-of-ethics-lobbyist-registration-is-now-live.

b. Plaintiffs Do Not Allege That Loquvam Has "Served As A Lobbyist."

To be ineligible for the IRC, Loquvam also had to have "served as a . . . lobbyist." *See* Ariz. Const. art. IV pt. 2, §1(3). Plaintiffs have not pled that Loquvam did so.

The Constitution does not define the terms "served" or "lobbyist." As relevant here, the term "serve" is commonly defined as "to perform the duties of (an office or post)." *See Serve*, Merriam-Webster Dictionary, available online at https://www.merriam-webster.com/dictionary/serve (last visited Oct. 27, 2020). Thus, to have "served" as a lobbyist, one must have performed the duties of a lobbyist. What are the duties of a lobbyist? In 2000, Arizona law defined "lobbying" as "attempting to influence the passage or defeat of any legislation by directly communicating with any legislator . . . or attempting to influence any formal rule making proceeding . . . by directly communicating with any state officer or employee." *See* A.R.S. § 41-1231(11) (2000). And it defined a "lobbyist" as "any person . . . who is employed by, retained by or representing a person other than himself, with or without compensation, for the purpose of lobbying." *See id.* § 41-1231(12) (2000).

Tellingly, in April 2000, mere months before passage of Proposition 106, the Legislature adopted statutory amendments prescribing separate prohibitions on entertainment expenditures by "lobbyists," *see* 2000 Ariz. Session Laws ch. 364, § 4 (adding A.R.S. § 41-1232.07(A)), and entertainment expenditures by "[a] person who for compensation attempts to influence . . . matters that are pending or proposed or that are subject to formal approval by the corporation commission," *see id.* (adding A.R.S. § 41-1232.07(B)). This is strong evidence that, in 2000, lobbying did not include activities intended to influence the ACC.

Plaintiffs do not allege that Loquvam has actually performed the duties of a lobbyist within the last three years. They do not allege that he has actually undertaken activities to attempt to, on behalf of another, influence the passage or defeat of any legislation or influence any rule making proceeding.

The fact that Loquvam registered as a lobbyist with the ACC cannot be dispositive. This is because the ACC's ethical rule about registration stretches well beyond the definition of lobbying under state law. Instead, the ACC requires registration for an extremely wide swath of communications with the ACC. ACC Rule 5.2 provides the following:

> "A Commissioner shall not knowingly communicate with any person, representing an industry or public service corporation whose interests will be affected by Commission decisions, and whose intent is to influence any decision, legislation, policy, or rulemaking within the Commission's jurisdiction, unless that person has registered as a lobbyist with the Commission prior to making or attempting to make such communication."

Ariz. Corp. Comm'n Code of Ethics r. 5.2, *available at* https://azcc.gov/code-of-ethics. Without registration, the rule restricts ACC commissioners from speaking to any person about any topic if the person's intent is to influence any decision within the ACC's jurisdiction and the person represents a public service corporation whose interests will be affected by the ACC's decisions. This broad and flexible standard essentially mandates registration by any employee of any public service corporation who has any contact with ACC commissioners.[10] Thus, the fact that someone is registered with the ACC says virtually nothing about whether that individual actually serves as a lobbyist, let alone in a way that satisfies the more narrow definition of "lobbyist" used in the Constitution.

Loquvam's IRC application demonstrates the difference between "lobbying" as the ACC defines it and "lobbying" as the Legislature and Constitution defines it. In his application, Loquvam indicated that he registered with the ACC because of his employment with EPCOR, which may require him to directly communicate with an ACC Commissioner over a "myriad of instances." Exh. D at "Explanation re: registered and paid lobbyist". He notes that "[t]hese

[10] The ACC admits as much: "It is mandatory for anyone who interacts with Commissioners on behalf of clients who have business before the Commission to register using our online system." Press Release, Ariz. Corp. Comm'n. Code of Ethics Lobbyist Registration Is Now Live, (Juen 21, 2018), https://azcc.gov/news/2018/06/21/code-of-ethics-lobbyist-registration-is-now-live.

instances could include, for example, explaining some aspect of EPCOR's operations to Commissioners outside of a formally scheduled Open Meeting, notifying Commissioners of an emergency that has arisen, or disclosing to Commissioners that EPCOR's facilities have been damaged." *Id.* While discussion of each of those matters may require registration with the ACC, none of them rises to the level of actual lobbying, as that term was used in 2000 in the Constitution. Because Plaintiffs have not established that Loquvam has "served as a . . . lobbyist" in the last three years, Plaintiffs' claims fail on the merits.

c. Plaintiffs Do Not Allege That Loquvam Was "Paid" As A Lobbyist.

Even if Loquvam had "served" as a "registered . . . lobbyist," he would only be ineligible if he was also "paid." Notably, the prevailing definition of "lobbyist" in 2000 made clear that one could be a lobbyist "with or without compensation." *See* A.R.S. § 41-1231(12) (2000). But the drafters of Proposition 106, and the voters approving it, went one step further and included the "paid" requirement. This makes sense considering that a member of the IRC is logically much more likely to let outside influences affect the decision-making process if he or she is receiving payment relating to lobbying public officials. But in order for "paid" not to be rendered completely superfluous, there must at least be some relationship between the payment and service as a lobbyist. *Morrisey v. Garner*, 248 Ariz. 408, 410 ¶8 (2020) ("We strive to give meaning, if possible, to every word and provision [of the Constitution] so that no word or provision is rendered superfluous."). This is why Arizona law in 2000 (and still today) defines a "lobbyist for compensation," as "a lobbyist who is compensated for the primary purpose of lobbying on behalf of a principal and who is listed by the principal in its registration pursuant to § 41-1232." A.R.S. § 41-1231(13) (emphasis added).

Here, Plaintiffs have not sufficiently pled that Loquvam is ineligible by virtue of any payment he has received. Instead, Plaintiffs' only allegation regarding payment is that Loquvam "admits that he is required to register by virtue of his employment." Thus, Plaintiffs erroneously believe Loquvam is a "paid" lobbyist. Not only have Plaintiffs not established that

Loquvam is compensated for the primary purpose of lobbying, even if that is not the constitutional standard, Plaintiffs have not established any connection between payments Loquvam has received and service as a lobbyist. Plaintiffs do not allege, for example, that Loquvam's compensation is based upon, in whole or in part, performing lobbying activities.

IV. CONCLUSION

The Commission respectfully requests that the Court dismiss Plaintiffs' claims in full.

RESPECTFULLY SUBMITTED this 17th day of November, 2020.

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