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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, et al., Defendants.	Case No.: CV2020-095696 **DEFENDANT COMMISSION ON APPELLATE COURT APPOINTMENTS' RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER** (Assigned to the Hon. Janice Crawford)

INTRODUCTION

Every ten years, Arizona redraws its congressional and legislative districts. In November 2000, the People, through an initiative called Proposition 106, delegated the re-districting process to an Independent Redistricting Commission ("IRC"). Those interested in serving on IRC submit detailed applications to the Commission on Appellate Court Appointments (the "Commission"), which screens, interviews, and conducts due diligence on interested candidates.[1] Eventually, the Commission transmits a list of twenty-five candidates—consisting of ten republicans, ten democrats, and five independents—to the Speaker of the House, who must make a selection from the list no later than January 31 of the year ending in 1 (this cycle that deadline is January 31, 2021). Nothing in the Arizona Constitution prevents the Speaker from making a selection earlier than January 31, and regardless of when that selection occurs, it sets into motion a series of constitutional deadlines by which other legislators must act to form IRC. The Speaker's appointment triggers a seven-day deadline for the House minority leader to make a selection from the list. Once the House minority leader makes a selection, the President of the Senate has seven days to make a selection. And once that selection occurs, the Senate minority leader has seven days to make a selection. The Constitution is clear that "[a]ny official who fails to make an appointment within the specified time period will forfeit the appointment privilege." Ariz. Const. art. IV pt. 2, § 1(6). Finally, the four members selected by legislative leadership pick a fifth member who serves as chair of IRC and cannot be registered with any political party already represented on IRC.

Proposition 106 also established certain qualifications to serve on IRC. As relevant here, "[e]ach 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

[1] The Commission's primary function is to screen applicants for the Arizona Court of Appeals and Arizona Supreme Court and to submit names of qualified candidates to the Governor.

years immediately preceding the appointment." *Id.* § 1(3). Moreover, "[w]ithin the three years previous to appointment, members shall not have . . . served as a registered paid lobbyist[.]" *Id.*

In late August 2020, 138 individuals applied to serve on IRC. The Commission carefully reviewed the applications and, on September 21, 2020, selected 51 candidates for additional due diligence and to publicly interview. The Commission conducted public interviews on October 8 and 9, 2020. On October 13, 2020, the Commission transmitted a list of 25 individuals (10 registered republicans, 10 registered democrats, and 5 registered independents) to legislative leadership, including plaintiffs. Among the individuals on the list are registered independents Robert Wilson ("Wilson") from Coconino County, and Thomas Loquvam ("Loquvam") from Maricopa County. Nine days later, on October 22, 2020, the Speaker selected David Mehl, a registered republican from Pima County, as a member of IRC. This triggered House Minority Leader Charlene Fernandez's ("Leader Fernandez") seven-day window to make a selection from the pool.

Nine days after the Commission transmitted its list, and on the same day that the Speaker announced his choice, Leader Fernandez, along with Minority Leader David Bradley ("Leader Bradley"), responded with this lawsuit against the Commission, claiming that Wilson and Loquvam are not qualified to serve on IRC. Leader Fernandez and Leader Bradly (collectively, "Plaintiffs") seek equitable relief stopping the constitutionally-mandated selection process, declaring Wilson and Loquvam ineligible, and ordering the Commission to transmit a new list.

Plaintiffs' requests for equitable relief fail on several grounds. To start, Plaintiffs waited for the Speaker to make his selection and, therefore, brought their claims too late. Once the Speaker selected Mehl, Mehl became a member of IRC and cannot be removed except for very good cause. But the Arizona Constitution requires that all members of IRC be chosen from the same pool of candidates. Because of the limitations on removal, it is an impossibility for the selection process to ever begin anew even if Wilson or Loquvam are not qualified (they are qualified though). And the remaining three legislative leaders cannot choose from a pool

different than that Speaker Bowers had to choose from. Similarly, bringing the selection process to a halt now would require the Court to unilaterally and unfairly alter the constitutional selection deadlines. For example, stopping the selection process after it is underway will result in Leader Fernandez having more time to make her selection than Speaker Bowers did and having more time than President Fann or Leader Bradley will have, unless the Court also unilaterally adjusts their constitutional deadlines. None of this will result in an equitable process, and all of it could have been avoided had Plaintiffs brought this action in the nine-day period between transmittal of the candidate list and the Speaker's selection, which is what happened during the last IRC selection process. *See Adams v. Comm'n on App. Ct. Appointments*, 227 Ariz. 128, 130 (2011) (claim brought one day after list transmitted).

Plaintiffs' claims also fail on the merits. Plaintiffs argue that Wilson is not independent enough to be listed as one of the five independent candidates because he has requested a Republican ballot for certain primary elections (something he is entitled to do in Arizona as an unaffiliated voter), he owns a gun store, and he has occasionally hosted meet and greets for Republican candidates at his business. Plaintiffs admit, however, that Wilson has been registered as independent (i.e., unaffiliated with a political party) since 2005, far longer than the three-year requirement in the Constitution. The Court cannot apply an additional political litmus test to the registration requirement. Beyond confirming voter registration, the Commission is tasked with selecting candidates who are "committed to applying the provisions [regarding redistricting] in an honest, independent, and impartial fashion." Ariz. Const. art. IV, pt. 2, § 1(3). The Commission conducted due diligence and received public comment about Wilson, and then interviewed him. The Commission was satisfied that Wilson would discharge the duties of a member of IRC in a fashion that is honest, independent, and impartial, and the Court should not second guess that determination. Plaintiffs' attack on Wilson's integrity is unfortunate, and their attempt to have courts delve into the subjective political beliefs of IRC candidates is foolhardy.

Plaintiffs argue that Loquvam is ineligible to serve on IRC because he is registered through his employer, Epcor USA, Inc. ("Epcor"), as a lobbyist with the Arizona Corporation Commission ("ACC"). In 2000, when Proposition 106 was passed, the meaning of "served as a . . . paid lobbyist" was to actually engage in lobbying activities with the Arizona legislature or members of Congress (i.e., those affected by redistricting) in return for compensation. Moreover, it was understood that to be "registered," an individual had to be registered with the Secretary of State to lobby the Arizona legislature or members of Congress. Plaintiffs' complaint—and they have not submitted any evidence—does not allege activities, or registration, or payment falling within the constitutional restriction. Instead, the ACC's lobbyist registration requirements trigger registration even for activities that were not understood as lobbying activities under Proposition 106, and Plaintiffs have not alleged that Loquvam has actually served as a lobbyist in any fashion. Plaintiffs do not allege that Loquvam is registered to lobby the Arizona legislature or members of Congress on behalf of Epcor (others are actually registered to do so on behalf of Epcor). And Plaintiffs do not allege that Loquvam has received compensation that is in any way connected to, or dependent upon, lobbying activities.

Plaintiffs also cannot satisfy the other requirements to obtain equitable relief. Plaintiffs are not likely to suffer irreparable harm and the balance of hardships does not tip sharply in Plaintiffs' favor. Plaintiffs do not indicate anywhere in their complaint that, because Loquvam and Wilson were included on the list of candidates, another applicant they are even somewhat likely to choose was left off. The chances that either Leader Fernandez or Leader Bradley will choose a candidate other than from the list of registered democrats is exceedingly small. On the other hand, no matter how the court might attempt to intervene, it will introduce confusion and uncertainty into a process that is subject to immense public scrutiny and that is already wrought with tremendous discord. The Court should deny Plaintiffs' requested relief, including any preliminary injunctive relief.

ARGUMENT

The party seeking a temporary restraining order or preliminary injunction is required to establish (1) a strong likelihood that he will succeed at trial on the merits; (2) the possibility of irreparable injury to him not remediable by damages if the requested relief is not granted; (3) a balance of hardships favors himself; and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). Plaintiffs do not satisfy any of these requirements.

I. Plaintiffs' Claims, Brought After The Speaker's Selection, Would Require The Court To Re-Write The Constitution And Are Therefore Not Redressable.

By October 8, 2020, the identity of the five unaffiliated candidates the Commission selected for inclusion in the pool was publicly known. By October 13, the Commission had transmitted the names of all 25 candidates to the legislative leaders. Plaintiffs, nonetheless, waited nine days, and until after Speaker Bowers had selected Mehl, to file this action. That delay is fatal to Plaintiffs' claims.

The Arizona Constitution requires a single list to be used for all selections to IRC. Once Speaker Bowers made his selection from a particular pool of candidates, that became the pool of candidates from which all selections must be made. Specifically, the Constitution provides that Speaker Bowers "shall make one appointment to the independent redistricting commission from the pool of nominees." Ariz. Const. art. IV pt. 2, § 1(6). After that, the remaining three legislative leaders must make their selections "from the pool." *See id.* The Constitution provides that the IRC chairperson must then be selected by the four other IRC members "from the nomination pool." *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 as members.

Once Speaker Bowers made his selection, the pool chosen from became the pool from which all remaining selections must be made. Undoing Speaker Bowers' selection and starting back at square one so all five members can be chosen from the same pool without Wilson or

Loquvam is not an option. This is because, upon his selection, Mehl became a member of IRC. Mehl can now only be removed from that position "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." *See id.* § 1(10). The Court has no ability to eliminate these removal restrictions simply to allow Speaker Bowers, at Plaintiffs' request, to choose from a new pool that does not include Wilson or Loquvam; to the contrary, the Arizona Supreme Court has stressed the importance of enforcing the removal restrictions. *See Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 354 ¶32 (2012) ("The gubernatorial removal power derives from the Constitution, not statute. That fact, however, does not alter or lessen a court's power to review whether removal of an independent commissioner meets constitutional requirements").

Similarly, Plaintiffs' request to simply put the selection process on hold for some unknown time is untenable. Doing so would require the Court to re-write the Constitutional timing provisions and will create more issues than it will solve. If Leader Fernandez gets additional time, does President Fann get additional time? If so, does President Fann get the same amount of additional time as Leader Fernandez gets? If President Fann gets additional time, does Leader Bradley get addiitonal time? If so, how much extra time does he receive? If one of these individuals picks before their deadline, do the remaining selection deadlines get adjusted accordingly? To make matters worse, stopping the selection clock will not change that the Court cannot order the Commission to create a pool different than that from which Speaker Bowers chose.

All of this could have been avoided had Plaintiffs timely brought this action during the period between when the pool of unaffiliated candidates was made public or transmitted and when Speaker Bowers made his selection. *See Adams*, 227 Ariz. at 131 ¶7, 136 ¶44 (allowing a challenge to the pool of candidates when brought one day after the list was transmitted and prior to the first selection). A close analogy can be found in the law governing procedural challenges to elections. It has long been settled that any issue involving the election procedure

must be raised prior to the election. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶9 (2002) ("Challenges concerning alleged procedural violations of the election process must be brought prior to the actual election."); *Renck v. Super. Ct. of Maricopa Cty.*, 66 Ariz. 320, 327 (1947) ("Once the measure has been placed upon the ballot, voted upon and adopted by a majority of the electors, the matter becomes political and is not subject to further judicial inquiry[.]"). The procedural process by which the Commission establishes a pool of qualified applicants ends when the pool is finalized and the first appointment is made.

This Court cannot alter or violate the Arizona Constitution any more than any other branch of government. *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"). Because Plaintiffs' challenge would require either (1) removal of Mehl in violation of the Constitution or (2) selection of the remaining IRC candidates from a pool different than that Speaker Bowers used, also in violation of the Constitution, Plaintiffs' claims are not redressable. *See 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 to prevent the claimed injury.'").

II. Plaintiffs Are Not Likely To Succeed On The Merits Of Their Claim That Either Wilson Or Loquvam Are Ineligible For IRC.

A. Wilson Is Eligible Because He Has Been Registered As An Independent For More Than Three Years.

To be considered an independent candidate for IRC, the Arizona Constitution requires only that a candidate be registered as unaffiliated with a political party for three or more years prior to appointment. If those who drafted Proposition 106 wanted to include additional requirements to prove one's unaffiliated status, they could have easily done so. They chose otherwise. The courts should not second guess that decision twenty years later. There is no dispute that Wilson has been registered as an independent since 2005. That should be the end.

Plaintiffs, however, are not content to accept Wilson's registration status, although that is what the Constitution requires. Instead, while Plaintiffs admit that Wilson is registered independent, they argue that his inclusion in the pool of candidates violates "the spirit and the intent" of the Constitution because Wilson "is closely aligned with the republican party." Compl. at ¶¶ 43, 44. Plaintiffs also allege that while Wilson "claimed to be an Independent," he "is for all purposes and effects a Republican." Mot. at 3. But Plaintiffs do not point to any constitutional provision that conflicts with Wilson's nomination, because Wilson plainly satisfies the pertinent constitutional provisions.

A member of IRC must 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 appointment …." Ariz Const. art. IV, pt. 2, § 1(3) (emphasis added). Similarly, the Constitution instructs the Commission that "[t]he pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona." *Id.* § 1(5). Plaintiffs have not challenged Wilson's nomination on these grounds; instead, they concede that he has been registered for at least three years as an Independent voter. *See* Compl. at ¶ 24 ("Wilson is and has been registered as an Independent since 2005 …").

Without offering any legal basis for Wilson's removal, Plaintiff's point to Wilson's voting history for example, alleging that Wilson drew ballots in Republican primaries in 2010, 2014, and 2018, while drawing a Democratic ballot in 2020. But all independently registered voters are constitutionally eligible to choose and vote a party ballot in primary elections, other than during a Presidential Preference Election. *See* Ariz. Const. art. 7 § 10; A.R.S. § 16-467(B). Wilson's selection of a particular ballot during a primary election has no effect on his voter registration status, and in turn does not affect his eligibility to be a member of IRC.

Similarly, Plaintiffs point to Wilson's activities which they believe to be politically

affiliated. But this inquiry "is inconsistent with accepted constitutional construction that the enumeration of certain specified things in a constitution will usually be construed to exclude all other things not so enumerated." *Whitney v. Bolin*, 85 Ariz. 44, 47 (1958). Wilson satisfies the constitutional requirement regarding his voter registration status, and looking into his activities beyond that is outside of the constitutional framework. Courts should not be in the business of deciding whether someone is independent, democrat, or republican enough to be listed as such in the IRC candidate pool. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). If the Court adopts Plaintiffs' arguments, the floodgates of litigation about the purity of IRC candidates' "true" political thoughts will surely be opened.

The registration requirement is not the only safeguard in the IRC selection process to ensure the integrity of those applying as independent. The Commission collects a significant amount of information about each candidate through various means and sources. If the Commission concludes that a candidate is not truly independent despite registration status, the Commission should be trusted to exercise its discretion to eliminate that individual from consideration. The Arizona Supreme Court has justifiably explained that courts should trust the Commission to discharge its responsibility to create a list that is comprised with individuals who are committed to acting independently and impartially. *See Adams*, 227 Ariz. at 136 ¶41 ("[W]e are confident that the [Commission] will carefully exercise its constitutional responsibility to identify nominees who are committed to serving 'in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process.'"). The Commission did just that in creating the current pool of candidates.

Plaintiffs have alleged nothing to show that Wilson should be disqualified as a nominee under the Arizona Constitution. And the Court is not permitted to impose additional

qualifications. *Cf. State ex rel. Sawyer v. LaSota*, 119 Ariz. 253, 256 (1978) ("In a continuous line of cases commencing over 60 years ago, it has been held that the Legislature has no power to add new or different qualifications for a public office other than those specified in the Constitution."). Wilson's status as a registered independent voter is uncontested. Even accepting as true Plaintiffs' allegations regarding Wilson's voting history and political activities, Plaintiffs have alleged no cognizable violation of the Arizona Constitution. Plaintiffs' pleadings do no more than express their dissatisfaction with Wilson's inclusion on the list of nominees, while offering no viable legal reason for disqualification.

B. Loquvam Is Eligible Because He Has Not "Served As A Registered Paid Lobbyist" Within The Last Three Years.

Plaintiffs base their claim against Loquvam on the constitutional provision prohibiting an IRC member from having "served as a registered paid lobbyist" "[w]ithin the three years previous to appointment" to the IRC. Ariz Const. art. IV, pt. 2, § 1(3). They claim that Loquvam's mere registration as a lobbyist with the ACC renders him ineligible for IRC. But their claim fails because Loquvam has not "served as a registered paid lobbyist" as that term was understood at the time Proposition 106 was enacted in 2000.

1. Loquvam Is Not "Registered" As A Lobbyist As Contemplated By The Arizona Constitution.

Being registered with the ACC does not make one "registered" as a lobbyist under the provisions regarding eligibility for IRC. Although the Constitution does not define the term "registered," that term was understood at the time Proposition 106 passed to mean registered to lobby the Arizona Legislature or members of Congress. *Kilpatrick v. Supe.r Ct. (Miller)*, 105 Ariz. 413, 419 (1970) (recognizing that "constitutions must be construed as a whole and their various parts must be read together"); *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398 (1953) (noting that "no 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; *see also id.* § 21 ("The Legislature shall enact all necessary laws to carry into effect the provisions of this Constitution"). Pursuant to that power, the Legislature has 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, 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.[2] Thus, in 2000, when Proposition 106 passed, the public understood "registered" to mean "registered 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.").

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.[3] [*See* Exh. 1[4].]

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

[3] Notably, the Commission eliminated from consideration two individuals because they had been registered as lobbyists with the Secretary of State. [*See* Exh. 2 at 3.]

Plaintiffs instead argue that Loquvam is "registered" because he is registered with the ACC. 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 recognizes that its registration process is not the same as the statutorily required registration with the Secretary of State. Ariz. Corp. Comm. Code of Ethics r. 5.2 cmt., available at https://azcc.gov/code-of-ethics ("Lobbyist registration . . . is separate from other statutory lobbyist registration requirements[.]").

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. 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 system maintained by the Secretary of State and the U.S. House of Representatives.

In contrast, voters understood that the prohibition in § 1(3) on holding "other public office" during the three year period prior to appointment extended to offices of the state and its subdivisions. *Adams*, 227 Ariz.at 131-32 ¶¶10-11. This is because §1(3) expressly excludes membership on a school board from disqualification. "Because school districts are political subdivisions of the state, A.R.S. § 15-101(21) (2011), this exclusion implies that public offices of other political subdivisions (e.g., counties or municipalities) are encompassed by the term

[4] *See Bolin v. Super. Ct.*, 85 Ariz. 131, 136 (1958) (courts "will take judicial notice of our records and the records of election matters on file in the office of secretary of state").

'public office' in § 1(3)." *Id.* at 132 ¶11. In contract, there is no language in § 1(3) from which one can imply that "registered" includes registration with political subdivisions.

There is no limiting principle inherent in Plaintiffs' argument. If ACC registration disqualifies 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 disqualifying, presumably registration with an out-of-state political organization would be as well. There are hundreds, if not thousands, of such organizations. If any lobbyist registration is enough, the pool of eligible IRC 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.

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

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

Plaintiffs have not established that Loquvam has actually performed the duties of a lobbyist within the last three years. They have not established 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 says little about whether he has actually served as a lobbyist. This is because the ACC's registration requirement stretches far beyond the definition of lobbying under state law. Indeed, the ACC's registration rule requires registration for an extremely wide range 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.[5] Thus, the fact that someone is registered with the ACC says virtually nothing about whether that

[5] 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.

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. 3 at "Explanation re: registered and paid lobbyist".] He notes that "[t]hese 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.

3. Loquvam Is Not A "Paid" 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). 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 much more likely to let outside influences affect the decision-making process if he or she is receiving payment relating to lobbying public officials. On the other hand, 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).

Here, Plaintiffs have not established 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 believe Loquvam has conceded that "he is a paid lobbyist," and that "[h]is claim that lobbying is not the 'primary purpose' for his compensation is irrelevant." Mot. at 4-5. Plaintiffs are incorrect. 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. They, therefore, cannot prevail.

III. The Remaining Equitable Factors Do Not Support Injunctive Relief.

Even if Plaintiffs were likely to succeed on the merits, their request for preliminary equitable relief should still be denied because Plaintiffs cannot satisfy any of the remaining requirements for injunctive or other equitable relief.

Plaintiffs will not suffer irreparable harm if the Court does not stop or re-start the selection process. To the contrary, and as explained, because a selection has already occurred, Plaintiffs' claims are not redressable. The Court is powerless under the Constitution to (1) order that the remaining three picks come from a new pool of candidates or (2) order that the member of IRC already selected (Mehl) be removed such that all five selections can come from the same pool of candidates. The Court also risks injecting tremendous confusion about the timing of selectionss by altering the constitutionally mandated deadlines for selection. In fact, it is the Plaintiffs' requested relief that is very likely to result in irreparable harm if granted.

See Maryland v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating [its] statutes . . . it suffers a form of irreparable injury."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[A] state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

Plaintiffs also do not allege that Loquvam or Wilson's inclusion caused another applicant they are even somewhat likely to choose to be left off. Practically speaking, the chances that either Leader Fernandez or Leader Bradley will choose a candidate other than from the unchallenged list of registered democrats is exceedingly small. In fact, it has been publicly reported that Leader Fernandez "laughed at the idea that she would pick a 'moderate' Republican to throw the process off – the kind of five-dimensional chess that often gets proposed during redistricting. 'Boy, I don't know if I'd recognize one,' she said. '10 years ago, that was a consideration. But the (Republican) Party has changed so much in those 10 years,' she said." [*See* Exh. 4 at 2.] The balance of hardships does not tip sharply in Plaintiffs' favor.

Finally, public policy does not support the requested relief. On its way to granting such relief, Plaintiffs would have the Court rewrite the Arizona Constitution in multiple ways. The requested relief would inject confusion into a process that is closely watched and scrutinized by the public. The Commission spent an inordinate amount of time reviewing background materials, conducting due diligence, and holding interviews. The Commission carefully reviewed the materials and comments received about Wilson and Loquvam, including about the issues raised here. The Commission determined that Wilson and Loquvam are eligible for IRC and would discharge their duties as required under the Constitution. Neither public policy nor equity supports setting aside that sound determination. Equity and public policy require the opposite. *See Adams*, 227 Ariz. at 136 ¶41 ("[W]e are confident that the [Commission] will carefully exercise its constitutional responsibility" when selecting IRC candidates.).

CONCLUSION

For the foregoing reasons, Plaintiffs' request for preliminary equitable relief, including a temporary restraining order, should be denied.

RESPECTFULLY SUBMITTED this 28th day of October, 2020.

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