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June 27, 2018

Members and Staff of the Arizona Legislative Council
1700 W. Washington
Phoenix, AZ 85007

Dear Members and Staff:

I write to provide information to the Legislative Council so that it may provide a fair analysis of HCR 2007, which concerns candidates participating in Clean Elections Clean Funding program, and, separately, the Commission's exemption from certain rulemaking requirements.

1. Standard

As you know, Legislative Council must "produce a neutral explanation of . . . proposals, avoiding argument or advocacy, and describing the meaning of the measure, the changes it makes, and its effect if adopted." *Fairness & Accountability in Insurance Reform v. Greene*, 886 P.2d 1338, 1343-44 (Ariz. 1994). "Likewise, the language used in the Legislative Council's analysis must be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring." *Tobin v. Rea*, 291 P. 3d 983, 988 (Ariz. 2013) (internal quotations and citation omitted).

"Employing 'rhetorical strategy' in the crafting of wording of the analysis, therefore, is not compatible with the statute's impartiality requirement." *Id.* (quoting *Citizens for Growth Mgmt. v. Groscost (CGM)*, 13 P.3d 1188, 1190 (Ariz. 2000)).

2. HCR 2007

HCR2007 proposes two distinct changes to the Citizens Clean Elections Act. One addresses the relationship of participating candidates and political parties and certain tax exempt organizations. The other removes language relating to an

exemption from certain rulemaking requirements. This letter addresses each in turn and provides additional context about the Clean Elections Act.

a. Participating Candidates

If approved, HCR 2007 would change the way candidates can interact with political parties and certain tax exempt organizations. Section A.R.S. 16-948(C), as amended in the HCR, states:

THE FOLLOWING PAYMENTS MADE DIRECTLY OR INDIRECTLY FROM A PARTICIPATING CANDIDATE'S CAMPAIGN ACCOUNT ARE UNLAWFUL CONTRIBUTIONS:

1. A PAYMENT MADE TO A PRIVATE ORGANIZATION THAT IS EXEMPT UNDER SECTION 501(a) OF THE INTERNAL REVENUE CODE AND THAT IS ELIGIBLE TO ENGAGE IN ACTIVITIES TO INFLUENCE THE OUTCOME OF A CANDIDATE ELECTION.
2. A PAYMENT MADE DIRECTLY OR INDIRECTLY TO A POLITICAL PARTY.

This change arises following the Commission's comprehensive review of its rules related to candidate purchases of goods and services. *See* Exhibit 1, Collins Declaration at ¶ 9. During that review, the Commission considered a number of options to narrow candidate purchasing options, and, in a separate rulemaking, required all participating candidates to undergo audits of their financial transactions. *Id.* at ¶¶ 9-11.

At no time have participating candidates ever been permitted to "pool" or pass money through to political parties or tax exempt organizations. *Id.* (explaining statutory and other regulatory restrictions). Such candidates have been permitted to make direct campaign expenditures to purchase services from these organizations (or other organizations), subject to the Commission's longstanding restrictions and reporting requirements, as well as Commission oversight. *Id.* The Commission's recent review resulted in rules imposing additional restrictions and reporting requirements on payments to political parties for services. *Id.* ¶ 8.

HCR 2007 can be said to do two things on this topic:

- First, it prohibits candidates, who have already applied and been approved to become clean elections participating candidates, from

using their clean elections campaign account to make purchases from parties or certain tax exempt groups. A.R.S. § 16-947.¹

- Second, it authorizes the Commission to review transactions of candidates, parties, and certain tax exempt organizations to determine if “indirect or direct” purchases have been made.

Significantly, this measure does *not* do two things:

- First, it does not affect political committees, unincorporated associations not subject to IRS restrictions, corporations, or unions; it only prohibits purchases where money flows to parties or certain tax exempt organizations.
- Second, despite the prohibitions that it proposes, the HCR provides no language regarding a penalty for a violation of its new requirements.

b. Changes to Commission Rule-making

In contrast to Section 1, which addresses candidates, Section 2 deals exclusively with the rule-making process of the Commission. Commission rules apply to candidates and other election participants subject to the Act. If approved, HCR 2007 would remove two phrases from A.R.S. § 16-956. Specifically it strikes “~~Commission rule making is exempt from title 41, 12 chapter 6, article 3.~~” and the Commission “~~shall also file a notice of exempt rule making and~~ the proposed rule in the format prescribed in section 41-1022 with the secretary of state's office for publication in the Arizona administrative register.”

The amendments add no additional duties or obligations to the Commission. To the extent the amendments change the Commission’s authority, their effect is entirely unclear—and will likely require judicial determination. Importantly, ordinary principles of statutory construction dictate that “where two statutes deal with the same subject, the more specific statute controls.” *Pima Cty. v. Heinfeld*, 654 P.2d 281, 282 (Ariz. 1982); *see also Fairness & Accountability in Insurance Reform*, 886 P.2d at 1343-44 (requiring legislative council to produce a neutral explanation “describing the meaning of the measure, *the changes it makes, and its effect if adopted.*”) (emphasis added).

¹ The repetition of the direct or indirect language in section C and (C)(2) does not appear meaningful.

The Commission's duties are unamended. *See, e.g.*; A.R.S. § 16-955(A) (requiring commissioners to be "committed to enforcing this article in an honest, independent and impartial fashion and to seeking to uphold public confidence in the integrity of the electoral system."); A.R.S. § 16-956(A)(7) (The Commission "shall . . . enforce this article, ensure that money from the fund is placed in candidate campaign accounts or otherwise spent as specified in this article and not otherwise, monitor reports filed pursuant to this chapter and financial records of candidates as needed and ensure that money required by this article to be paid to the fund is deposited in the fund."). The HCR adds no specific duties to the Commission and, importantly, does not alter the Commission-specific rule-making process described in Act, except to strike the language described above.

The Commission's duties and rule-making requirements are more specific than (and conflict with) the generalized duties of the Governor's Regulatory Review Council, or the Attorney General. *Heinfeld*, 654 P.2d at 282.²

Similarly, Clean Elections rules are subject to a 60-day public comment period; the generic rule in article 3 calls for only a 30-day period. *Compare* A.R.S. § 16-956(C) *with* A.R.S. § 41-1023. Commission rules may be made immediately effective upon a unanimous vote of the Commission, while A.R.S. § 41-1026 limits immediate rulemaking and requires Attorney General review. In each case, because the specific governs over the general and no proviso in the HCR imposes a specific duty on the Commission or alters these requirements, the specific Commission statute controls.

² Nowhere does the text of the HCR state that the Governor's Regulatory Review Council or the Attorney General are authorized to interfere with the Commission's execution of its duties. It is a matter of public record that the HCR's sponsors made claims regarding their intent. Legislative Council's role, however, is to deal with the language before voters, not the thoughts of individual lawmakers and lobbyists. *See Ariz. Citizens Clean Elections Comm'n v. Brain*, 322 P.3d 139, 142 (Ariz. 2014) ("[A] legislator, lobbyist, or other interested party lacks competence to testify about legislative intent in passing a law.") (citing *Golder v. Dep't of Revenue*, 599 P.2d 216, 221 (Ariz. 1979)). Indeed, any analysis that includes these other offices and fails to explain what GRRC and the Attorney General do, how the offices are filled, and contrast that with the Commission's unamended duties fails to provide voters with an accurate understanding of the claimed intent of lobbyists and legislators. *Tobin*, 291 P. 3d at 988 (misleading omissions and amplifications are incompatible with Legislative Council's duties).

In contrast, HCR 2007 does expressly require a change in the notice provided by the Commission pursuant to A.R.S. § 41-1022. Accordingly, this requirement, if enacted, would change the Commission's process.

3. Draft Analysis.

a. The Clean Elections Act

Contrary to the Draft Analysis, The Clean Elections Act did not simply establish a public campaign funding program. It also established the Citizens Clean Elections Commission and gave it the responsibility to implement a clean funding program, implement a voter-education program, and enforce violations of the Act. The establishment of the non-partisan, independent citizens Commission was itself a significant aspect of the Clean Elections reform that voters approved. This background should be included in the Analysis to provide an accurate description. The proposed description is misleading. The description of the Clean Elections Act should be expanded to accurately reflect the scope of the Act.

b. Restrictions on Participating Candidate Accounts

The description of the prohibition in Section 1 of the HCR should be expanded to:

- (a) explain what a participating candidate is and the restrictions and obligations such a candidate agrees to;
- (b) explain the Commission's proposed authority to review transactions of candidates, parties, and certain tax exempt organizations to determine if "indirect or direct" payments have been made to these groups;
- (c) note that the HCR provides no penalty for a violation of this restriction;
- (d) explain that currently any expenditures to these groups by a participating candidate must be for the purchase of services for a campaign purpose and are subject to audit; and
- (e) articulate that the HCR's restrictions do not apply to any other politically active person or organization other than parties and certain tax exempt entities.

c. Rule-Related Provisions

The description of Section 2 of the HCR that eliminates the exemption from Title 41, chapter 6, article 3 and the requirement that the Commission file a notice of exempt rulemaking should be rewritten to:

(a) precisely describe the language being eliminated from current law;

(b) accurately describe the Commission's current rulemaking process and the aspects of that process and the Commission's authority and responsibility that remain unchanged under HCR 2007; and

(c) note that although the HCR clearly eliminates the requirement that it file a notice of exempt rulemaking and will now file a different notice under A.R.S. § 41-1022, only provisions of article 3 that are consistent with the specific statutes governing the Commission will apply to the Commission.

Without these changes, Legislative Council's analysis inaccurately describes HCR 2007 and risks misleading voters about its content and context. If you would like additional information, please feel free to contact me.

Sincerely,



Thomas M. Collins
Executive Director

cc: JLBC Staff
Attachment

Exhibit 1

Declaration of Thomas M. Collins

I, THOMAS M. "TOM" COLLINS, hereby state, under penalty of perjury, the following information is true to my knowledge, information, and belief:

1. I am Executive Director of the Arizona Citizens Clean Elections Commission, a voter-created body charged with enforcing, administrating, and protecting the Citizens Clean Elections and its associated fund. A.R.S. §§ 16-955(A), (B), (J), -956(A)(7). I am an attorney and member of the Arizona bar.
2. I have served as Executive Director since August 2013. In my role, I serve as the chief administrative officer for the Commission, managing functions including voter education, the Commission's Clean Funding program, and campaign finance enforcement. I make recommendations to the Commission related to rulemaking, ensure that the Commission follows the dictates and limitations on the Commission's rulemaking authority as set forth in the Clean Elections Act, keep administrative records of rulemaking activities, and file rulemaking notices with the Arizona Secretary of State.
3. The Commission is designed to be a nonpartisan entity that functions independently from any single elected official, political party, or political interest. Its unique structure includes an alternating appointment process so no single elected official or even officials of the same political party can ever dominate the selection of Commissioners. And the Commission itself can have no more than two of its five members from any political party.
4. The Commission's independence and composition are critical to promoting fair and unbiased implementation of all aspects of the Act, including voter education, campaign finance enforcement, and rule making.
5. The Commission's rules must be consistent with the Act and other governing statutes. Under existing law, the Commission adopts rules to carry out the purposes of the Act. If there are statutory changes that impact Commission rules, the Commission follows the controlling statutes and amends rules as appropriate following the rule-making process established in the Act.
6. I have reviewed the Consolidated Rule 12(B)(6) Motion to Dismiss and Response to Application for Preliminary Injunction filed by the Special Intervenors ("the Consolidated Response") and its exhibits. The

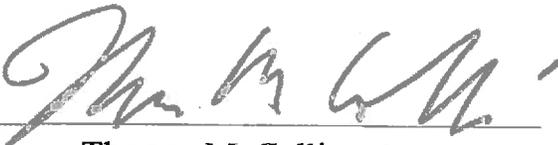
Consolidated Response contends at pages 3 and 6 that Commission Rules – both before and after a 2017 amendment – permitted participating candidates to “pool public money with political parties.” These statements are factually inaccurate.

7. I was executive director when the Commission amended Ariz. Admin. Code R2-20-702 in 2017. The amendment was effective January 1, 2018. The Commission circulated three versions of this amendment for public comment. See Exhibit 1, Consolidated Response. The plain language of each of these proposals limited the ability of candidates to use political parties for campaign services. See Exhibit A (Proposed Rules). None of the proposals permit participating candidates to “pool public money with political parties.”
8. The final rule adopted by the Commission barred advance payments to political parties without an itemized receipt of services and provided that candidates may only make payments “for services actually used by the participating candidate and that no additional fees may be added.” Failure to abide by the rule is deemed an unlawful contribution to the party. See Exhibit 1, Consolidated Response at 1 § 6.
9. Even before the 2017 amendment of R2-20-702, the Clean Election Act and several Commission rules implementing it made clear that a participating candidate could not “pool public money with political parties.” The Clean Elections Act states, in A.R.S. § 16-948(C), that candidates must pay monies “directly to the person providing goods or services to the campaign” and must file a report including the full name and address of the person. Section 16-956(A)(7) provides that the Commission shall “ensure that money from the [Clean Elections] fund is ... spent as specified in this Article.”
10. Before the 2017 amendments, Rule R2-20-702 provided that “[a] participating candidate shall use funds in the candidate’s current campaign account to pay for goods and services for direct campaign purposes only.” Under R2-20-703, participating candidates had and continue to have the burden of proving that they have complied with this requirement. Under rule R2-20-101(7), the phrase “direct campaign purpose” “includes, but is not limited to, materials, communications, transportation, supplies and expenses used *toward the election of a candidate*” (emphasis added). Rule R2-20-104(C)(5) requires that a participating candidate certify under oath

that the candidate “[h]as the burden of proving that expenditures made by or on behalf of the candidate are for direct campaign purposes. . . .” And rule R2-20-702 requires that all campaign funds “be disbursed and reported in accordance with A.R.S. § 16-948(C),” which as noted above requires that candidates pay funds only “directly to the person providing goods or services to the campaign.”

11. The 2017 amendment to R2-20-702 also requires, among other things, that candidates who make purchases from a party include the Commission in the mail batch for all mailers and invitations. Exhibit 1, Consolidated Response at 3. This provision ensures the Commission will know that materials produced are for the participating candidate. The Commission also expanded its auditing to include every candidate who participates in the Clean Funding program. *See* Ariz. Admin. Code §§ R2-20-402.01 & R2-20-402.02.
12. In sum, both before and after the 2017 amendment, it is inaccurate to state that Commission rules allow participating candidates from “pooling public money with political parties.” Such a practice has always been barred under Commission rules. Instead, the 2017 amendment had to do with tightening the conditions under which participating candidates could purchase goods or services from political parties.

EXECUTED this 20th day of June, 2018



Thomas M. Collins