



**NOTICE OF PUBLIC MEETING
AND POSSIBLE EXECUTIVE SESSION OF THE
STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION**

Location: Citizens Clean Elections Commission
1616 West Adams, Suite 110
Phoenix, Arizona 85007

Date: Thursday, September 26, 2019

Time: 9:30 a. m.

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the Commissioners of the Citizens Clean Elections Commission and the general public that the Citizens Clean Elections Commission will hold a regular meeting, which is open to the public on September 26, 2019. This meeting will be held at 9:30 a.m., at the Citizens Clean Elections Commission, 1616 West Adams, Suite 110, Phoenix, Arizona 85007. The meeting may be available for live streaming online at www.livestream.com/cleanelections. Members of the Citizens Clean Elections Commission will attend either in person or by telephone, video, or internet conferencing.

The Commission may vote to go into executive session, which will not be open to the public, for the purpose of obtaining legal advice on any item listed on the agenda, pursuant to A.R.S. § 38-431.03 (A)(3). The Commission reserves the right at its discretion to address the agenda matters in an order different than outlined below.

All matters on the agenda may be discussed, considered and are subject to action by the Commission.

Possible action on any Matter Under Review (MUR) identified in this agenda may include authorizing or entering into a conciliation agreement with subject of the MUR, in addition to any other actions, such as finding reason to believe a violation has occurred, finding probable cause to believe a violation has occurred, applying penalties, ordering the repayment of monies to the Clean Elections Fund, or terminating a proceeding.

The agenda for the meeting is as follows:

- I. Call to Order.
- II. Discussion and Possible Action on Commission Minutes for July 29, 2019 meeting.
- III. Discussion and Possible Action on Executive Director's Report and Legislative Report. **Possible Action may include directing staff to take positions on legislation or legal issues discussed in the report. The report is typically available online on the Clean Elections Commission website or via email request at ccec@azcleanelections.gov**

- IV. Discussion and Possible Action on Voter Education’s We The Voters: Our impact on 2020 Conference.

- V. Discussion and Possible Action on Adoption of Amendment to A.A.C. R2-20-104 related to loans to participating candidates. **Possible action may include approval of the proposed rules, a determination whether any rules adopted unanimously should be made effective immediately, termination of a rulemaking docket, or directing staff to file a notice of supplemental rulemaking.**

- VI. Discussion and Possible Action on Proposed Amendment to A.A.C. R2-20-209 for 60-day public comment period pursuant to A.R.S. § 16-956.

The Commission may vote to go into executive session, which will not be open to the public, for the purpose of obtaining legal advice on this item, pursuant to A.R.S. § 38-431.03 (A)(3).

- VII. Discussion and Possible Action on Approval of Audit of former Candidate Rebecca Speakman
- VIII. Discussion and Possible Action on *State Ex Rel. Brnovich v. Arizona Board of Regents*, 1 CA-CV 18-0420 and Petition for Review to the Arizona Supreme Court.

IX. Public Comment

This is the time for consideration of comments and suggestions from the public. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date or responding to criticism

X. Adjournment.

This agenda is subject to change up to 24 hours prior to the meeting. A copy of the agenda background material provided to the Commission (with the exception of material relating to possible executive sessions) is available for public inspection at the Commission’s office, 1616 West Adams, Suite 110, Phoenix, Arizona 85007.

Dated this 24th day of September, 2019.

Citizens Clean Elections Commission
Thomas M. Collins, Executive Director

Any person with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting the Commission at (602) 364-3477. Requests should be made as early as possible to allow time to arrange accommodations.

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THE STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona

July 29, 2019

9:32 a.m.

ITEM II

COASH & COASH, INC.
Court Reporting, Video & Videoconference
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1 PUBLIC MEETING BEFORE THE CITIZENS CLEAN
2 ELECTIONS COMMISSION convened at 9:32 a.m. on July 29,
3 2019, at the State of Arizona, Clean Elections
4 Commission, 1616 West Adams, Conference Room, Phoenix,
5 Arizona, in the presence of the following Board members:
6
7 Ms. Amy B. Chan, Chairwoman
8 Mr. Mark S. Kimble, Teleconference
9 Mr. Damien R. Meyer, Teleconference
10 Mr. Galen D. Paton, Teleconference
11
12 OTHERS PRESENT:
13
14 Thomas M. Collins, Executive Director
15 Paula Thomas, Executive Officer
16 Mike Becker, Policy Director
17 Gina Roberts, Voter Education Director
18 Alec Shaffer, Web Content Manager
19 Avery Oliver, Voter Educations Specialist
20 Fanessa Salazar, Administrative Assistant
21 Adrienne Carmack, AZ Advocacy Network
22 Joel Edman, AZ Advocacy Network
23 Joseph LaRue, Assistant Attorney General
24 Kara Karlson, Assistant Attorney General
25 Nathan Arrowsmith, Osborn Maledon
Rivko Knox, AZ League of Women Voters

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1 P R O C E E D I N G S
2
3 CHAIRWOMAN CHAN: All right. This is
4 Commissioner Amy Chan. I'll call this meeting to order.
5 Since I'm the only one here in person, I guess
6 -- Chairman Kimble, I guess I'm going to be doing all
7 the official stuff today here in the -- in Phoenix.
8 I hope that's alright with you, Mr. Chairman.
9 COMMISSIONER KIMBLE: Okay. Fine.
10 CHAIRWOMAN CHAN: Perhaps to start, we can
11 just do a roll call to see who's attending via phone.
12 Let's see. Commissioner Kimble, you're here,
13 correct?
14 COMMISSIONER KIMBLE: I'm here.
15 CHAIRWOMAN CHAN: Okay. Commissioner Paton?
16 COMMISSIONER PATON: Here.
17 CHAIRWOMAN CHAN: Commissioner Meyer?
18 COMMISSIONER MEYER: Here.
19 CHAIRWOMAN CHAN: Okay. Is any other
20 Commissioner on the line that I --
21 MS. THOMAS: No.
22 CHAIRWOMAN CHAN: Okay. All right. So -- and
23 then I'm here, of course, Amy Chan.
24 Please bear with me. I just got here. I
25 think I need a minute to just get organized. And I'm

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1 sorry for being a little bit late, although that clock
2 says I'm --
3 MR. COLLINS: That clock is wrong.
4 CHAIRWOMAN CHAN: -- early, or super late.
5 All right.
6 COMMISSIONER MEYER: This is Commissioner
7 Meyer. Take your time.
8 CHAIRWOMAN CHAN: Thank you.
9 COMMISSIONER MEYER: You are doing fine.
10 CHAIRWOMAN CHAN: Thank you so much.
11 All right. Well, now that I have my agenda,
12 which was in front of me but I just needed a minute to
13 actually get situated, let's go on to Item Number II,
14 which is discussion and possible action on Commission
15 minutes for our May 30th, 2019 meeting.
16 Do -- do I have a motion and a second on that?
17 COMMISSIONER KIMBLE: This is Commissioner
18 Kimble. I move to approve the minutes.
19 CHAIRWOMAN CHAN: Okay. Second?
20 COMMISSIONER MEYER: Commissioner Meyer,
21 second.
22 CHAIRWOMAN CHAN: All right. Do we need a
23 roll call vote then on that? We do, don't we?
24 MR. COLLINS: We've been taking those.
25 CHAIRWOMAN CHAN: Okay. All right. Let's go

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1 ahead and take a roll call vote on that to approve the
2 minutes as written.
3 Commissioner Kimble?
4 COMMISSIONER KIMBLE: Aye.
5 CHAIRWOMAN CHAN: Commissioner Meyer?
6 COMMISSIONER MEYER: Aye.
7 CHAIRWOMAN CHAN: And I vote aye.
8 And with that, the minutes for the May 30th
9 meeting are approved as written.
10 COMMISSIONER PATON: You forgot me.
11 CHAIRWOMAN CHAN: Oh. Oh, my God,
12 Commissioner Paton. I am so sorry. How do you vote on
13 this?
14 COMMISSIONER PATON: Aye.
15 CHAIRWOMAN CHAN: Thank you. I apologize.
16 All right. Tom, do I need to do anything to
17 fix that, or we're good?
18 MR. COLLINS: No. I think -- well, he said
19 the -- you got the aye.
20 CHAIRWOMAN CHAN: He voted, so we're good.
21 MR. COLLINS: Yeah, you got the aye.
22 CHAIRWOMAN CHAN: Okay. Moving on to Item
23 Number III, discussion and possible action on executive
24 director's report and legislative report. Thank you.
25 MR. COLLINS: Yes. Chairwoman Chan and

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1 Commissioners, I just wanted to -- it's actually kind of
2 a busy -- we're coming up on the beginning of a busy
3 time here. We have the -- starting this week, if I can
4 read my calendar, on --
5 CHAIRWOMAN CHAN: Can you identify yourself?
6 MR. COLLINS: Oh, sure. Yeah, I should.
7 This is Tom Collins. I'm the Executive
8 director of the Commission. I hope you all can hear me.
9 (Court reporter request to speak louder.)
10 MR. COLLINS: Sure. Okay. Did you get my
11 name, by any chance? No? Yes?
12 Okay. Cool. All right. I'm going to try
13 this volume and see if this works.
14 All right. The most important thing we have
15 happening this week is August 1st begin -- begins the
16 qualifying period for candidates interested in running
17 with Clean Elections funding.
18 So, qualifying contributions, as I think
19 everybody knows now, are \$5 contributions candidates
20 raise to show grassroots support from voters who
21 actually live and are registered in their district if
22 they're a legislative candidate or in the state if they
23 are running statewide. These \$5 contributions are
24 turned in along with the candidate's application for
25 funding.

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1 I also wanted to highlight that Avery
2 completed his first week of the SOS election officer
3 certification training course. So, when he's wrapped
4 that up he'll be a certified election officer for the
5 state. So, that's -- that's cool.
6 We've got some elections coming up that are
7 listed there. I think that in the City of Phoenix, for
8 what it's worth, Prop 105 and 106 are probably going to
9 be pretty, I don't know, big, for lack of better putting
10 it, for --
11 (Court reporter clarification.)
12 MR. COLLINS: Are going to be pretty big
13 elections, I think.
14 We have -- you can see some of the community
15 outreach events that the Voter -- that the Voter
16 Education Department, as it were, is -- has been doing.
17 Gina's been out at election officer certification to do
18 trainings.
19 We've been working with -- Avery's been
20 participating in voter outreach groups put together by a
21 variety of government organizations, including the SOS,
22 the Arizona Commission on African American Affairs, and
23 the Maricopa County Recorder's Office. And Gina has
24 participated in the Department of Education's Civic
25 Engagement Committee meeting.

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1 Commissioner Paton's recent Op Ed has run in a
2 number of papers. It ran in the Capitol Times last week
3 online, and I think it may be in the paper Mon- -- today
4 -- this week. And we're also hopeful and expecting to
5 have it published in the Republic this week. So, that's
6 very cool.
7 And, lastly, there's -- there's just a -- on a
8 miscellaneous, there are a lot of miscellanea. Just to
9 keep things moving, I'll just mention that the GRRC
10 staff moved our pending 2017 5-year review. They
11 removed it from their internal, internal agenda. On
12 GRRC's website they maintain a list of what is coming up
13 in their pipeline. Our report, which has been -- you
14 know, is a couple years old now and has been sitting
15 there. What I was informed is that they were just doing
16 housekeeping.
17 So I -- I can't say for certain that that
18 means that that 2017 report is -- is anything. It's
19 still on file there. But they may decide to wait until
20 the 2020 5-year report, or else there may be some other
21 interaction we have. But that's where we are right now
22 on that old matter.
23 So, without further ado, I -- there's some
24 information on a couple of lawsuits; one filed here in
25 Arizona, one that just got resolved by the Washington

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1 Supreme Court. One has to do with petition circulators
2 for -- for initiatives, and one has to do with affirming
3 the City of Seattle's public financing program which
4 uses something called Democracy Vouchers. That was
5 found not to violate the First Amendment.
6 The only reason I -- it's in the -- part of
7 the reason it's in the notes is that reason. The other
8 reason it's in the notes is because the, you know, the
9 plaintiffs in that case were very hot-to-trot about the
10 fact that the U.S. Supreme Court case Janus had recently
11 been decided. That case basically said that non-union
12 members couldn't be, quote, unquote, forced to pay an
13 administrative offset when they are benefitting from a
14 collective bargaining agreement.
15 The folks who were behind this lawsuit were
16 bragging today in a column in the Hill, bragging about
17 this is the end of public financing. And the Washington
18 Supreme Court distinguished that case in a footnote. So
19 I think that Janus does not necessarily mean that, you
20 know, you have a right to, you know, block all
21 government spending.
22 So, anyways, that's all I've got if -- unless
23 anyone has any questions.
24 CHAIRWOMAN CHAN: Thank you, Tom.
25 COMMISSIONER KIMBLE: Madam Chair --

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1 CHAIRWOMAN CHAN: Commissioner --
2 COMMISSIONER KIMBLE: -- this is Commissioner
3 Kimble.
4 CHAIRWOMAN CHAN: Go ahead, Commissioner
5 Kimble.
6 COMMISSIONER KIMBLE: Tom, going back to
7 another old matter, is there anything at all to report
8 about the long overdue appointment to the Commission?
9 MR. COLLINS: Yeah, yes. There is -- I think
10 I can say that -- that Paula has been coordinating on
11 advertising with both the Governor's office and the
12 Secretary of State's office. So we think we'll be --
13 we're -- we've reached out affirmatively to those
14 administrations and are working to ensure that we can
15 provide whatever support we need to -- to help them
16 achieve getting a person who they believe is qualified.
17 So, we're just going to keep -- keep doing
18 that. And I think it's -- I think -- I think that we've
19 had -- we've focused their attention enough on it that I
20 believe that -- that we'll make progress there. And
21 that's -- that's where we are now.
22 So, following the last meeting we have made at
23 least, you know, been undertaking our own efforts to
24 keep the -- to support the Governor's office and the
25 Secretary of State's office as much as we can.

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1 CHAIRWOMAN CHAN: Is that all, Commissioner
2 Kimble?
3 COMMISSIONER KIMBLE: Okay. I guess so, yes.
4 CHAIRWOMAN CHAN: Okay. Anyone else have any
5 items to add or questions for Tom?
6 If not, Tom, just a comment from myself, or
7 maybe a request. I would love to share any such ads on
8 my own personal Facebook page and Twitter accounts.
9 MR. COLLINS: Yep.
10 CHAIRWOMAN CHAN: So when, if -- I don't know
11 if they're already available, but if and when they are,
12 I'd love to --
13 MR. COLLINS: Sure.
14 CHAIRWOMAN CHAN: -- you know, get a copy or a
15 link. I mean, I usually get the clean election stuff,
16 so -- but I -- I don't know, sometimes I miss things.
17 So, if they're out there, I'll -- I'd love to get a link
18 to share.
19 Unfortunately, I think I know a lot of
20 politically active people, and many times that means
21 they're precinct committeemen in either of the major two
22 parties, but -- and they would be disqualified. But I'd
23 love to share it with anybody who might know me or see
24 something I post and be interested in -- in helping the
25 Commission that way. So -- okay.

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1 Okay. With that, I think the next item is
2 Number IV, discussion and possible action on proposed
3 rule changes for 60 day public comment period.
4 Tom, I know we have some options as far as,
5 you know, maybe going into -- well, making a
6 determination. We may want to discuss the rules. I
7 don't know. Do you want to lead the discussion on this
8 and then we can determine where to go from there?
9 MR. COLLINS: Let's see.
10 CHAIRWOMAN CHAN: Take your time.
11 MR. COLLINS: I need a moment.
12 CHAIRWOMAN CHAN: Sure.
13 COMMISSIONER KIMBLE: Is someone saying
14 something?
15 MR. COLLINS: I'm sorry.
16 CHAIRWOMAN CHAN: No. Sorry. This is
17 Commissioner Chan. Tom just need a moment and I was
18 whispering with Kara about something unrelated. Sorry.
19 MR. COLLINS: Chairwoman Chan, I'm -- I'm
20 back. Sorry. I had to double-check something.
21 I guess -- do I have the --
22 CHAIRWOMAN CHAN: You have the floor.
23 MR. COLLINS: Okay. Thank you.
24 Chairwoman Chan and Commissioners, as you
25 know, back 60 days ago, or a little more than 60 days

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1 ago, or maybe exactly 60 days ago, we put out for public
2 comment for amendments to rules, to four rules. And so
3 now we're at a point where we are recommending different
4 -- well, we have a recommendation on each of those and
5 where we want to go.
6 First of all, you should have in your e-mail a
7 list of -- of -- of potential motion language. And as I
8 noted in my supplemental e-mail on Friday, in each case
9 you'll want to make clear what the effective date you
10 select is for the rules that are in front of us. That's
11 in -- in -- in -- in part, to make -- in large part, to
12 make a clear record, and also, you know, to just -- to
13 do that.
14 So what you have in front of you as far as
15 procedurally, is for the three rules, amendments, that
16 we do recommend adopting today, we have immediate effect
17 motion language and delayed effect motion language. You
18 have proposed language there for both of those. And
19 then there is a -- one of the rules we propose to
20 terminate the proceedings and initiate a different
21 amendment.
22 So, I guess my question, Madam Chairwoman, in
23 the first instance, would you, and maybe the rest of the
24 Commission, as well, would you like me to go through
25 each rule, A, B, C, D, why we're recommending what we're

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1 recommending? I think that, to me, might be the easiest
2 way to go.
3 The only question is, do you want to vote --
4 to -- to vote per amendment or -- or do them all at the
5 end? That really is a question that you can -- you can
6 decide --
7 CHAIRWOMAN CHAN: Well --
8 MR. COLLINS: -- among yourselves.
9 CHAIRWOMAN CHAN: -- and the other
10 Commissioners can weigh in here. Just from my
11 perspective, I think maybe I would like to take them
12 maybe each individually, if you guys don't mind, just to
13 avoid any confusion, particularly since we're not all
14 here in person. That might help me.
15 But Commissioner Paton, Kimble, Meyer, what do
16 you guys think?
17 COMMISSIONER MEYER: This is Commissioner
18 Meyer. I think we should take them one by one.
19 CHAIRWOMAN CHAN: Okay.
20 MR. COLLINS: Okay. Great.
21 Madam Chairwoman, Commissioners, so
22 Item IV (A) is an amendment to Arizona Administrative
23 Code R2-20-702 concerning participating candidate's use
24 of Clean Elections funding.
25 The reason for this amendment, it actually is

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1 self-explanatory, but just to put it on the record, this
2 is the amendment that makes sure that our rules are in
3 compliance with the amendments to 16-948 that were
4 passed by the voters in Proposition 306 in 2018.
5 This rule, the language we propose to strike
6 is, in effect, moot at this point because Prop 306
7 supersedes this rule. Nevertheless, you know, in order
8 to clean up the rules, we need to go through this
9 process. And, therefore, because the sections of 702
10 which are obviated by the recent amendments, you know,
11 we want them in conformity. I recommend that -- that
12 you all go ahead and recommend that the -- and approve
13 the rule.
14 I don't have a strong opinion about the timing
15 of this because, as I say, the language being struck
16 here is already preempted by statute. I think that's
17 well known, you know. So, I'm -- I don't really have a
18 recommendation on immediate versus later effective date.
19 But, in any event, that's -- that's there. I
20 mean, the advantage of immediate is hopefully, you know,
21 within a period of time, you know -- you know, for
22 filing and what have you, you know, everybody will know
23 that's what's coming down the pike, if they don't
24 already. But that's the -- but if someone were to spend
25 money with a party pursuant to 702, they would

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1 absolutely risk, potentially, a violation of 16-948.
2 So, you know, there are stakes there that
3 would -- you know, there's both sides. On the -- on the
4 one hand it's not, you know, it's -- it's important that
5 these be aligned. But, as a legal matter, 702's
6 language we're striking is moot.
7 So, you know, there's arguments on both sides
8 for immediate. I think the question really becomes, in
9 my mind, if you believe there's any -- there's any
10 potential for people to be confused between 16-948 and
11 R2-20-702, I'd recommend that you make the rule
12 effective immediately. On the other hand, if -- if --
13 if we are not concerned about that, then I wouldn't.
14 So, you would be selecting between the first
15 effective motion language and the second top one. So,
16 number one under each category.
17 CHAIRWOMAN CHAN: Okay. Do any Commissioners
18 have questions for Tom?
19 COMMISSIONER KIMBLE: Madam Chair, this is
20 Commissioner Kimble.
21 CHAIRWOMAN CHAN: Commissioner Kimble.
22 COMMISSIONER KIMBLE: Tom, can we put
23 something into effect immediately? Does that require
24 unanimous vote?
25 MR. COLLINS: That's correct. It would

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1 require unanimous vote for -- for you to have it be
2 immediate.
3 Again, if you were, I mean, I think that the
4 best reason, and I would want to state this for the
5 record, is in order to ensure that there's no gap or
6 confusion between what 702 purports to allow but no
7 longer does and what 16-948 disallows.
8 COMMISSIONER KIMBLE: Okay. And -- and
9 unanimous is defined as everyone who's attending the
10 meeting, not all Commissioners?
11 MR. COLLINS: Correct. That's how the
12 Commission has carried out its business for -- since '98
13 or 2000, whenever the Commission was first assembled.
14 That is, in large part, because the statute
15 specifically, unlike many statutes, defines that three
16 commissioners is a quorum. Therefore, I think it's
17 clear that the drafters and the voters who passed that
18 aspect of it wanted the Commission to be able to operate
19 without all five commissioners being present.
20 CHAIRWOMAN CHAN: Anyone else?
21 COMMISSIONER KIMBLE: Okay.
22 CHAIRWOMAN CHAN: Commissioner Kimble, do you
23 have additional questions?
24 COMMISSIONER KIMBLE: No.
25 CHAIRWOMAN CHAN: Okay.

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1 MR. COLLINS: One other note I would make for
2 the record, we received no public comment on this amendment.
3 CHAIRWOMAN CHAN: Okay. Did somebody speak up
4 just now?
5 COMMISSIONER MEYER: This is Commissioner
6 Meyer.
7 I did have a question. And that is, Tom, is
8 there any reason not to make this immediate? Because it
9 seems as -- I mean, if this thing -- if this rule going
10 on the books is moot, then doesn't that mean that there
11 could be confusion?
12 MR. COLLINS: Mr. Chair -- Madam Chairman,
13 Commissioner Meyer, yes. I -- I -- I think, you know,
14 we're going to be doing our training starting this week,
15 for example. We will be making clear in those trainings
16 that the language that hasn't, you know, officially been
17 amended yet is to be ignored.
18 But, yes, I -- I think that's a crack that
19 someone could say, "Oh, I didn't know, how was I to
20 know?" kind of thing. We like to try to avoid those.
21 And that is -- and confusion is -- and simplification is
22 both a goal of the Commission and an express goal of the
23 Arizona Procedure's Act, so I think that that is a -- a
24 -- that's a good justification.
25 CHAIRWOMAN CHAN: Anyone else?

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1 Do -- Are we ready to take a vote on this,
2 Commissioners, or --
3 COMMISSIONER KIMBLE: Madam Chair, this is
4 Commissioner Kimble.
5 CHAIRWOMAN CHAN: Commissioner Kimble.
6 COMMISSIONER KIMBLE: I move that, pursuant to
7 A.R.S. 956(C) and (D), that the amendment to R2-20-702
8 be approved for immediate stay.
9 CHAIRWOMAN CHAN: Thank you. Do we have a
10 second?
11 COMMISSIONER MEYER: This is Commissioner
12 Meyer. I'll second the motion.
13 CHAIRWOMAN CHAN: All right. I'm going to
14 take a roll call vote. This time I will not forget the
15 next Commissioner from Tucson.
16 I'll start with Commissioner Kimble. How do
17 you vote?
18 COMMISSIONER KIMBLE: Aye.
19 CHAIRWOMAN CHAN: Commissioner Paton?
20 COMMISSIONER PATON: Aye.
21 CHAIRWOMAN CHAN: Commissioner Meyer?
22 COMMISSIONER MEYER: Aye.
23 CHAIRWOMAN CHAN: And I vote aye, as well.
24 All right. By your vote of four ayes, zero
25 nays, we have approved R2-20-702, the amendment to it,

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1 for -- with immediate effect.
2 Okay. We'll move on to the next proposed rule
3 amendment. Tom?
4 MR. COLLINS: Yes. Thank you.
5 Members, Madam Chairman and Committee Council
6 members -- or, Commission members, rather, the amendment
7 to Arizona Administrative Code R2-20-704 relates to the
8 repayment of Clean Elections funding.
9 You may recall, in some cases we have asked
10 for repayment of funds for various reasons. In so
11 doing, we had -- we've reviewed Rule 704 and found that
12 there is a, what appears to be a rule of limitations on
13 the Commission as far as recovering Clean Elections
14 funding from candidates. It is a -- it has -- it has a
15 number of problems.
16 First, I -- I do not -- it's not my experience
17 that the state allows the statute to run on a -- on a
18 debt like that as a statutory matter or a common law
19 matter. So the rule is kind of questionable on those
20 grounds and I'd hate to see it end up in litigation.
21 Number 2, you know, I think that policy idea
22 that if you wait a year you can just walk away from
23 whatever you might owe is inconsistent with the
24 Commission's obligations under 16-956 to ensure that
25 monies are paid into the Fund and out of the Fund as

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1 pursuant to the article -- or, pursuant to the --
2 pursuant to the Clean Elections Act.
3 Finally, R2-20-704 is not well drafted in that
4 it is ambiguous about the meaning of the word
5 "election." It just says "from the election." So --
6 which is, in a -- in a -- in a system that has a primary
7 and a general is not -- that's just not clear enough.
8 So -- so for the principal reasons I outlined
9 above, plus the -- the, sort of, confusing nature of it,
10 we recommend just eliminating this altogether. We think
11 it's, again, of questionable validity, questionable
12 consistency with the Commission's obligations, and
13 confusing. And for those three reasons we recommend the
14 deletion of the one-year rule-based limitation on
15 recovering Clean Elections funding that is owed to the
16 Fund.
17 And with that, I'll take your questions.
18 CHAIRWOMAN CHAN: Thank you, Tom.
19 Are there any questions? If not, I think,
20 Tom --
21 MR. COLLINS: Oh, yes. Sorry. I'm sorry.
22 CHAIRWOMAN CHAN: I was just going to ask
23 about the effect.
24 MR. COLLINS: Yes, of course. I'm sorry.
25 CHAIRWOMAN CHAN: No, that's all right.

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1 MR. COLLINS: I should have thought of that
2 myself.
3 Two things. One, we do believe that this
4 should be given effective -- immediate effect. We -- we
5 do not want candidates starting out the process without
6 knowing that they -- that the -- that this doesn't exist
7 any longer. And we don't want to end up in a situation
8 where we have some people who might be under one set of
9 rules and the other under another set of rules, because
10 it's just -- it's -- you know, even though no one will
11 be able to access Clean Elections funding until January,
12 it's just -- we just think this is an important thing to
13 communicate to folks.
14 Secondly, we received no public comment on
15 this rule whatsoever.
16 CHAIRWOMAN CHAN: All right. Thank you, Tom.
17 With that, do I have a motion?
18 Oh, does anybody have anything else to say,
19 though, first?
20 All right. With that, do I have a motion from
21 anybody?
22 COMMISSIONER MEYER: Madam Chair, this is --
23 COMMISSIONER KIMBLE: This is Commissioner
24 Kimble.
25 COMMISSIONER MEYER: -- Commissioner Meyer.

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1 COMMISSIONER KIMBLE: Go Ahead, Commissioner
2 Meyer.
3 COMMISSIONER MEYER: Madam Chair, I have a
4 motion.
5 CHAIRWOMAN CHAN: Okay.
6 COMMISSIONER MEYER: Madam Chair, I move that
7 pursuant to A.R.S. 956(C) and (D), that the amendment to
8 R2-20-704 be approved for immediate effect.
9 CHAIRWOMAN CHAN: Thank you.
10 Do we have a second?
11 COMMISSIONER KIMBLE: I have a point of clari-
12 -- no. I second it.
13 CHAIRWOMAN CHAN: Okay.
14 (Court reporter speaker clarification.)
15 CHAIRWOMAN CHAN: Oh, Commissioner Kimble just
16 seconded it.
17 Commissioner Kimble, before we take our vote,
18 did you want a point of clarification?
19 COMMISSIONER KIMBLE: No, I didn't. That's
20 fine.
21 CHAIRWOMAN CHAN: Okay. All right. In that
22 case, Commissioner Kimble, how do you vote?
23 COMMISSIONER KIMBLE: Aye.
24 CHAIRWOMAN CHAN: Commissioner Paton?
25 COMMISSIONER PATON: Aye.

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1 CHAIRWOMAN CHAN: Commissioner Meyer?
2 COMMISSIONER MEYER: Aye.
3 CHAIRWOMAN CHAN: And I vote aye.
4 And so we have approved, with immediate
5 effect, the amendment to R2-20-704. Thank you.
6 Moving on to R2-20-113. Tom?
7 MR. COLLINS: Yes. Madam Chairwoman and
8 members, the amendment to Rule R2-20-113 relates to
9 candidate statements.
10 And by way of background, as you know, we put
11 together a candidate statement pamphlet that is
12 delivered to every household in the state that -- where
13 a registered voter lives. We have, often have what I
14 would call straggler candidate statements. And this
15 specifically happens in the general election from the
16 primary where folks who won, it may not be top of mind
17 for them to realize that there's another addition of the
18 candidate pamphlet that will be coming and our
19 publication deadlines for that for are much more
20 accelerated than they are for the primary.
21 One of the solutions we have used when
22 possible with some candidates is to substitute their
23 primary candidate statement for a new general candidate
24 statement. And this rule provides that in the event
25 that we don't hear from a candidate and we don't have a

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1 statement from a candidate other than the primary
2 statement, we can use that -- we will use that primary
3 statement as the general statement.
4 With respect to this rule, I don't -- I don't
5 believe we need an immediate effective date because the
6 candidate statement pamphlet won't begin to be put
7 together before January 1.
8 And we received no public comment on this
9 rule. So . . .
10 CHAIRWOMAN CHAN: Okay. Thank you, Tom.
11 Commissioners, do you have any comments or
12 questions about the proposed amendment?
13 And, Tom, do you have a recommendation on the
14 effective date?
15 MR. COLLINS: As I said, Madam -- no, Madam
16 Chairwoman, Commissioners -- well, it doesn't matter.
17 I'm happy to readjust it. I'm sorry for my -- as I
18 said, the -- we don't reco- -- we don't see any need for
19 this to have an immediate effective date because it's --
20 because it doesn't -- that process is later in our
21 process.
22 CHAIRWOMAN CHAN: Okay. Thank you.
23 Commissioners, any questions?
24 COMMISSIONER KIMBLE: Madam Chair?
25 CHAIRWOMAN CHAN: Yes, Commissioner Kimble.

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1 COMMISSIONER KIMBLE: This is Commissioner
2 Kimble.
3 CHAIRWOMAN CHAN: Go ahead, Commissioner
4 Kimble.
5 COMMISSIONER KIMBLE: Should there be some
6 deadline in here that if you don't hear from them by X
7 date or X number of days before the general election?
8 MR. COLLINS: Well, let me -- let me take a --
9 CHAIRWOMAN CHAN: We must have a deadline, I
10 would think, that they have to submit for primary or
11 general.
12 Gina, do you want to --
13 MR. COLLINS: Yeah, Gina'S --
14 CHAIRWOMAN CHAN: Gina, just identify yourself
15 for the record.
16 MS. ROBERTS: Madam Chair, Commissioners, this
17 is Gina Roberts, Voter Education director for the
18 Commission.
19 What we have in the rules is that the deadline
20 will be established by the Commission staff. So that
21 allows us, based off of our print dates with our vender
22 that vary a lot, to determine that deadline after
23 consultation with the print office and the USPS. So we
24 prefer not to have an actual hard deadline in code.
25 So, usually we have plenty of time to collect

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1 our statements from the candidates and so we don't
2 really run into too many issues with deadlines there.
3 So we don't feel we need a deadline in the code.
4 CHAIRWOMAN CHAN: Okay. Thank you, Gina.
5 COMMISSIONER KIMBLE: Okay. So, just to
6 clarify, the candidates will know that if they do not
7 submit a statement by a certain date, their primary
8 statement will be used.
9 MS. ROBERTS: Madam Chair, Commissioner
10 Kimble, the rest of the Commissioners, yes. Yes. So we
11 are in constant communication with them to let them know
12 these are the deadlines that we have, because we also
13 have to have Spanish translation done. And so we will
14 -- usually our internal process is, our staff will
15 contact, through several means of communications, each
16 of these candidates who have not submitted a new
17 statement, and we let them know if we don't hear from
18 you by this date we will just go ahead and re-use your
19 primary statement.
20 And, quite frankly, that's actually assumed.
21 by most of the candidates who haven't turned them in.
22 The usual response we get in is, "Oh, I thought you just
23 re-used my primary."
24 So, it really is in line with what the
25 candidates were assuming would happen anyways.

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1 CHAIRWOMAN CHAN: Thank you, Gina.
2 COMMISSIONER KIMBLE: Okay. Thank you.
3 CHAIRWOMAN CHAN: Any other questions?
4 All right. With that, is -- do we have a
5 motion?
6 COMMISSIONER KIMBLE: Madam Chair, this is
7 Commissioner Kimble.
8 CHAIRWOMAN CHAN: Commissioner Kimble.
9 COMMISSIONER KIMBLE: I move that pursuant to
10 A.R.S. 956(C) and (D) that the amendment to R2-20-113 be
11 approved for immediate effect.
12 CHAIRWOMAN CHAN: All right. Thank you. Do
13 we have a second?
14 COMMISSIONER MEYER: Commissioner Meyer. I
15 second.
16 CHAIRWOMAN CHAN: Thank you, Commissioner
17 Meyer.
18 All right. With that, we'll take our roll
19 call vote.
20 Commissioner Kimble, how do you vote?
21 COMMISSIONER KIMBLE: Aye.
22 CHAIRWOMAN CHAN: Commissioner Paton?
23 COMMISSIONER PATON: Aye.
24 CHAIRWOMAN CHAN: Commissioner Meyer?
25 COMMISSIONER MEYER: Aye.

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1 CHAIRWOMAN CHAN: And I vote aye, as well.
2 And with that we have approved the amendment
3 to R2-20-113 with immediate effect.
4 And moving on to the amendment to R2-20-104.
5 Tom?
6 MR. COLLINS: Yes. Commissioners, Madam
7 Chair, Commissioners, this one gets a little more
8 complicated because we want to -- we have to take two
9 steps. And these are at the bottom of the motion
10 language. But just to give you the background, as a
11 direct result of -- of a candidate in the 2018 -- 2018
12 election who identified what at least is an ambiguity in
13 this -- in 113, or in 104(E) related to loans, that
14 candidate, how I would describe it, is that candidate
15 stacked their personal limit along with all of the
16 individual limits up to the seed money amount, and then
17 that candidate loaned themselves that amount.
18 We had not previously thought that that's what
19 the rule said, nor was it intended. It didn't turn out
20 to be a huge deal because that candidate never qualified
21 for Clean Elections funding.
22 However, that's where we started, with
23 language that we knew had at least -- at least an
24 ambiguity, if not -- if not outright suggesting that you
25 could stack these limits in a manner -- in the manner

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1 that this candidate did. So, that was problem one.
2 Problem two, and that we've talked about, we
3 tried to use the language that's been there, we think,
4 since approximately 2001, tried to work with the
5 ordinary language that was in the rule without changing
6 too much.
7 We did get a helpful public question or
8 comment from Eric Spencer, the former election director
9 and current partner at Snell & Wilmer, saying, you know,
10 the way you have these things set up it's not -- it's no
11 more clear. And, in fact, if you have a copy of the
12 comment, basically, it seems like it's transposing
13 contribution expendi- -- or, campaign expenditures with
14 campaign contributions. And, as a staff, we concluded
15 that's -- that that is correct.
16 We also went further, however, and realized
17 that what it looks like the original drafters of this
18 rule were doing was trying to cram together concepts
19 from up to three or four or five different statutes into
20 two sentences.
21 They wanted concepts from the definition of
22 contribution, which includes loans. They wanted all --
23 they wanted to lump together limiting language in 16-945
24 and 46, as well as 16-941(A) and (B). That is too much
25 work for two sentence to do.

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1 And, frankly, it -- it -- it's confusing.
2 What we realized upon review is that, really, the rule
3 was -- is -- is -- is not serving a purpose, because the
4 individual limits received money, the personal limits
5 for your own personal funds if you agree to run clean,
6 and the requirement that the individual donate --
7 contributions come from individuals, actually, are all
8 apparent on the face of the statute.
9 So we think that allowing the statute to speak
10 for itself provides actually a much more reliable
11 indicator for -- for candidates of what is allowed and
12 what is not allowed.
13 And, therefore, with all of this input and --
14 and reconsideration in mind, we would like to terminate
15 the rule proceeding -- existing rule proceeding
16 regarding R2-20-104. We'd also like to initiate a new
17 proceeding where we strike out Paragraph E from -- from
18 R2-20-104 altogether.
19 So, that's our -- that's our recommendation
20 there. And we think it's the right one. We think where
21 we can, it's easier to use -- to rely on the language of
22 the statute than it is to try to recapitulate the
23 statute in shorthand, for lack of a better way of
24 putting it.
25 So we -- we -- this is the under -- a plan of

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1 the undertaking we would like to see. So what you'll
2 see -- what we recommend is, A, a vote on termination
3 and, B, a vote on circulation of the -- of the
4 strike-out of -- of R2-21-104(E).
5 So, we've received, as I said, the one public
6 comment from Mr. Spencer. We received no other public
7 comments. And this really isn't an effective -- or,
8 this hasn't -- this does not have an effect -- immediate
9 effective date issue. Although, in order to assure the
10 voters -- or, candidates, rather, don't start loaning
11 themselves seed money in excess of the limits, you know,
12 when it comes back around, assuming there's been no
13 serious objections, we would probably recommend an
14 immediate effective date, you know, at that point. But
15 we'll see what we get.
16 Anyways, that's our recommended course of
17 action, Madam Chairwoman, and I'm available for any
18 questions.
19 CHAIRWOMAN CHAN: Thank you, Tom.
20 I would just have a comment. I think that is
21 why public comment is so necessary. I mean, even a
22 question from, of course, the previous election director
23 who's also well-versed in election law, can kind of
24 provoke additional thought and -- and comment and have
25 us reconsider what we're doing.

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1 So, with that, I would say I support Tom's
2 recommendation, but do the other Commissioners have any
3 questions? Comments? Concerns?
4 COMMISSIONER MEYER: This is Commissioner
5 Meyer. I do not have any other questions.
6 CHAIRWOMAN CHAN: Okay. If not, then perhaps
7 one of you would make a motion to terminate the
8 proceedings, the rule amendment proceeding, for
9 R2-20-104.
10 COMMISSIONER MEYER: Madam Chair, this is
11 Meyer. I can make a motion.
12 CHAIRWOMAN CHAN: All right.
13 COMMISSIONER MEYER: Madam Chair, I move that
14 the Commission terminate the rule amendment proceeding
15 for Rule R2-20-104.
16 CHAIRWOMAN CHAN: Thank you.
17 COMMISSIONER KIMBLE: This is Commissioner
18 Kimble and I second.
19 (Court reporter request on speaker
20 identification.)
21 CHAIRWOMAN CHAN: Oh, I'm sorry, that was
22 Commissioner -- I'm sorry, Commissioner Meyer made
23 the --
24 MR. COLLINS: Motion.
25 CHAIRWOMAN CHAN: -- motion, and Commissioner

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1 Kimble seconded. Thank you. And I apologize. I
2 forget, too, when they're on the phone if I recognize
3 their voice.
4 Okay. With that, we'll take a role call vote.
5 Commissioner Kimble, how do you vote?
6 COMMISSIONER KIMBLE: Aye.
7 CHAIRWOMAN CHAN: Commissioner Paton?
8 COMMISSIONER PATON: Aye.
9 CHAIRWOMAN CHAN: Commissioner Meyer?
10 COMMISSIONER MEYER: Aye.
11 CHAIRWOMAN CHAN: And I vote aye, as well.
12 So, by a vote of four to zero we have voted to
13 terminate the rule amendment proceeding in R2-20-104.
14 The next item for this piece of business would
15 be to initiate a new amendment, and we just need the
16 motion for that. And if one of you could identify
17 yourselves and make the motion, that would be great.
18 COMMISSIONER KIMBLE: Madam Chair, this is
19 Commissioner Kimble.
20 CHAIRWOMAN CHAN: Thank you.
21 COMMISSIONER KIMBLE: I move to pursuant to
22 16-956C-E that the amendment to R2-20-104 be published
23 for a public comment period of no less than 60 days.
24 CHAIRWOMAN CHAN: Thank you.
25 And do we have a second?

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1 COMMISSIONER MEYER: Commissioner Meyer, I
2 second the motion.
3 CHAIRWOMAN CHAN: Thank you, Commissioner
4 Meyer.
5 With that, I'll go ahead and take your votes.
6 Commissioner Kimble, how do you vote?
7 COMMISSIONER KIMBLE: Aye.
8 CHAIRWOMAN CHAN: Commissioner Paton?
9 COMMISSIONER PATON: Aye.
10 CHAIRWOMAN CHAN: Commissioner Meyer?
11 COMMISSIONER MEYER: Aye.
12 CHAIRWOMAN CHAN: And I vote aye, as well.
13 So, by a vote of four to zero we have
14 initiated a new amendment that will be published for a
15 comment period of no less than 60 days. Thank you,
16 Commissioners.
17 And moving on to Agenda Item V, public
18 comment, I see Rivko Knox is here. Would you like to
19 come up to the podium and identify yourself for the
20 record?
21 MS. KNOX: Thank you very much. My name is
22 Rivko Knox. I'm here representing the League of Women
23 Voters of Arizona.
24 I wanted to make a few very quick comments.
25 One is that the League, as I think you're all aware, had

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1 sent a letter to the governor indicating our grave
2 concern about the lack of new appointments to the
3 Commission, and so we would be very happy to receive a
4 copy of the ad when it's finalized with all the
5 requirements --
6 CHAIRWOMAN CHAN: Yes.
7 MS. RIVKO: -- because I think the
8 requirements are very significant for people who are
9 interested. And we will do our best to try to find, or
10 encourage those who meet the qualifications to submit
11 their names.
12 Depending -- I've forgotten. I don't know
13 everybody's -- in the League we normally do not know
14 people's registration, so as a result it's hard for me
15 to know who might meet the qualifications; one reason
16 I'm asking that.
17 A second quick comment is that, as I think
18 you're all aware, the League opposed Proposition 306.
19 Unfortunately, we were unsuccessful in persuading the
20 public to vote it down.
21 But that is one of the reasons that the League
22 is actively supporting the Clean Elections -- this
23 year's Clean Elections -- this year's Outlaw Dirty
24 Money; I'm sorry, in the wrong place at the wrong time
25 -- supporting the Outlaw Dirty Money, or Citizens' Right

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1 to Know Initiative.
2 I know that most people have no idea of the --
3 that is involved in the initiative because for most
4 people that whole issue of clean elections and GRRC and
5 all this other stuff is completely esoteric.
6 But that is, for us, a significant reason why
7 we're supporting it, along with our obvious ongoing
8 commitment to the idea of campaign finance reform.
9 And that -- if you have any questions, I'll be
10 happy to answer. That's all I wanted to say.
11 CHAIRWOMAN CHAN: Thank you.
12 Tom, did you have a comment?
13 MR. COLLINS: No. I don't think -- I mean, I
14 don't think we can.
15 CHAIRWOMAN CHAN: And, Rivko, I just want to
16 say thank you for offering to have the League amplify
17 our efforts to try to get as many qualified applicants
18 as possible to join the Commission. That would be
19 wonderful.
20 So, I see Mr. Edman is here. I don't know if
21 you have anything you wanted to say today.
22 MR. EDMAN: Thank you. Commissioner Chan and
23 -- and Commissioners. I'm Joel Edman with the Arizona
24 Advocacy Network.
25 As you know, we, along with the League, work

1 to support the work that you all do and try to protect
2 the work you all do at the state capitol, among others
3 things.
4 But I just wanted to introduce our new team
5 member, Adrienne Carmack, who is going to be attending,
6 I think, just about all of these meetings on our behalf.
7 So I'm sure you'll get to know her very well.
8 But that's all I had. Thank you so much.
9 CHAIRWOMAN CHAN: Thank you very much, Joel.
10 Thank you everybody for being here. And, you
11 know, I think the Commission certainly appreciates the
12 support that both organizations give us.
13 So, if there's no other public comment, I
14 think the next -- we just need a motion for adjournment.
15 Thank you, Tom.
16 Can I get a motion?
17 COMMISSIONER MEYER: Commissioner Meyer. I
18 move that we adjourn the meeting.
19 CHAIRWOMAN CHAN: Thank you, Commissioner
20 Meyer.
21 COMMISSIONER KIMBLE: Commissioner Kimble,
22 second.
23 CHAIRWOMAN CHAN: Thank you. All right.
24 Do we need to take a roll call vote?
25 MR. COLLINS: We need to take a vote.

1 CHAIRWOMAN CHAN: Oh, okay. Let's just,
2 everybody in favor, please say aye.
3 Aye.
4 COMMISSIONER KIMBLE: Aye.
5 COMMISSIONER PATON: Aye.
6 COMMISSIONER MEYER: Aye.
7 CHAIRWOMAN CHAN: Anybody opposed to
8 adjournment, please say no.
9 And with that, we are adjourned. See you guys
10 next month.
11 (Whereupon, the proceedings concluded at
12 10:18 a.m.)
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1 STATE OF ARIZONA)
2 COUNTY OF MARICOPA)
3 BE IT KNOWN the foregoing proceedings were
4 taken by me, that I was then and there a Certified
5 Reporter of the State of Arizona; that the proceedings
6 were taken down by me in shorthand and thereafter
7 transcribed into typewriting under my direction; that
8 the foregoing pages are a full, true, and accurate
9 transcript of all proceedings and testimony had and
10 adduced upon the taking of said proceedings, all done to
11 the best of my skill and ability.
12 I FURTHER CERTIFY that I am in no way
13 related to nor employed by any of the parties thereto
14 nor am I in any way interested in the outcome hereof.
15 DATED at Phoenix, Arizona, this 29th day of
16 July, 2019.
17
18 
19 Deborah L. Tucker
20 Certified Reporter #50464
21 and Notary Public
22 My Commission expires:
23 October 29, 2020
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		<p>46 (1) 30:24</p>		
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		6		
		<p>60 (6) 12:3,25,25;13:1; 34:23;35:15</p>		
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		<p>956C (3) 19:7;23:7;</p>		

**CITIZENS CLEAN ELECTIONS COMMISSION
EXECUTIVE DIRECTOR REPORT
September 26, 2019**

Announcements:

- The public can view Commission meetings live via the internet at www.livestream.com/cleanelections. A link is available on our website.
- Avery, Alec, Gina and Tom completed their training from the Secretary of State's Office, and are all certified election officers.
- I'd like to introduce Julian Arndt who started with the Commission staff on August 26th as the contracted Executive Support Specialist. Julian graduated last year from ASU with a Bachelor of Science in Public Policy & Public Service. Julian will be assisting & supporting staff with programs & projects for administration, campaign finance & enforcement for the current 2019-2020 election cycle.

Voter Education:

Elections:

- Local elections will be held on November 5th.
 - Voter registration deadline = Monday, October 7, 2019
 - Early voting begins = Wednesday, October 9, 2019
- There are approximately 48 school district elections occurring across the state. A voter education video was filmed with Tom and Christine Thompson, President and CEO of Expect More Arizona, to educate voters on school district bonds and override elections.

Community Outreach/Events

- Chairman Kimble spoke about Clean Elections to members of the League of Women Voters Southern Arizona in Tucson.
- Gina participated in the Secretary of State's statewide election security conference calls with county election officials, and also participated in the Governor's National Governor's Association Policy Academy home team meetings for election security.
- Avery participated in the ITCA/Native Vote Session in Sedona.
- Avery participated in the SOS's Voter Outreach Advisory Committee meetings.
- Avery participated in the Arizona Commission of African American Affairs meetings.
- Avery, Tom and Gina participated in the Yavapai County Follow Your Ballot Tour, hosted by the Yavapai County Recorder, Leslie Hoffman, her staff, and the Elections Department. CCEC and Yavapai County also discussed voter education efforts for the Presidential Preference Election.
- Avery, Gina and Tom participated in the Maricopa County Recorder's roundtable event for voters with disabilities.
- Avery participated in the Maricopa County Recorder's roundtable event for African American voters.
- Avery and Alec hosted a voter registration event at the YMCA Maryvale location in celebration of Constitution Week. This kicks off a monthly commitment from CCEC to provide voter registration services to the YMCA community.
- Alec, Avery, Julian and Gina partnered with ASU Undergraduate Student Government for National Voter Registration Day (September 24th) and registered students on campus.

Miscellaneous

- **Outstanding legal matters**
 - Legacy Foundation Action Fund
 - AZAN v. State et. al.

NOTICES OF PROPOSED RULEMAKING

This section of the *Arizona Administrative Register* contains Notices of Proposed Rulemakings.

A proposed rulemaking is filed by an agency upon completion and submittal of a Notice of Rulemaking Docket Opening. Often these two documents are filed at the same time and published in the same *Register* issue.

When an agency files a Notice of Proposed Rulemaking under the Administrative Procedure Act (APA), the notice is published in the *Register* within three weeks of filing. See the publication schedule in the back of each issue of the *Register* for more information.

Under the APA, an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for making, amending, or repealing any rule (A.R.S. §§ 41-1013 and 41-1022).

The Office of the Secretary of State is the filing office and publisher of these rules. Questions about the interpretation of the proposed rules should be addressed to the agency that promulgated the rules. Refer to item #4 below to contact the person charged with the rulemaking and item #10 for the close of record and information related to public hearings and oral comments.

NOTICE OF PROPOSED RULEMAKING

TITLE 2. ADMINISTRATION

CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

[R19-158]

PREAMBLE

- | | |
|--|--|
| <p>1. <u>Article, Part, or Section Affected (as applicable)</u>
R2-20-104</p> | <p><u>Rulemaking Action</u>
Amend</p> |
|--|--|
- 2. Citations to the agency's statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific):**
 Authorizing statute: A.R.S. § 16-956(A)(7)
 Implementing statute: A.R.S. 16-941(A)-(B)
- 3. Citations to all related notices published in the Register as specified in R1-1-409(A) that pertain to the record of the proposed rule:**
 Notice of Proposed Rulemaking: 25 A.A.R. 1411, June 14, 2019
 Notice of Rulemaking Docket Opening: 25 A.A.R. 1456, June 14, 2019
 Notice of Termination of Rulemaking: 25 A.A.R. 2129, August 23, 2019 (*in this issue*)
 Notice of Rulemaking Docket Opening: 25 A.A.R. 2130, August 23, 2019 (*in this issue*)
- 4. The agency's contact person who can answer questions about the rulemaking:**
 Name: Thomas M. Collins
 Address: Citizens Clean Elections Commission
 1616 W. Adams, Suite 110
 Phoenix, AZ 85007
 Telephone: (602) 364-3477
 E-mail: ccec@azcleelections.gov
 Website: www.azcleelections.gov
- 5. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:**
 R2-20-104: By elimination subsection A.A.C. R2-20-104(E), the Commission proposes to ensure that candidates and others know that the contribution and expenditure limits which apply to them, continue to apply to them regardless of the form of contribution, including loans. Prior language had lead to confusion about how those limits apply, and public comment from an expert in the election law field confirmed that conclusion. The amendment is the result of analysis of the rule during the 2018 election cycle, a 2019 proposed rule amendment that was later withdrawn, and is consistent with stakeholder practices and the Commission's understanding of the rule's intent.
- 6. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**
 Not applicable
- 7. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**
 These changes do not diminish a previous grant of authority to a political subdivision of this state.
- 8. The preliminary summary of the economic, small business, and consumer impact:**
 There is no economic or consumer or small business impact other than that imposed by statute.



9. The agency's contact person who can answer questions about the economic, small business and consumer impact statement:

Name: Thomas M. Collins
Address: Citizens Clean Elections Commission
1616 W. Adams, Suite 110
Phoenix 85007
Telephone: (602) 364-3477
E-mail: ccec@azcleelections.gov
Website: www.azcleelections.gov

10. The time, place, and nature of the proceedings to make, amend, repeal, or renumber the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

Pursuant to A.R.S. § 16-956, a 60 day public comment period precedes an oral hearing which is the earliest the Commission may act on a proposed rule. Rule comments are accepted, in addition, through the web site, email, and regular mail, as well as at call to the public at interim meetings. Rules that are passed unanimously may be made effective immediately. All other approved rules are effective January 1. A.R.S. § 16-956(C), (D).

11. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

Not applicable

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

No

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

No

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:

No

12. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

Not applicable

13. The full text of the rule follows:

TITLE 2. ADMINISTRATION

CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

ARTICLE 1. GENERAL PROVISIONS

Section

R2-20-104. Certification as a Participating Candidate

ARTICLE 1. GENERAL PROVISIONS

R2-20-104. Certification as a Participating Candidate

- A. No change
 - 1. No change
 - 2. No change
 - 3. No change
 - 4. No change
 - 5. No change
 - 6. No change
- B. No change
 - 1. No change
 - 2. No change
 - 3. No change
 - 4. No change
- C. No change
 - 1. No change
 - 2. No change
 - 3. No change
 - 4. No change
 - 5. No change
 - 6. No change
 - 7. No change
 - 8. No change



9. No change
 10. No change
 11. No change
- D.** No change
1. No change
 2. No change
 3. No change
 4. No change
 5. No change
 - a. No change
 - b. No change
 6. No change
- E.** ~~Loans. A participating candidate may accept an individual contribution as a loan or may loan his or her campaign committee personal monies during the exploratory and qualifying periods only. The total sum of the contributions received or personal funds and loans shall not exceed the expenditure limits set forth in A.R.S. § 16-941(A)(1) and 2. If the loan is to be repaid, the loans shall be repaid promptly upon receipt of clean elections funds if the participating candidate qualifies for clean elections funding. Loans from a financial institution or bank, to a candidate used for the purpose of influencing that candidate's election shall be considered personal monies and shall not exceed the personal monies expenditure limits set forth in A.R.S. § 16-941(A)(2).~~
- FE.** No change
- GE.** No change

Proposed Amendment Language for R2-20-209 Re: investigations.

Recommendation: Approve amended language for 60-day public comment period.

Proposed Language:

R2-20-209. Investigation

A. THE EXECUTIVE DIRECTOR OR ANY OTHER PERSON DESIGNATED BY THE EXECUTIVE DIRECTOR shall conduct an investigation in any case in which the Commission finds reason to believe that a violation of a statute or rule over which the Commission has jurisdiction has occurred or is about to occur.

B. THE INVESTIGATION may include, but is not limited to, field investigations, audits, and other methods of information gathering.

R2-20-209. Investigation

A. The Commission shall conduct an investigation in any case in which the Commission finds reason to believe that a violation of a statute or rule over which the Commission has jurisdiction has occurred or is about to occur.

B. The Commission's investigation may include, but is not limited to, field investigations, audits, and other methods of information gathering.

CITIZENS CLEAN ELECTIONS COMMISSION

Report on Agreed-Upon Procedures

**Rebecca Speakman - Full Examination
Participating Candidate for
State Senator - District 26
General Election 2018**

ITEM VII



Independent Accountants' Report on
Applying Agreed-Upon Procedures

To the Chairman and Members of the
Citizens Clean Elections Commission
Phoenix, Arizona

We (the Contractor) have performed the procedures enumerated below, which were specified and agreed to by the State of Arizona Citizens Clean Elections Commission (the Commission), solely to assist the Commission in evaluating whether Rebecca Speakman (the Candidate) Campaign finance reports for both the General Recap (October 21, 2018 to November 6, 2018) and the 2018 4th Quarter (October 21, 2018 to December 31, 2018) reporting periods were prepared in compliance with Title 16, Articles 1 and 2 of the Arizona Revised Statutes, Campaign Contributions and Expenses, and the Citizens Clean Elections Act, and whether the reports complied with the rules of the Citizens Clean Elections Commission. The Candidate's management is responsible for the General Recap and 4th Quarter Reports. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

The summary of procedures and associated findings are presented on the subsequent pages.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. We were not engaged to, and did not conduct an examination or review, the objective of which would be the expression of an opinion or conclusion, respectively, on the General Recap and 4th Quarter Campaign finance reports of Rebecca Speakman. Accordingly, we do not express such an opinion or conclusion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the parties listed in the first paragraph, and is not intended to be and should not be used by anyone other than those specified parties.

Fester & Chapman, PLLC
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September 16, 2019

Summary of Procedures and Findings

1. Fieldwork Procedures

- a) Commission staff will contact the candidate to request the records for agreed-upon procedures attest engagement. Candidates receiving audits after the General Election shall provide records from the election cycle through the 4th Quarter Report.

Finding

We obtained both the General Recap (October 21, 2018 to November 6, 2018) and the 2018 4th Quarter (October 21, 2018 to December 31, 2018) Campaign finance reports from the Arizona Secretary of State's Website.

- b). Commission staff will provide the records to the Contractor upon receipt. The contractor shall contact the candidate and/or his or her representative(s) to discuss the purpose of the engagement, the general procedures to be performed and potential future requirements of the candidate, such as possible repayments to the Fund.

Finding

Commission staff sent an initial notice of additional full audit selection to the Candidate and informed the Candidate that we would be contacting them. We then communicated to the Candidate in a written request, the purpose of the request, agreed-upon procedures to be performed, documentation needed, and potential future requirements of the Candidate

- c) Review bank statements for each of the months in the reporting period and perform the following:
 - (i) Select 100% of the deposits and withdrawals from the bank statements and determine that the transaction is properly reflected in the candidate's records and campaign finance report.

Finding

We selected the entire population of withdrawals and deposits from the bank statements for the periods under review and determined that they appeared to be properly recorded in the Candidate's Campaign finance reports, with the following exceptions: (a) a credit on the Campaign account bank statement for \$20.00 was not listed on the Campaign finance reports; (b) a withdrawal for excess Campaign funds returned to CCEC of \$2,771.53 was not listed on the Campaign finance reports; (c) two additional withdrawals on the Campaign account bank statements which totaled \$28.82 were not listed on the Campaign finance reports.

- (ii) Perform a proof of receipts and disbursements for the reporting period.

Finding

Proof of receipts and disbursements was performed for the reporting period with the following exceptions: (a) the Campaign bank account listed a \$0.00 balance, but the 4th Quarter Campaign finance report listed an ending balance of \$2,511.53; (b) a credit on the Campaign account bank statement for \$20.00 was not listed on the Campaign finance reports; (c) a withdrawal for excess Campaign funds returned to CCEC of \$2,771.53 was not listed on the Campaign finance reports. The Candidate was unable to provide support for this payment, but we were able to review support provided by CCEC; (d) two additional withdrawals on the Campaign account bank statements which totaled \$28.82 were not listed on the Campaign finance reports. The net result of these differences was a remaining unreconciled variance of \$268.82.

- d) Select 100% cash expenditures reported in the candidate's campaign finance report, and perform the following:

- (i) Review supporting invoice or other documentation and agree amount to the amount reported in the candidate's finance report.

Finding

We reviewed nine expenditures and agreed amounts to supporting invoices or other documentation to the Candidate's Campaign finance report without exception.

- (ii) Determine that the name, address and nature of goods or services provided agree to the information reported in the candidate's campaign finance report.

Finding

We reviewed nine expenditures and agreed the name, address, and nature of goods or services provided in the Candidate's Campaign finance report without exception.

- Agree the amount of the expenditure to the campaign account bank statement.

Finding

We reviewed nine expenditures and agreed amounts to the Campaign account bank statements without exception.

- (iii) Determine whether the expenditure was made for a direct campaign purpose. Direct campaign purpose includes, but is not limited to, materials, communications, transportation, supplies and expenses used toward the election of the candidate.

Finding

We reviewed nine expenditures and determined that all appeared to have been made for direct campaign purposes, except for two exceptions: these two expenditures, totaling \$265.00 were payments to the Arizona Secretary of State for fees/penalties for filing various Campaign reports late. These expenditures are not allowable Campaign expenditures per Clean Elections rules.

- If the expenditure is a joint expenditure made in conjunction with other candidates, determine that the amount paid represents the candidate's proportionate share of the total cost.

Finding

None of the expenditures we tested appeared to be for joint expenditures.

- e) Determine whether any petty cash funds have been established and, if so, determine how expenditures from these funds have been reflected in the accounting records. Determine whether aggregate petty cash funds exceed the limit of \$1,460.

Finding

Based on inquiry of the Candidate, the Candidate did not establish a petty cash fund during the periods under review.

- (i) If applicable, judgmentally select a sample of expenditures made from the candidate's petty cash fund(s) and obtain supporting documentation for the expenditure. Determine whether the expenditure was for a direct campaign expense and whether the expenditure was in excess of the \$160 limit on petty cash expenditures.

Finding

Based on inquiry of the Candidate, the Candidate did not establish a petty cash fund during the periods under review.

- f) Determine whether a legal defense fund has been established.

Finding

Based on inquiry of the Candidate, the Candidate did not establish a legal defense fund during the periods under review.

- (i) If a legal defense fund was established, how was it accounted for?

Finding

Based on inquiry of the Candidate, the Candidate did not establish a legal defense fund during the periods under review.

- g) Contact the candidate and/or his or her representative(s) to discuss the preliminary engagement findings and recommendations that the Contractor anticipates presenting to the CCEC. During this conference, the Contractor will advise the candidate and/or his or her representative(s) of their right to respond to the preliminary findings and the projected timetable for the issuance of the final issuance of the report.

Finding

We discussed our findings with the Candidate and the Candidate did not provide responses to our findings.

ARIZONA SUPREME COURT

STATE OF ARIZONA, *ex rel.*
MARK BRNOVICH, Attorney General

Appellant/Petitioner,

v.

ARIZONA BOARD OF REGENTS,

Appellee/Respondent.

CV–

Court of Appeals
No. 1 CA-CV 18-0420

Maricopa County Superior Court
No. CV2017-012115

STATE OF ARIZONA *EX REL.* MARK BRNOVICH, ATTORNEY GENERAL'S PETITION FOR REVIEW

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ITEM VIII

INTRODUCTION

This Petition presents a critical question about the rule of law and separation of powers in Arizona. This Court has held, consistent with statutory authority, that the Attorney General (“AG”) may “go to the courts for protection of the rights of the people.” *State ex rel. Morrison v. Thomas*, 80 Ariz. 327, 332 (1956). Such authority is necessary to protect constitutional rights that would otherwise go unenforced and does not make the AG a “dictator” because “the courts alone [will] in all such cases make the final decisions and not the [AG].” *Id.*

Four years after *Morrison*, this Court did an about-face and interpreted “prosecute” in A.R.S. § 41-193(A)(2) as not granting the AG authority to initiate suit. *See Ariz. State Land Dep’t v. McFate*, 87 Ariz. 139, 144-46 (1960). That decision, and the conclusion by lower courts that the First Amended Complaint (“FAC”) does not allege a payment of public monies under A.R.S. § 35-212, has been dispositive in this case.

While bound by *McFate*, **all three** Court of Appeals judges agreed its interpretation “appears to be flawed.” *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 2019 WL 3941067 at *4 ¶22 (App. Aug. 20, 2019) (mem. decision) (special concurrence). The Court of Appeals was right about *McFate*. And, in any event, the FAC clearly alleges a payment of public monies under § 35-212. This Court should grant review and reverse the judgment of dismissal.

ISSUE PRESENTED

1. Did the courts below err by dismissing the FAC for lack of jurisdiction? This issue encompasses:
 - a. whether § 41-193(A)(2) authorizes the AG’s suit;
 - b. whether § 35-212 authorizes the AG’s suit; and
 - c. whether dismissal was required on a different threshold ground—political question or legislative immunity.

FACTUAL BACKGROUND

The AG sued ABOR related to tuition and fees at the State’s public universities. R.1 ¶¶54-98; R.16 ¶¶53-97. Counts I-V of the FAC allege ABOR is violating (1) Article XI, § 6 of the Arizona Constitution, which mandates “the instruction furnished [at the universities] shall be as nearly free as possible,” and (2) statutory provisions in A.R.S. Title 15. R.16 ¶¶53-91. Count VI alleges ABOR is making illegal payments of public monies under § 35-212 by paying state subsidies to cover the costs of instruction for students who pay less than cost to attend the universities but are ineligible for such benefits under Proposition 300. R.16 ¶¶92-97.¹

ABOR moved to dismiss for lack of jurisdiction. R.10-14. The Superior Court granted dismissal based on limits on the AG’s authority to institute suit. R.30, 34. The AG specifically noted in his Response to the MTDs (R.17 at 3 n.2) that he would seek *McFate*’s reversal in this Court.

¹ ABOR subsequently rescinded its subsidies for ineligible students, but the FAC seeks *recovery* of the illegally paid monies. *Id.* at 20 ¶3.

The Court of Appeals affirmed, concluding the AG lacked authority under § 41-193(A)(2) and had not challenged a “payment” under § 35-212. *Brnovich*, 2019 WL 3941067 at *3 ¶¶12-16.² However, **all three** panel judges specially concurred to explain that *McFate*’s “interpretation of ‘prosecute’ in A.R.S. § 41-193(A)(2) appears to be flawed.” *Id.* at *4 ¶22 (special concurrence). *McFate* “overlooks substantial evidence of the plain meaning of the phrase in 1953 when the legislature amended the 1939 Code 4-607(a) to authorize the [AG] to ‘prosecute and defend’ actions, and adopts an interpretation that ascribes different meanings to ‘prosecute’ within the same sentence.” *Id.*

REASONS THE COURT SHOULD GRANT REVIEW

- I. **The Court Should Overrule *McFate*’s “Flawed” Interpretation of § 41-193(A)(2)**
 - A. **Plain Language, Secondary Factors, And Case Law *Uniformly* Support One Conclusion—§ 41-193(A)(2) Authorizes The AG To Initiate Suit In Matters Of State Concern**

Plain language. Section 41-193(A)(2)’s plain language authorizes the AG to initiate suit. Courts look to plain language as the “best indicat[or]” of legislative intent and apply clear language “unless an absurd or unconstitutional result would follow.” *Premier Physicians Grp. v. Navarro*, 240 Ariz. 193, 195 ¶9 (2016).

“Absent statutory definitions, courts apply common meanings, and may look to

² The AG unsuccessfully sought transfer to this Court and filed an original petition, jurisdiction over which was declined. *See* Case Nos. T-19-0002-CV, CV-19-0027.

dictionaries.” *State v. Pena*, 235 Ariz. 277, 279 ¶6 (2014). Section 41-193(A)(2) states, “[t]he department of law shall ... when deemed necessary by the [AG], prosecute ... any proceeding ... in which the state ... has an interest.”

The common meaning of “prosecute” includes instituting civil actions.

“1. Law a. To initiate or conduct a criminal case against ... b. To initiate or conduct (a civil case or legal action) ... c. To initiate or conduct legal proceedings regarding (an offense, for example)[.]”

The American Heritage Dictionary of the English Language 1414 (5th ed. 2011); *see also Black’s Law Dictionary* 1476 (11th ed. 2019) (“1. To commence and carry out (a legal action)<because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>.”). And dictionaries show the word also meant this when § 41-193(A)(2) was amended in 1953:

PROSECUTE. ... To “prosecute” an action is not merely to commence it, but includes following it to an ultimate conclusion.

PROSECUTION. ... The term is also frequently used respecting civil litigation; and includes every step in an action from its commencement to its final determination.

Black’s at 1450-51 (3d ed. 1933); *accord Black’s* at 1385 (Revised 4th ed. 1968).

Prosecute: ... *Intransitive*: ... 2. Law. To institute and carry on a legal suit or prosecution....

Prosecution ... 2. *Law*. a The institution and carrying on of a suit or proceeding in a court of law or equity....

Webster's New Int'l Dictionary of the English Language at 1987 (2d ed. 1947).³

Courts interpreting “prosecute” for attorney-general powers have thus concluded that “prosecute” plainly includes instituting civil actions. *E.g.*, *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270-71 & n.16 (5th Cir. 1976) (citing *Black's* and cases from 1911 to 1971); *State v. Valley Sav. & Loan*, 636 P.2d 279, 281 (N.M. 1981) (citing 1948 case interpreting “prosecute” using *Webster's* and court decisions).

Secondary factors. Section 41-193(A)(2) is not ambiguous, but secondary factors nevertheless confirm that it authorizes initiating actions. Courts “determine [ambiguous statutes’] meaning by considering secondary factors, such as ... context, subject matter, historical background, effects and consequences, and spirit and purpose.” *Premier Physicians Grp.*, 240 Ariz. at 195 ¶9.

Following the people’s vote to create a Department of Law under the AG’s direction “to properly administer the legal affairs of the state,” the Legislature in 1953 revised the AG’s duties in two critical ways. *See* 1939 Code § 4-606 (1954 supp.) (reproducing 1952 SCR No. 10). First, the Legislature added that the AG “shall serve as chief legal officer of the state.” 1939 Code § 4-609(a) (1954 supp.), codified at A.R.S. § 41-192(A). In Arizona and elsewhere, “chief legal officer” is a

³ Courts cited these dictionaries. *See State v. Dickens*, 66 Ariz. 86, 92 (1947); *Marquez v. Rapid Harvest Co.*, 89 Ariz. 62, 66 (1960).

term of art used in conjunction with common-law powers. *See Shute v. Frohmiller*, 53 Ariz. 483, 492 (1939); *see also Shevin*, 526 F.2d at 268. Therefore, that language indicates legislative intent to confer on the AG statutory power similar to other “chief legal officers,” including the power to initiate actions. *See U.S. v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888) (words familiar in common law must be interpreted in statute with reference to common-law meaning); *Shevin*, 526 F.2d at 270-71 (“no doubt” common-law power to “prosecute” includes initiating suit).

Second, the Legislature added that the Department of Law shall “at the direction of the governor or when deemed necessary by the attorney general, prosecute and defend any cause....” *Id.* § 4-607(a)(2) (1954 supp.) (addition underlined), codified as amended at A.R.S. § 41-193(A)(2). This addition textually equated the AG’s power with the Governor’s in this area and confirmed each could order the initiation of suit.

And it was appropriate and constitutional for the Legislature to authorize the AG to initiate actions “when deemed necessary” by him because attorneys general elsewhere traditionally and presently have this authority. *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 645 n.47 (W. Va. 2013) (identifying 35 states with common-law powers, 8 without, and 6 indeterminate); Committee on the Office of Attorney General, Nat’l Ass’n of Attorneys General, *Common Law Powers of State Attorneys General* 26-27 (1980) (identifying 35 with, 7 without,

and 8 undecided); Emily Myers, *State Attorneys General Powers and Responsibilities* 29 & n.12 (3d ed. 2013) (“Although each jurisdiction varies in [what] common law authority is recognized, cases affirming ... use of those traditional powers are legion.”).

Case Law. Three years after the people’s vote and 1953 statutory amendments, this Court interpreted § 41-193(A)(1), which includes the *identical* word “prosecute.” *Morrison*, 80 Ariz. at 332. Under *Morrison*, “it follows from [§ 41-193(A)](1) that the [AG] is the proper state official *to institute* the action. In doing so he acts as the ‘chief legal officer’ of the State.” *Id.* at 332 (emphasis added); *see also id.* (The AG “may, like the Governor, go to the courts for protection of the rights of the people.”). Given its timing, *Morrison* (which remains good law) is excellent evidence of what “prosecute” means here.

B. *McFate’s* Outlier Interpretation of “Prosecute” Should Be Overruled

The unanimous special concurrence correctly recognized that *McFate’s* interpretation of “prosecute” is “flawed,” *Brnovich*, 2019 WL 3941067 at *4 ¶22, and this Court should overturn *McFate*. “It is not the function of the courts to rewrite statutes.” *Lewis v. Debord*, 238 Ariz. 28, 31-32 ¶11 (2015). But *McFate* did exactly that. To reach its desired policy result, *McFate* contravened § 41-193(A)(2)’s plain language and secondary interpretive factors. *See supra* 3-7. The word “prosecute” in § 41-193(A)(2) “would have been understood by the

legislature in 1953 to include both the initiation and pursuit of proceedings, whether they be at ‘the direction of the governor or when deemed necessary by the attorney general.’” *Brnovich*, 2019 WL 3941067, at *6 ¶33 (special concurrence). Because of this, *McFate*’s construction of “prosecute” is internally inconsistent even within (A)(2). *See* 87 Ariz. at 148. The word “prosecute” in (A)(2) modifies *both* the Governor’s and AG’s powers, meaning any limit on “prosecute” would land equally on both the Governor and the AG, not just the AG.

McFate’s construction of “prosecute” is also inconsistent with the phrase “when deemed necessary by the [AG].” The most logical and natural reading of that language is that the AG has authority to determine when to initiate suit, not just how to conduct it after commencement, because “when” “signal[s] a point in time related to the occurrence of a specific event.” *See Brewer v. Burns*, 222 Ariz. 234, 239 ¶27 (2009).

McFate’s erroneous interpretation can properly be overruled under this Court’s decisions discussing stare decisis. *McFate* should be subject to a lower standard for reversal because it is based not on statute but on concerns about court-made ethics rules and the constitutional structure of Arizona’s executive branch. *See State v. Hickman*, 205 Ariz. 192, 201 ¶38 (2003) (recognizing “subject matter” determines threshold for reversal under stare decisis). *McFate* concluded the AG’s “fundamental obligation ... is to act as legal advisor” and that an “assertion ... in a

judicial proceeding of a position in conflict with a State department is inconsistent with his duty as its legal advisor.” 87 Ariz. at 143-44. *McFate* also concluded the Constitution delegated authority to initiate litigation for the public interest to the Governor. *Id.* at 148.

But the AG’s dual role of legal advisor and people’s lawyer is not absurd or unconstitutional and does not improperly infringe on the Governor’s powers. This dual role flows from having a separately elected attorney general, who answers to the people. Instituting suit is a traditional function of the office, and a *majority* of states empower their attorneys general to serve this role. *See supra* 6-7. *McFate* lacked any analysis of the prevalence of this dual role in other states, including those with elected attorneys general. *See* 87 Ariz. at 141-48. It is this Court’s duty to correct *McFate*’s error in contravening a plain statutory provision based on extra-textual, misplaced policy concerns.

Even as a statutory interpretation case, however, *McFate* still should be overruled. This Court set forth five factors for when stare decisis permits overturning a prior statutory interpretation—*all* are met here. *See Lowing v. Allstate Ins.*, 176 Ariz. 101, 107 (1993). First, as explained above, § 41-193(A)(2)’s language does not compel *McFate*’s conclusion; in fact, *McFate*’s analysis contravenes the plain language. Second, *McFate*’s analysis violates the policies underlying the 1953 amendments to the AG’s duties. Third, *McFate*’s

concerns were the Governor’s powers and legal ethics, which can be better accommodated through ethical screens and outside counsel practices rather than a bright-line rule on AG authority that is at odds with the statutory language. Fourth, overruling *McFate* would return Arizona law to the earlier *Morrison* interpretation, which aligns with § 41-193(A)(2)’s plain language, is more contemporaneous to the 1953 statutory amendments, and is better reasoned, particularly as to promoting the rule of law.⁴ Fifth, this case shows that *McFate* has produced deleterious results because, unbound by meaningful judicial review, ABOR has increased tuition in lock-step across the universities contrary to the “as nearly free as possible” provision and ignored statutes, including Proposition 300.

Courts have recognized that stare decisis carries less weight when reliance interests are not at stake or in cases involving how courts function. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)); *see also White v. Bateman*, 89 Ariz. 110, 113 (1961) (stare decisis “grounded on public policy” is tied to knowledge of rights and reliance on such rights). Here, overruling *McFate* relates to how the courts function. It would

⁴ *McFate*’s construction of “prosecute,” compared to *Morrison*’s earlier construction of that word in § 41-193(A)(1), flouted the venerable canon that “identical words used in different parts of the same act are intended to have the same meaning.” *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 860 (1986).

not change underlying substantive law or create new causes of action; it only permits a mechanism for challenging violations of existing law.

Overruling *McFate* also would not disrupt other precedent generally stating that the AG has no common-law powers. That precedent stands for: 1) statute can authorize state agencies to use counsel other than the AG, and 2) the AG has no common-law powers in criminal matters. Ct. App. Opening Brief at 44 nn.14-15. Interpreting § 41-193(A)(2) as authorizing the AG to go to court to protect the people’s rights will not disrupt those holdings.⁵

Finally, legislative acquiescence is inapplicable here, given “the absence of some affirmative indication that the legislature considered and approved of [the court’s construction].” *Lowing*, 176 Ariz. at 106; accord *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 314 ¶24 (2017). There is no such indication here in any subsequently enacted statutes or amendments to § 41-193. Ct. App. Reply Brief at 18, 20.

⁵ Because § 41-193(A)(2) confers authority to initiate suit, this Petition takes no position on whether the Arizona Constitution confers common-law powers on the AG and what implied limitations exist on the Legislature abrogating such powers. Compare *Shute v. Frohmiller*, 53 Ariz. 483, 488 (1939) (no AG common-law powers), with *Merrill v. Phelps*, 52 Ariz. 526, 530 (1938) (sheriffs have common-law powers), and *Hudson v. Kelly*, 76 Ariz. 255, 266 (1953) (Legislature cannot eliminate all duties of a constitutional office).

II. In Holding That § 35-212 Did Not Authorize The AG’s Suit, The Courts Below Incorrectly Decided An Important Issue of Law

In addition to § 41-193(A)(2), section 35-212 also authorizes the FAC. This is because Count VI expressly alleged an illegal payment of public monies under § 35-212. *See, e.g.*, R.16 ¶¶93, 97. And those allegations withstand a Rule 12 motion. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012). Accordingly, the courts below erred in dismissing Count VI based on concluding that the FAC had not challenged a payment, as required under § 35-212.

A. Count VI Challenges An Illegal Payment Of Public Monies Under § 35-212 As Interpreted by *Woods*

The AG’s claim in Count VI concerns the payment of public monies, specifically the monies paid to cover the cost of instruction for students who pay less than cost to attend the universities. R.16 ¶¶93, 97. By providing below-cost tuition to ineligible students, ABOR necessarily pays the difference between the below-cost subsidized rate and the actual cost of instruction. This is exactly the type of payment this Court said could be challenged under § 35-212 in *State ex rel. Woods v. Block*. *See* 189 Ariz. 269, 274 (1997) (“We conclude that the [AG’s] request to prohibit CDC from exercising its power to litigate *necessarily includes* a request to prohibit payment for such litigation.” (emphasis added)). The AG’s

allegations do not concern merely “collecting tuition.” *See Brnovich*, 2019 WL 3941067 at *3 ¶15.⁶

B. Counts I-V Are Factually Intertwined With Count VI And Thus Also Authorized by §§ 35-212 or 41-193(A)(2)

The AG is also authorized to assert FAC Counts I-V based on properly pleading Count VI under § 35-212. Once the AG properly pleads a § 35-212 claim, other factually related claims are also authorized. *See Woods*, 189 Ariz. at 273 (requiring only that AG’s “[s]tanding ... be linked to some statutory basis” and recognizing that AG “may use ‘any ethically permissible argument’ to prevent the illegal payment of public monies” (quoting *Fund Manager v. Corbin*, 161 Ariz. 348, 354 (App. 1988))). In addition, if Count VI states a § 35-212 claim, then the AG has validly instituted a proceeding and has authority to “prosecute” that proceeding pursuant to § 41-193(A)(2), even under *McFate*. Such “prosecut[ion]” includes asserting additional legal theories and factually related claims.

Here, Counts I-V are intertwined with Count VI because resolving them also partially resolves Count VI. Every count includes a common factual question: what is the cost of furnishing instruction? Answering that question not only will determine whether and how much of an illegal subsidy ABOR pays in providing

⁶ *Biggs v. Cooper* has no bearing here because the statutes at issue did “not grant an express expenditure power.” 234 Ariz. 515, 522 ¶13 (App. 2014). Here, A.R.S. §§ 15-1626(A)(13) and 15-1664, among others, provide ABOR an express expenditure power. R.17 at 3.

in-state tuition to ineligible students, but also will show if the other tuition procedures and policies challenged in Counts I-V are illegal because they violate “as nearly free as possible” and provisions in A.R.S. Title 15.

III. ABOR’s Alternative Grounds For Dismissal—Political Question And Legislative Immunity—Are Meritless

The alternative dismissal grounds ABOR argued—political question doctrine and legislative immunity—are neither reasons to decline review nor alternative bases for affirming dismissal of Counts I-V (ABOR did not challenge Count VI on these grounds).

These counts do not raise non-justiciable political questions. *Kromko v. Arizona Board of Regents* expressly limited itself to whether a particular tuition level violated the Arizona Constitution. *See* 216 Ariz. 190, 192 ¶¶9, 194-95 ¶¶22 (2007); *id.* at 195 ¶¶23 (“[W]e hold only that other branches of state government are responsible for deciding whether a particular level of tuition complies with Article XI, Section 6.”). In contrast, the FAC alleges that ABOR’s tuition-setting *criteria* (rather than any specific tuition *levels*) do not account for instruction’s actual cost and therefore violate the Constitution’s “as nearly free as possible” mandate. *See* Ariz. Const. art. XI, § 6; R.16 ¶¶8, 60. The FAC also challenges ABOR’s policies that require paying fees unrelated to instruction to access instruction and charging more to online and part-time students. These allegations are distinguishable from challenging a particular tuition level.

If *Kromko* applies, its political question analysis should be reconsidered. See *State v. Maestas*, 244 Ariz. 9, 17 ¶35 (2018) (Bolick, J., concurring). “[T]he judiciary construes the law” and when questions of constitutional power arise, the courts typically will “consider the matter and determine whether [the question] falls on the one side or the other of the dividing line between constitutional and unconstitutional delegation of power.” *Giss v. Jordan*, 82 Ariz. 152, 161 (1957); see also *State v. Wagstaff*, 164 Ariz. 485, 487 (1990). Courts should exercise their duty to say what the law is and not dismiss on prudential “discoverable and manageable standards” grounds unless absolutely necessary.

ABOR’s legislative-immunity defense likewise fails because the FAC names ABOR based on policy implementation, not legislative function. A government body can be sued in an official capacity to challenge a legislative act’s constitutionality that it implements. See, e.g., *Dobson v. State ex rel. Comm’n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶5, 124 ¶20 (2013). Because the FAC challenges the lawfulness of ABOR policies and procedures that ABOR also implements, ABOR cannot claim legislative immunity.

CONCLUSION

This Court should grant review and reverse the judgment of dismissal.

RESPECTFULLY SUBMITTED this 18th day of September, 2019.

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