

GOVERNOR'S REGULATORY REVIEW COUNCIL (GRR)
REPORTER'S TRANSCRIPT OF AUDIO RECORDED PUBLIC MEETING
JANUARY 5, 2016 COUNCIL MEETING

PRESENT: Council Chairwoman Nicole A. Ong
Council Member Jason Isaak
Council Member Lori Daniels
Council Member Connie Wilhelm
Council Member Mike Lofton (Telephonic)
Council Member Brenda Burns (Telephonic)
Council Member John Sundt (Telephonic)

ALSO PRESENT: Mr. Chris Klemminich, Staff Attorney
Mr. Thomas Collins, Executive Director,
Citizens Clean Elections Commission
Mr. Eric Spencer, State Elections Director,
General Counsel for the Secretary of State

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1 P R O C E E D I N G

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3 (Whereupon the audio recording commences as

4 follows:)

5 CHAIRWOMAN ONG: Good morning, everyone. It's

6 10 o'clock, so we will call this meeting to order.

7 Appearing telephonically are Council Members Sundt,

8 Lofton, and Wilhelm.

9 MEMBER WILHELM: No.

10 CHAIRWOMAN ONG: Or, I'm sorry. And Burns.

11 We'll begin with the Pledge of Allegiance.

12 MEMBER DANIELS: You turned it off. You just

13 push it once and it stays green. Perfect.

14 (Whereupon the Pledge of Allegiance is recited.)

15

16 CHAIRWOMAN ONG: As a reminder, if anyone would

17 like to speak about an item, we have the speaker slips

18 available which you can hand to Delores.

19 With regards to disclosure of conflicts of

20 interest, Council Members Isaak, Daniels, and Wilhelm have

21 disclosed a conflict of interest with regards to Item D.1.

22 MEMBER BURNS: Madame Chairwoman, this is, um,

23 Brenda Burns. I'm having difficulty hearing.

24 MEMBER DANIELS: Okay.

25 MEMBER SUNDT: I am as well, Ms. Chairman.

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1 MEMBER LOFTON: Okay.

2 CHAIRWOMAN ONG: -- a little bit better now?

3 MEMBER DANIELS: Try it again. Ask him.

4 CHAIRWOMAN ONG: Council Members on the phone,

5 can you hear us?

6 MEMBER BURNS: Uh, yes.

7 MEMBER DANIELS: Oh, good.

8 MEMBER LOFTON: Yeah.

9 CHAIRWOMAN ONG: Okay. So, with regards to the

10 Consent Agenda items, I'm removing Item C.2, the Study

11 Session Minutes from December 29th, 2015, um, such that

12 the consideration of such Study Session Minutes will be

13 tabled until the -- until the February agenda. Revised

14 draft minutes were circulated to the council and posted on

15 the GRRC Website yesterday afternoon. The revisions were

16 made non-sub- sub- -- non-substantiative technical changes

17 in the nature of correcting typos and making clarifying

18 changes; but to give time for the Council to review, Item

19 C.2 is tabled.

20 So, Item C.1, C.3, and C.4 are on the Consent

21 Agenda. Are there any objections from the Council Members

22 to leaving such items on the Consent Agenda?

23 MEMBER LOFTON: Madame Chair, this is Council

24 Lofton. I am using the study guide -- I'm using the study

25 guide agenda, and I want to -- I would like you to confirm

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1 MEMBER DANIELS: Chris?

2 MEMBER LOFTON: That goes for Lofton as well.

3 MEMBER DANIELS: Chris, can you turn up the sound

4 at all on the phone? They're not hearing.

5 CHAIRWOMAN ONG: We are working on the sound

6 issue.

7 MR. KLEMINICH: Okay. The phone is at top volume

8 and I know Delores is going to turn the microphones up as

9 well.

10 MEMBER BURNS: Okay.

11 MR. KLEMINICH: Madame Chair, you may -- you may

12 just need to project.

13 CHAIRWOMAN ONG: Okay. Can you hear us better

14 now?

15 MR. KLEMINICH: Is the mic on?

16 MEMBER LOFTON: Is the mic --

17 CHAIRWOMAN ONG: Mm-hm. It is on.

18 MEMBER DANIELS: You want two mics? Try to work

19 them both, see if that helps.

20 CHAIRWOMAN ONG: Okay.

21 MEMBER SUNDT: Chris, if somebody is speaking to

22 us now, I can't hear it at all.

23 CHAIRWOMAN ONG: No. We were working on the

24 sound issue.

25 Can you hear us --

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1 the items D.1 [sic], 3, and 4 for me.

2 CHAIRWOMAN ONG: Okay. So, Items C.1 are the

3 Council meeting minutes from December 1st, 2015; Item C.3

4 are the five-year reports -- five-year review reports for

5 the Law Enforcement Merit System Council, Arizona

6 Commission for Postsecondary Education, Arizona Department

7 of Environmental Quality, another one from the Arizona

8 Department of Environmental Quality, Arizona Naturopathic

9 Physicians Medical Board, and Arizona Department of Health

10 Services; Item C.4 is with regards to the rulemakings for

11 Arizona State Retirement System and the Arizona State

12 Board of Optometry.

13 MEMBER LOFTON: Okay. Thank you.

14 MEMBER DANIELS: Madame Chair, I'd make a motion

15 that we, um, approve the Consent Agenda with the -- with

16 the exception of C.2, the Study Session Minutes.

17 MEMBER WILHELM: I'll second the motion.

18 CHAIRWOMAN ONG: All those in favor?

19 (Chorus of "ayes.")

20

21 MEMBER LOFTON: Can I --

22 CHAIRWOMAN ONG: Anyone opposed?

23 MEMBER LOFTON: Excuse me. Excuse me, Council.

24 This is -- this is Representative Lofton and I simply did

25 not hear the motion. Whoever made that motion, can you

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1 please speak directly into your microphone?

2 MEMBER DANIELS: I move the Consent Agenda with

3 the -- um, be adopted and approved with the exception of

4 Item C.2, the Study Session Minutes that are going to be

5 removed to the February agenda.

6 Could you hear me now?

7 MEMBER LOFTON: Thank you.

8 CHAIRWOMAN ONG: Okay. Let's take a vote again.

9 All those in favor?

10 (Chorus of "ayes.")

11

12 CHAIRWOMAN ONG: Anyone opposed?

13 The Consent Agenda is approved.

14 So, moving on to Item D.1, that's the

15 consideration and -- of the five-year review report for

16 the Citizens Clean Election Commission. And, Chris?

17 MR. KLEMINICH: Thank you, Madame Chair. Um, I'm

18 not -- I'm not going to bother going into my -- my

19 presentation, I think we all heard that last week. Um, I

20 would simply note that we received over the last week two

21 public comments, um, one from the Arizona Chamber of -- of

22 Commerce and related organizations, which you all received

23 yesterday, and there is an additional public comment from

24 the Secretary of State, um, which we received this

25 morning. I -- I attempted to send it all to the Council

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1 themselves from this here at GRRC. But the comment was

2 not related to the issue of statutory authority.

3 MEMBER SUNDT: All right. But you did -- but you

4 did indicate, if I heard correctly, that's why. I'm --

5 I'm on it now.

6 Did you receive additional comments that you

7 haven't been able to get to us; is that correct?

8 MR. KLEMINICH: Right. We received a comment

9 this morning from the Secretary of State, but it was a

10 little too large for our State-run e-mail system. So,

11 I'll get that compressed after -- after the meeting and

12 getting a full copy of that to you.

13 MEMBER SUNDT: Okay.

14 CHAIRWOMAN ONG: And Council Members --

15 MEMBER SUNDT: So, I'm -- I'm -- go ahead.

16 CHAIRWOMAN ONG: I'm sorry. Council Member

17 Sundt, the comment was received about half an hour before

18 this meeting and so that is why it was not able to be sent

19 electronically to you because the file was too large. But

20 for those Council Members who are present, we do have hard

21 copies for -- for them.

22 MEMBER SUNDT: Okay. Well, I -- I would like to

23 be able to review those. I wondered if it's possible -- I

24 don't know when the appropriate time is -- to make a

25 motion for the sum of consideration of D.1, but I would

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1 Members electronically, but, um, the comment is too large

2 for our -- our e-mail system. For those of you

3 telephonically, I -- I apologize for that. Um, we will --

4 we will get that to you as soon as possible.

5 But I know we have representatives here from both

6 the Commission and the Secretary of State's office, so I

7 will leave the floor to them.

8 MEMBER LOFTON: Chris, Madame Chair --

9 MR. KLEMINICH: Yes.

10 MEMBER LOFTON: -- I have a question for Chris.

11 MR. KLEMINICH: Yes.

12 MEMBER LOFTON: Chris, did you say the Attorney

13 General had weighed in on this as well with public

14 comments? I don't think I've seen those.

15 If they were in the five-year report packet, I

16 didn't see them.

17 MR. KLEMINICH: Yes, um, Member Sundt. The

18 Attorney General's office made a -- a public comment, but

19 it was not related to the issue of statutory authority so

20 I did not include that.

21 MEMBER SUNDT: Okay.

22 MR. KLEMINICH: And this was a public comment

23 made on the -- or, made at the time the Commission was

24 doing its rulemaking, it wasn't a comment to GRRC. So, as

25 a result, the Attorney General's office has recused

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1 like to table it for the meeting and move it to the next

2 Study Session and review those comments.

3 MR. KLEMINICH: That -- that is an option, Member

4 Sundt.

5 MEMBER SUNDT: I don't know the timing --

6 MR. KLEMINICH: I think --

7 MEMBER SUNDT: -- the proper timing on that.

8 MR. KLEMINICH: Correct, yeah. I think the

9 thinking was that the parties who are here could discuss

10 the matter and Council could ask questions; and then, um,

11 if Council does decide to table it, that that could be

12 done at the end of that discussion.

13 MEMBER SUNDT: All right. Thank you.

14 CHAIRWOMAN ONG: And Council Member Sundt, we do

15 have representatives from the Commission as well as from

16 the Secretary of State's office present here, um, who are

17 available to -- to respond to any questions.

18 MEMBER SUNDT: Right. Very good.

19 MR. KLEMINICH: And, Madame Chair, I don't --

20 there's no formal process for this, but I believe that

21 generally we have the Agency speak first, so.

22 CHAIRWOMAN ONG: Um, Mr. Collins, you're welcome

23 to approach.

24 MR. COLLINS: Um, Ms. Chairwoman, Councillors,

25 thank you. I will be brief as I certainly have the sense

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1 that you-all will take Chris' recommendation and -- and
 2 move this to another agenda item.
 3 I simply would note that there's been ample time
 4 for the Secretary of State's office to provide comment.
 5 There was a Study Session that was noticed, the Secretary
 6 of State's office was in attendance, no comment was made
 7 at that time and, in fact, no Councillor had a substantive
 8 comment on any of the rules based on Chris' recommendation
 9 and the economist's recommendation.
 10 As you know, we have concerns about the
 11 procedural and substantive issues with respect to GRRC as
 12 we look forward; we don't know the reach of those
 13 questions. Um, I've raised those in the record and those
 14 materials are with you.
 15 We are, in fact, prepared to address, I think,
 16 the majority, if not all, of -- of Secretary Reagan's
 17 Election Director's arguments. We have a number of
 18 exhibits that we've prepared even before we received this
 19 document this morning that refute in a -- as a matter of
 20 law the majority of arguments that you will see when you
 21 see them.
 22 Um, and so, you know, although I obviously
 23 understand that the sense is that there will be more time
 24 taken on this and I appreciate that, the Commission
 25 continues to be compliant, available, providing documents
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1 MR. COLLINS: Um, Madame Chairwoman, Councillor
 2 Sundt, I wouldn't put it precisely that way. I would say
 3 the following: First, we did have concerns that the date
 4 of submission of the report was the date that controls for
 5 purposes of updating reports. So, the idea being that
 6 this is not -- at least as we understand the statute and
 7 the rules -- a substantive change to the report that
 8 changes based on the date of submission, we -- we -- we
 9 had suggested we believed was -- was not how the statute
 10 and GRRC rules work together. Our sense is that the
 11 Council and, certainly, staff disagree with that position,
 12 but that was our position.
 13 And then -- so then the question becomes: What
 14 precisely is in front of the -- the Council?
 15 We have actually just for the purposes of the
 16 public record and to -- and because I misunderstood some
 17 of what Chris was asking for, supplemented that report, so
 18 that all of the material, which I think was all available
 19 to you anyway, is now contained in the report.
 20 MR. KLEMINICH: Yes. And -- and, just -- I'm
 21 sorry, Tom. All that was sent to the Council on Wednesday
 22 of last week.
 23 MR. COLLINS: More broadly, there were amendments
 24 to 41-1056, that if we get to this point, we don't believe
 25 we're compliant with the Voter Protection Act; we don't
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1 as quickly as we can to Chris and to -- to the Council.
 2 And -- and with that, if you have any other
 3 further questions on the provision -- assuming you will
 4 not, in fact, take a substantive action today -- I would
 5 leave it there unless you have specific questions for me.
 6 And thank you again for allowing me to appear.
 7 CHAIRWOMAN ONG: Thank you, Mr. Collins. Um,
 8 just to clar- -- clarification from the last meeting, we
 9 only addressed the procedural concerns. Um, and at the
 10 outset -- at the outset, our staff attorney, Chris, um,
 11 felt that we should address the procedural concerns before
 12 even getting to any substantive concerns, um, if -- if
 13 any. And so -- so that was part of the reason why we
 14 focused primarily on the proce- -- procedural concerns at
 15 the Study Session meeting, um, because the question before
 16 us was whether or not we had the authority to even review
 17 the amended Rule 109.
 18 Are there any questions from the Council?
 19 MEMBER SUNDT: Council, this is Council Member
 20 Sundt, it's a little difficult for me to hear, Madame
 21 Chair.
 22 I'm not -- if I understand this procedural -- if
 23 I understand what the Clean Election Commission is saying,
 24 they're questioning whether or not we even have authority
 25 to review; is that correct?
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1 believe that certain authority that GRRC may otherwise
 2 have can be applied to the Commission without superseding
 3 the Clean Elections Act and with- -- without furthering
 4 the purpose of the Clean Elections Act. And, therefore,
 5 um, those amendments, which are principally those that
 6 were passed in -- I will find the cite here if I can --
 7 um, that principally those passed in 2012 Arizona Session
 8 Law, Chapter 352, Section 17, we don't think are compliant
 9 with the Voter Protection Act insofar as the Clean
 10 Elections Act is concerned, because they would supersede
 11 the Clean Election Commission's authority to enact rules
 12 interpreting the statute.
 13 As you may recall, Chris' memo has found it's not
 14 necessary to reach that question yet and it may not be at
 15 all necessary to reach that question at any time. It
 16 simply, as I sort of shorthanded, Ms. Chairwoman,
 17 Councillor Sundt, what some of our -- our issues were.
 18 Those are the -- the principal ones that I think
 19 identified in our papers that are before you.
 20 MEMBER LOFTON: Madame Chairperson, this is
 21 Council Member Lofton. May I ask a question?
 22 CHAIRWOMAN ONG: Please.
 23 MEMBER LOFTON: To the person from the
 24 Commission, I'm sorry, I didn't get your last name and I
 25 don't want to call you "Tom," 'cause we've never met.
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1 Um, my question is more procedural or mechanical
 2 in nature. I'm reading Chris' study documents, which
 3 state that the Commission submitted your report to the
 4 Council on the 28th and then unanimous- -- unanimously
 5 passed it on the 29th and 30th. Is this a normal time
 6 frame for input?
 7 As I think that you mentioned a moment ago that
 8 you've been open to the Secretary of State's many counsel
 9 for any kind of input, but this seems like an awful tight
 10 window to do such.
 11 MR. COLLINS: Um, well, that's a -- so, um,
 12 Council Chairwoman Ong, Council Lofton, let me answer that
 13 question this way: The -- the timeline here -- there are
 14 two different timelines that we need to keep straight,
 15 there is -- in my view. There's the timeline for GRRC's
 16 process for submitting five-year reports, there's the
 17 Commission's timeline for circulating and adopting
 18 administrative rules.
 19 The Commission meeting dates are published six
 20 months in advance, and unless there's an emergency
 21 meeting, the agenda, the dates are set. So, at our
 22 December meeting, we set the meeting -- the agenda through
 23 June, and the June meeting we'll set it through December.
 24 So, there was an ongoing rulemaking -- or,
 25 rule-amending process, I should say, going on throughout
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1 synthesis within the State agencies. And I'm hearing that
 2 again in your answer, that there seems to be timelines
 3 that are posted and that are -- are supposed to be known
 4 by one agency to the other, but they don't -- they don't
 5 appear to correlate or there doesn't seem to be a clear
 6 sense of leadership when these -- these dates, you know,
 7 become critical like they are now. And now I'm hearing
 8 that this is a coincidence, which is troubling for me.
 9 MR. COLLINS: Well, I -- Chairman Ong and
 10 Councillor Lofton, I mean, I can't -- I guess I -- I would
 11 defer to your staff on -- on part of that question. I --
 12 um, I feel like we've -- we've tried to be as compliant
 13 with providing your staff in preparation for this review
 14 all the information necessary. So, I -- I don't know, but
 15 I would certainly defer that to a GRRC question.
 16 MR. KLEMINICH: And -- and, Member Lofton, I
 17 would agree with Director Collin's assessment that it was
 18 a -- a coincidence, if you will.
 19 The -- the report was originally due from the
 20 Commission to GRRC on June 30th of 2015. At that time,
 21 um, before the -- before they knew when, you know, the
 22 final passage of these rules would take place, they
 23 requested a 120-day extension, which so happened to be
 24 October 28th. So, it does appear, um, from my review,
 25 that it -- that it is a coincidence as Mr. Collins
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1 the summer that was set to be resolved under our timeline
 2 on the 29th, and then ultimately carried over to the 30th
 3 in order to -- you know, because the meeting basically ran
 4 long, and, you know, just to make -- just to get
 5 everything done and correct, we had a follow-up meeting
 6 the day after.
 7 But there are two separate timelines. GRRC's
 8 timeline for providing the report and our timeline for
 9 doing rule amendments simply don't align. So, it's a
 10 coincidence that our final rule was approved on the 29th
 11 and the GRRC report was due on the 28th.
 12 Nevertheless, that timing is -- you know,
 13 essentially becomes an issue given, at least as we see
 14 the -- the -- you know, with deference to the staff's
 15 recommendation, as we see the statute of rules working, is
 16 the date of submission, really, that matters. The
 17 coincidence of when the rule passed under our timeline is,
 18 is just what it is.
 19 Does that answer your question?
 20 MEMBER LOFTON: Okay. Then, I'm sorry, let me
 21 follow up that and maybe with a more clarifying question
 22 for you, Commissioner [sic].
 23 Then would I be -- and -- and please keep in
 24 mind, I've been on the GRRC Council for six to
 25 eight months and one of my observations is the lack of
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1 indicated.
 2 MEMBER LOFTON: Yes. And I'm not -- I'm not
 3 questioning that, um, now, Chris. What I'm questioning,
 4 really, is the way State agencies are ideally working
 5 together and the way they are currently working together.
 6 MR. KLEMINICH: Yes.
 7 MEMBER LOFTON: It doesn't appear that there is
 8 much synthesis involved, which leads to situations like I
 9 think we're experiencing this morning.
 10 MR. KLEMINICH: Well, that's a -- that's a fair
 11 assessment and we're clearly working on that. But, you
 12 know, like I said, I think this was just kind of a case of
 13 two separate timelines converging at a certain moment.
 14 But I -- I would be interested in any, um, of the
 15 questions that the Council Members have on -- on
 16 substance, namely anything related to the issue of whether
 17 or not the Commission has legal authority in the Council's
 18 view.
 19 MEMBER SUNDT: Yes. I have a question in that
 20 regard, Chris, Madame Chair, if you're soliciting -- if
 21 you're soliciting questions at this point.
 22 MR. KLEMINICH: Fire away.
 23 MEMBER SUNDT: I am struggling to find the grant
 24 of authority in the statute. And I'm not -- I'm setting
 25 aside case law and I'm just looking at, you know, our
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1 charter is to look at whether or not the proposed rules
 2 can conform to the statute, is the statutory authority
 3 there.
 4 And in the literal language of the statute, I see
 5 that the Commission has the power it has established under
 6 Article 2, but I don't see a grant of authority extending
 7 its power to enforcement of Article 1, and I'd like -- I'd
 8 like to hear something in that regard.
 9 And I've read the arguments. But as I
 10 understand, the rebuttal to date has been sort of, well,
 11 if we can't enforce Article 1, the result is absurd. But
 12 that's -- that's sort of a conclusory statement and I'm --
 13 I am not yet persuaded. Can you show me in Article 2
 14 where the authority is granted to enforce the provisions
 15 in Article 1?
 16 MR. COLLINS: Um, is this -- I'm sorry. Ms.
 17 Chairwoman, is this Member Sundt?
 18 MR. KLEMINICH: Council Member Sundt, yes.
 19 MR. COLLINS: Okay. This is Tom Collins.
 20 MEMBER SUNDT: Yes, sir.
 21 MR. COLLINS: Um, so, I think that -- I mean, to
 22 deal with your first caveat first, I mean, I think that to
 23 the extent that you divorce this from the established
 24 precedent that we have in the State, you know, which
 25 includes, you know, the Horne versus Clean Elections case,
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1 in terms of what the Secretary of State now says, I am
 2 saying that it is not difficult to find published
 3 documents written by non-elected officials such as judges,
 4 for example, or in the context of legal advocacy in the
 5 Attorney General's office, that say that the Commission's
 6 authority is not limited to -- to publically-financed
 7 candidates.
 8 And you -- on a broader level, you need look no
 9 further than the State Supreme Court, which says that the
 10 Commission's authority over independent expenditures,
 11 certainly under -941(D), is, in fact, not related to
 12 public financing, nor is its authority over campaign
 13 finance limits found in 16-941(D). That's the literal
 14 language of a case called State v. Brewer, so.
 15 So, I guess, I don't know if "consensus" -- I
 16 said -- when I use the word "consensus," perhaps I've got
 17 the wrong word. What I mean is the binding and persuasive
 18 authority align and suggest that, in fact, the statute
 19 says what the Commission has articulated. So, as not to
 20 answer -- that's just to your caveat. Your caveat
 21 actually includes a significant, it would seem to me,
 22 amount of -- of relevant legal analysis done by people
 23 other than the Commission itself, is -- is a point I just
 24 simply felt I should make.
 25 But, Ms. Chairwoman, Councillor Sundt, I simply
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1 includes filings made by the Attorney General as recently
 2 as 2013, that articulate that the Commission and Secretary
 3 of State share authority under Article 1.
 4 You know, so it's -- it's -- in that sense, I
 5 guess the one point I would make on -- to your -- to your
 6 caveat is, there is a consensus that exists outside of the
 7 bounds of this Secretary of State, that's existed for some
 8 time that this is, in fact, what the statute says.
 9 MEMBER SUNDT: May I -- may I ask a question, Mr.
 10 Collins?
 11 MR. COLLINS: Sure. Of course.
 12 MEMBER SUNDT: Are you say- -- are you saying to
 13 me that there is a consensus --
 14 MR. COLLINS: I --
 15 MEMBER SUNDT: -- that under Article 2, the Clean
 16 Elections Commission has authority over candidates that
 17 are not participating --
 18 MR. COLLINS: I'm saying --
 19 MEMBER SUNDT: -- in the Clean Elections
 20 provision?
 21 MR. COLLINS: I would say this about that, Ms.
 22 Chairwoman, Councillor Sundt, by "consensus" I mean:
 23 Court decisions, filings of the State Attorney General,
 24 um, you know, obviously, the Commission's own rules.
 25 So, by "consensus," I don't mean a lack of decent
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1 would say, with respect to the enforcement authority, it's
 2 certainly clear that 16-956(A) articulates the
 3 Commission's authority to enforce the Article. Um.
 4 MEMBER SUNDT: Article 2.
 5 MR. COLLINS: Correct. And 16- --
 6 MEMBER SUNDT: Okay.
 7 MR. COLLINS: -- 16-942(B) is -- is inarguably
 8 part of Article 2, and it applies by its terms, in
 9 addition to any other penalty. So, it's not a conflicting
 10 statute, it's an additional statute that is applies to
 11 reports in the Chapter. And if you were to look at the
 12 title -- the -- the Table of Contents of Chapter 6 of
 13 Title 16, you see: "Chapter 6," "Article 1," "Article 2,"
 14 "Reports, and "-942(B)," and you read those together and
 15 you don't need to get past the Table of Contents to see
 16 the analysis.
 17 I would also note -- and this is important --
 18 that in 16-924, which is the statute that generally
 19 governs the Secretary of State preceding, the legislature
 20 passed in 2011, a measure that expressly, if there was any
 21 confusion, excludes the Secretary of State from enforcing
 22 Article 2 in any way when it says, um, that the Secretary
 23 can find reasonable cause of a violation for any provision
 24 of Title 16, except for violations of Chapter 6, Article
 25 2.
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1 So, if 16-942(B) applies in addition, which it
 2 does, and the Secretary does not enforce, which it cannot
 3 under 16-924, logically the only body that may enforce
 4 that statute is the Commission and the Commission has
 5 authority under -956(A)(7) to do so.
 6 That's -- that's, essentially, the shorthand of
 7 the analysis.
 8 MEMBER SUNDT: So, if I follow your argument,
 9 it's -- boiled down, it's simplified in this manner and
 10 it's: Okay, well, the legislature established that the
 11 Secretary of State is not going to have authority to
 12 enforce provisions of the Clean Elections Act?
 13 MR. COLLINS: Correct.
 14 MEMBER SUNDT: And so from that -- okay. And --
 15 and from that, you argue: It must follow that the Clean
 16 Elections Commission therefore has authority to enforce
 17 the provisions of Article 1?
 18 MR. COLLINS: I think that there -- Madame
 19 Chairwoman, Councillor Sundt, I think there's a step
 20 missing in that analysis. The first premise is the
 21 Commission has the authority to enforce Article 2 under
 22 16-956. 16-942(B) is part of 16-956 and applies
 23 Chapter-wide. That are -- that is its plain terms. If
 24 there was to have been a conflict, any possibility of
 25 conflict was eliminated when the legislature expressly
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1 cetera, et cetera.
 2 So, I see it there where it's referencing
 3 enforcing this Article, which is Article 2. And as I read
 4 through the other provisions in Article 2, it continues to
 5 refer to participate -- participating candidates, and it
 6 seems clear to me that -- that the intent under the -- at
 7 least as expressed in the statute, and Arizona
 8 historically has -- has woefully limited legislative
 9 histories documenting the debate. But as I read it, it
 10 seems clear to me that they're saying that the Commission
 11 has authority over Article 2 and it can enforce its rules
 12 with regard to those participating candidates when it's
 13 talking about expenditures.
 14 MR. COLLINS: Um.
 15 MEMBER SUNDT: I mean, it talks about the return
 16 of funds by participating candidates, you know, where the
 17 funds aren't expended, et cetera. But I'm just not
 18 following your argument. And perhaps I should review the
 19 Horne case, but I'm not -- I'm not following the argument
 20 that since it's established that the Clean Elections
 21 Commission has jurisdiction over Article 2 matters and the
 22 Secretary of State does not, that the Secretary of State
 23 somehow loses authority over Article 1 matters and the
 24 Clean Elections Commission has authority to enforce that.
 25 MR. COLLINS: Can --
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1 barred the Secretary of State from finding reasonable
 2 cause of violations of Chapter 6, Article 2.
 3 So, I think that -- in other words, I think that
 4 your way of putting it, puts it backwards. The emanations
 5 come from the Commission's power. The clarification comes
 6 from 16-924, which tells us that Article 2 is not the
 7 Secretary of State's to enforce; and essentially ratifies
 8 that the authority that comes from -956 to enforce
 9 -942(B), which applies by its terms Chapter-wide is the
 10 authority the Commission is exercising.
 11 And that, if you read the -- which we have a copy
 12 of here -- obviously, we probably won't be able to get it
 13 to you, and I don't know if it's in the additional
 14 record -- is precisely what Judge Bergen said in the Horne
 15 versus Clean Elections Commission case.
 16 Does that -- I hope that's closer to answering
 17 your question. I -- I just wouldn't characterize it the
 18 way you have because I don't think that fully captures the
 19 way the statute actually works.
 20 MEMBER SUNDT: Well, you know, when I read -- and
 21 I'm a simple man. But when I read A.R.S. 16-956, which is
 22 "Voter Education and Enforcement Duty," when I go to --
 23 let's see. 16-956(C)(7), it says: "Enforcing this
 24 Article, comma, ensure that money from the fund
 25 is placed in candidate campaign accounts," et
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1 MEMBER SUNDT: That's how it strikes me that the
 2 -- the boil down on how the argument is being made.
 3 MR. COLLINS: Um, Madame Chairwoman, Commissioner
 4 [sic] Sundt, there are three points that I think are
 5 critical that I fundamentally think that we're missing
 6 each other on. First, at no --
 7 MEMBER SUNDT: Okay.
 8 MR. COLLINS: -- at no time has the Commission
 9 ever said that the Secretary of State cannot enforce
 10 anything other than the Clean Elections Act. The
 11 Secretary of State's authority within Article 1 is
 12 untouched, untrammled, unquestioned. So, there is not
 13 a -- the -- the Secretary of State uses bellicose language
 14 like "power grab" and "usurpation," and that is simply
 15 false.
 16 The fact is that the Commission simply has gone
 17 about enforcing Article 2 as it's written.
 18 To your point about the language that you're
 19 looking at, I would cite two specific provisions that I
 20 think make clear that the statutes you are citing all do
 21 deal with participating candidates because those are the
 22 statutes that deal with participating statutes.
 23 And if you look at 16-942(B), for example, and
 24 juxtapose it with 16-942(A) and (D), for example, it says
 25 there: "In addition," again, "to any other penalties."
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1 So, not usurping the Secretary of State. But:
 2 "In addition to penalties that may be imposed by
 3 law, the violation for any reporting requirement
 4 imposed by this Chapter shall be \$100 per day for
 5 candidates for the legislature, \$300 for
 6 candidates for statewide office."
 7 In (A): "If the civil penalty for -- for
 8 expenditures on behalf of a participating
 9 candidate."
 10 So, in (A) it's qualified by
 11 "participating" and (B) it is not; and that distinction I
 12 think is on purpose, because (D), again, refers to
 13 participating candidates.
 14 Finally and relatedly, if you look to the penalty
 15 statute -- excuse me, I'm losing my voice here -- at
 16 16-957, 16-957 asserts and says: "That if the Commission
 17 finds there's reason to believe that a person has
 18 violated any provision of this Article, the
 19 Commission shall serve on that person an order
 20 stating the nature of the violation and requiring
 21 compliance."
 22 So, again, it's not limited to
 23 "participating candidates" and it's not limited to
 24 "candidates"; it's, in fact, applies to "persons."
 25 So, it must be, reading these statutes together,
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1 the way to "person"; and you -- and you take this
 2 together, combined with, you know, that -- that the plain
 3 language really speaks to where we're coming from.
 4 And there is no conflict for the Secretary
 5 because there is no effort to prevent the Secretary's
 6 office from doing anything.
 7 And, lastly, you know, this measure and these
 8 amendments we've done and passed, you know, unanimously by
 9 a bipartisan Commission appointed by multiple parties, we
 10 have spent months analyzing these materials -- really,
 11 years when you think about the development of these, so
 12 there's a -- not a lack of -- of -- of effort here. And I
 13 really -- and I think that many of our commissioners, some
 14 of whom you may know, are -- are committed public servants
 15 who have no real interest in being involved in
 16 controversy, but have taken upon themselves to enforce a
 17 statute as written as they see their duty to have been.
 18 It's my duty to simply articulate their -- their views on
 19 that and why they've reached the conclusions they've
 20 reached.
 21 CHAIRWOMAN ONG: Are there any other questions
 22 from the Members?
 23 MEMBER SUNDT: With the -- Madame Chair, this is
 24 John again. Is the Secretary of State going to speak as
 25 well? A representative, elections representative?
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1 that "persons" encompasses all people who might violate
 2 the statute in a way that leads to penalties under the
 3 Clean Elections Act, otherwise 16-957(A) makes little
 4 sense in using the broader term "person."
 5 So, you know, I think that those distinctions are
 6 there. They're apparent on the face of the statute. I
 7 don't think that, you know, from what I understand of
 8 GRRC's history or -- and GRRC's position, that it is --
 9 that -- the question really from an administrative law
 10 perspective as staff has identified, is one of
 11 reasonableness.
 12 It's, I think, given -- that's why, frankly, the
 13 judicial results we have in addition to the plain
 14 language, are -- are important because the question is
 15 whether or not the Commission is being reasonable and I
 16 think there's no doubt that's true.
 17 Um, but, you know -- and I'm happy if you're
 18 going to continue this to another -- to another time to
 19 continue to -- to put these arguments together in a
 20 written format you might find more accessible than me
 21 simply talking into the -- the speakerphone here. But --
 22 but, nevertheless, I think that there are -- that when you
 23 look to -942(B)'s distinction between "participating" and
 24 "all candidates"; -957's distinction between
 25 "participating" and "candidates" and "any candidates" all
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1 MR. KLEMINICH: Yes, Member Sundt.
 2 CHAIRWOMAN ONG: Yes.
 3 MEMBER SUNDT: All right. I'm not trying to cut
 4 Mr. Collins off in any sense, but I -- I believe I am -- I
 5 believe I grasp his argument. I don't believe it that
 6 we're necessarily in agreement on the rules governing
 7 statutory interpretation as I find them, but I'd be very
 8 interested in hearing what the Secretary of State's office
 9 has to say.
 10 CHAIRWOMAN ONG: It appearing that there is no
 11 other questions for Mr. Collins, um, Mr. Eric Spencer from
 12 the Secretary of State's office is present here and
 13 available to speak.
 14 MR. SPENCER: Good morning, Madame Chairman,
 15 Members of the Commission. My name is Eric Spencer. I'm
 16 the State Election Director and General Counsel for
 17 Secretary of State Reagan. It's a privilege to briefly
 18 address you today.
 19 Um, I want to first start off by addressing some
 20 of the procedural aspects that were mentioned by my friend
 21 Mr. Collins. Um, first, the Secretary of State's office
 22 found out about the Study Session about eight minutes
 23 before it occurred last week, and due to the, um,
 24 intervening holidays, it's been a little procedurally
 25 difficult to muster the kind of fire power needed for an
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1 argument of this complexity and so that does at least
2 partially explain why you received our 16-page,
3 single-spaced legal analysis only 30 minutes ago.
4 Um, secondly, um, I do believe there are some,
5 um, logistical issues here where three of the conflicted
6 Council Members are present and three of the
7 non-conflicted Council Members are on the phone. And with
8 respect to a subject this weighty, I respectfully suggest
9 that it would be more appropriate to table this to
10 February so that the three absent Members can be here
11 personally to more effectively get into some of these
12 heavy legal arguments. And this has been tangentially
13 suggested by Chris, and I think acknowledged by Tom, as a
14 possibility. So, I would echo my support to table this
15 important subject mostly to a -- to a February meeting.
16 Um, that being said, to the extent that the
17 merits are to be addressed today, I want to briefly
18 mention a couple of things. As Council Member Sundt
19 mentioned, he is exactly correct. The reading of 16-956
20 is that the Commission is only expressly empowered to
21 enforce Article 2. It says that in a subsection (A)(7),
22 and it says it in subsection (C).
23 The Commission in recent years, especially in
24 2013 on, has seen it as its mission to extend its
25 regulatory reach well into Article 1. And while Mr.

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1 entirety of subsection (F); and we're also requesting
2 review of the entirety of subsection (G) in Rule 109.
3 Now, 2012, as Mr. Collins mentioned, your statute
4 was amended. And, importantly, in 41-1056(E), you have
5 the express power to declare a rule to be, quote,
6 "materially flawed." You also have the power to direct a
7 return of the five-year report back to the agency and to
8 order that agency to repeal the offending regulations no
9 earlier than six-months from the date of this meeting.
10 That is exactly what Secretary of State is asking to be
11 done here today, and preferably in February; to exercise
12 your statutory power under 41-1056(E).
13 Now, it is my understanding this Commission has
14 not yet exercised that authority in its history and,
15 therefore, I realize it will be a significant step for you
16 to, um, go past that precipice, and that's why I think a
17 more thorough, um, opportunity for legal analysis is
18 merited, um, so that we can walk you through why from a
19 legal and public policy perspective, each of these
20 regulations should be repealed. And that's especially
21 apparent because, I guess, through the megabyte size of
22 our filing, it didn't reach the three commissioners [sic]
23 on the phone.
24 Again, it's a -- I apologize for the verbosity,
25 but it's a 16-page, very detailed, well-researched, um,

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1 Collins says that does not in any way infringe upon the
2 Secretary of State's jurisdiction, it most certainly does.
3 When a pronouncement of the Secretary of State can be
4 contradicted by a parallel agency that has regulated its
5 way into that jurisdiction, that reduces the authority of
6 the Secretary of State. There are actual examples where
7 the Secretary of State has found no reasonable cause to
8 move on a campaign finance violation and the Clean
9 Elections Commission has disagreed and initiated its own
10 separate enforcement action.
11 And, so, although the Secretary of State on paper
12 retains her jurisdiction under 16-924(A) to make campaign
13 finance decisions, if the Clean Elections Commission can
14 do the same thing in complete derogation of that
15 authority, then that weakens the Secretary's authority.
16 And, therefore, we definitely believe her authority under
17 Article 1 has been infringed upon over the last couple
18 years, which was been accelerated since 2013.
19 It's very important for us to address the
20 argument that the Voter Protection Act somehow precludes
21 you from exercising your statutory duties. It does not.
22 Um, and it's very important to address each of
23 the substantive rules that the Secretary of State is
24 asking to be reviewed here. They're mostly contained in
25 Rule R2-20(F)(1) through (F)(12), which is almost the

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1 document that I hope everyone can have a chance to read.
2 And, frankly, Mr. Collins deserves the opportunity to
3 fully digest it and respond to it as well as a matter of
4 due process.
5 Um, so, for all those reasons, I think February
6 was the best way to go here. But if I had to summarize
7 the Secretary of State's position, is it is the Commission
8 is only empowered to enforce Article 2 that is said
9 expressly twice in A.R.S. 16-956.
10 And the whole reason why I'm here today is to ask
11 the Commission [sic] to exercise its statutory power and,
12 really, its duty to push back on regulations that have
13 infiltrated their ways into Article 1; and, therefore,
14 usurp the Secretary of State's jurisdiction.
15 I'm very happy to answer any questions.
16 CHAIRWOMAN ONG: Are there any questions from the
17 Council Members?
18 Understanding that those on the phone --
19 MEMBER SUNDT: I do -- this is Council Member
20 Sundt. I do not, Madame Chair. I would like to -- I
21 would like to read the briefing prepared by the Secretary
22 of State's office.
23 MR. KLEMINICH: Yeah. I'm sorry, and, Members, I
24 did attempt while in the meeting to resend the document
25 and it does appear as though it went through this time,

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1 so --

2 MEMBER DANIELS: I just got it.

3 MR. KLEMINICH: -- so you may have it in your

4 e-mail. Not -- not to suggest that you can digest it now,

5 but hopefully you do have it.

6 MEMBER SUNDT: Well, it's what we're supposed to

7 get in law school, Chris, right? Read it, think about it,

8 and talk about it all at the same time?

9 MR. KLEMINICH: I've forgotten everything about

10 law school.

11 MEMBER SUNDT: It did come through to me. Thank

12 you.

13 MR. KLEMINICH: Okay. Thanks.

14 MEMBER BURNS: This is Brenda. I received it as

15 well.

16 MR. KLEMINICH: Excellent.

17 MEMBER LOFTON: This is Lofton. I've got it on

18 my e-mail also.

19 MR. KLEMINICH: Very good. Thank you.

20 CHAIRWOMAN ONG: Are there any other questions or

21 comments from the Council Members for -- for Mr. Spencer?

22 MEMBER SUNDT: Are we -- Madame Chair, this is

23 John. Are we at the point of entertaining motions?

24 CHAIRWOMAN ONG: Yes.

25 MR. KLEMINICH: I would -- Madame Chair, I think
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1 This is a rule that was developed in conjunction

2 with folks who are both Republican and Democrat,

3 conservative and liberal, that actually aligns with the

4 practices of, we believe, the majority of political actors

5 in this State; it will not impact anyone's function as a

6 political committee or -501(C)(4), it simply comes well in

7 compliance with the normal course of events, the normal

8 course of practice that the Commission documented over the

9 course of a year and a half of research.

10 So, for those reasons, we simp- -- we do believe

11 that you have ample information to support the staff's

12 recommendation and simply pass forward the five-year

13 report. But we will, if you choose to move this to

14 February, provide a thorough written response to Mr.

15 Spencer's comments and we will attempt to get it to you in

16 a timely fashion.

17 CHAIRWOMAN ONG: Thank you, Mr. Collins.

18 MEMBER SUNDT: Madame Chair.

19 MEMBER LOFTON: Madame Chair.

20 MEMBER SUNDT: Go ahead, Michael. Sorry.

21 MEMBER LOFTON: Um, this is Council Member

22 Lofton. I would like to entertain a motion to table this

23 to the February meeting, because as the public interest

24 member, I am compelled to resist any such regulations

25 being placed in the hands of an appointed member of
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1 it would be appropriate to ask Mr. Collins, do you -- do

2 you care to respond at all?

3 MR. COLLINS: With your -- with your permission.

4 CHAIRWOMAN ONG: Yep. Mr. Collins, please.

5 MR. COLLINS: Ms. Chairwoman, Councillors, my

6 only response would -- would continue to be that, um, I

7 happily will provide a written response to Mr. Spencer's

8 comments on the assumption that you're not going to take

9 direct action on this today.

10 It should come as no surprise to you that I

11 believe that the Commission's actions are reasonable; that

12 -1056(E) cannot be applied to the Commission in the way

13 that Mr. Spencer has said under the Voter Protection Act;

14 and, even if it could, there is no basis for concluding

15 that the Commission's rules are not supported by law and

16 none of the other factors are applicable. There is no

17 conflict because of the "in addition" language and the

18 exclusion of the Secretary from enforcing Article 2.

19 There is no permitting issue.

20 This is really a very different animal from the

21 kinds of things that this Body engages in. This is not a

22 question of what kind of filter are you going to have to

23 put on your smokestack in order to make sure there's not

24 enough particulate pollution or there's too much

25 particulate pollution that has a real economic impact.
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1 government and out of the hands of an elected member of

2 government; I would not be doing my job as a public

3 interest Council Member if I supported such measures.

4 So, I'd like to, um, move that we table this

5 until February and until we can read the Secretary of

6 State's report and the report by the Commission.

7 MEMBER BURNS: I'll second the motion.

8 CHAIRWOMAN ONG: The motion has been made and

9 seconded. Um, all those in favor, if you could announce

10 your name and your vote on the phone.

11 All those in favor, "aye."

12 (Chorus of "ayes.")

13

14 CHAIRWOMAN ONG: It sounds like we had three

15 "ayes" on the phone.

16 Anyone opposed?

17 The motion passes so that Item D.1 is

18 tabled to the February agenda.

19 And there being no other items on the agenda, the

20 meeting is adjourned.

21 MEMBER SUNDT: Thank you very much.

22 MR. KLEMINICH: Thank you.

23 MEMBER BURNS: Thank you.

24 UNIDENTIFIED FEMALE SPEAKER: (Inaudible).

25 MEMBER DANIELS: When they're all on the phone,
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1 it is harder.
 2 (Whereupon the audio recording concludes.)
 3
 4 * * * * *
 5
 6 C E R T I F I C A T E
 7
 8 I, Angela Furniss Miller, Certified Reporter, do
 9 hereby certify that the foregoing pages numbered 1 through
 10 37, inclusive, constitute a printed record of the audio
 11 recording, as provided to me, all done to the best of my
 12 skill and ability.
 13 Further, I was not present at the aforementioned
 14 proceeding nor did I control the audio recording of said
 15 proceeding.
 16 DATED, at LITCHFIELD PARK, Arizona, this 15th
 17 day of January, 2016.

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 20 _____
 21 Angela Furniss Miller, RPR, CR
 Certified Reporter (AZ50127)

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