

Katie Hobbs
Governor

Thomas M. Collins
Executive Director



Damien R. Meyer
Chair

Steve M. Titla
Mark S. Kimble
Galen D. Paton
Amy B. Chan
Commissioners

State of Arizona
Citizens Clean Elections Commission

1110 W. Washington St. - Suite 250 - Phoenix, Arizona 85007 - Tel (602) 364-3477
Fax (602) 364-3487 - www.azcleanelections.gov

MEMORANDUM

To: Commissioners

From: Thomas Collins, Executive Director

Date: 4.25.2023

Subject: Recommendation to terminate Proposed Amendments to R2-20-211.

In 2022, I recommended a set of three rule amendments to clarify responsibilities for certain enforcement and investigatory procedures. The rules were published for public comment, noticed in the Arizona Administrative Register, and a noticed public hearing was held by the Commission where it approved the Proposed Rules.

The Proposed Rules were submitted to the Governor's Regulatory Review Council pursuant to 2018's Proposition 306.

The Council held study sessions in February and March on the Proposed Amendments and business meetings in March and April. After the Commission staff received no questions at the February study session, the Proposed Amendments were set on the consent calendar for the March Council business meeting.

At the March meeting, a member of the Council raised questions about the Proposed Amendment to R2-20-211. *See* Exhibit 1 (Proposed Amendment). That member, Jenna Bentley, suggested the 211 amendment was an invalid delegation of the subpoena power created by the Clean Elections Act. The Council tabled the entire package.

At its March Study Session, the Council received a memo from its own staff explaining that the 211 amendment was valid. Commission staff appeared and answered questions and provided its view that the 211 amendment was valid.

Chairwoman Nicole Sornsin ordered the Commission to submit a brief prior to the April business meeting and ordered the Council's own assistant attorney general to provide the Council legal advice to the Council. Additionally, the Council staff attorney submitted a new memo.

The Attorney General's Office prepared a briefing memo on the Commission's behalf for GRRC. Again, the staff attorney and the Commission's attorneys agreed the 211 amendment was valid. *See Exhibit 2 & 3 (Council Staff and Attorney General memos).*

Nevertheless, the Council voted 6-1 to return the 211 amendment to the Commission. Although not all Council members articulated their basis for their vote, some expressed views. For example, Council member Bentley reiterated her view about delegation stated at the March business meeting. Council member John Sundt indicated he disliked a provision of the proposed 211 amendment that allowed additional attorneys for the Executive Director to be involved in subpoenas. The Council approved unanimously the other two Proposed Amendments in the package.

Video minutes of the Council are available here:
<https://archive.org/details/04.04.2023-cm>

In addition to the briefs and memos, the Council received 145 pages of public comment that based on their uniform messaging and shared inaccuracies were likely the result of an organized influence campaign. All the comments went against the Commission.

The purpose of the 211 amendment was to clarify responsibility for subpoenas and avoid conflicts that could arise between the Commission, its staff and the Attorney General's Office. The rules currently envision either the Executive Director or and Assistant Attorney General could be involved in subpoenaing a person. Although this had never been an issue before, Commission staff had reason to believe this could become an issue.

Given the return and other legal developments, including case law and Proposition 211, I recommend terminating this proposed amendment so that we can revisit these issues with more analysis in a future proceeding as needed.

NOTICES OF PROPOSED RULEMAKING

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

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

[R22-236]

PREAMBLE

1. **Article, Part, or Section Affected (as applicable)**

R2-20-211	Amend
R2-20-220	Amend
R2-20-223	Amend
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)(6) and (A)(7)
 Implementing statute: A.R.S. § 16-948(C)
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 rules:**
 Notice of Rulemaking Docket Opening: 28 A.A.R. 3489, October 28, 2022 (*in this issue*)
4. **The agency's contact person who can answer questions about the rulemaking:**
 Name: Tom Collins, Executive Director
 Address: Citizens Clean Elections Commission
 1802 W. Jackson St.
 Phoenix, AZ 85007
 Telephone: (602) 364-3477
 Email: 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:**
 The Commission needs to amend its rules to clarify how the Commission may issue subpoenas, take depositions, prevent ex parte communications, and draft notices of appealable agency actions. Such clarification will ensure the rules are clear, concise, and consistent and the public is aware of how the Commission ensures compliance with clean elections rules and statutes.
6. **A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not 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.**
 None
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:**
 Not applicable
8. **The preliminary summary of the economic, small business, and consumer impact:**
 There is little to no economic, small business, or consumer impact, other than the cost to the Commission to prepare the rule package, because the rulemaking simply clarifies statutory requirements and processes that already exist. Thus, the economic impact is minimized.

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

Name: Tom Collins, Executive Director
 Address: Citizens Clean Elections Commission
 1802 W. Jackson St.
 Phoenix, AZ 85007
 Telephone: (602) 364-3477
 Email: ccec@azcleanelections.gov
 Website: www.azcleanelections.gov

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

An oral proceeding regarding the proposed rules will be held as follows:

Date: December 15, 2022
 Time: 9:30 a.m.
 Location: Citizens Clean Elections Commission
 1802 W. Jackson St.
 Phoenix, AZ 85007
 Or virtually
<https://us02web.zoom.us/j/81604218149>
 Meeting ID: 816 0421 8149
 One tap mobile
 +13462487799,,81604218149# US (Houston)
 +16694449171,,81604218149# US

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:

None

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:

Not applicable

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:

Not applicable

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

No analysis was submitted.

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

None

13. The full text of the rules follows:

TITLE 2. ADMINISTRATION

CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

ARTICLE 2. COMPLIANCE AND ENFORCEMENT PROCEDURES

Section

R2-20-211. Subpoenas and Subpoenas Duces Tecum; Depositions
 R2-20-220. Ex Parte Communications
 R2-20-223. Notice of Appealable Agency Action

ARTICLE 2. COMPLIANCE AND ENFORCEMENT PROCEDURES

R2-20-211. Subpoenas and Subpoenas Duces Tecum; Depositions

- A. The Commission may authorize its Executive Director ~~or Assistant Attorney General~~ to issue subpoenas requiring the attendance and testimony of any person by deposition and to issue subpoenas duces tecum for the production of documentary or other tangible evidence in connection with a deposition or otherwise. The Executive Director may delegate the authority to issue subpoenas to any person authorized to provide legal services. The Executive Director's delegate may delegate this authority to any person authorized to provide legal services as the Executive Director's delegate deems necessary.
- B. If the Commission orders oral testimony to be taken by deposition or for documents to be produced, the subpoena shall so state and shall advise the deponent or person subpoenaed that all testimony will be under oath. The Commission may authorize its Executive Director to take a deposition and have the power to administer oaths. The Executive Director may delegate the authority to take depositions to any person authorized to provide legal services. The Executive Director's delegate may delegate this authority to any person authorized to provide legal services as the Executive Director's delegate deems necessary.

C. The deponent shall have the opportunity to review and sign depositions taken pursuant to this rule.

R2-20-220. Ex Parte Communications

- A. In order to avoid the possibility of prejudice, real or apparent, to the public interest in enforcement actions pending before the Commission pursuant to its compliance procedures, except to the extent required for the disposition of ex parte matters as required by law (for example, during the normal course of an investigation or a conciliation effort), no interested person outside the agency shall make or cause to be made to any Commissioner or any member of any Commission staff any ex parte communication relative to the factual or legal merits of any enforcement action, nor shall any Commissioner or member of the Commission's staff make or entertain any such ex parte communications.
- B. This rule shall apply from the time a complaint is filed with the Commission or from the time that the Commission determines on the basis of information ascertained in the normal course of its statutory responsibilities that it has reason to believe that a violation of a statute or rule over which the Commission has jurisdiction has occurred or may occur, and remains in force until the Commission has finally concluded all action with respect to the matter in question.
- C. Nothing in this Section shall be construed to prohibit contact between a respondent or respondent's attorney and any staff member or other authorized representative of the Commission or the Commission staff attorney or the Administrative Counsel or the Assistant Attorney General in the course of representing the Commission or the respondent with respect to an enforcement proceeding or civil action. No statement made by a Commission representative attorney or staff member shall bind or estop the Commission.

R2-20-223. Notice of Appealable Agency Action

If the Commission makes a probable cause finding pursuant to R2- 20-215 or decides to initiate an enforcement proceeding pursuant to R2-20-217, ~~the any person authorized to provide legal services on behalf of the Commission Assistant Attorney General (AAG)~~ shall draft and serve notice of an appealable agency action pursuant to A.R.S. § 41-1092.03 and § 41-1092.04 on the respondent. The notice shall identify the following:

1. The statute or rule violated and specific facts constituting the violation;
2. A description of the respondent's right to request a hearing and to request an informal settlement conference; and
3. A description of what the respondent may do if the respondent wishes to remedy the situation without appealing the Commission's decision.

NOTICE OF PROPOSED RULEMAKING

TITLE 4. PROFESSIONS AND OCCUPATIONS

CHAPTER 16. ARIZONA MEDICAL BOARD

[R22-245]

PREAMBLE

1. **Article, Part, or Section Affected (as applicable)** **Rulemaking Action**
R4-16-401 Amend
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. § 32-1404(D)
Implementing statute: A.R.S. § 32-1456(D)
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 Rulemaking Docket Opening: 28 A.A.R. 3489, October 28, 2022 (*in this issue*)
4. **The agency's contact person who can answer questions about the rulemaking:**
Name: Patricia McSorley, Executive Director
Address: Arizona Medical Board
1740 W. Adams St., Suite 4000
Phoenix, AZ 85007
Telephone: (480) 551-2700
Fax: (480) 551-2704
Email: patricia.mcsorley@azmd.gov
Website: www.azmd.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:**
Under Laws 2021, Chapter 259, the legislature amended A.R.S. § 32-1456 to require the Board to make a rule providing for a medical assistant training program designed and offered by a physician. The Board fulfills the statutory requirement in this rulemaking. An exemption from Executive Order 2022-01 for this rulemaking was provided by Brian Norman, of the Governor's Office, in an email dated September 29, 2022.
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:**
The Board does not intend to review or rely on a study in its evaluation of or justification for any rule in this rulemaking.



GOVERNOR'S REGULATORY REVIEW COUNCIL

ATTORNEY MEMORANDUM - REGULAR RULEMAKING

MEETING DATE: March 7, 2023; April 4, 2023

TO: Members of the Governor's Regulatory Review Council (Council)

FROM: Council Staff

DATE: March 31, 2023

SUBJECT: CITIZENS CLEAN ELECTION COMMISSION
Title 2, Chapter 20

Amend: R2-20-211, R2-20-220, R2-20-223

Note: This Council staff memorandum supersedes the previous memorandum dated March 15, 2023 and all legal analysis therein.

Staff Update:

The Citizens Clean Election Commission ("Commission") submitted a rulemaking package to the Council seeking to amend three rules in Title 2, Chapter 20, Article 2. Specifically, the Commission sought to amend rules R2-20-211 to allow the Executive Director of the Commission to delegate authority to issue subpoenas and take depositions to "any person authorized to provide legal services." Similarly, the Commission sought to amend R2-20-223 to allow "any person authorized to provide legal services on behalf of the Commission" to draft and serve notice of an appealable agency action rather than only the Assistant Attorney General.

This rulemaking was considered at the Governor's Regulatory Review Council ("Council") Study Session on February 28, 2023 and Council Meeting on March 7, 2023. At the March 7, 2023 Council Meeting, Council Member Bentley questioned whether the Commission had authority to delegate its subpoena power. Specifically, Council Member Bentley cited *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942) as prohibiting agency delegation of

subpoena power unless expressly authorized. Council Member Bentley requested Council staff provide additional information clarifying the concerns raised. Ultimately, the Council voted to table consideration of this rulemaking to the March 28, 2023 Study Session and April 4, 2023 Council Meeting.

At the March 28, 2023 Study Session there was also discussion regarding whether the Commission's rulemaking was properly before the Council given the language in A.R.S. § 16-974(D) which states "[t]he [C]ommission's rules and any commission enforcement actions pursuant to this chapter are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official. Notwithstanding any law to the contrary, rules adopted pursuant to this chapter are exempt from title 41, chapters 6 and 6.1."

Council staff previously prepared a memorandum addressing some of the Council's concerns dated March 15, 2023. Given Council staff's updated understanding regarding the structure of A.R.S. Title 16 and the additional concerns raised by the Council at the March 28, 2023 Study Session, Council staff has revised the March 15, 2023 memorandum to include additional analysis in Section III(1) and modified analysis in Sections III(2) and (3), including additional case analysis of *NLRB v. John S. Barnes Corp.* in Section III(3)(c).

I. QUESTIONS PRESENTED

1. Is the Commission's rulemaking exempt from Council review and the requirements of the Administrative Procedures Act (APA) pursuant to A.R.S. § 16-974(D)?
2. Does statute grant the Commission express authority to delegate issuing subpoenas, taking depositions, and drafting and serving notices of an appealable agency action?
3. Does *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942) prohibit delegation of subpoena power by an agency when delegation authority was not expressly granted by statute?
4. Is the term "legal services," included in the proposed amended language in Commission rules R2-20-211 and R2-20-223, defined in either the Commission's rules or statutes?

III. ANALYSIS

- 1. Is the Commission's rulemaking exempt from Council review and the requirements of the Administrative Procedures Act (APA) pursuant to A.R.S. § 16-974(D)?**

Short Answer:

No. While A.R.S. § 16-974(D) exempts Commission rulemakings to implement, and arising out of statutory authority from, A.R.S. Title 16, Chapter 6.1 from Council review and the requirements of the APA generally, the current rulemaking is being brought pursuant to statutes in A.R.S. Title 16, Chapter 6, Article 2, which does not have a similar exemption.

Full Analysis:

The exemption from Council review outlined in A.R.S. § 16-974(D) is applicable only to “rules and any commission enforcement actions *pursuant to this chapter....*” (emphasis added). The chapter referenced is A.R.S. Title 16, Chapter 6.1, which was recently added by the Voters’ Right to Know Act (*see* 2022 AZ Init. Meas. 4, § 3, approved as Proposition 211, effective December 5, 2022), under which A.R.S. § 16-974 is codified.

However, the Commission indicated at the March 28, 2023 Study Session that the current rulemaking is being brought pursuant to the Citizens Clean Elections Act, the statutes of which are found in A.R.S. Title 16, Chapter 6, Article 2. A.R.S. Title 16, Chapter 6, Article 2 currently has no similar statutory exemption from Council review of the Commission’s rulemakings as found in Chapter 6.1. In fact, while such an exemption did exist at one time in A.R.S. § 16-956(C), that exemption was removed pursuant to Proposition 306, which was approved by Arizona voters in November 2018. Since that time, the Commission has submitted several rulemakings implementing, and arising out of the statutory authority from, A.R.S. Title 16, Chapter 6, Article 2 to the Council for its review and approval. Similarly, the current rulemaking is properly before the Council.

2. Does statute grant the Commission express authority to delegate issuing subpoenas, taking depositions, and drafting and serving notices of an appealable agency action?

Short Answer:

No. No statute in A.R.S. Title 16, Chapter 6 expressly authorizes the Commission to delegate its duties.

Full Analysis:

The Commission cites to A.R.S. § 16-956(A)(7) as part of its statutory authority for these rules which states, “[t]he [C]ommission shall [e]nforce this article, ensure that money from the fund is placed in candidate campaign accounts or otherwise spent as specified in this article and not otherwise, monitor reports filed pursuant to this chapter and financial records of candidates as needed and ensure that money required by this article to be paid to the fund is deposited in the fund.” (emphasis added). A.R.S. § 16-956(B) also states, “[t]he [C]ommission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the commission's duties or the exercise of its powers.” (emphasis added). No other statute in A.R.S. Title 16, Chapter 6, Article 2 authorizes the Commission to delegate these duties.

While A.R.S. § 16-979(C) states “[n]otwithstanding any law, the [C]ommission has exclusive and independent authority to select legal counsel to represent the [C]ommission regarding its duties *under this chapter....*”, A.R.S. § 16-979(C) is codified under A.R.S. Title 16,

Chapter 6.1. (emphasis added).¹ As such, any authority to delegate the Commission's duties to legal counsel is limited to those duties outlined by statute in A.R.S. Title 16, Chapter 6.1. As outlined above, the Commission indicates the current rulemaking is being brought pursuant to statutes in A.R.S. Title 16, Chapter 6, not Chapter 6.1. Therefore, the Commission has not cited to, and there does not appear to be any, express statutory authority to delegate the Commission's duties outlined in Title 16, Chapter 6, Article 2.

3. Does *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942) prohibit delegation of subpoena power by the Commission?

Short Answer:

No. Given that the *Cudahy* decision involved construction of the Fair Labor Standards Act, a different statute from the Citizens Clean Elections Act at issue here, and the *Cudahy* Court's emphasis on the fact that the legislative history of the Fair Labor Standards Act showed a provision granting the authority to delegate subpoena power was eliminated when the bill was in Congress, though no similar history exists surrounding Proposition 200 which established the Citizens Clean Election Act by ballot initiative in 1998, *Cudahy* is distinguishable from the current circumstances and is not controlling. Furthermore, subsequent case law, discussed in more detail below, supports delegation of the Commission's subpoena power, even in the absence of express statutory authority to delegate.

Full Analysis:

a. *Cudahy Packing Co. v. Holland*

In *Cudahy*, a regional director of the Wage and Hour Division of the Department of Labor issued a subpoena to Cudahy Packing Co. ("Petitioner"), demanding the production of books, papers, and records relating to wages and hours and purchases and shipments. *Cudahy*, 315 U.S. at 358-59. On appeal to the Supreme Court, the question was raised as to whether, under the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. § 201, *et seq.* ("Act"), the Administrator of the Wage and Hour Division of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum to a regional director. *Id.* at 358.

Section 11 of the Act authorized the Administrator and his designated representatives to conduct investigations which he may deem necessary to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. The Act did not define the Administrator's power to issue subpoenas or specifically authorize him to delegate it to others.

¹ Council staff notes that prior to March 28, 2023, the Arizona Revised Statutes (A.R.S.) found at azleg.gov did not include the Chapter 6.1 heading in Title 16. As such, A.R.S. §§ 16-971 through 979 were erroneously codified under A.R.S. Title 16, Chapter 6, Article 2.

However, for the purposes of any hearing or investigation, § 9 of the Act made applicable to the powers and duties of the Administrator, the subpoena provisions of a separate act, §§ 9 and 10 of the Federal Trade Commission Act. 15 U.S.C.S. §§ 49 and 50. The Administrator was thus given all the powers with respect to subpoenas which are conferred upon the Federal Trade Commission, and no more. Specifically, under § 9 of the Federal Trade Commission Act, 15 U.S.C.S. § 49, the Commission may require the attendance and testimony of witnesses, and production of documents by subpoena; and any members of the Commission may *sign* the subpoenas.

Given this statutory structure, the Administrator argued that he was given authority to delegate to regional directors the signing and issuance of subpoenas by § 4(c) of the present Act, and that, in any case, this authority is to be implied from the structure of the Act and the nature of the duties which are imposed upon him. *Id.* at 360. Section 4(c) provided: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."

The Court held that the words of § 4(c), read in their statutory setting, make it reasonably plain that its only function is to provide that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as each possesses. *Id.* at 361-62. The Court stated that, under the language in the Act, the power of the Administrator to delegate his power to sign and issue subpoenas could not be inferred, either from the extensive nature of the Administrator's duties, or from the fact that, under Section 11 of the Act, he is empowered, through designated representatives, to gather data and make investigations authorized by the Act. *Id.* at 363-64. The Court held that subpoena power shall be delegable only when an authority to delegate is expressly granted. *Id.* at 366. Furthermore, the Court noted that the legislative history of the Act showed that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted. *Id.* Such authority expressly granted in the bill which passed the Senate, was rejected by the Conference Committee. *Id.*

The *Cudahy* case involved construction of an entirely different statutory framework from the Citizens Clean Election Act. Here, unlike in *Cudahy*, the plain language of A.R.S. § 16-956(B) defines the Commission's power to issue subpoenas, though the statutes in A.R.S. Title 16, Chapter 6, Article 2 are silent as to the Commission's authority to delegate it to others. Additionally, unlike in *Cudahy*, there is no evidence in the history of the Citizens Clean Elections Act, established by ballot initiative in 1998, showing that a provision granting authority to delegate the subpoena power was eliminated or restricted. Therefore, the facts at issue in *Cudahy* are different from those surrounding the Commission's rules and its holding does not apply.

b. *Fleming v. Mohawk Wrecking & Lumber Co*

While *Cudahy* was cited at the March 7, 2023 Council Meeting, the authority of agencies to delegate subpoena power, specifically the Court's holding in *Cudahy*, was considered in a subsequent Supreme Court case, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111

(1947), decided five years later. In *Fleming*, the Court found that the Price Administrator of the Office of Price Administration *could* delegate to district directors authority to sign and issue subpoenas. *Id.* at 122.

Fleming dealt with Section 201(a) of the Emergency Price Control Act which provided, in part, "[t]he Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended." Furthermore, Section 201(b) of the Emergency Price Control Act provided, "[t]he principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

While these provisions were practically identical to those considered in *Cudahy*, the Court in *Fleming* determined the decision in *Cudahy* did not control. *Id.* at 120 Specifically, the Court in *Fleming* found that the legislative history of the Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the bill was in Conference. *Id.* On the other hand, the Court noted the Senate Committee in reporting the bill that became the Emergency Price Control Act described § 201(a) as authorizing the Administrator to "perform his duties through such employees or agencies by delegating to them any of the powers given to him by the bill." *Id.* Furthermore, the Court noted that § 201(b) authorized him or "any representative or other agency to whom he may delegate any or all of his powers, to exercise such powers in any place." *Id.* at 120-21 (*citing* S. Rep. No. 931, 77th Cong., 2d Sess., pp. 20-21.). The Court in *Fleming* also noted in *Cudahy*, the Act made expressly delegable the power to gather data and make investigations, thus lending support to the view that when Congress desired to give authority to delegate, it said so explicitly. *Id.* at 121. In the Emergency Price Control Act, the Court noted there was no provision which specifically authorizes delegation as to a particular function. *Id.* In *Cudahy*, the Act made applicable to the powers and duties of the Administrator the subpoena provisions of the Federal Trade Commission Act, §§ 9 and 10, 38 Stat. 722, 723, 15 U. S. C. §§ 49 and 50, which only authorized either the Commission or its individual members to sign subpoenas. *Id.* The Court in *Fleming* noted the subpoena power under the Emergency Price Control Act was found in § 202(b) which states, "[t]he Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place" and was not dependent on the provisions of another Act having a history of its own. *Id.*

Furthermore, the Court noted the Act involved in *Cudahy* granted no broad rulemaking power. *Id.* However Section 201(d) of the present Act provided, "[t]he Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." The Court stated, such a rulemaking power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. *Id.* (*citing* *Plapao Laboratories v. Farley*, 92 F.2d 228 (D.C. Cir. 1937)). The Court found there was no provision in the Emergency Price Control Act negating the existence of such authority, so far as the subpoena power is concerned, nor can the absence of such authority be fairly inferred from the history and

content of the Act. *Id.* at 121-22. Thus, the Court held that the presence of the rulemaking power, together with the other factors differentiating this case from *Cudahy*, indicates that the authority granted by § 201(a) and (b) should not be read restrictively. *Id.* at 122.

c. *NLRB v. John S. Barnes Corp.*

In another case decided by the Seventh Circuit Court of Appeals two years later, *NLRB v. John S. Barnes Corp.*, 178 F.2d 156 (7th Cir. 1949), the Court also held that a Regional Director of the National Labor Relations Board (Board) could issue subpoenas. *Id.* at 162. The Regional Director of the Thirteenth Region of the Board issued subpoenas to John S. Barnes Corporation and Ernest J. Svenson (Respondents), one of its officers, to appear and testify and to produce certain documents and data before a hearing officer of the Board at a designated time and place. *Id.* at 157. The respondents contended that since the National Labor Relations Act, as amended, gave no express delegation authority to the Regional Directors of the Board to issue subpoenas, the subpoenas were invalid. *Id.* at 158.

Section 11(1) of the Labor-Management Relations Act of 1947 provided that, “the Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.” *Id.* Section 11(1) also provided additional powers which the Board was expressly authorized to delegate to “any agent or agency designated by the Board for such purposes”, including administering oaths and affirmations. *Id.* Respondents contended that the express authorizations to delegate certain powers and the failure to expressly authorize the delegation of the subpoena power indicated that Congress did not intend that the Board should have the right to delegate the subpoena power to any agent. *Id.* at 158-59. However, the Court in *Barnes* found that, the mere fact that certain sections of the Labor-Management Relations Act of 1947 authorized the delegation of certain powers by the Board, had not been generally construed as depriving the Board of the power to delegate certain other powers, the delegation of which was not expressly authorized, citing several examples. *Id.* at 159.

The Court in *Barnes* also noted Section 6 of the Act gives the Board power to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act. *Id.* at 159. The Court in *Barnes* noted that the Board adopted Rule 203.58(c) National Labor Relations Board Rules and Regulations, Series 5, 12 Fed.Reg. 5656, which provided that subpoenas should be issued by the regional director or a hearing officer. *Id.* The Court in *Barnes* found that the rule was “necessary to carry out the provisions of the Act.” *Id.* The Court also noted that while it agreed that the Board could not, by its own rule, enlarge its powers beyond the scope intended by Congress, “[s]uch rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.” *Id.* (quoting *Fleming*, 331 U.S. at 121).

Furthermore, the Court in *Barnes* noted that, given the broad purpose and policy of the Act, the administration of the Act must be flexible and construed as to make its various provisions workable. *Id.* at 160. Ultimately, the Court found, from its consideration of the

National Labor Relations Act as a whole, its various provisions, its purpose, its legislative history, and the magnitude of the program involve, it was convinced that Congress intended to grant the Board the authority to delegate the power to issue subpoenas even though the power was not expressly granted. *Id.* at 162. The Court held that the subpoenas issued by the Regional Director pursuant to the Rules and established practice of the Board, were valid. *Id.*

d. *NLRB v. Lewis*

In another case regarding the same provision of the National Labor Relations Act, decided by the Ninth Circuit Court of Appeals, *NLRB v. Lewis*, 249 F.2d 832 (9th Cir. 1957), the Court again held that a Regional Director of the National Labor Relations Board (Board) could issue subpoenas under the facsimile signature of a Board member. *Id.* at 835. The General Counsel, by the Regional Director in Los Angeles, California, filed a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the company and the union were engaging in various unfair labor practices in violation of the Labor-Management Relations Act of 1947. *Id.* at 833. Pursuant to the written request of counsel for the General Counsel, the Regional Director, acting under Section 11(1) of the Act, 29 U.S.C.A. 161(1); issued the subpoenas in question under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. *Id.*

The Court in *Lewis* noted, just as the Court in *Barnes*, that, while Section 11(1) explicitly empowers only the Board, or a member thereof, to issue subpoenas, nowhere in the Labor-Management Relations Act of 1947 does it make that power delegable nor expressly prohibit delegation. *Id.* at 835. Furthermore, the Court in *Lewis* noted all courts that had considered the delegability of the Board's subpoena issuing power to a Regional Director had interpreted Section 11(1) of the Labor-Management Relations Act of 1947 as empowering the Board to delegate the subpoena power. *Id.* (citing *National Labor Relations Board v. John S. Barnes Corp.*, 190 F.2d 127 (7th Cir. 1951) and *Jackson Packing Co. v. National Labor Relations Board*, 204 F.2d 842 (5th Cir. 1953)). As such, the Court held that subpoenas may validly be issued by a Regional Director under the facsimile signature of a Board member. *Id.*

Interestingly, the Court in *Lewis* also stated that neither *Cudahy* nor *Fleming* were controlling. *Id.* The Court noted the *Cudahy* decision merely held that the Fair Labor Standards Act, 29 U.S.C.A. 201 *et seq.* did not grant the Administrator the power to delegate his subpoena power to subordinates, while on the other hand, the *Fleming* case held that the Administrator of the Emergency Price Control Act, 50 U.S.C.A. Appendix, 901 *et seq.* was authorized to delegate the authority to issue subpoenas. *Id.* The Court found each of those cases involved the construction of a statute different from Section 11(1) of the Labor-Management Relations Act of 1947 at issue in *Lewis*. *Id.* Accordingly, the Court held those decisions, one upholding the delegability of this power and the other denying it, did not govern the instant case. *Id.* Therefore, the Court held that subpoenas could be issued by a Regional Director under the facsimile signature of a Board member.

Finally, the Court in *Lewis* addressed the fact that counsel for the General Counsel, not the General Counsel himself, sought the subpoenas. *Id.* at 838. To that point, the Court stated,

“[n]o citation of cases is necessary to restate the rule that in legal contemplation counsel representing counsel occupies the identical legal status of the person he represents.” *Id.* As such, the Court found, if the General Counsel could apply for the issuance of subpoenas, as the Court had held, counsel representing him could also do so validly. *Id.*

e. *Applicability of case law to Commission’s authority to delegate subpoena power.*

In the current circumstance, as noted in *Lewis*, the applicability of the holdings in *Cudahy*, *Fleming*, *Barnes*, and even *Lewis* itself are limited as they involved construction of different statutes from those at issue here. For that reason alone, *Cudahy* is not controlling as related to whether the Commission’s subpoena power is delegable under its statutes. However, in the absence of a Court’s interpretation of the present statutory provisions, we can look to the above cases for guidance. In that regard, the circumstances here are more similar to those found in *Fleming*, *Barnes*, and *Lewis* than *Cudahy*.

Here, while there is no express statutory authority to delegate the Commission’s subpoena power, like in *Barnes* and *Lewis*, there is no statutory prohibition either. Furthermore, unlike in *Cudahy*, there is no evidence in the history of the Citizens Clean Elections Act that the ability to delegate the Commission’s subpoena power was eliminated or restricted. Ultimately, as in *Fleming*, there is no provision restricting delegating authority, so far as the subpoena power is concerned, “[n]or can the absence of such authority be fairly inferred from the history and content” of the Citizens Clean Elections Act.

Additionally, like Section 201(d) of the Emergency Price Control Act in *Fleming*, which granted the Administrator the authority to “issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act,” or Section 6 of the Labor-Management Relations Act of 1947 in *Barnes* and *Lewis*, which granted the Board power to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act, the Commission “may adopt rules to carry out the purposes of this article and to govern procedures of the [C]ommission”, pursuant to A.R.S. § 16-956(C). As outlined in *Fleming* and reiterated in *Barnes*, such a grant of power “may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.” *Fleming*, 331 U.S. at 121. Therefore, just like the NLRB adopted Rule 203.58(c) outlined in *Barnes*, which provided that subpoenas should be issued by the regional director or a hearing officer, and that the *Barnes* Court indicated was “necessary to carry out the provisions of the Act,” here the Commission’s proposed amendments to allow delegation of subpoena power to any person authorized to provide legal services may also “carry out the purposes of” A.R.S. Title 16, Chapter 6, Article 2 and “govern procedures of the Commission.”

Ultimately, given the presence of the rulemaking power in A.R.S. § 16-956(C), together with the other factors differentiating the present circumstances from *Cudahy* and making them similar to *Fleming*, *Barnes*, and *Lewis*, as well as a consideration of the purpose and intent of the Citizens Clean Elections Act as a whole as outlined in A.R.S. § 16-940 and the Commission’s role to enforce and administer the system, Council staff believes the Commission has authority to

delegate its subpoena power to persons authorized to provide legal services, and subdelegate to any person authorized to provide legal services to the delegee as discussed in *Lewis*.

4. Is the term “legal services,” included in the proposed amended language in Commission rules R2-20-211 and R2-20-223, defined in the Commission’s rules or statutes?

Short Answer:

No. The term “legal services” is not defined in either the Commission’s rules or statutes.

Full Analysis:

The proposed amendments to rule R2-20-211(A) and (B) state the Executive Director of the Commission may delegate the authority to issue subpoenas and take depositions “to any person authorized to provide legal services.” Likewise, the proposed amendments to rule R2-20-223 states “any person authorized to provide legal services on behalf of the Commission” shall draft and serve notice of appealable agency action.

The term “legal services” is not defined in the Commission’s rules or statutes. However, the Rules of the Supreme Court of Arizona defines “practice of law” to mean, “*providing legal advice or services* to or for another by: (1) preparing or expressing legal opinions to or for another person or entity; (2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation; (3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal; (4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or (5) preparing a document, in any medium, intended to affect or secure a specific person's or entity's legal rights.” *See* A.R.S. Sup.Ct.Rules 75(b) (emphasis added).

Additionally, the Rules of the Supreme Court of Arizona and Rules of Professional Conduct state, “[a] lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services...is compatible with the professional obligations of the lawyer.” *See* A.R.S. Sup.Ct.Rules, Rule 42(a); Rules of Prof.Conduct, ER 5.3(a). Specifically, lawyers shall “ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of a lawyer comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all lawyer client information protected by ER 1.6.” *Id.*

As such, it appears the scope of the term “legal services” would include lawyers issuing subpoenas, taking depositions, or drafting and serving appealable agency actions. However, the Rules of the Supreme Court of Arizona and Rules of Professional Conduct also contemplate nonlawyers “assisting lawyers in providing legal services.”

Council staff believes the rules are sufficiently clear, concise, and understandable as written pursuant to A.R.S. § 41-1052(D)(4) as related to the term “legal services” as it is generally understood in the legal profession.

IV. CONCLUSION

The Commission’s rulemaking is properly before the Council as there is no statutory exemption from Council review located in A.R.S. Title 16, Chapter 6, Article 2, out of which this rulemaking arises.

While there is no express statutory authority for the Commission to delegate its duties, including the issuance of subpoenas, the Court’s holding in *Cudahy* is not controlling and does not prohibit the Commission’s delegation of subpoena power. In fact, subsequent case law from the Supreme Court, Seventh Circuit, and Ninth Circuit have all held that agencies may delegate subpoena power in the absence of express authority to do so, particularly when the agency is given a broad grant of rulemaking authority and no evidence of restriction exists either in express provisions or history. As such, given the Commission’s broad grant of rulemaking power in A.R.S. § 16-956(C), together with the other factors differentiating the present circumstances from *Cudahy* and making them similar to *Fleming*, *Barnes*, and *Lewis*, Council staff believes the Commission has authority to delegate its subpoena power to persons authorized to provide legal services, and subdelegate to any person authorized to provide legal services to the delegee as discussed in *Lewis*.

Finally, while the term “legal services” is not defined in the Commission’s rules or statutes, Council staff believes the rules are sufficiently clear, concise, and understandable as written pursuant to A.R.S. § 41-1052(D)(4) as related to the term “legal services” as it is generally understood in the legal profession.

Memorandum

To: Governor's Regulatory Review Council

From: Kara Karlson & Kyle Cummings, Assistant Attorneys General

RE: Clean Elections Commission Rule Amendments to A.A.C. R2-20-211, R2-20-220, and R2-20-223.

Date: March 31, 2023

Introduction

At the Council's Study Session on March 28, Chair Nicole Sornsin requested the Citizens Clean Elections Commission ("Commission") provide a brief on the amendments to rules Ariz. Admin. Code R2-20-211, -220, and -223 ("Rule Amendments") pending before the Governor's Regulatory Review Council ("GRRC").

The proposed amendments are "not illegal, inconsistent with legislative intent or beyond the agency's statutory authority" and meet all other statutory requirements imposed by Title 41. *See* A.R.S. § 41-1052. GRRC should approve the Rule Amendments at its next available meeting.

I. The Commission Submitted the Rule Amendments Pursuant to the Statutes Requiring GRRC Approval of Rules

In November 2018, Arizona voters approved Proposition 306 and removed an exemption from GRRC review for rules proposed under the Clean Elections Act. The Commission has submitted amendments to GRRC since that referendum became effective.

The Voter's Right to Know Act was approved by voters in November 2022. That law, codified at Chapter 6.1 of Title 16, provides an exemption from GRRC review for rules promulgated under that chapter. A.R.S. § 16-974(D). The Rule Amendments here

were first adopted by the Commission prior to the enactment of the Voter's Right to Know Act ("VRKA").¹ Consequently, the Clean Elections Act, not the Voter's Right to Know Act, governs the review of the Rule Amendments.

II. The Commission's Procedures Are Proper and the Rule Amendments Are Lawful.

A. The Statute and Rules Provide a Legal Process for the Issuance of Subpoenas.

The Rule Amendments pertain to rules that have existed since the initial rules created after the 1998 passage of the Clean Elections Act ("CEA"), A.R.S. §§ 16-940 through -961.² The Commission has express authority to issue subpoenas and delegate that authority to staff. First, the Act specifically empowers the Commission to subpoena witnesses:

The commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the commission's duties or the exercise of its powers.

A.R.S. § 16-956(B). The very next sub-section authorizes the Commission to "adopt rules to carry out the purposes of this article and to govern procedures of the commission."

A.R.S. § 16-956(C). In sum, the Commission is statutorily authorized to "adopt rules" that govern the authority of the Commission to "subpoena witnesses." A.R.S. § 16-956 (B),

¹ Ariz. Clean Elections Comm'n Meeting Packet (Sept. 29, 2022), *available at* <https://storage.googleapis.com/core.usgovcloudapi.net/public/docs/828-9-29-22-Meeting-Packet.pdf>.

² As recently as September 1, 2020, GRRC considered and accepted the Commission's Five-Year Report that included the baseline rules authorizing the delegation process at issue here. Governor's Regulatory Review Council, September 1, 2020 Council Meeting, Internet Archive (Sept. 1, 2020), <https://archive.org/details/9.1.2020-cm>.

(C). This includes a procedure, when properly promulgated by the Commission, to delegate that subpoena authority.

It is axiomatic that procedural rules can include the delegation of authority to issue a subpoena. *See, e.g.* A.R.S. § 12-2212 (providing a valid subpoena may be issued by any public officer authorized by law). For example, the Arizona Rules of Civil Procedure authorizes the issuance of subpoenas in civil proceedings. This includes a subpoena requiring the attendance of a witness at a deposition, hearing, or trial, as well as a subpoena *duces tecum* to produce documents. Ariz. R. Civ. P. 45. Indeed, it is a *rule* and not a statute that delegates authority to the “State Bar of Arizona to issue signed subpoenas on behalf of the clerk through an online subpoena issuance service approved by the Supreme Court.” Ariz. R. Civ. P. 45(a)(2). This is not surprising. Rulemaking pursuant to statute provides the authority for a number of necessary government functions. *See* A.R.S. § 41-1030 (authorizing rule-making and proscribing restrictions to ensure compliance with statutes).

There is a long line of cases that recognizes just the same type of statutory-regulatory framework employed by the Commission here authorizing the delegation of subpoena power. For example, in *Nat’l Labor Relations Bd. v. Duval Jewelry Co. of Miami*, parties moved to quash subpoenas issued pursuant to an NLRB complaint. 357 U.S. 1 (1958). The NLRB refused to hear the request to quash because the NLRB rules required review by a hearing officer before the Board would consider them. *Id.* at 4. The Court held that “[w]hile there is delegation here, the ultimate decision on a motion to revoke is reserved to the Board, not to a subordinate.” *Id.* at 7. Likewise, in *General Engineering, Inc. v. Nat’l Labor Relations Bd.*, 341 F.2d 367 (9th Cir. 1965), the court

explained that while the relevant statute “by its terms, relates only to subpoenas duces tecum, . . . the Board is authorized to make such rules and regulations as may be necessary to carry out the provisions of the Act.” *Id.* at 372. The Ninth Circuit held the language authorizing the board to “make such rules and regulations,” and then engaging in the act of rulemaking, provided appropriate authorization to apply the statute to subpoenas in other contexts. *Id.*

Indeed, such delegation in enforcement matters by boards and commissions may be *required* as a matter of due process. *See, e.g. Burns v. Ariz. Public Srv’c Co.*, 517 P.3d 624, 632, ¶34 (2022) (recognizing that the Corporation Commission’s subpoena power was not “without constraint,” limited by its “own limited constitutional authority, as well as the overarching requirements of due process.”). For instance, *Horne v. Polk*, holds that an agency may “investigate, prosecute, and adjudicate cases,” so long as the final decision-maker does not make the “initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision.” *Horne*, 242 Ariz. 226, 230, ¶ 14 (2017).³

While *Horne* was the first case to squarely address the procedure for administrative enforcement of campaign finance law in Arizona, it was not the first state or federal case to address due process in the context of administrative proceedings. For that reason, the

³ While there was discussion of *Legacy Found. Action Fund v. Clean Elections Comm’n*, CV-22-0041-PR (Mar. 2, 2023), during the Study Session on March 28, 2023, the Commission’s Motion for Reconsideration in that case remains pending and the Attorney General has filed an amicus in support of that motion. In view of the pending motion, this memorandum does not discuss that case.

rules at issue in the Rule Amendments pre-date *Horne*, and had been promulgated based on the long-standing recognition that due process requires that “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” *In re Murchison*, 349 U.S. 133, 136 (1955). For this reason, not only is the ability to delegate subpoena authority proper given the plain language of the Clean Elections Act, it is an important due process protection as propounded by the state and federal Supreme Courts.

B. *Cudahy Packing* Is Inapplicable

As the GRRC Staff Attorney memo detailed in its extensive analysis, *Cudahy Packing, Co. v. Holland*, 315 U.S. 357 (1942), is inapplicable. There are a few points that the Commission wants to highlight to explain why the Commission agrees *Cudahy* does not apply here.

First, Cudahy is a case of statutory construction; a different statute necessitates a different result. In *Cudahy*, the administrator argued that delegation was authorized by a statute that provided “ ‘the principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.’ ” *Id.* at 360. This is not a delegation of authority. It is, as the majority held, a section designating the principal place of business and geographic constraints for the Administration. *Id.* at 361-62. (“We think that the words of the section, read in their statutory setting, make it reasonably plain that its only function is to provide that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as each possesses.”).

The generally-applicable principle that can be derived from *Cudahy* is that there must be a legal process that authorizes delegation of investigative authority. The section relied upon by the agency in *Cudahy* was insufficient because it was not a *delegation* of authority, but an authorization to exercise its *extant authority* from the District of Columbia throughout the United States.

Second, federal laws enacted contemporaneously with the legislation at issue, providing agencies with authority to regulate in similar ways, expressly provided authority to delegate subpoena power when it was the will of Congress to include it. The majority opinion names a number of legislative acts, including the Federal Trade Commission Act “whose subpoena provisions were adopted by the present Act,” which did not include delegation authority. *Id.* at 364. And those agencies, in absence of an authorization of delegation authority, had never “construed the authority of its head to include the power to delegate the signing and issuance of subpoenas.” *Id.* at 365. In contrast, “Congress, in numerous cases, has specifically authorized delegation of the subpoena power” to subordinates. *Id.* Given this context, in *Cudahy* it was consistent with federal agency practice to find that there was *not* authority to delegate subpoena authority.

Third, Congressional intent *not* to delegate authority in *Cudahy* was apparent due to the fact that the authority to delegate subpoena power was included in a prior version of the statute, but removed and never re-inserted. *Id.* at 366. In fact, the case discusses a number of ways the statute was changed to eliminate or restrict the ability to delegate authority. *Id.* at 366-67.

Finally, other courts agree on the limited utility of *Cudahy*. The Federal Circuit Court of Appeals has also examined *Cudahy*, specifically the argument that because Congress explicitly gave a director a specific power, but not the authority to delegate, the intent was that there could be no delegation. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031 (Fed. Cir. 2016). The court disagreed, noting “[t]he implicit power to delegate to subordinates by the head of an agency was firmly entrenched in *Fleming v. Mohawk Wrecking & Lumber Co.*” *Ethicon Endo-Surgery, Inc.*, 812 F.3d at 1031. Furthermore, “[t]he Supreme Court has not cited *Cudahy* since 1958 and the lower courts no longer follow it,” *id.* at 1032 (citation and internal quotations omitted), with “*Cudahy* simply stand[ing] for the unremarkable proposition that congressional intent to preclude delegation can sometimes be found in the legislative history.” *Id.* Much like *N.L.R.B. v. Lewis*, 249 F.2d 832 (9th Cir. 1957), cited to by the Staff Attorney Memo, *Ethicon* provides persuasive guidance that *Cudahy* does not impose a requirement of explicit provision of delegation authority.

Given the points above, *Cudahy* must be read in its proper context. It is a case that relies upon the plain language of a federal statute that did not authorize the delegation of authority, and further statutory context indicated that delegation authorization was considered and rejected by Congress and had not been exercised by similar agencies. Furthermore, *Cudahy* has been critiqued or ignored “since 1958.” *Ethicon Endo-Surgery, Inc.*, 812 F.3d at 1031. *Cudahy* is inapposite to the Rule Amendments before GRRC, and provides no basis to return the Rule Amendments.

C. The Commission’s Statutory-Regulatory Framework Properly Delegates Authority to Issue Subpoenas.

The statutory-regulatory framework provided by the Clean Elections Act is “consistent with the statute [and] reasonably necessary to carry out the purpose of the statute.” A.R.S. § 41-1030(A). The Clean Elections Act directs the Commission to “enforce this article” and to “adopt rules to carry out the purposes of this article and to govern procedures of the commission.” A.R.S. § 16-956(B), (C). To protect the rights of respondents before the Commission, the Commission has, by rule, separated the prosecutorial and decision-making functions as required by due process. This is consistent with Arizona law and procedure, as well as a long line of court cases approving limited delegation of authority in similar circumstances.

The commission has not delegated the unfettered authority to subpoena at will, as was the concern in *Cudahy*. Instead, the Executive Director must be authorized by the Commission to issue the subpoena. *See* Proposed Amend. R2-20-211(A). The Commission will continue to adjudicate in its neutral capacity the scope and extent of a subpoena on a motion by the respondent. Ariz. Admin. Code R2-20-213. Because the Rule Amendments are lawful exercises of the rulemaking power and *Cudahy* is inapposite, GRRC may not reject the rules on these grounds and should approved them at its next meeting.

D. The Term “Legal Services” is clear, concise and understandable to the general public.

While the term “legal services” is not defined in the Clean Elections Act, it is a clear, reasonable, and understandable term. The term “legal services” is neither vague

nor confusing. The plain meaning of the term is “work done by a lawyer for a client.” See “legal services,” *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/legal-services> (accessed March 31, 2023). Because A.R.S. § 16-979 does not apply to the Clean Elections Act, a mere editorial suggestion is not sufficient to return the rule. Consequently, GRRC should approve the Rule Amendments.

III. Conclusion

The Commission submitted the Rule Amendments to GRRC pursuant to A.R.S. §§ 41-1024, -1052. The Rule Amendments meet all of the requirements set forth in A.R.S. § 41-1052(D). The applicable case law and statutes demonstrate clearly and convincingly that the Rule Amendment are lawful and there is no good faith basis to return them. Respectfully, GRRC should approve them at its earliest convenience.

NOTICE OF TERMINATION OF RULEMAKING

TITLE 2. ADMINISTRATION

CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

1. The *Register* citation and the date of the Notice of Rulemaking Docket Opening:

Notice of Rulemaking Docket Opening: 28 A.A.R. 3489 (October 28, 2022)

2. The *Register* citation and the date of the Notice of Proposed Rulemaking:

Notice of Proposed Rulemaking: 28 A.A.R. 3409 (October 28, 2022)

3. Article, Part, or Section Affected (as applicable) Rulemaking Action

R2-20-211

Terminate