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

Location: **Citizens Clean Elections Commission**
1110 W. Washington, Suite 250
Phoenix, Arizona 85007

Date: **Thursday, October 26, 2023**

Time: **9:30 a. m.**

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the Commissioners of the Citizens Clean Elections Commission and the general public that the Citizens Clean Elections Commission will hold a regular meeting, which is open to the public on October 26, 2023. This meeting will be held at 9:30 a.m. **This meeting will be held in person and virtually.** Instructions on how the public may participate in this meeting are below. For additional information, please call (602) 364-3477 or contact Commission staff at ccec@azcleanelections.gov.
The meeting may be available for live streaming online at https://www.youtube.com/c/AZCCEC/live. You can also visit https://www.azcleanelections.gov/clean-elections-commission-meetings. Members of the Citizens Clean Elections Commission will attend in person, by telephone, video, or internet conferencing.

Join Zoom Meeting

https://us02web.zoom.us/j/89323025759

Meeting ID: 893 2302 5759

Please note that members of the public that choose to use the Zoom video link must keep their microphone muted for the duration of the meeting. If a member of the public wishes to speak, they may use the Zoom raise hand feature and once called on, unmute themselves on Zoom once the meeting is open for public comment. Members of the public may participate via Zoom by computer, tablet or telephone (dial in only option is available but you will not be able to use the Zoom raise hand feature, meeting administrator will assist phone attendees). Please keep yourself muted unless you are prompted to speak. The Commission allows time for public comment on any item on the agenda. Council members may not discuss items that are not specifically identified on the agenda. Therefore, pursuant to A.R.S. § 38-431.01(H), action taken as a result of public comment will be limited to directing Council staff to study the matter, responding to any criticism, or scheduling the matter for further consideration and decision at a later date.

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

The agenda for the meeting is as follows:

I. Call to Order.

II. Discussion and Possible Action on Meeting Minutes for September 21, 2023.

III. Discussion and Possible Action on Executive Director's Report, Enforcement and Regulatory Updates and Legislative Update.

IV. Discussion of and possible action on adoption of rules pursuant to the Voter's Right to Know Act, Chapter 6.1 of Arizona Revised Statutes Title 16.

R2-20-809 - Complaint Procedures.

R2-20-810 - Response Procedures.

R2-20-811 - Investigation and Enforcement Procedures.

R2-20-812 - Enforcement Hearing Procedures.

R2-20-813 - Transactions and Structuring.

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

VI. Adjournment.
This agenda is subject to change up to 24 hours prior to the meeting. A copy of the agenda background material provided to the Commission (with the exception of material relating to possible executive sessions) is available for public inspection at the Commission's office, 1110 W Washington St, #250, Phoenix, AZ 85007.

Dated this 24th day of October, 2023
Citizens Clean Elections Commission
Thomas M. Collins, Executive Director

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

THE STATE OF ARIZONA

CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona
September 21, 2023
9:30 a.m.

By: Kathryn A. Blackwelder, RPR
Certified Reporter
Certificate No. 50666

CERTIFIED TRANSCRIPT

PUBLIC MEETING BEFORE THE CITIZENS CLEAN ELECTIONS COMMISSION convened at 9:30 a.m. on September 21, 2023, at the State of Arizona, Clean Elections Commission, 1110 West Washington, Conference Room, Phoenix, Arizona, in the presence of the following Board Members:

Mr. Mark Kimble, Chairman
Mr. Galen Paton
Ms. Amy Chan
Mr. Steve Titla

OTHERS PRESENT:

Thomas M. Collins, Executive Director
Paula Thomas, Executive Officer
Mike Becker, Policy Director
Gina Roberts, Voter Education Director
Alec Shaffer, Web Content Manager
Avery Xola, Voter Education Manager
Kara Karlson, Assistant Attorney General
Mary O'Grady, Osborn Maledon
Cathy Herring, Staff
Rivko Knox, Member of the Public
Nathan Madden, Member of the Public

P R O C E E D I N G

CHAIRMAN KIMBLE: Good morning. Agenda Item I is the call to order. It's 9:30 a.m. on September 21st, 2023. I call this meeting of the Citizens Clean Elections Commission to order.

With that, we will take attendance. Commissioners, please identify yourselves for the record.

COMMISSIONER PATON: Galen Paton.

COMMISSIONER CHAN: Amy Chan.

CHAIRMAN KIMBLE: And I'm Chairman Kimble.

We are also expecting Commissioner Titla at some point, but we will proceed without him until he attends. We do have a quorum.

Item II, discussion and possible action on minutes for the August 24th, 2023 meeting. Is there any discussion on the minutes?

COMMISSIONER CHAN: Mr. Chairman, I move that we approve the minutes as written.

CHAIRMAN KIMBLE: It's been moved by Commissioner Chan that we approve the minutes as written. Is there a second?

COMMISSIONER PATON: Second.

CHAIRMAN KIMBLE: Seconded by Commissioner Paton.

I will call the roll. Commissioner Chan.

COMMISSIONER CHAN: Aye.

CHAIRMAN KIMBLE: Commissioner Paton.

COMMISSIONER PATON: Aye.

CHAIRMAN KIMBLE: Chair votes aye.

The minutes are approved 3-to-nothing.

COMMISSIONER TITLA: Chairman, this is Steve Titla joining the call.

CHAIRMAN KIMBLE: Thank you, Commissioner Titla. We just approved the minutes.

So we will now move on to Item III, discussion and possible action on the Executive Director's Report. Tom.

MR. COLLINS: Yes. Thank you, Mr. Chairman and Commissioners. And just real quick I wanted to highlight a few things. There is a consolidated election date, November 7th, and there are 12 counties with local elections from school district elections to local referendums.

I also want to note that we've launched, on our web page, a poll worker page to -- that gives folks frequently asked questions for poll workers and links to the County's poll workers -- to each County's poll worker sign-up page. So that's really great. And obviously I just want to say, you know, that, you know,

this effort to pull this information together from counties, you know, takes a lot of work on Alec's part, as our web content manager, and it's a really important part of -- excuse me -- why I think our website is the -- is the best voter website -- voter-oriented website of any -- certainly of any government agency in the state.

You know, we also -- you'll see we had a full slate of activities for National Voter Registration Day. And I really want to thank Gina and Avery and Alec, as well as Dana Lewis, the Pinal County Recorder, for their efforts there. I think we were able to be in more -- I mean, in more places than we ever have been for Voter Registration Day and we were able to --

And then Gina and the Recorder did a Q and A on Facebook. And, in fact, they did some -- there was a new reel on our Instagram page from -- from the Recorder where she explains how to register to vote in 5 seconds, which I think is very impressive and I think sets a good precedent for being able to get access to information as quickly as possible and --

And I will say this: As an inveterate story poster on my own Instagram page, which is all very locked down and none of you can find it --

COMMISSIONER PATON: What's the purpose?

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MR. COLLINS: -- if it's -- if it's longer than 10 seconds, I'm not going to post it, because people can't watch the whole thing. And if you're a standup comic, you need to have a punchline in 10 seconds if you want to end up on somebody's stories, because it cuts off at 15 seconds.

So what I'm trying to say is, this 5-second thing is actually really important and it demonstrates a level of sophistication with this approach that I was very impressed with, obviously. So I'm very thrilled about that and -- and just the whole day was great.

And then you can see, and we've been talking about this for some time internally and I think that this sort of sketches out, you know, that this is part of a whole effort on voter education and public affairs that we are rolling out over the course of the fall. You know, Gina and Avery, for example, have participated, on an ongoing basis, and with other organizations, to --

COMMISSIONER PATON: Excuse me. I have a question.

MR. COLLINS: Oh, please.

COMMISSIONER PATON: The 5-second thing you were talking about --

MR. COLLINS: Yeah.

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COMMISSIONER PATON: -- that was at the Pinal County --

MR. COLLINS: Yeah, Pinal County.

COMMISSIONER PATON: -- Recorders Office?

MR. COLLINS: It was -- well, we filmed it here in Phoenix, I believe, yes, but --

COMMISSIONER PATON: So it's on our page?

MR. COLLINS: Yeah. Yeah.

COMMISSIONER PATON: Okay.

MR. COLLINS: Yeah. Yeah. Yeah.

COMMISSIONER PATON: I just wanted to know --

MR. COLLINS: No, sure.

COMMISSIONER PATON: -- where we could find that or --

MR. COLLINS: You can. It was on -- if you follow our Instagram page, which is just AZ Clean Elections on Instagram, it's there. I posted it on my LinkedIn page too.

COMMISSIONER PATON: Okay. All right. Thank you.

MR. COLLINS: So we have -- you know, we have -- and then Avery last week was at the Tempe Public Library doing a presentation that he's developed on civil discourse, which I think is great. Gina and Avery were at the Tribal County Summit in Camp Verde

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last week. You know, I can tell you that, you know, Gina shared with me that the organizers there, you know, specifically thanked Clean Elections for being a continued partner and, you know, continuing to be present at these kinds of events.

You know, and I hear -- I'm lucky to get calls about -- from folks about -- you know, telling me how impressive Avery was at a particular event or Gina, you know, or -- and then even last night, you know, this is -- you know, Alec replied to an e-mail from a voter about -- about something that she -- got immediate praise from that voter because it was a very responsive answer. And likewise on the -- on the -- with respect to candidates, you know, Mike continues to be responsive to those folks.

So I think that we're -- you know, what we're outlining here in this report is, you know, our commitment as an agency to doing, you know, nonpartisan promotion, participation in elections and civic engagement that touches as many different populations around the state as we can. We'll continue that, at the end of the month, with a partnership with the Flinn Foundation and Center for Civic Leadership to talk -- the first of three talking about how to run for office.

So this is really an important part of what I

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think we'll be doing going forward. And part of what we're going to continue to try to make efforts to do is sort of tell this -- tell this important part of our story to -- to anybody who -- who we can.

I want to mention quickly that we are -- Gina, Paula, and I are working on the procurement process with respect to the 2024 broadcast debates. And then Gina is working to -- you know, on some improvements to the Voter Education Guide, which I'm sure we'll all see here in the next couple of -- couple of months.

You know, I want to note -- and if you have any questions, I'm not sure I can answer them, but there is a new election-related ballot measure that has been filed and may or may not -- may start collecting signatures soon. That language is at the link there, but there's a summary there.

You know, I think that that's -- that's kind of -- I mean, those are the main -- the main points I wanted to make sure we highlighted.

There's obviously a lot of litigation related to elections going on, some of which involves us, some of which does not. I thought it was a --

I will say, and I think this is actually a positive thing, at least from view of the Commission's

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position, this House Bill 2492 is a piece of legislation passed a couple years ago that said that -- trying to reinstitute different forms of what is referred to as documentary proof of citizenship for certain voters. The Commission voted -- you all voted, at the time that legislation was passing, to recommend to Governor Ducey that he then veto that legislation because of its impact on -- legal impact on -- it was likely to be found to not be consistent with the National Voter Registration Act. It also has some direct impact or potential direct impact on people who may not have a permanent address, which is a population that Clean Elections has been working to support in terms of their right to participate in elections over the past couple years -- or, the last several -- I should say, not the past couple, the past several years.

And so I think that the fact that at least -- at least on the -- the partial summary judgment there generally followed along the lines of what the Commission had suggested to the Governor's Office at that time was -- was the correct -- was the correct way to have gone. So, you know, I -- not to say that we're involved in litigating this, we're not, but it is good to be right.

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COMMISSIONER PATON: So I have a question.

MR. COLLINS: Sure.

CHAIRMAN KIMBLE: Commissioner Paton.

COMMISSIONER PATON: So the main issue that I had was on the reservations --

MR. COLLINS: Yes.

COMMISSIONER PATON: -- they all have PO boxes.

MR. COLLINS: Right.

COMMISSIONER PATON: And I used to work on a reservation --

MR. COLLINS: Right.

COMMISSIONER PATON: -- and live there and no -- we didn't have road names.

MR. COLLINS: Right.

COMMISSIONER PATON: So, I mean, that just wouldn't work if you needed to have a street address.

MR. COLLINS: And that particular aspect of it, I think, is still subject to getting hashed out. But the bottom line is that, I think that, broadly speaking, we -- the critiques we made of that were -- are, you know, consistent with what the law is. And I think that's the most important point, and so I agree with that.

I don't know if there's anything else. We

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are -- Mike is continuing to do outreach to candidates. And obviously we are -- you know, I just wanted to -- as I occasionally do, I just wanted to, you know, say that, you know, with the team we have here, with Paula, Mike, Gina, Alec, and Avery, we have a particularly good, solid team of folks who are committed to doing -- doing the work we have to do and making sure that we can be as seamless as possible and make good on the agenda that the statute sets forth for us. So, you know, I just wanted to, you know, say that again. And, you know, every person who works here has a -- has a role in ensuring that this continues to operate and, you know, everybody's level of commitment to that mission is -- you know, it's -- it makes this a lot -- a lot of fun and a lot more -- and in many ways makes my job a heck of a lot more easy -- a heck of a lot easier than it could otherwise be.

So I guess with that, Mr. Chairman, I guess I -- I think that concludes my report, unless I'm missing anything.

CHAIRMAN KIMBLE: Thank you, Tom.

Are there any discussion or questions from Commissioners?

COMMISSIONER PATON: One more thing.

CHAIRMAN KIMBLE: Yes, Commissioner Paton.

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COMMISSIONER PATON: So I'm -- I mean, with this new Act it just --

MR. COLLINS: Sure.

COMMISSIONER PATON: -- worries me that we may not have enough people to do that work or whatever. So I guess maybe if -- if you can give us notice --

MR. COLLINS: Sure.

COMMISSIONER PATON: -- you know, of like this looks like it's going to be more labor intensive, you know, that we can start thinking about ways of maybe -- you know, because I don't want people to be overwhelmed, especially this is all new, and -- so anyway, that's my concern.

MR. COLLINS: No. No. And I -- Mr. Chairman.

CHAIRMAN KIMBLE: Yeah, Mr. Collins.

MR. COLLINS: Mr. Chairman, Commissioner Paton, no, you've mentioned this at a few meetings, and we're -- I think from my point of view and from -- sort of from -- and I don't know what Paula and Mike think, but from my point of view I think we're in a position where we're kind of playing that by ear.

I mean, we have had the assistance of -- you know, we have -- we have engaged Mary for purposes of leading a lot of the litigation that we have around

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that Act. Most of the things that I hear, you know, relate principally to, you know, sort of compliance issues. And we are getting and, you know, working through answering questions as we get them that we can on compliance issues. We are -- I think we'll see.

I mean, I will say this. I mean, from a complaint perspective, just from a pure enforcement perspective, between 2014 and 2022 we had a dropoff of something like -- from like, I think, I want to say, 27 complaints in 2014, which was lower than the matching funds days, but still high, to 2022 we had five, I want to say, something like that. So the number of complaints has dropped significantly. I don't know, because no one knows, how many complaints get filed at the Secretary of State's Office or go to the AG's Office, you know, but I don't -- so I don't know if their volume is consistent with that decrease in volume that we've experienced. Now, will --

COMMISSIONER PATON: But if you see all this paperwork that -- it's almost exclusively about this Act, you know, it's -- you know, it's significant.

MR. COLLINS: Well, if we end up in a place where we -- where we're -- where we need -- I mean, I can tell you, from my point of view, the things that I am looking at adding in terms of staffing, the

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priorities I would have. Right now the idea of adding enforcement staff is probably -- just to be candid with you, it's about fourth on my list.

The list is basically -- the first piece of the list is public relations for press assistance to sort of back up some of the stuff that we do. The second thing would be to look at how we might be able to assist the state in general, and especially the counties, especially the rural counties, with ADA compliance issues, which is something that we've heard a lot about. And the third would be whether or not we need to look at some specific set-aside to deal with sort of misinformation things. So those are -- those are the -- to me those are the top three. Fourth would be enforcement.

Now, in the event that we get -- you know, ramp up a bunch of complaints, I think there's reason to believe that 2024 won't be that year. And the reason I think 2024 might not be that year is because, you know, we've said, at least the staff in these meetings to you and other places, that we feel like compliance is really more important to us than trying to, you know, drop hammers on folks. And that's been true throughout the Commission, throughout the way that we have oriented ourselves, and really since, you know,

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since -- you know, Commissioner Paton, since you've joined, in part, because of, I think, some of the changes we've made to reorient the Commission around voter education and compliance on the campaign finance side. So my overall sense is that if, you know, something gets -- if something gets weirder between now and then, you know, we'll -- between now and when things get more intense around the election, we'll see.

The reality is that, and we'll talk about this later on the Agenda, and it's certainly noticed, that the -- that the process for enforcing these kinds of laws, regardless of who you are or regardless of which agency it is, is itself long and getting longer as a matter of the way in which the background administrative law principles are changing. So it's not like we're going to be able to -- if a complaint was filed on a -- you know, in June -- I mean, we have always tried really hard to get our complaints resolved before the end of the calendar year. Doesn't always happen, but we really push to do that.

But, you know, some of these things, if this -- if you were to go through the entire -- an entire enforcement with somebody who might have violated some aspect of the Voters' Right to Know Act, it will be a lengthy process. That, the resource

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issues associated with that, the obvious sensitivity we have towards the constitutional overlay here, that all tends to get us into the area of compliance --

I'm going to get criticized by one of -- the member of the public who likes to come and say I talk too much here for such a long answer, but, I mean, it's something --

I guess what I'm trying to demonstrate, just to -- just to be clear, Commissioner Paton, is we've given -- we think about this a lot, but we think we have the -- we think we have a framework that accommodates flexibility around all those things, so -- I don't know. Is that -- is that long enough anyways? It's enough words.

COMMISSIONER PATON: Yeah.

CHAIRMAN KIMBLE: And thank you for those questions, Commissioner Paton, because that leads us into our next item. Are there any other -- any other questions or discussions on the Executive Director's Report?

(No response.)

CHAIRMAN KIMBLE: Okay. With that, we'll move to Item IV, discussion and possible action regarding adoption of proposed Rule R2-20-805, disclaimers, related to the Voters' Right to Know Act,

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Proposition 211.

Last month we approved a set of rules we first circulated in June. Today we're focused on a specific rule about disclaimers. This is the "paid for by" that most of us are now familiar with. Voters specifically charged the Commission with developing the rules for these disclaimers, which must include the top three donors at a minimum. These disclaimers also improve the transparency from what was required in existing law.

Prior to the passage of Proposition 211, only political committees had to make the top three disclosures and the disclosure was only of other political committees. Proposition 211 provides more transparency because now all covered persons, not just PACs, will be subject to this requirement.

With that, staff has proposed -- excuse me -- staff has prepared a memo about comments related to this proposed rule.

Before I ask Tom to discuss that, any questions from the Commission regarding the disclaimer rules, proposed rules, and comments?

(No response.)

CHAIRMAN KIMBLE: Hearing none, Tom.

MR. COLLINS: Thank you, Mr. Chairman. So

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the outline -- the memo that you all received outlines the statutory basis for this particular rule and then we outline some of the comments. I don't want to -- I don't want to belabor too much of this. I think that the comments were very helpful. You know, and we do have two suggestions we wanted to adopt.

I wanted to, you know, highlight the Statecraft comment, I think, brought -- brings out -- I think that I agree with -- their assessment was implied in the text, but makes it direct. The VRKA sets a threshold for when you're reported as a donor in the reporting system at $5,000. So this just makes that explicit, for the purposes of the donors, you know, that there's not -- and it looks like, from assessing the Campaign Legal Center's comments on this, there's a consensus there that that's -- that that's appropriate. And certainly I don't think we have any -- any -- I think that's -- so I think that's helpful.

You know, we did get one comment that I think I need to, you know, just articulate a little bit that said, hey, you know, could this disclaimer be cabined to just those folks who paid for the mailer in question. And that's -- as I understand the existing law that folks were operating under prior to the Voters' Right to Know Act and the language of the

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Voters' Right to Know Act itself, that there's really not language to hook that kind of a limitation on for rule purposes. You know, indeed the 16-925, which is the preexisting, more limited, you know, population still says top three at the time the thing was produced. So it's never been -- there's just not a lot of text -- there's just not -- I'm unable to find text to hook that limitation into. It's basically, you know, it's top three through the election cycle.

The -- I did think that, you know, although we don't anticipate a lot of this, that the point about, similar to the $5,000 threshold, people with protected identities through the process outlined in the rules we've already adopted, you know, I think those folks would not be disclosed on a disclaimer and -- and as I -- as I -- and as we talked about there, we do not want the -- you know, so say we've got top three, and person number three is a protected person. It doesn't make a lot of sense to us to move the number four up because number three is not available to be listed. That wouldn't really be accurate. It would basically be saying the top four -- or, three of the top four -- it just would become kind of a nonsensical kind of a thing. So it's better to just cut it off if that's -- if that's appropriate.

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We did get some suggestions that, you know, were -- were more detailed, you know, from CLC and, you know, we -- we, for right now, are -- think that those are worth, you know, keeping in mind as we go forward if they come up. But for the time being, you know, we generally think that those are not necessary.

And then the one that we had a legal kind of issue with was they suggested that if you -- if you -- that you should look back -- or, at least, I guess, the beginning of a campaign to the prior election cycle, and if somebody gave a bunch of money then and it carried over -- but, again, it's -- you know, we weren't able to identify a good statutory hook for that rule suggestion, so we don't -- we don't suggest it.

I want to highlight one other thing, which -- which Howie Fischer, who's the Capitol correspondent for Arizona Capitol Media Services, highlighted for me last night, because he read the rules, as he is one who does, that the -- so in the -- so we based R2-20-805 on 16-925. So why would we do that? Well, because 16-925 is the existing framework that practitioners in Arizona, we believe, are used to. So it will be more inclusive, in a general sense, right, because we'll be doing 501(c)(4)s and not just PACs, but generally we try to stick with that framework.

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There are -- there are some distinctions in the 16-925 between how PACs operate versus non-PACs. You know, we -- and so -- and most of that I excised from the draft. There was one that I did not, which is in R2-20-805(D)(5)(b), which, again, Howie read all the way through, so -- and he only got the memo like -- so I was just -- I mean, it's good. It's why we do a public process. And he pointed out that there's still a reference -- a distinction drawn in that particular draft rule between political action committees and other spenders.

That's not something that I -- I actually intended. However, I think the right thing for us to do at this point, given that, as far as I know, we did not get a comment about it objecting to it -- it may very well be that practitioners here don't care, or maybe they do. But in the absence of any suggestions to change it, and it having been noticed, you know, my suggestion would be that we just -- if you all are inclined to adopt this, we adopt the language as it's been circulated and as it's been published. And then if folks, you know, who I know are out there, think that, in fact, that distinction needs to come out, they can let us know.

And if I missed something along the way where

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someone suggested it, you know, I'm sorry if I did that. I'm happy to -- you know, if you feel like you said this to us somewhere and we missed it and I missed it, tell us again and we can -- we can look at fixing that if it needs to be fixed. But if it doesn't need to be fixed, given the fact that it's been circulated for -- you know, circulated for 60 days plus, and nobody seems to -- and nobody seems to have been focused on it until -- until Howie was reading the memo, I'm, you know -- and, you know, I -- my recommendation would just be that we continue with it as is. If anybody wants to go find the memo or the e-mail where they told me to do this, you know, I will read it and -- you know, just try not to be too rude.

COMMISSIONER PATON: I have a question.

CHAIRMAN KIMBLE: Commissioner Paton.

COMMISSIONER PATON: So on this Page 3 here of this thing you gave me, I mean, maybe I'm just paranoid of, you know, lawyer words and whatever, but where it says, the third paragraph, "Consequently, Section 805(B) would read," and then so on, then underlined it says, "in excess of $5,000 for the election cycle." And then on the -- on the following page they were talking about below $5,000. Wouldn't that just eliminate $5,000 just -- you're not including

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$5,000 at all? That's in excess. Why isn't it like $5,000 or more, I guess?

MR. COLLINS: Good question.

COMMISSIONER PATON: Isn't that --

MR. COLLINS: No, it's a good question.

COMMISSIONER PATON: That's like a lawyerly --

MR. COLLINS: Yeah. Yeah. No, that's a very good question, and I am going to have to look it up.

COMMISSIONER PATON: Because that wording would eliminate $5,000 --

MR. COLLINS: Yeah. No, that's --

COMMISSIONER PATON: -- and start at 5,001. I think that's --

MR. COLLINS: I have to -- I have to double-check the language. That was a little -- just give me a second and I will give you an -- have an answer for you.

CHAIRMAN KIMBLE: While Tom is looking that up, I just wanted to comment that I very much appreciate all the comments we got -- the numerous comments we got on these proposed rules. They were helpful. Some of the comments have been incorporated in these and I think helped make them more clear. And even if your comments were not incorporated, we

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appreciate you taking the time to suggest them to us.

And Tom is --

COMMISSIONER PATON: So like on the --

CHAIRMAN KIMBLE: -- frantically thumbing through his phone.

COMMISSIONER PATON: -- on the Page 4 it says, "The next comment, CLC suggests, consistent with Statecraft, that Commission clarify that donors under $5,000." So that's eliminating the number of 5,000.

MR. COLLINS: Right. No, I follow.

COMMISSIONER PATON: Okay. Well, you're the lawyer.

MR. COLLINS: Well, I'm -- I'm a lawyer.

CHAIRMAN KIMBLE: Let's not get into name calling.

MR. COLLINS: Any of the other lawyers are --

MS. KARLSON: Mr. Chairman.

MR. COLLINS: -- obviously --

CHAIRMAN KIMBLE: Yes, Ms. Karlson.

MS. KARLSON: I was trying to come to Tom's rescue. 16-973, it does talk about more than 5,000. So it does specifically say more than 5,000, more than 5,000. So in excess would be -- would be consistent with more than 5,000.

COMMISSIONER PATON: So wouldn't it be -- I

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guess in my mind it would be -- make more sense to include the 5,000. Maybe it's --
CHAIRMAN KIMBLE: Right.
COMMISSIONER PATON: -- stupid to worry about it --
MR. COLLINS: No. No. No. No. No.
COMMISSIONER PATON: -- but I know this is what lawyers fight about, this kind of stuff.
MR. COLLINS: I think that's fair. I mean, I think that it sounds like -- so, yeah. So the language directly in 973 -- 972 is more than $5,000. So instead of in excess of $5,000 we could say more than $5,000. Does everybody -- do all the other lawyers --
COMMISSIONER PATON: No. $5,000 or more.
MS. KARLSON: Mr. Chairman.
CHAIRMAN KIMBLE: Yes, Ms. Karlson.
MS. KARLSON: The language of the statute, by the plain language of the statute, it has to be more than 5,000.
COMMISSIONER PATON: Okay.
MS. KARLSON: That's why.
CHAIRMAN KIMBLE: Okay. Just so -- to clarify, do we need to make any changes in Exhibit 1?
MS. KARLSON: No. The language of the -- Mr. Chairman, were you directing that question at me?

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My apologies.
CHAIRMAN KIMBLE: Directing it to anyone who wants to answer.
MS. KARLSON: Well, I can answer. The language of the rule -- the proposed rule, the in excess of, is consistent with the language of the statute, which says more than 5,000. So it does not need to be changed. Sorry. I was using lawyer words again.
COMMISSIONER PATON: Okay.
CHAIRMAN KIMBLE: Okay. So does that address your concern, Commissioner Paton?
COMMISSIONER PATON: Just so everybody understands, I guess, this other commentary about being less than 5,000 --
MR. COLLINS: I will -- I will say, Mr. Chairman, Commissioner Paton, I think in writing my memo what I did was I -- I was a little bit -- was not as precise as I should have been. I triggered --
COMMISSIONER PATON: Okay. You see that --
MR. COLLINS: Yeah.
COMMISSIONER PATON: -- thing I --
MR. COLLINS: Yes, you're right. You are right in reading what I wrote. What I wrote is wrong.
CHAIRMAN KIMBLE: So getting back to my

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question that Ms. Karlson answered, we do not need to make any changes to this, is that correct?
You are nodding yes. Okay.
MR. COLLINS: Oh, I -- you're directing it to me? Yes. Yes. The description of CLC's comment is -- but that I wrote is not correct. The language that Statecraft submitted is correct and is the language that is in the rule that we are asking to be adopted.
CHAIRMAN KIMBLE: Okay. Thank you.
COMMISSIONER PATON: So that's the top three above $5,000. So --
MR. COLLINS: Correct.
COMMISSIONER PATON: -- you could have a hundred at $5,000, as long as they're not in the top three above --
MR. COLLINS: Correct.
COMMISSIONER PATON: -- correct?
MR. COLLINS: Correct.
COMMISSIONER PATON: Okay.
CHAIRMAN KIMBLE: Thank you, Commissioner Paton.
Any other questions from Commissioners about these proposed rules?
(No response.)
CHAIRMAN KIMBLE: Is there any member of the

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public that wishes to comment on these proposed rules the way they are now written?
(No response.)
CHAIRMAN KIMBLE: Seeing no one, is there a motion to adopt R2-20-805 with the changes indicated in Exhibit 1 of the staff memo on those items?
COMMISSIONER CHAN: Mr. Chairman.
CHAIRMAN KIMBLE: Commissioner Chan.
COMMISSIONER CHAN: I move that -- I move that we adopt the proposed Rule R2-20-805 with the changes as shown in Exhibit 1 to the memo.
CHAIRMAN KIMBLE: Thank you, Commissioner Chan.
Is there a second?
COMMISSIONER PATON: I'll second.
CHAIRMAN KIMBLE: Seconded by Commissioner Paton.
Any discussion?
(No response.)
CHAIRMAN KIMBLE: Okay. I will call the roll. Commissioner Chan.
COMMISSIONER CHAN: Aye.
CHAIRMAN KIMBLE: Commissioner Titla.
COMMISSIONER TITLA: Aye.
CHAIRMAN KIMBLE: Commissioner Paton.

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COMMISSIONER PATON: Aye.
CHAIRMAN KIMBLE: Chair votes aye.
The motion to approve R2-20-805 with the changes indicated in Exhibit 1 is approved 4-to-nothing.
Item V, discussion of Voters' Right to Know Act, Chapter 6.1 of Arizona Revised Statutes Title 16, including pending rules and comments related to pending rules. The Commission will not be voting to adopt these rules at this time.
This item involves discussion of the enforcement-related rules that we current -- that we are currently accepting public comment on. Tom is going to give us an overview of these rules and some of the comments that we have received. And then if the Commission has any questions, we'll get into that.
Tom.
MR. COLLINS: Yes. Mr. Chairman, Commissioners, I just wanted to -- the main -- I want to do two things here real quick. First, on the -- on the -- the rules that we'll be talking about in October, which are still subject to public comment and we'll probably get more public comment between now and then, are -- are how we would go about enforcing the Act in the event we got a complaint or a complaint was

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generated internally. And they lay out, you know, in some -- you know, in some pretty specific detail, how to do that. They set up the -- what we think are the necessary safeguards to ensure that any respondent has, you know, probably as much process as could possibly be conceivably due for those folks.
And so it -- and it will be a more involved process than -- for hearings and the like than we have had under the Clean Elections Act. It will take more time and it will involve -- at the end of the day, it will necessarily involve more attorneys because we will have to have attorneys for the Commission itself, we will have to have attorneys who work with Mike and I, and we will have to have -- and then obviously the attorneys who represent the respondents and complainants and all this other stuff.
But, you know, that is the direction in which the law is headed, and we are trying to, you know, have a -- have a plan that represents that, you know, look, at the end of the day, you know, the ultimate enforcement of the Voters' Right to Know Act happens through a court proceeding really, not a -- not just the Commission's actions. And so, you know, we -- so we have some confidence around -- around that, but I think as we get closer, just as a preview, you know, as

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we get more comments, I think we'll get a better -- you know, some aspects of that will get focused on.
One of the other issues within the enforcement context that we talked about in the rulemaking is the idea of structuring, which is -- you know, structuring, in the context of financial regulation, is basically setting up a transaction so that you're sort of just under the -- the sort of paradigm case of structuring is you're just under the threshold to report something, you know, and you -- you know, you make payments, you break up payments, for example, in a way that they all are just under the threshold where they would be reported.
This is the -- for people with long memories, this is the -- this is the crime that Denny Hastert ultimately went to prison for actually, as opposed to other crimes that, you know, he committed, was the, you know, setting the payments to his victim at something like $9,000, when $10,000 was the threshold for those to be reported.
So in this context, and if you look at the campaign materials that CLC action and the committee put out, you know, that's sort of the paradigm that they use.
One of the things that we incorporated in the

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draft rules was the notion that if you had sort of -- you were some kind of advisor, fiduciary, lawyer who is, you know, involved in a transaction, you are not -- you ought not participate in that, essentially, structuring, you ought not advise folks to structure their transactions illegally, et cetera, et cetera.
You know, we did get some feedback on that directly, and that I -- that's one of the things I wanted to highlight. You know, in the Statecraft comment, you know, on Page 3 of that comment they go into some detail on this and the interaction between the rule as we've drafted it and the -- and the, you know, rules of professional conduct for lawyers and some of the other issues.
You know, our point of view when drafting this rule initially was along the lines of, well, we want to make sure that folks are on notice that, in fact, you know, just because you're an attorney doesn't mean you can, you know, structure your transactions.
But I think that one of the things that this highlights in the current climate is, as much as that's an issue, you know, if our goal, which is perhaps -- which is certainly a goal that I had in drafting, is to try to get the sort of malefactors on notice that their malefacting is a problem, there's a -- there's a

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converse problem, which is, folks who would leverage the complaint process itself to disrupt the ongoing attorney-client relationship of a spender and their attorney.

In other words, if you invite complaints, where every complaint turns out to be, you know, ABC, you know, Organization for Good Stuff and their attorneys are -- then all of a sudden that triggers as a -- as a -- as an ethical matter for the attorney, that they've got to turn the 501(c)(4) over to yet another attorney, they may have to have their own attorney, et cetera, et cetera, and it can lead to kind of a multiplicity of -- sort of a ripple effect.

So, you know, as we get closer to next month, I do -- I do want to say that, you know, having spent some time with this particular comment, that, you know, we will probably modify that rule to account for that. Because I think that, as much as I am concerned about making sure folks have notice that there's not a sort of -- just because you're -- you know, just because you hold yourself out as some kind of advisor, whether you're actually, you know, a licensed attorney or some other kind of advisor, you can't be in the middle of a -- of a conspiracy. The particular acute problem is for attorneys who might, you know, end up in sort of a

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situation that they wouldn't otherwise be in.

This is sort of akin to sort of the idea that, you know, as the world evolves, we have more and more -- you know, we just -- there's just -- there's a lot more antagonism in the legal community in general, and I do want to be weary of that. And certainly our intent has been more focused on sort of, you know, sort of, like I say, people who are acting with bad -- in bad faith, but we don't want to have a rule that ends up wrapping in people who are also acting in good faith.

So it's an important comment to consider. And when we come back to you next month on this, you know, we will probably have some modifications to that that I wanted to preview. I think that -- so that's kind of -- that's kind of -- that's kind of where we are on that.

You know, we also received a new comment from the People United for Privacy. And that, again, is -- you know, has some other suggestions as well, so we'll be considering that. I just wanted to, you know, make sure that you have that and you can look at it over the next couple of -- couple of -- couple of -- you know, over the next six weeks before the next meeting or five weeks.

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So those are the main comments I wanted to make about the enforcement-related rules that are coming up next -- next month. I don't -- unless -- Mr. Chairman, unless you all -- you all have any questions, obviously, like I said, there's no action to take on those at this point.

CHAIRMAN KIMBLE: Any questions from Members of the Commission about Item V on our Agenda?

(No response.)

CHAIRMAN KIMBLE: Thank you, Tom.

Item VI, discussion and possible action on suggestions for additional rulemaking, including clarification of terms and the definition of campaign media spending, and guidelines for donors to follow in response to request from covered persons as provided in the Voters' Right to Know Act.

The purpose of this item is to allow staff to provide us some information about suggestions for additional rules we have received and some preliminary feedback. If Commissioners have a sense that they would like to look at more specific language, this would be the time to discuss that.

So, Tom, can you tell us a little bit about these suggestions?

MR. COLLINS: Yes. I wanted to highlight a

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couple, and they're -- and they're noticed in the -- in the -- the topics are noticed in that Agenda item. We did get the -- there are additional suggestions in that People United for Privacy comment that I did not get a chance to process to put -- to notice in the Agenda, so those are down the road a ways.

But with respect to the issues highlighted there, one of the -- one of the suggestions we received from -- we got -- we got a couple suggestions from the Elias Law Group, and I just wanted to make sure that everybody understood where I -- what I thought about these so far. The Elias comment is --

Oh, there it is. Is that mine --

CHAIRMAN KIMBLE: No.

MR. COLLINS: -- or did you give me yours?

CHAIRMAN KIMBLE: It's mine.

COMMISSIONER PATON: It's blue at the top, yeah.

MR. COLLINS: Yeah, it's the blue one.

Okay. So -- so first of all -- so my inclination on these, just so you know, is the clarifying the meaning of activity -- you know, as I read this, we think that the -- you know, this sort of -- sort of goes through an analysis of how to clarify the term -- how to clarify the term --

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I think I lost my mic. I might have turned it off.

CHAIRMAN KIMBLE: I'll give you my mic.

MR. COLLINS: Sort of clarifying the term activity in the -- in the --

Okay. We'll turn this into a press conference. Okay. I guess I'll -- I can give you more space.

There's -- at Page 4 the Elias Law Group talked about clarifying what an activity would be, you know, and they sort of say -- they start by saying the common definition of the term could potentially include anything that a person does, but I think that then they go -- but from my point of view, they then go on to talk about how, well, that really wouldn't make sense under the Act itself in their view. And so -- you know, so they are -- they ask for a -- some kind of rule along the lines of clarify that the term activity only includes programs aimed externally at voters to support or oppose their, you know, various political activities, and then say this interpretation is consistent with the language of the statute.

I -- you know, I'm not at a point where I necessarily feel like we even need to say that we agree or disagree about this. What I think -- the issue here

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is that if the plain language of -- the plain meaning really of this statute, sort of as Elias presents it, is that activity has to be limited in some -- in some way, and it doesn't mean everything anyone ever does, which it can't and doesn't, then -- you know, then I'm not sure that there's a need for an additional rule to clarify at this time.

You know, in other words, what we -- what we would like to do, at least as staff, is not sort of go through and subdefine every definition that's in the Act, that's in the definitions of the Act, just because someone comes up with a question or, you know, has, you know, pondered it in a way that results in them having convinced themselves there's a -- there's an issue.

I mean, as this comment itself sort of lays out, well, this has to be this way, so we should say it in a rule. Well, if it has to be this way, then it has to be this way, and that's a statutory issue, that's not a rulemaking issue.

And we are trying as staff, from staff's philosophical perspective, to not just have rules because -- to have them. Because what you could end up with is, if every single example needs to be articulated and every single rule needs a comprehensive list of examples in it, you know, I'm a little

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concerned that we will end up with -- we'll never -- that's a never-ending process. It means that every time we -- every time anyone has a question, we're going to make a rule. Every time someone thinks of something new, we're going to have to make a rule.

And, you know, as a philosophical matter, that's not where we as staff are, because it -- those things then can become dated or outmoded or the statute gets amended and we have to go back through. And we've been -- you know, between -- you know, we've been doing this a while, and certainly in the Clean Elections Act rules there are things that, you know, that are harder to change -- sometimes harder to change things once they're there than it is to not. So, you know -- so our tendency is not to want to move in that direction.

So, you know, similarly, in their comment on Page 5, ELG --

I don't mean to pick on ELG. It's just that I wanted to give you sort of a sense of where we are. And their comment I feel comfortable enough to talk about this with. And I've talked to them about this as well.

You know, their layout -- the term campaign media spending means spending monies or accepting an in-kind contribution. It does not include making an

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in-kind contribution. This reflects a clear distinction that the statute draws between donors and covered person and makes a clear choice that the recipient of an in-kind contribution bears the burden of filing the reports.

Well, I mean, again, it's like -- you know, I think that -- again, without necessarily having to say the Commission agrees with this particular comment, where the plain meaning of a statute provides an answer to the question, there's simply not a need for an additional rule.

The other -- you know, the other thing, just, again, candidly for those who are more regulatorily minded, perhaps, than that, or believe that there ought to be more rules than less, the other issue is that, as a practical matter, rules -- additional rules make compliance, in my view, in some ways, more complicated and they make enforcement issues more complicated and can lead to a whole bunch of, at least in our experience, a whole bunch of satellite arguments about rulemaking that are not really part of the merits of resolving matters if they actually develop.

You know, and while it's certainly a lawyer's job to avoid the merits of most things as much as possible, that doesn't necessarily mean that that's the

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best approach for -- from a -- from a regulatory body. And so, you know -- so, if anything, I feel like we just are -- we're just -- we're just not inclined to, again, you know, create a comprehensive sort of list that will never be comprehensive enough of everything anyone can and can't do.

There are other ways to address that. We may want to develop some examples that people can follow. There are some out there through the campaign that at least capture what Campaign Legal Center Action thinks the law is, and we may -- we may work on that.

Then similarly, we had a comment from -- okay. So we also had a comment from CLC, this is on Page 9 of the CLC comments, that wants to have more -- more guidance regarding the process for direct donors to covered persons to provide original source information.

So as we've talked about -- and some of this may start to become familiar. I mean, I sometimes find like it's a new -- I've read this for the first time every time. But the way the process works, for background, is, you know, I'm a covered person. I want to go out and spend money on campaign media spending. I have some donors. I send a message to the donors that say, provide me the information required in the

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statute. The donor, you know, has to -- has to, under the statute, respond with that information in a certain amount of time.

I am not inclined to go past what we've said already and what the statute says, again, because, you know, those relationships between the donor and the covered person, provided that they're following the law, it's not something that we need to start promulgating, I don't think, at this point, rules to dictate the terms of that beyond what's in statute. The more we press into the relationship between donors and covered persons, the more we raise the possibility that a violation of one of those rules could result in an enforcement.

In other words, you're complying with the basics of the statute, but we said you have to -- you know, you have to do this in this way, not just do it in the way the statute provides. And each time you do that, you're creating another possibility for -- for a problem.

And so philosophically, you know, this is the sort of double-edged sword of compliance. On the one hand, the more direction you give, people can follow along and check the box and say, yes, I did that, yes, I did that. But on the other hand, as a regulatory

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body, we don't know the best way to handle that beyond the outlines of the statute, let alone start to say, you know, oh, you didn't -- you did this thing -- the statute would allow you to do it either way, but we decided it has to be this particular way, and now this is how you -- this is how you need to do it. So --

COMMISSIONER PATON: Hang on. I have a question on that.

MR. COLLINS: Please.

CHAIRMAN KIMBLE: Commissioner Paton.

COMMISSIONER PATON: So by my count, we've got information from three Washington, D.C. law firms. I think we're going to need somebody, a lawyer, to deal with this stuff. This isn't Phoenix and Tucson people. So these people, from all over the country, are -- because we're a swing state, and I just -- I think this is going to get out of hand and I think you're a tad Pollyannish thinking that we can -- this is not going to be that big of a deal. You know what I'm saying?

This is like 10 pages from a Washington, D.C. law firm trying to figure out exactly what they can do. And we can't be like Boss Hogg here and, you know, assign Luke Duke to deal with this stuff. I think we're going to need real people just to deal with this. For the past four or five months this is all we're

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dealing with, right?

MR. COLLINS: Yeah. Yeah. Well --

COMMISSIONER PATON: I don't want to say I told you so, Tom.

MR. COLLINS: No. No. Well, you're free to say that. That's what you're paid to do.

COMMISSIONER PATON: Really?

CHAIRMAN KIMBLE: You're paid?

MR. COLLINS: Mr. Chairman, you know --

COMMISSIONER PATON: Are you not getting nervous? That's what I'm saying.

MR. COLLINS: No. No, I am -- this is not the stuff that makes me nervous, just honestly, but here is what I think about that. I mean, what we tried to do with these comments is break them up over the past several meetings. We have been talking about them -- we have been talking about them, as you know, for many, many, many meetings. So for the -- for the Campaign Legal Center we have broken their comments up so that we have covered them over the course of two different meetings. Then that's how we've done it on a timely basis.

We certainly have had legal advice from the -- I mean, we have legal advice on an ongoing basis. I don't think that's telling anyone anything

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they don't know or giving anything up.
You know, yes, there are Washington, D.C.-based law firms that are going to be involved in this process and -- but I will say, and I really -- and I really mean this, I think that the Phoenix-based law firms that we deal with, most of them, at this point, have national scope too. And I think it's -- I think that integrating the approach that we take here into --
The voters charged the Clean Elections Commission with doing this. Whether or not Terry Goddard and the CLC Action folks, in framing this, intended that to be the Clean Elections Commission that exists, they picked the Clean Elections Commission that exists. And the Clean Elections Commission that exists has a relationship with the regulated community that is one where we -- our commitment is to be predictable, to allow people to make decisions which are informed, to provide reasonable and as-timely-as-we-can answers to folks' questions, and to not surprise anyone. I think that, by and large, that is our reputation and -- among both Democratic and Republican attorneys.
We -- we -- if some -- and that -- and, yes, does that make us a little bit more likely to, for example, let lawyers lawyer, right, rather than sort of try to regulate away every question? I'll just be

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honest with you, that is my inclination. I believe lawyers ought to lawyer.
COMMISSIONER PATON: I don't have anything against what you're saying. I'm just saying, this seems like it's going to be a really big deal, that all these people are getting involved, and I think we need to plan for it --
MR. COLLINS: Sure.
COMMISSIONER PATON: -- and I think we're going to need probably to get more personnel to deal with it. I mean, five months ago I was led to believe, you know, that we don't have that many people donating that much money in our state elections. But if they're going to all this work, I think we're going to have more.
MR. COLLINS: And I don't want to be argumentative. I really don't intend to be. But, Mr. Chairman, if I could, the other thing I want to distinguish here is between the Elias Law Group and the Campaign Legal Center.
The, you know, Elias Law Group is a big national Democratic law firm. It has clients -- I don't know who all their clients are, I don't know where all their clients are. If the Elias Law Group is unhappy with our decisions, they have made clear, to

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anyone who works on the election administration side, they're happy to sue you. So if we -- if we -- so there's no way to avoid that. That's a decision they're going to make that really there's nothing I can do that would change that. That is their brand.
The Campaign Legal Center is a special interest group. They paid for this law to get passed. Campaign Legal Center Action Fund, they paid for this law to get passed. They have a particular ideological point of view on the statute in addition to what -- the words they actually wrote. So their position is different. And, in fact, they do sue the FEC all the time when they don't like the answers that they get.
So part of this is absorbing the fact that we have to do stuff that's consistent with our -- with our practice and with what the repeat players here are familiar with, because the regulated community, in my experience, more than anything else it wants predictability.
Campaign Legal Center's agenda here, you know, and they are -- you know, they're defending this law in court, and so I'm not saying this to be in any way rude, I'm just being blunt, their agenda is to get these laws implemented in the way that is their vision of those laws. When those things match, they match;

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when they don't, they don't. But, again, because of the way that they're put together and their overall approach to the law, they're not shy about making their displeasure known. And if we end up with a couple of -- if we end up with lawsuits --
Let me put it this way. We live in the state of Arizona, with the courts in the state of Arizona. If anyone wants to sue us for under regulating, go ahead.
COMMISSIONER PATON: Okay. I just made my comment.
MR. COLLINS: No. No. I mean, that's all I can tell you at this point. Maybe we do need other people, but I -- you know, we can -- we will -- I mean, we're -- Mike and I will have a conversation after this about what to do about that for sure.
COMMISSIONER PATON: Okay.
MS. KARLSON: Mr. Chairman.
CHAIRMAN KIMBLE: Are there any other --
Oh, I'm sorry. Ms. Karlson.
MS. KARLSON: Yes. There is a comment in the public -- or, in the chat, and they wanted to know who was speaking. And it was Executive Director Tom Collins.
CHAIRMAN KIMBLE: Thank you for clarifying

that.
MR. COLLINS: Is this the person who says I talk too long? If it takes too long to say, it's being said by me.
CHAIRMAN KIMBLE: Are there any other comments or questions on Item VI from Members of the Commission?
(No response.)
CHAIRMAN KIMBLE: Hearing none, we'll move on to Item VII, public comment. This is the time for consideration of comments and suggestions from the public. Action taken as a result of comment -- of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date or responding to criticism. Please limit your comments to no more than two minutes.
Does any member of the public wish to make comments at this time? Raise your hand feature or do something to call attention to yourself -- well, not anything. Anyone -- any member of the public wishing to comment on anything at this time?
(No response.)
CHAIRMAN KIMBLE: No one? Okay. Seeing no one, the public may also send comments to the

Commission by mail or e-mail at ccec@azcleanelections.gov.
At this time, I would entertain a motion to adjourn.
COMMISSIONER PATON: I'll make a motion to adjourn.
CHAIRMAN KIMBLE: Thank you, Commissioner Paton.
Is there a second?
COMMISSIONER CHAN: I second that motion.
CHAIRMAN KIMBLE: Thank you, Commissioner Chan.
I will call the roll on the motion to adjourn. Commissioner Chan.
COMMISSIONER CHAN: Aye.
CHAIRMAN KIMBLE: Commissioner Titla.
COMMISSIONER TITLA: Aye.
CHAIRMAN KIMBLE: Commissioner Paton.
COMMISSIONER PATON: Aye.
CHAIRMAN KIMBLE: Chair votes aye.
By a vote of 4-to-zero, we are adjourned. Thank you very much.
(The meeting concluded at 10:37 a.m.)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

BE IT KNOWN that the foregoing proceedings were taken by me; that I was then and there a Certified Reporter of the State of Arizona; that the proceedings were taken down by me in shorthand and thereafter transcribed into typewriting under my direction; that the foregoing pages are a full, true, and accurate transcript of all proceedings had and adduced upon the taking of said proceedings, all to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to nor employed by any of the parties hereto nor am I in any way interested in the outcome hereof.

DATED at Tempe, Arizona, this 22nd day of September, 2023.

Kathryn A. Blackwelder, RPR
Certified Reporter #50666

CITIZENS CLEAN ELECTIONS COMMISSION
EXECUTIVE DIRECTOR REPORT
October 26, 2023

Announcements:

- The next consolidated election date is November 7, 2023.
  - Early voting began Wednesday, October 11.
  - 12 counties are conducting local elections, ranging from school district elections to local referenda.
  - Several elections are "all ballot by mail". This means every eligible voter will automatically be mailed a ballot, regardless if they requested one.
  - The last recommended day to mail back your voted ballot is Tuesday, October 31st.

Voter Education and Outreach:

- Avery continues his participation in Arizona Commission of African American Affairs committee meetings, Arizona African American Legislative Council and the Mesa Community College Civic Action Council
- In collaboration with the Congressman Ed Pastor Center for Politics and Public Service at ASU, Avery held a get Informed virtual workshop for students.
- Avery presented on the topics of Civil Discourse and Getting Informed to the students at Mesa Community College at Civic Action Hour
- Avery attended the The Arizona Alliance of Black School Educators Governance in Education Commission meeting
- Avery represented Clean Elections at the Mesa Community College Career & Resource Fair
- Avery presented to the Kids Voting Leadership Council on the topic of Voter misinformation/disinformation
- Gina, Avery and Alec successfully completed Election Officer Certification training
- Gina was a panelist at the Scholars Strategy Network Election Enhancement and Protection Program Launch.
- Gina welcomed a multi-regional foreign delegation through Global Ties AZ focused on Transparency and Accountability in Government and presented on Clean Elections.

Administration:

- 9 Candidate Workshops have been held, with more to be scheduled through the end of the year. Workshops are held virtually on Tuesdays from 1-2pm.
- 20 candidates have attended the workshops.

- The Secretary of State submitted the 2023 Election Procedures Manual to the Attorney General and the Governor for approval.
- Gov. Hobbs Bipartisan Elections Task Force continues its work. The task force was expected to meet Tuesday. Its report is due to the Governor on November 1.
- Two different groups aiming to change the primary elections process in Arizona have now applied for initiative serial numbers with the Secretary of State. Let us know if you would like more details.
- The Arizona Association of Counties and several election directors have been working on legislation to address a measure that lowered the threshold for a recount. The result of the lower threshold is more recounts. The additional time these recounts may take may affect counties ability to move from the primary election to the general election. An automatic recount in the general election could affect the ability of the counties to finalize results to allow the state to timely report its presidential electors. Staff is monitoring these developments for changes that might affect deadlines under the Clean Elections Act. More details are in this story from Votebeat.org: https://arizona.votebeat.org/2023/10/19/23924048/arizona-presidential-election-timeline-katie-hobbs-legislature.
- We received a request for an Advisory Opinion. It is attached to this report. Under the rules adopted by the Commission, in general the Commission has 60 days to issue an opinion or determine it is unable to issue an opinion. We are currently accepting public comment. The request and the final adopted rules are available on our rulemaking page: https://www.azcleanelections.gov/rule-making.

Legal

- Center for Arizona Policy v. Arizona Secretary of State, CV2022-016564, Superior Court for Maricopa County.
    - Briefing on Motion to Dismiss Plaintiffs amended complaint is being finalized.
- Americans for Prosperity v. Meyer, No. 2:23-cv-00470-ROS (D. Ariz.)
    - Suit challenging Prop. 211 on First Amendment grounds.
    - Commission, the VRKA Committee, and the Attorney General Office's have filed motions to dismiss.
- Toma v. Fontes, CV2023-011834, Superior Court for Maricopa County.
    - Lawsuit and related motion for preliminary injunction filed challenging Proposition 211 on separation of powers theories.
    - A hearing is set for December 13.
- The Power of Fives, LLC v. Clean Elections, CV2021-015826, Superior Court for Maricopa County & Clean Elections v. The Power of Fives, LLC et al. CV2022-053917, Superior Court for Arizona. Oral argument on these cases was held October 6.
- Lake v. Richer, CV2023-051480, Superior Court for Maricopa County.
    - In this public records matter, Lake challenges the county's decision to withhold ballot affidavit envelopes on the basis that 16-168(F) makes signatures exempt and in the best interests of the state.

- Richer v. Lake, CV2023-009417, Superior Court for Maricopa.
    - Suit by Stephen Richer for libel over statements by Kari Lake.
- Arizona Free Enterprise Club v. Fontes, Sl300CV202300202 (Yavapai County). Lawsuit challenges process Maricopa and many other counties use to verify signatures on vote by mail affidavit envelopes.
- Arizona Free Enterprise Club v. Fontes (Yavapai County). Lawsuit challenging the use of what the Complaint refers to as "unstaffed" drop boxes for the return of mail ballots to the county recorder pursuant to the Elections Procedures manual. Case number unavailable at this time.
- The No Labels Party of Arizona v. Fontes, 2:23-cv-02172 (D. Ariz.) Complaint and Motion for Preliminary Injunction by a political party seeking to block the Secretary of State from accepting filings to run for office as a No Labels Party candidate for offices other than President and Vice President arguing that state statute allows the party to block such efforts and that their associational rights under the First Amendment likewise require the party to be able to bar such candidates.
- Litigation challenging SB1485, HB2492 and HB2243, as well as SB1260 is ongoing.

Appointments:

- No additional information at this time

Enforcement:

- MUR 21-01, TPOF, pending.

Regulatory Agenda:

The Commission may conduct a rulemaking even if the rulemaking is not included on the annual regulatory agenda.

If the Commission approves the items on the agenda day for public comment, the regulatory agenda will be updated.

The following information is provided as required by A.R.S. § 41-1021.02:

- Notice of Docket Opening:
    - R2-20-211. R2-20-220, R2-20-223- clarify roles of executive director and other representatives of the commission in enforcement proceedings. 28 A.A.R. 3489, October 28, 2022
    - R2-20-305 & R2-20-306 provide for a process to address complaints against a commissioner. January 20, 2023.
- Notice of Proposed Rulemaking:
    - R2-20-211. R2-20-220, R2-20-223- clarify roles of executive director and other representatives of the commission in enforcement proceedings. 28 A.A.R. 3409, October 28, 2022.

Notice of Proposed Rulemaking: 28 A.A.R. 3409, October 28, 2022
    - R2-20-305 & R2-20-306- - provide for a process to address complaints against a commissioner. January 20, 2023
    - R2-20-801 to R2-20-808 – providing for definitions, time computations, opt out notices, exemptions, disclaimers, communications with the Commission, record keeping, and advisory opinions, 29 A.A.R. 1571, July 14, 2023.
    - R2-20-810 to R2-20-813 – providing for complaint and enforcement process, including hearings. 29 A.A.R. 1969, September 1, 2023.
- Federal funds for proposed rulemaking: **None**
- Review of existing rules: **None pending**
- Notice of Final Rulemaking:
    - Amendments to R2-20-220 and R2-20-223, 29 A.A.R. 994, May 5, 2023.
    - Amendments to R2-20-305 & R2-20-306, 29 A.A.R. 1549, July 14, 2023.
- Rulemakings terminated: Amendment to R2-20-211. 29 A.A.R. 1149, May 12, 2023.
- Privatization option or nontraditional regulatory approach considered: **None Applicable.**

State of Arizona
Citizens Clean Elections Commission

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MEMORANDUM

To: Commissioners

From: Tom Collins

Date: 10/24/2023

Subject: Recommendations on Comments Received Re:

Introduction and Summary of Proposed Rules

The Voter's Right to Know Act, Chapter 6.1 of Title 16, Arizona Revised Statutes was passed by voters and certified on December 5, 2022. The Act provides for the disclosure of certain information related to the funding of political campaigns and disclaimers on campaign public communications. It also granted enforcement, rulemaking, and other powers to the Citizens Clean Elections Commission, a nonpartisan state commission. These proposed rules are part of the implementation of the Act.

The Commission approved circulation of rules related to the enforcement of the Act at its meeting in July.

A summary of the proposed rules follows:

R2-20-809- Provides for complaints regarding violations of Title 16, Chapter 6.1 and related rules, as well as complaints by the Executive Director and referrals from other government entities. Provides a process for handling the administration of complaints.

R2-20-810- Provides for a response by a person against whom a proper complaint has been filed. Provides the procedures for such a response, including requirements, and for a presumption that may arise based on a failure to respond.

R2-20-811- Provide the process for investigation and enforcement. Authorizes the Executive Director or other staff member to issue subpoenas and other process and seek compliance with such process. Provides for an appeal to the Commission. Provides that attorneys may assist the Executive Director but may not also represent the Commission itself when it sits for a hearing. Provides for a report by the Executive Director including factual and legal allegations and recommendations and recommended penalties. Provides a process for consent agreements. Provides the Executive Director may dismiss a complaint at any time.

R2-20-812 – Provides for a hearing at a respondent's request. Provides for a pre-hearing conference and items that should be discussed, including scheduling, briefing, witnesses and other items. Provides for the Commission to hold a meeting and vote on whether to issue an order and assessment of penalties, dismiss a complaint or continue a complaint. Provides for judicial review by a respondent upon a final order and for the Executive Director to enforce a Commission order.

R2-20-813 – Provides rules relating to transactions and structuring. Provides that a person who is not a covered person may rely on records provided related to campaign media spending, but has the burden of establishing reasonable reliance, and may not claim reasonable reliance on records the person knows are false or misleading. Provides that a person who is not a covered person may issue a notice to another person that their donation may be used for campaign media spending. Provides that the Executive Director has the burden of establishing structuring by evidence of willful conduct with respect to a transaction or circumstance. Provides that advising investigation, enforcement, or judicial review, nor does it include assisting a person in availing themselves of provisions of Title 16, Chapter 6.1 or these rules relating to exemptions from disclosure. Provides that willful conduct does include providing advising a client to take an action or taking an action to violate A.R.S. § 16-975

Comments and Staff Responses

Staff is in receipt of comments from Statecraft, a Phoenix Law Firm, and the Campaign Legal Center about these proposed rules.

Statecraft Comment: Statecraft objects to much of the language included in Proposed R2-20-813(D). Proposed Section 813 provides rules related to implementing the anti-structuring provisions of the VRKA.

The anti-structuring provision of the Act provides that: "A person may not structure or assist in structuring, or attempt or assist in an attempt to structure any solicitation, contribution, donation, expenditure, disbursement or other transaction to evade the reporting requirements of this chapter or any rule adopted pursuant to this chapter." A.R.S. § 16-975. Proposed R2-20-813(D) proposed to address how this would apply in the case of lawyers and other advisors.

Statecraft's objections include that the Commission lacks authority to issue a rule that purports to regulate attorneys and other fiduciaries in the course of advising clients. Additionally, Statecraft argues, to the extent the Commission attempts to parallel otherwise existing obligations of these professionals, the rule is not sufficiently narrow. Statecraft expresses concern the rule could have a chilling effect on the ability of attorneys to advise clients. Finally, it specifically objects to the proposed language in the last sentence of the rule that provides an express prohibition on advising a course of action that violates the underlying statute prohibiting structuring.

While Staff does not agree the rule is beyond the Commission's power, as indicated by the Executive Director's comments at the September meeting, staff acknowledges the concern about a potential chilling effect. In view of that, at this time, Staff recommends not approving R2-20-813(D). The statute and rules themselves apply to all those subject to the Act, and so, as things stand the particularized focus on attorneys and advisors is unnecessary to assure compliance.

The Campaign Legal Center provided comment on several provisions of the proposed rules.

CLC Comment 1: Section R2-20-809 permits complaints from any person. In its comment, CLC argues that A.R.S. § 16-979, which authorizes the Commission to address complaints regarding violations of the VRKA, allows "any qualified voter in this state" to file a Complaint with the Commission. Moreover, CLC argues that the definition of person included in the Act and the already adopted rule includes a range of entities, not just individuals. Consequently, CLC argues that the proposed rule "is inconsistent with the statutory language and drastically expands who may submit a verified complaint."

Staff does not agree that there is an express conflict with the statute. For clarity's sake, however, and because staff believes this will not substantially affect the actual complaints the Commission will receive, Staff recommends accepting this recommendation from CLC.

CLC Comment 2a: Section R2-20-810 provides the process for addressing a Complaint, including the timelines for response to the Complaint. It also provides for a reply by a complainant. While the proposed rules provide that when requesting a reply, the Executive Director may grant no more than 30 days to reply, CLC would like the Commission's rules to require a minimum amount of time.

With respect, Staff does not think this change is necessary at this time. Staff regularly works with complainants and respondents on the timing of submitting documents to the Commission. Were an Executive Director to provide unreasonably short time periods to reply that would risk the fairness of the process and surely be brought to the Commission's attention. Consequently, we think this change is unnecessary.

CLC Comment 2b: Proposed R2-20-810(A)(3) provides that if a proper Complaint is filed, the Respondent will receive a written communication from the Executive Director and will have an "opportunity to respond in writing in a timely manner and setting forth a deadline of not more than 30 days after the date of the written communication." In its comment, CLC recommends the Commission change the deadline so it runs from the date that the Respondent receives the written communication, not the date of the communication.

Staff has no objection to this change, which, as a practical matter should not substantially affect either party or any public interest because the Executive Director already had discretion to set the deadline within the window of 30 days. The change is indicated in Exhibit 1 below.

CLC Comment 2c: Proposed Rule 810 also provides that when a response is requested, "[e]xtensions shall be granted on request at the discretion of the Executive Director." CLC argues that the term shall is inherently mandatory and should be changed to may. It also argues that the rule should be changed so that extensions should only granted upon a showing of good cause.

Respectfully, Staff does not think these changes are necessary. The "shall" in the sentence regarding extensions is not mandatory as the sentence indicates that the extensions are granted at the discretion of the Executive Director. Further, ordinarily the Commission Staff grants extensions in its role enforcing the Clean Elections Act without any express authority. Wise attorneys will likely provide a basis for the need for an extension.

CLC Comment 3: Proposed Rule 811 provides for investigation and enforcement procedures including allowing the Executive Director to provide a report "stating with reasonable particularity the nature of the violation, including the facts, laws, or rules substantiating the allegations in the complaint, and issue it to the respondent." The rule also provides the Executive Director may dismiss a Complaint at any time.

In its comment, CLC observes that it would be, at a minimum, a better practice for the Executive Director to provide the basis concluding that there are not sufficient facts to sustain a complaint. The CLC recommends the following language:

> If, upon completion of an investigation, the Executive Director does not find sufficient facts to substantiate the allegations in the complaint, the Executive Director shall dismiss the complaint and issue a written report to the respondent stating that after completion of an investigation, the Executive Director did not find sufficient facts substantiating the allegations in the complaint to pursue the matter."

Staff has no objection to this suggestion and it is incorporated below. Staff believes that an Executive Director who closes a Complaint ought to, as a background legal matter, provide a basis for that decision that is available to the public. Codifying that as a requirement is wise, but does not itself change the nature of the work that the Executive Director ought to do. Staff believes the language is properly included in proposed subsection (F).

Other comments

Staff notes that CLC also requests additional language specifying requirements for donor records. CLC acknowledges that may be better as a separate rule. If the Commission so directs, Staff can provide a review of this language with an eye toward evaluating a proposal for an additional rule. Such an approach would necessarily include evaluating whether the VRKA authorizes such a rule as part of a recommendation.

Staff has incorporated the minor changes and corrections CLC recommended in the exhibit below.

People United for Privacy provided general comments. Among other things, the organization:

- urges the Commission to slow its rulemaking process,
- argues that the dismissal of the initial challenge to the law brought by two other organizations and donors was improperly dismissed,

- asks the Commission to reject the reasoning it has put forth in court filing regarding partisan activities that are included in the campaign media spending definition and instead determine some clarifying or limiting language,
- and argues that language in the Act providing that campaign media spending includes "public communication that promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate" is too vague.

While Staff appreciates the time PUFP put into submitting a comment and in reviewing the legal arguments that have been made in lawsuits challenging the Act, at the present time, given that continued litigation, these arguments are better maintained in that forum. Staff will continue to consider whether additional rulemakings are necessary or any specific language that PUFP and others have in mind.

Conclusion

Staff recommends adoption of Proposed R2-20-809 to 813 with the changes incorporated in Exhibit 1.

Exhibit 1
Text of Rules with Recommended Changes

ARTICLE 8. VOTER'S RIGHT TO KNOW ACT RULES

R2-20-809. Complaint Procedures

A. Any ~~person~~ qualified voter in this state may submit a complaint to the Executive Director if the person believes a violation of Arizona Revised Statutes Title 16, Chapter 6.1 or these rules has occurred. The complaint must be made in writing. Email submissions are acceptable.

B. Regardless of whether a complainant is represented by counsel, a complaint must contain the full name, email address, and mailing address of the complainant.

C. A complaint must:

1. Clearly recite the facts that describe a violation of Arizona Revised Statutes Title 16, Chapter 6.1 or these rules as specifically as possible. Citations to law are not required.
2. Clearly identify ~~each~~ any person, including any individual, entity, committee, organization or group, that is alleged to have committed a violation.
3. Include any supporting documentation which the Complainant believes establishes the alleged violation, if available.
4. Differentiate between statements based on a complainant's personal knowledge and those based on information and belief. Statements not based on personal knowledge should identify the source of the information, and include supporting documentation if available. Contents of the complaint shall be sworn to and signed in the presence of a notary public and shall be notarized.

D. The Executive Director shall review the complaint within 5 days to determine if the Commission has jurisdiction to hear and rule on the complaint, and to ensure the complaint meets the criteria identified in subsection (C).

E. If the complaint does not meet the criteria, Commission staff shall notify the complainant of the deficiencies in the complaint and that no action shall be taken on the complaint unless those deficiencies are remedied.

F. If the complaint is deemed sufficient, Commission staff shall:

1. Assign the complaint a complaint number.
2. Confirm in a writing to the complainant and respondent that the complaint has been received.
3. Inform the complainant that the respondent shall be provided an opportunity to submit a response.

G. A complainant may withdraw the complaint by writing to the Executive Director no later than 14 days after filing the complaint or before the response, whichever is sooner.

H. The Executive Director may file a complaint if a person believes a violation of Arizona Revised Statutes Title 16, Chapter 6.1 or these rules has occurred. The complaint shall:

1. Clearly recite the facts that describe a violation of Arizona Revised Statutes Title 16, Chapter 6.1 or these rules as specifically as possible. Citations to law are not required;
2. Clearly identify ~~each~~ any person, including any individual, entity, committee, organization or group, that is alleged to have committed a violation; and
3. Include any supporting documentation which the Complainant believes establishes the alleged violation, if available.

I. Any employee, agent or representative of another government agency or subdivision of Arizona, including the state, any Arizona county, or any Arizona city or town, may make a referral to the Executive Director under this subsection.

~~**J.** Commission staff shall:~~

~~1. Assign the complaint a complaint number;~~

~~2. Confirm in a writing to the complainant and respondent that the complaint has been received; and~~

~~3. Inform the complainant that the respondent shall be provided an opportunity to submit a response.~~

R2-20- 810. Response Procedures

A. Within 14 days after receiving a complaint that complies with R2-20-809, a staff member shall send the respondent a copy of the complaint and a written communication describing the campaign finance processing procedures. The written communication shall:

1. Inform the respondent that the Executive Director has received allegations as to possible violations of campaign finance laws by the respondent.
2. Provide a copy of the complaint.
3. Give~~s~~ the respondent an opportunity to respond in writing in a timely manner and setting forth a deadline of not more than 30 days after the ~~date~~ respondent's receipt of the written communication. Extensions shall be granted on request at the discretion of the Executive Director.

B. The notification letter reflects no judgment about the accuracy of the allegations.

C. The response is the respondent's opportunity to demonstrate to the Executive Director why they should not pursue an enforcement action, or to clarify, correct, or supplement

the information in the complaint or referral. Respondents are not required to respond to the allegations.

D. Respondents, if they choose, may be represented by counsel. Once the Executive Director receives a notification that the respondent is represented by counsel, the Commission staff shall communicate only with the counsel unless otherwise authorized by the respondent or the respondent's counsel.

E. The respondent's response shall be sworn to and signed in the presence of a notary public and shall be notarized. The respondent's failure to respond within the time specified in subsection A may be viewed as an admission to the allegations made in the complaint.

F. If a respondent provides a response, the response should address each and every reason why no further action should be taken, including any legal or factual basis for an assertion that the matter is not subject to the Commission's jurisdiction.

G. While not required, when possible, a response should provide documentation, including sworn affidavits or declarations under penalty of perjury from persons with first-hand knowledge of the facts.

H. The response may be submitted by email, and the respondent need not copy the complainant on the response.

I. A complainant may request a copy of the response.

J. Complainants other than the Executive Director are not parties to any enforcement matter that may arise as a result of the complaint and response.

R-20-811. Investigation and Enforcement Procedures

A. Upon the expiration of the time for a response, the Executive Director or other Commission staff may conduct an investigation. The Executive Director or other Commission staff may engage attorneys pursuant to A.R.S. § 16-979(~~D~~C).

B. Attorneys who do substantial work investigating the complaint or enforcing orders and other matters arising from the complaint shall not participate as attorneys for the Commission regarding the complaint. Such attorneys may represent the Executive Director or other Commission staff before the Commission.

C. The Executive Director or other Commission staff 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. The Executive Director or Commission staff may utilize attorneys to effectuate any of these actions, including filing any action necessary to compel compliance. A person subject to a subpoena or other order pursuant to this subsection may appeal to the Commission by sending a written request to the Commission's attention. The Chair or a Commissioner designated by the chair may confer with an independent legal advisor and shall issue an order scheduling the appeal for a public meeting of the Commission and may set a schedule for any additional briefing.

D. Upon the completion of an investigation the Executive Director may prepare a report stating with reasonable particularity the nature of the violation, including the facts, laws, or rules substantiating the allegations in the complaint, and issue it to the respondent. The Executive Director may make a recommendation regarding the seriousness of violation, the appropriate remedy, and any other factors that the Executive Director and staff believe are relevant to the matter.

E. If the Executive Director determines that a consent agreement with the respondent is sufficient, the Executive Director and the respondent may agree to present the agreement to the Commission for acceptance. A consent agreement may include a penalty. The Commission may vote to accept, reject, or modify the proposed consent agreement at a public meeting. At this meeting, the Commission's commission attorney for independent advice shall serve as the legal advisor for the commission. That attorney must not have worked on the investigation, enforcement, or consent agreement.

F. The Executive Director may dismiss the complaint at any time. If, upon completion of an investigation, the Executive Director does not find sufficient facts to substantiate the allegations in the complaint, the Executive Director shall dismiss the complaint and issue a written report to the respondent stating that after completion of an investigation, the Executive Director did not find sufficient facts substantiating the allegations in the complaint to pursue the matter."

R2-20- 812. Enforcement Hearing Procedures

A. Within 30 days after the issuance of the Executive Director's report and recommendations, a respondent may request a hearing before the Commission. The Commission shall be represented by counsel who have had no role in the investigation or enforcement.

B. No later than 14 days after the request, the Executive Director, other Commission staff or attorneys for the Executive Director shall meet with the respondent or their attorneys to develop a proposed hearing plan. At the conference the following matters shall be considered:

1. The possibility of a consent agreement, and possible terms;

2. Select at least three mutually-agreeable dates for the hearing to present to the Commission;

3. Discuss whether any additional written material shall be provided to the Commission. If additional written material is necessary, discuss deadlines for the parties to exchange those materials prior to the hearing;

4. Decide whether either side shall call live witnesses, disclosure of the witness' proposed testimony, and agree whether alternative procedures for providing the evidence are available and appropriate;

5. Determine how much time each side shall need at the hearing;

6. Any pre-hearing matters that must be decided by the Commission and a schedule for presenting such matters;

7. A schedule for any pre-hearing briefing; and

8. Each side may prepare a draft final order to be submitted to the Commission with other materials.

C. Following the Conference, the Executive Director and respondent shall provide a report to the Commission's Chair or other Commission member designated by the Chair. The Chair may consult with an independent legal advisor. The Chair or the independent legal advisor shall issue a scheduling order.

D. The complaint, the response, the report, and any additional documents shall be provided to the Commission no later than 14 days before the hearing.

E. At the conclusion of the hearing the Commission may:

1. Vote to issue a final order and assessment of penalties;

2. Vote to dismiss the matter; or

3. Vote to continue the matter to another meeting.

F. The Commission shall schedule the next hearing as soon as practicable, considering the schedules of respondent, respondent's counsel, the Executive Director, and any counsel for the Executive Director.

G. Following a vote in favor of a final order and assessment of penalties a respondent may seek timely judicial review.

H. At the expiration of the time for judicial review, the Executive Director or their representatives must seek compliance with the Commission's final order. This may include the Executive Director, Commission staff, or their attorneys seeking judicial enforcement of the order if necessary.

R2-20- 813. Transactions and Structuring

A. A person, including an individual, may rely on records provided to the person as documentation of a transaction related to campaign media spending if the records are provided by an independent person who owns or controls the monies involved in the transaction. The person claiming reliance bears the burden of showing the reliance is reasonable by a preponderance of the evidence. The person claiming reliance must not have knowledge the records are false or misleading, and must not refuse to consider or produce information that indicates the records are false or misleading.

B. A person who is not a covered person may provide the notice prescribed by A.R.S. § 16-972(B) to another person who has given that person monies before transferring monies or making an in-kind donation to a covered person.

C. In order to establish structuring, the Executive Director shall provide evidence that a person acted willfully with regard to the transaction or other circumstance.

~~**D.** Willful conduct does not include representing a client during an investigation, enforcement, or judicial review, nor does it include assisting a person in availing themselves of provisions of Title 16, Chapter 6.1 or these rules relating to exemptions from disclosure. Willful conduct includes advising a client to take an action or taking an action to violate A.R.S. § 16-975.~~

September 25, 2023

Submitted electronically to ccec@azcleanelections.gov.

Mark Kimble, Chairman
Arizona Citizens Clean Elections Commission
1802 W. Jackson St. #129
Phoenix, Arizona 85007

Re: Comments in Support of Proposed Rules R2-20-809 through R2-20-813, relating to the Voters' Right to Know Act (Proposition 211)

Dear Chairman Kimble and Members of the Commission,

Campaign Legal Center ("CLC") respectfully submits these written comments to the Arizona Citizens Clean Elections Commission ("Commission") in support of Proposed Rules R2-20-809 through R2-20-813 (collectively "Proposed Rules") implementing Arizona's recently enacted Voters' Right to Know Act.[1]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American's right to an accountable and transparent democratic system.[2]

CLC thanks the Commission for its consideration of our comments on the prior round of proposed rules seeking to implement other portions of the Voters' Right to Know Act ("VRTKA" or "the Act")[3] and for its ongoing commitment to developing thorough, clear, and functional regulations. Our brief comments and recommendations are intended to strengthen and clarify the Proposed Rules and assist the Commission's work on this important issue.

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[1] *See* Ariz. Admin. Reg., Vol. 29, Issue 35 at 1969-73, Notice of Proposed Exempt Rulemaking, Title 2. Administration, Chapter 20. Citizens Clean Elections Commission, Article 8, R2-20-809 through 813 (Sept. 1, 2023), https://apps.azsos.gov/public_services/register/2023/35/contents.pdf.

[2] CLC's affiliated 501(c)(4) organization, CLC Action, represents Voters' Right to Know, the political committee established to draft and support Proposition 211, in ongoing litigation relating to the Act.

[3] *CLC Comments on Arizona Rulemaking Regarding the Voters' Right to Know Act (Prop 211),* Campaign Legal Ctr. (August 22, 2023), https://campaignlegal.org/document/clc-comments-arizona-rulemaking-regarding-voters-right-know-act-prop-211.

DISCUSSION

I. Background

Before the passage of the Act, Arizona's prior campaign finance disclosure system was described as "one of the most pro-dark-money statutes imaginable."[4] Wealthy special interests used 501(c)(4) groups and other nonprofits to conceal the true sources of millions of dollars of election spending, whether by using those entities to for independent spending directly or as a conduit to transfer the money to super PACs and other organizations for election spending in Arizona.[5] The Voters' Right to Know Act was enacted by over 70% of Arizona voters in November 2022 to shine a light on the original sources of this flood of secret "dark money" campaign spending.[6]

In June 2023, the Commission promulgated the first round of Proposed Rules to implement the Act, resulting in the adoption of the first set of rules on August 24, 2023.[7] This second round of Proposed Rules, focusing primarily on complaint, investigation, and enforcement procedures, are an important next step in implementing the Act, providing necessary guidance and clarification for the public and persons involved in or contributing to campaign media spending.

II. The Proposed Rules and CLC's Recommendations

In the following subsections, CLC suggests clarifications for three sections of the Commission's Proposed Rules, including provisions relating to verified complaints and responses, investigation, and enforcement. We have also included a brief subsection identifying minor technical corrections and suggested language regarding the recordkeeping obligations of intermediary donors, as discussed in our prior comments.[8]

A. § 809 – Complaint Procedures

The citizen complaint process is a key feature of the Act, providing any Arizona voter with the ability to help ensure enforcement of original source disclosure requirements under the Act. This process allows "[a]ny qualified voter in [Arizona]" to file a verified complaint with the Commission alleging that a person has failed to comply with the Act. A.R.S. § 16-977(A). This provision empowers Arizona voters to help protect their right to know who is spending to influence their ballots. To avoid confusion and ensure that the

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[4] *See* Alexander J. Lindvall, *Ending Dark Money in Arizona*, 44 Seton Hall Legis. J. 61, 73 (2019).

[5] *See* DAVID R. BERMAN, MORRISON INST. FOR PUB. POL'Y, DARK MONEY IN ARIZONA: THE RIGHT TO KNOW, FREE SPEECH AND PLAYING WHACK-A-MOLE 3-4 (2014). *See also* Lindvall at 67-68; *Dark Money Basics*, OpenSecrets, https://www.opensecrets.org/dark-money/basics (last visited January 28, 2023).

[6] *See* ARIZ. SEC. OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2022 GENERAL ELECTION 12 (Dec. 5, 2022, 10:00:00 AM), https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf. *See also* Jane Mayer, *A rare win in the fight against dark money,* THE NEW YORKER (Nov. 16, 2022), https://www.newyorker.com/news/news-desk/a-rare-win-in-the-fight-against-dark-money.

[7] *See Text of Rules Adopted*, *Proposed Rules related to the Voter's Right to Know Act, Proposition 211*, Ariz. Citizens Clean Elec. Comm'n (Aug. 24, 2023), *available at* https://storageccec.blob.core.usgovcloudapi.net/public/docs/916-Text-of-Rules-Adopted-8-24.pdf.

[8] *CLC Comments, supra* note 3.

regulatory language adheres to the statute, we recommend revising the below portions of § R2-20-809.

Proposed Rule § R2-20-809(A), outlining the citizen complaint process, permits a broader category of persons to file complaints than is provided in the statute. A.R.S. § 16-977(A) provides "[a]ny qualified voter in [Arizona]" with the right to file a verified complaint. However, under the proposed rule, subsection (A)(1) allows for "any person" to submit a complaint to the director. This change is inconsistent with the statutory language and drastically expands who may submit a verified complaint.

The Commission has already adopted many rules from the first round of rulemaking for the Act, including § R2-20-801; this rule sets the definitions for the regulatory chapter, using the statutory definitions provided in A.R.S. § 16-971.[9] Under A.R.S. § 16-971, "person" is defined as "both a natural person and an entity such as a corporation, limited liability company, labor organization, partnership or association, regardless of legal form." Thus, the proposed language of § R2-20-809(A)(1) substantially broadens and conflicts with the Act and appears to permit both natural persons and entities to file complaints, regardless of whether they are qualified Arizona voters.

Should the Commission wish to consider complaints that are not submitted by a qualified Arizona voter, the proposed rule already authorizes the Executive Director to file a complaint under subsection (H) "if a person believes a violation of [the Act or its associated regulations] has occurred." This subsection permits the Executive Director to consider complaints from persons other than qualified Arizona voters but requires the official complaint to be filed by the Executive Director directly. This ensures compliance with the Act but permits the Commission to consider issues raised by persons or entities who fall outside of the Act's citizen complaint process for enforcement.

Considering the above, we strongly recommend that the Commission revise § R2-20-809(A)(1) to reflect the statutory language, which limits the verified citizen complaint process to qualified Arizona voters.

B. § 810 - Response Procedures

Proposed rule § R2-20-810 provides the procedures for Commission staff and Respondents to respond to a complaint under § R2-20-809, laying out critical timelines and details so both the Commission and persons who have had complaints filed against them can understand the timeline, rights, and responsibilities afforded under the Act. To ensure all parties have a clear understanding of the response process, we recommend the following revisions to the proposed rule:

First, while many parts of the response procedures timeline in § R2-20-810 are clearly outlined, there is one significant absence: a floor or minimum number of days the Commission staff may provide to a Respondent to reply. When Commission staff send a copy of the complaint and a description of the process and procedures to the Respondent, the proposed rule states that Commission staff must give Respondents "a deadline of not more than 30 days after the date of the written communication [sharing the complaint and

[9] *See Text of Rules Adopted*, *supra* note 7.

procedures]."[10] However, there is no minimum or base period in the proposed rule that a Respondent may rely on to prepare a reply.

We recommend the Commission consider setting a reasonable minimum period for a Respondent to reply, in addition to the thirty-day maximum already included in the proposed rule. We suggest ten or fourteen days as a reasonable potential minimum period; however, the Commission and its staff will have the best understanding of what might be reasonable in Arizona. By providing a minimum period, potential Respondents will have assurance that they will have *at least* that period to respond to any complaint that might be made against them and that they will not be subject to very short response periods.

Second, we recommend the Commission consider beginning the response timeline on the date the communication is received by the Respondent, rather than on the date of the written communication from the Commission. This ensures that Respondents do not lose time to respond due to mail delays or other issues in the transmission of the complaint to the Respondent.

Third, § R2-20-801(A)(3) provides the Executive Director with the ability to grant Respondents extensions for a complaint response, at the Executive Director's discretion. We recommend two minor additions to this language: first, we recommend the rule state "Extensions *may* be granted on request at the discretion of the Executive Director," rather than the imperative "shall," to better reflect the discretion granted to the Executive Director. Furthermore, we suggest that extensions "shall only be granted with good cause shown" to ensure that requests are sufficiently detailed as to the Respondent's actual need for an extension and to inform the Executive Director's decision-making process.

C. § 811 - Investigation and Enforcement Procedures

Proposed rule § R2-20-811 outlines the process by which the Executive Director and Commission staff investigate complaints, report investigation results, and begin enforcement actions. To ensure clarity and protect the Commission in the event of a civil enforcement suit, we suggest the following revisions:

Subsection (D) directs the Executive Director to prepare a report regarding an alleged violation of the Act or its related rules upon completion of an investigation if the Executive Director believes the allegations were substantiated. However, the rule does not state what the Executive Director should do if the recommendation is that a violation did not occur. While Subsection (F) does permit the Executive Director to dismiss a complaint at any time, it would be prudent to include a parallel procedure under (D) for dismissals where the Commission has completed a full investigation of a complaint and the Executive Director believes the allegations were not substantiated. This record would be particularly important for the defense of the Commission if the Complainant were to file a citizen enforcement suit under A.R.S. § 16-977(C), which allows for a Complainant to bring a civil action to compel the Commission to enforce the Act if the complaint is dismissed at any point.

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[10] *See* § R2-20-810(A)(1)-(3).

We suggest the Commission consider creating additional language for subsections (D) or (F) or a new subsection outlining a procedure for when complaints are dismissed after a full investigation because the Executive Director believes the allegations were not substantiated. Depending on the Commission's preference, the report could be issued by the Executive Director alone as a reflection of the dismissal power under (F) or submitted to the Commissioners as a recommendation for their final determination under an expedited version the enforcement hearing process under § R2-20-812. An example of such language is as follows:

> "If, upon completion of an investigation, the Executive Director does not find sufficient facts to substantiate the allegations in the complaint, the Executive Director shall dismiss the complaint and issue a written report to the respondent stating that after completion of an investigation, the Executive Director did not find sufficient facts substantiating the allegations in the complaint to pursue the matter."

D. Additional Language Regarding Donor Records

In CLC's comments on the prior round of rulemaking for the Act, we recommended the Commission promulgate regulations or guidance regarding the process for the direct donor to a covered person to provide original source information for the funds contributed, if that donor is not the original source.[11] This language may fall within § R2-20-813 following subsection (A), or it may be better addressed in an additional section specific to donor recordkeeping.

We suggest the following language:

> [B.] A person who has contributed more than $5,000 in an election cycle to the covered person who does not already maintain records regarding the original source of monies eligible to become traceable monies must determine the identity of each other person that directly or indirectly contributed to the original monies being transferred and the amount of monies contributed or transferred by each person after receiving a written request from a covered person pursuant to A.R.S. § 16-972(D).
>
> 1. The donor shall make a clear and conspicuous request in writing to any upstream donors or intermediaries for the identity of the original source of the monies for the purpose of donor records.
>
> 2. Donor records shall be maintained in writing. Donors may utilize any reasonable accounting method to track all monies received and disbursed. To the extent that a donor owns or controls monies eligible to be traceable funds beyond the amount contributed to the intermediary or covered person, the donor may determine which monies are specifically contributed to the intermediary or covered person. Specific monies may not be disbursed more than once.
>
> 3. The ten-day period provided for a donor to respond to a covered person's request for original source information under A.R.S. § 16-972(D) shall not be interpreted or used to extend the covered

[11] *CLC Comments*, *supra* note 3.

person's statutory deadline for disclosure reports under A.R.S. § 16-973(A).

4. In-kind contributions. A person making an in-kind contribution to a covered person for the purposes of campaign media spending must provide information regarding the original source of monies at the time the contribution is made pursuant to A.R.S. § 16-972(E).

5. A covered person must aggregate donations from the same original source that reach the covered person through different sources.

[C.] A person who is not a covered person may provide the notice prescribed by A.R.S. § 16-872(B) to another person who has given that person monies before transferring monies or making an in-kind donation to a covered person. Nothing in this rule shall be interpreted to override restrictions donors place on donations or prevent a recipient from honoring those restrictions.

E. Minor Changes and Corrections

In addition to the suggestions above, we have identified a few minor changes and corrections the Commission may wish to consider. We suggest revising the following provisions:

- § R2-20-811, subsection (A) cites "A.R.S. § 16-979(D)," but that section does not include a subsection (D). It appears subsection (A) intends to reference A.R.S. § 16-979(C).
- § R2-20-809(A)(3)(b) requires verified complaints to "clearly identify each person, including any individual, entity, committee, organization or group, that is alleged to have committed a violation" under the Act or its associated regulations. At the time a qualified Arizona voter submits a verified complaint, it is possible that there are persons involved in a violation who are unknown to the Complainant and would only be revealed in the course of an investigation. As a result, we suggest the Commission consider revising the language to require complaints to "clearly identify any person," rather than "each person."

Conclusion

CLC thanks the Commission for its consideration of the foregoing comments and recommendations regarding this important rulemaking. As the Commission prepares to implement the Voters' Right to Know Act, CLC would be glad to provide further assistance or resources.

Respectfully submitted,

s/ Elizabeth D. Shimek
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September 28, 2023

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Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of Service Employees International Union-United Healthcare Workers West (SEIU-UHW), and pursuant to Arizona Administrative Code, Rule R2-20-808, this letter requests an advisory opinion to confirm that contributions — whether cash or in-kind — made to an Arizona political action committee sponsoring a ballot measure in Arizona (a "ballot committee"), and in support of the ballot committee's collection of signatures for ballot measure qualification ("qualification efforts") do not support a covered person's Campaign Media Spending as defined by the Voters' Right to Know Act, A.R.S. § 16-971(2) ("the Act").

SEIU-UHW has made significant in-kind contributions to ballot measure campaigns over the last two election cycles and will do so again in the current cycle, specifically making in-kind contributions in the form of paying for professional signature gathering and/or making cash contribution to support of the same.

Factual Background

In 2020 and 2022, SEIU-UHW made significant in-kind contributions to the ballot measure committee Arizonans Fed Up with Failing Healthcare (Healthcare Rising AZ) in form of paying the professional signature gathering firm Fieldworks, LLC to collect signatures in support of submitting the Stop Surprise Billing and Predatory Debt Collection Protection Acts on the 2020 and 2022 General Election ballots respectively. SEIU-UHW will make similar in-kind contributions as well as cash contributions to ballot measure committees in 2024—although they are not likely to make contributions to Arizonans Fed Up with Failing Healthcare (Healthcare Rising AZ) during the 2023-2024 cycle.

SEIU-UHW intends to make these contributions on the condition that they not be used for Campaign Media Spending as defined by A.R.S. § 16-971, thereby taking advantage of the opt-out provision provided by the Act.

The activities that SEIU-UHW will be supporting with their contributions are (a) administrative, fundraising or strategic support in support of petition circulation efforts; (b) printing petition signature sheets, (c) developing training and quality control systems;(d) recruiting petition circulators; (e) training petition circulators; (f) circulating petitions and

obtaining signatures from eligible voters; (g) compiling the signatures gathered by circulators; (h) performing quality control analysis on those signatures, (i) providing reports to the relevant ballot committee, and (j) coordinating the submission of circulated petitions with the relevant ballot committee.

These costs may include the ballot committee's efforts to train canvassers how to interact with the public in soliciting signatures — such as how to approach members of the public respectfully, how to avoid trespass, how to respond to requests to relocate, etc. — and how to describe the measure — including directing potential signers to the 200-word summary and the text of the measure.

Excluded from the activities for which this letter seeks an advisory opinion, are any public communication by means of broadcast, cable, satellite, internet or another digital method, newspaper, magazine, outdoor advertising facility, mass mailing or another mass distribution, telephone bank or any other form of general public political advertising or marketing, regardless of medium. Specifically excluded from this opinion request are contracts concerning phone banking, mass texting, mass emailing or any other communications directed *en masse* to hundreds of individuals.

Question Presented

Does a contribution (monetary or in-kind) made to a ballot committee in support of its collection of signatures for ballot measure qualification ("qualification efforts") support a covered person's Campaign Media Spending as defined by the Act?

Legal Background

On November 8, 2022, Arizona voters adopted the Voters' Right to Know Act. The Act

> establishes that the People of Arizona have the right to know the original source of all major contributions used to pay, in whole or part, for campaign ***media spending***. This right requires the prompt, accessible, comprehensible and public disclosure of the identity of all donors who give more than $5,000 to fund campaign ***media spending*** in an election cycle and the source of those monies, regardless of whether the monies passed through one or more intermediaries.

AZ LEGIS Prop. 211 (2022), 2022 Ariz. Legis. Serv. Prop. 211, §2. (emphasis added). The Act provides enhanced disclosure for traceable monies spent on campaign media spending in state and local races. A.R.S. § 16-973(A). Disclosure reporting is triggered by making campaign media spending. *Id*. (A)-(B). When determining whether a donor must be listed on the newly required disclosures, *id.*, or in newly required "paid-for-by" disclaimers under A.R.S. § 16-974(C), the recipient must ask whether the individual "contribute[d], directly or through intermediaries, $5,000 or less in monies or in-kind contributions during an election cycle to a

covered person for campaign media spending." A.R.S. § 16-973 (G). The Act also requires notification to a covered person's donors before making campaign media spending. A.R.S. § 16-972.

The Act recognizes that some expenditures made by a covered person will not be campaign media spending by requiring the covered person to "[i]nform donors that they can opt out of having their monies used or transferred for campaign media spending," before the monies are used for that purpose. *Id.* (B)(2).

In other words, the Act is focused intensely but not exclusively on campaign media spending, that is, public communications supporting or opposing candidates or ballot measures in local or state elections. Although the Act itself does not address operating expenses of a committee, it does not eliminate previous reporting requirements. For example, all contributions made to support or oppose local or state candidates or committees (including ballot committees) — including contributions that are not in support of campaign media spending, but that instead support operating or administrative expenses, or other activities — will be reported by the benefitted recipient committee as a contribution. These committees will disclose the information required by A.R.S. § 16-926.

The Act provides that "Campaign media spending" means spending monies or accepting in-kind contributions to pay for any of the following:

> (i) A public communication that expressly advocates for or against the nomination, or election of a candidate.
> (ii) A public communication that promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate.
> (iii) A public communication that refers to a clearly identified candidate within ninety days before a primary election until the time of the general election and that is disseminated in the jurisdiction where the candidate's election is taking place.
> (iv) ***A public communication that promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum***.
> (v) A public communication that promotes, supports, attacks or opposes the recall of a public officer.
> (vi) An activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity.
> (vii) ***Research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision***.

(Emphasis added). A.R.S. § 16-971(2).[1]

A public communication "[m]eans a paid communication to the public by means of broadcast, cable, satellite, internet or another digital method, newspaper, magazine, outdoor advertising facility, mass mailing or another mass distribution, telephone bank or any other form of general public political advertising or marketing, regardless of medium." *Id.* (17). Arizona's definition of public communication closely mirrors the federal definition found at 52 U.S.C. § 30101(22) as implemented by 11 C.F.R. § 100.26.

Notably, when defining Campaign Media Spending, the Act specifically does not include election related activities such as nonpartisan activity encouraging voter turnout or encouraging citizens to register to vote. A.R.S. § 16-971(2)(b). Like general operating expenses, these expenditures, if made by a political action committee, will be disclosed in the report required by A.R.S. § 16-926.

Analysis

Contributions — whether cash contributions or in-kind — made to a ballot committee in support of its qualification efforts do not support a covered person's Campaign Media Spending under the Act. Stated simply, the act of collecting signatures for a ballot measure qualification is not a public communication, as such costs are more properly not categorized as general public political advertising or marketing.

While Subpart (iv) of the test applies to public communications related to ballot measures, the work around collecting signatures for ballot qualification is in fact not a public communication. The definition of "public communication" in A.R.S. § 16-971(17) requires conveying one message to many recipients via some type of mass media or broadcasting medium. Circulators collecting signatures from the public are not communicating to the public in any of the means identified in the definition of public communication. They are not broadcasting a message; they are not sending that message out via mass mailing or phone banking. They are, rather, engaged in the act of collecting signatures from the public through individual, one-on-one conversations.

In a matter assessing the application of the definition of "public communication"[2] to similar activities, a Commissioner from the Federal Election Commission (FEC) observed that most of the costs of a party committee's field program did not rise to the level of a "public communication" because most of those costs are associated with "door-to-door canvassing, manning campaign offices and other traditional grass roots activities" and other "staff and overhead costs," including "salaries and benefits of its employees, and for costs related to

[1] This request for an advisory opinion is only with respect to contributions in support of ballot qualification efforts. Such efforts to support the collection of signatures for ballot measure qualification do not satisfy subparts (i) through (iii) or (v) through (vi) because these efforts have no relation to candidates and are therefore not relevant to this question presented.

[2] As noted above, Arizona's definition of "public communication" largely mirrors the federal regulation promulgated by the FEC.

maintaining office space." *See* MUR 5564, Statement of Reason of Chairman Robert Lenhard. This Commissioner specifically differentiates the costs of making phone calls, which SEIU-UHW's contributions do not intend to support, from the other administrative costs listed as part of the committee's field program, which SEIU-UHW's contributions do intend to support. *See Id.* at FN4.

More specifically, FEC Commissioners have concluded that door-to-door canvassing, like the work that SEIU-UHW contemplates supporting in this election cycle, is not "general public political advertising" — and by extension, not a "public communication" for purposes of campaign finance regulation because canvassing does not involve paying "for access to an established audience using a forum controlled by another person"; rather, canvassing uses a forum the canvassing organization controls "to establish their own audience." *See* MUR 5564, Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky (citing Internet Communications, 71 FED. REG. 18589, 18594-95 (F.E.C. 2006)).

The language of the Act demands a similar interpretation: it expressly defines "public communications" around mass media mediums, scenarios where the entity making the communication is paying for access to a specific established audience, via a specific forum. A.R.S. § 16-971(17). Petition circulation, on the other hand, involves direct communications with individuals, an audience selected by the communicating entity, and using no medium or forum other than direct person-to-person contact.

To that end, it is instructive that each subpart of the definition of campaign media spending relies on public communication. *See* A.R.S. § 16-971(2)(a). This is consistent with the Act's focus on specifically targeting *media spending* for additional regulation, and not all types of campaign or electoral spending, or all types of communications with the public. Black's Law Dictionary's definition of "media" is "[c]ollectively, the means of mass communication; specif., television, radio, newspapers, magazines, and the Internet regarded together." 11th ed. at 1175.

Understanding the act of collecting signatures to be outside the definition of Campaign Media Spending is also consistent with the exceptions identified in the statute. Registering people to vote is related to elections, and surely encouraging people to vote is related to elections or even campaigns, but those are not Campaign Media Spending because they are not the kind of mass communication activity or even the type of activity the Act seeks to regulate. Similarly, gathering signatures to put a measure on the ballot — as opposed to encouraging a particular vote on that ballot measure — is not Campaign Media Spending.

Such an act in furtherance of qualification is more similar to the nonpartisan voter registration and nonpartisan get out the vote activity that is **not** regulated by the Act and, under federal tax law, can even be conducted by 501(c)(3) charities that are prohibited from intervening in candidate elections. In fact, ballot qualification activities share the common goal to support an American's civic duty — the civic duty to exercise the right to vote without taking into account individual ideology or partisanship. A voter could sign a petition to support qualification of an initiative on the ballot, simply to exercise their right to ultimately vote against

the initiative once it was balloted. Like ensuring that individuals are registered to vote, the act of collecting petition signatures is simply an element of our civic mechanics.

Finally, the ballot qualification efforts that SEIU-UHW wishes to support do not satisfy subpart (vii) of the Campaign Media Spending definition. It is possible that some of a ballot committee's efforts associated with ballot qualification may include "research, design, production, polling, data analytics, mailing or social media list acquisition" in support of the specifically delineated categories of Campaign Media Spending in A.R.S. § 16-971(2)(a). For example, the development of literature or scripts advocating for the ballot measure that may be used by canvassers may have been intended by the drafters to be regulated under subpart (vii). However, as detailed above, the act of door-to-door or street canvassing to collect petitions is not itself a "public communication" that falls under subparts (i) - (vi) of the Campaign Media Spending definition, and therefore general support of signature collection cannot fall under subpart (vii) of the definition, which only encompasses activities "in preparation for or in conjunction with any activities described in items (i) through (vi)..."

Conclusion

For the above reasons, SEIU-UHW asks that the Commission issue an advisory opinion clarifying that paid signature gathering is not campaign media spending under A.R.S. § 16-971, SEIU-UHW's contributions — both monetary and in-kind — in support of a ballot committee's collection of signatures for ballot measure qualification do not support a covered person's Campaign Media Spending as defined by the Act.

Yours,

James E. Barton II

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August 7, 2023

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VIA EMAIL ONLY

Re: Comments on Draft Rules R-20-803, R-20-805 and R-20-813

Dear Director Collins:

I respectfully submit the following comments in connection with the draft regulations R-20-803, R-20-805 and R-20-813, pursuant to the Commission's Notice of Proposed Rulemaking. Although I write solely on my own behalf, the comments are informed by my experience as an election law practitioner, to include ambiguities and uncertainties that some of my clients have encountered in seeking to understand and ensure compliance with the new regulatory obligations created by Proposition 211, A.R.S. §§ 16-971, *et seq*.

I. Draft R-20-803: Application to Political Action Committees

This regulation should be revised to reflect the impracticality of the "opt-out" provisions of A.R.S. § 16-972 as applied to "covered persons" that are also political action committees ("PACs"). The current Arizona campaign finance code, which Proposition 211 did not amend in any material respect, requires PACs to publicly report all receipts, to include itemized disclosures of all contributions in any amount by entities and out-of-state individuals and all contributions by Arizona residents in excess of $100 for the election cycle. *See* A.R.S. § 16-926(B)(1). More broadly, section 527 of the Internal Revenue Code—which is the predicate for most PACs' tax-exempt status—largely conditions such entities' exemption from federal income tax on the use of revenues for "exempt functions," *i.e.*, "influencing or attempting to influence the selection, nomination, election, or appointment" of individuals to public office." 26 U.S.C. § 527(e).

The upshot is that the opt-out provisions of Proposition 211 stand in considerable tension with regulatory and disclosure obligations imposed on many PACs by extrinsic sources of law. For example, assume an individual donates $6,000 to a "covered person" that is also a PAC; assume further that the recipient PAC notifies the donor of his opt-out rights in accordance with the proposed R-20-803, and that the donor exercises this prerogative. The PAC then must ensure that the funds are not used or transferred for reportable "campaign media spending." *See* A.R.S. § 16-972(C). If those funds are used for any other purpose that could constitute influencing an election, however, the PAC remains required by A.R.S. § 16-926(A)(1)(a) to publicly disclose that donor's identity. Alternatively, the PAC could in theory allocate the monies to wholly non-electoral purposes (thus rendering the funds a receipt other than a "contribution," within the meaning of A.R.S. § 16-901(11)), but the donation then may no longer be for an "exempt purpose," within the meaning

of the Internal Revenue Code. Application of the opt-out provisions to individuals who donate less than $5,000 per election cycle to a "covered person" PAC produces even more incongruous results. Proposition 211 generally leaves such donors' privacy intact irrespective of whether they exercise opt-out rights, but A.R.S. § 16-926(A)(1) nevertheless may necessitate their disclosure. Providing the opt-out notice envisaged by R-20-803 to such donors could easily induce confusion, if not an erroneous belief by the donor that his or her privacy will remain protected.

For these reasons, the Commission should consider amending the proposed R-20-803 by adding a subsection (F), as follows:

> ". . . F. Notwithstanding the foregoing, a covered person that is also a registered political action committee pursuant to A.R.S. § 16-905(C) may comply with this section and A.R.S. § 16-972 by including either in its written solicitations of funds or in a written receipt provided to a donor within ten (10) days of receiving the donor's monies a clear and conspicuous written notice that the political action committee is required by Arizona law to publicly report the name, address, and (if applicable) occupation and employer of all out-of-state contributors and all entity contributors, and of Arizona residents who contribute more than $100 per election cycle."[1]

II. Draft R-20-803: Advance Written Consent

A.R.S. § 16-972(C) permits covered persons to bypass the 21-day opt-out waiting period by instead obtaining the donor's advance written consent to the use or transfer of the donor's monies for campaign media spending. The regulation should likewise incorporate this alternative, which in many instances offers a logistically easier and more efficient method of compliance. Accordingly, the Commission should amend draft R-20-803 by adding subsection (G)—in addition to the subsection (F) proposed above—as follows:

> " . . .G. Notwithstanding the foregoing, a covered person may comply with this section and A.R.S. § 16-972 by obtaining, at the time monies are transferred to the covered person or thereafter, the donor's written consent to the use or transfer of such monies for campaign media spending. A consent provided pursuant to this subsection is sufficient if it includes an affirmative written manifestation by the donor (including but not limited to the marking of a check box on an electronic or paper remittance form) that the donor (i) authorizes the use or transfer of some or all of the donor's monies for campaign media spending and (ii) understands that the donor's identifying information may be reported to the appropriate governmental authority in this state for disclosure to the public."

III. Draft R-20-805: Disclaimer Exemption for Small Donors

Although A.R.S. § 16-973(G) preserves the privacy of original sources that donate $5,000 or less in monies or in-kind contributions per election cycle for campaign media spending, neither A.R.S. § 16-974(C) nor the draft R-20-805 directly incorporates this limitation, thereby creating an ambiguity, if not a direct conflict between these provisions.

[1] For similar reasons, the Commission should consider including political party committees within the ambit of this proposed revision as well.

The Commission accordingly should amend the draft R-20-805(B) to clarify: "Public communications by covered persons shall state the names of the top three donors who directly or indirectly made the three largest contributions of original monies in excess of $5,000 for the election cycle and who have not opted out . . . ."

IV. Draft R-20-813: Application to Attorneys or Other Fiduciaries

The final sentence of the draft R-20-813(D)—to wit, "Willful conduct includes advising a client to take an action or taking an action to violate A.R.S. § 16-975"—is improper. The Commission has no constitutional or statutory authority to prescribe obligations for fiduciaries acting in their capacity as such, particularly when the proposed regulation is incongruent with, or cumulative of, ethical directives or rules of conduct promulgated by a licensing authority or (in the case of attorneys) a separate branch of government.

With respect to attorneys, Arizona Rule of Professional Conduct 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." While the draft R-20-813(D) might be intended to codify a prohibition approximating this ethical limitation, its wording is not so confined.

The final sentence should be removed from the draft regulation entirely. While admittedly not having researched the question exhaustively, I am aware of no other instance in which an administrative agency has purported to devise an independent predicate for an attorney's or other fiduciary's liability when acting in that capacity. To do so apparently for the first time in a regulatory field that is suffused with both First Amendment imperatives and increasingly vindictive litigation tactics is, I respectfully suggest, inappropriate and misguided.

Attorneys are, of course, subject to the same civil and criminal laws that bind all other citizens, in addition to the Rules of Professional Conduct. But the final sentence of the draft R-20-813(D) risks chilling effective legal representation by engendering a potential (if not actual) discrepancy between an attorney's ethical duties to his or her client and the Commission's diktats. It also cultivates a perverse incentive for complainants to strategically engineer conflicts of interest and undermine confidential attorney-client relationships by joining a covered person's legal counsel as a co-respondent in Commission proceedings.

The Commission accordingly should excise the final sentence of the draft R-20-813(D) entirely. To the extent a comparable provision remains in the adopted regulation, it should be revised to incorporate verbatim the language of Arizona Rule of Professional Conduct 1.2(d).

***

Thank you for your consideration of the foregoing comments.

Respectfully,

/s/ Thomas Basile
Thomas Basile

September 19, 2023

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VIA E-MAIL (ccec@azcleanelections.gov)

Re: Comments on Notice of Proposed Rulemaking; "Voter's Right to Know Act" (Proposition 211)

Dear Mr. Collins,

People United for Privacy[1] submits these comments on the above-referenced notice of proposed rulemaking by the Citizens Clean Elections Commission (the "Commission"). We urge the Commission to hold off on adopting regulations while the serious legal challenge to the underlying "Voter's Right to Know Act" (the "Act") remains pending in federal court.[2] As the lawsuit demonstrates, there are significant constitutional problems with the Act's vague and overbroad terminology and its unjustified encroachments on donor privacy. Promulgating rules to implement the Act at this time may turn out to be an exercise in futility and a waste of agency resources in the likely event that the Act is struck down in litigation.

1. There is no need for the Commission to rush to adopt these rules.

While the Commission may adopt rules to implement the Act, the Act sets no particular deadline for doing so.[3] Moreover, although the Act purports that this rulemaking is exempt from the Arizona Administrative Procedure Act,[4] that law also prescribes no particular deadline for promulgating rules. Indeed, the Act generally does not require the Commission to adopt any implementing rules at all; the only rulemaking the Act requires is for the Act's disclaimer requirements.[5]

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[1] People United for Privacy defends the rights of all Americans – regardless of their beliefs – to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights privately.

[2] *Americans for Prosperity, et al. v. Meyer, et al.*, Case No. 2:23-cv-00470-ROS (D. Ariz.).

[3] *See* Ariz. Rev. Stat. § 16-974(A)(1), (C).

[4] *Id.* § 16-974(D).

[5] *Compare id.* § 16-974(C) ("The commission *shall* establish disclaimer requirements for public communications by covered persons.") (emphasis added) *with id.* § 16-974(A)(1) ("The commission *may*… [a]dopt and enforce rules.") (emphasis added).

2. The Arizona Superior Court's dismissal of the challenge to the Act establishes no presumption of its constitutionality.

The recent ruling by the Maricopa County Superior Court dismissing a separate challenge to the Act provides little assurance of the Act's constitutionality.[6] The court failed to properly apply the "exacting scrutiny" standard against the Act's unconstitutionally broad donor exposure requirements and to adequately address the Act's unconstitutionally vague terminology.

2.1. The Act is not "narrowly tailored" and fails "exacting scrutiny."

The Arizona Superior Court concluded the Act satisfies the "exacting scrutiny" standard for disclosure laws insofar as:

> the Act mandates the disclosure of original sources of campaign funds, which prevents cloaking actual contributors by using intermediaries:
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> The interests in where political campaign money comes from and in learning who supports and opposes ballot measures extend beyond just those organizations that support a measure or candidate directly. The secondary-contributor requirement is designed to go beyond the ad hoc organizations with creative but misleading names and instead expose the actual contributors to such groups.[7]

However, both the Superior Court decision and the U.S. Court of Appeals for the Ninth Circuit's "*No on E*" decision cited therein fail to explain how the Act's requirement for organizations to indiscriminately report their donors—and donors to those donors—is "narrowly tailored" to the state's interest in disclosure of "who supports and opposes ballot measures" and candidates. Donors give to non-profit organizations for wide variety of charitable, educational, and issue advocacy purposes. Those donors, by definition, are not giving to "support[] and oppose[] ballot measures" or candidates. The Superior Court decision fails to explain why such donors should have to be publicly exposed on an organization's so-called "campaign media spending" reports.

That nexus is even more attenuated for the Act's "secondary-contributor [disclosure] requirement" – i.e., the requirement that "campaign media spending" sponsors report their donors' donors. If: (i) Donor 1 gives to Organization A to support its educational activities; (ii) A then gives to Organization B to support B's charitable activities; and (iii) B also engages in "campaign media spending," how can it be said that Donor 1 "supports" or "opposes" any ballot measure or candidate such that Organization B should have to report Donor 1 under the Act? Again, the Superior Court decision fails to justify how this donor reporting requirement bears a "*substantial*" relationship

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[6] *Center for Arizona Policy, Inc., et al. v. Arizona Secretary of State, et al.*, Case No. CV 2022-016564 (Super. Ct. of Ariz., Maricopa County), Under Advisement Ruling dated Jun. 21, 2023.

[7] *Id.* at 8-9 (quoting *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*, 62 F.4th 529, 540-41 (9th Cir. 2023)) (internal brackets and italics omitted).

with the state's interest in exposing "who supports and opposes ballot measures" and candidates, as the "exacting scrutiny" standard demands.[8]

The Superior Court's analysis is premised on the notion that organizations engaged in political campaign spending are "cloaking actual contributors by using intermediaries." While this may be true in a few instances, the court cites no record evidence of how pervasive this practice is. Therefore, the court's pretext for its holding is mere conjecture, and "we have never accepted mere conjecture as adequate" to uphold a law that burdens First Amendment rights.[9]

Moreover, even if the Superior Court was justifiably concerned about the circumvention of disclosure "by using intermediaries," the court failed to consider why an alternative approach that either: (a) prohibits such "earmarking" of contributions (a la Ariz. Rev. Stat. §§ 16-918 and -1022(B)); or (b) requires only contributions earmarked through intermediaries for "campaign media spending" to be reported (a la Ariz. Rev. Stat. § 16-926(E)) wouldn't be a far better fit for the governmental interest at issue.

Under the "exacting scrutiny" standard that applies here, "fit matters," and there must be a "reasonable assessment of the burdens imposed by disclosure" that "begin[s] with an understanding of the extent to which the burdens are unnecessary."[10] Here, there is an exceedingly poor fit between the Act's vastly overbroad donor reporting requirement relative to the narrow interest in exposing donors "using intermediaries" to fund political campaign spending. And the patently obvious alternative of requiring only the reporting of donors who earmark their contributions for political campaign spending renders "the burdens [of the Act] unnecessary." Therefore, the Act fails "exacting scrutiny."

The Superior Court also places great stock in the Act's allowance for donors to opt out of disclosure by prohibiting their donations from being used for "campaign media spending." However, the presumption that someone supports or consents to a practice simply because he or she does not opt out is highly disfavored. For example:

- The Federal Election Commission ("FEC") prohibits deducting contributions for a PAC from employees' paychecks or on union members' dues statements on an opt-out basis;[11]

[8] *See id.* at 9 (emphasis in the original).

[9] *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (internal quotation marks and citation omitted).

[10] *Amer. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384-85 (2021) (internal quotation marks and citation omitted).

[11] *See* FEC Adv. Op. Nos. 2001-04 (MSDWPAC) and 1977-37 (NEA-PAC).

- The FEC has recommended that Congress prohibit campaign contribution solicitations from requiring donors to opt out of having their credit cards charged for recurring contributions;[12]

- The Federal Communications Commission prohibits robocalls and automated text messages from being sent to cellphones on an opt-out basis.[13]

In the same vein, we cannot presume that donors to nonprofit organizations intend to fund "campaign media spending," as the Act and Superior Court presume, simply because those donors fail to opt out of having their funds used for such purposes. Indeed, the written opt-out notices that organizations are required to send may become lost in the mail, sequestered in recipients' e-mail spam filters, or simply overlooked. "In a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment . . . and where the Internet removes any geographic barriers to cyber harassment of others,"[14] the Act imposes an undue burden on donors' right to privacy by requiring their names, addresses, occupations, and employers to be publicly associated with "campaign media spending"[15] by default on an opt-out basis.

Moreover, as plaintiffs in the federal court litigation correctly note, the Act's opt-out provision does not apply to a donor's donors.[16] Again, using the example from before, if: (i) Donor 1 gives to Organization A to support its educational activities; (ii) A then gives to Organization B to support B's charitable activities; and (iii) B also engages in "campaign media spending," how can the Superior Court presume that Donor 1 "supports" or "opposes" any ballot measure or candidate when the Act doesn't even give Donor 1 any opportunity to opt out of being associated with Organization B's "campaign media spending"?

2.2. The Act relies upon unconstitutionally vague terminology, and the Commission's proposed rule fails to clarify it.

As even the Arizona Superior Court acknowledges, the Act "burden[s] the ability to speak" by virtue of its reporting and disclaimer requirements.[17] Accordingly, a "greater degree of

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[12] *See* FEC 2022 Legislative Recommendations, *at* https://www.fec.gov/resources/cms-content/documents/legrec2022.pdf.

[13] *See* 47 C.F.R. § 64.1200(a)(1); *see also* FCC Enforcement Advisory No. 2016-03, DA 16-264 (Mar. 14, 2016).

[14] *Amer. For Prosperity v. Grewal*, 2019 WL 4855853 at *20 (D. N.J. 2019).

[15] *See* Ariz. Rev. Stat. §§ 16-973(A)(6), -971(10) (defining "identity").

[16] *Americans for Prosperity, et al. v. Meyer, et al.*, Case No. 2:23-cv-00470-ROS (D. Ariz.), Plaintiffs' Omnibus Opp. to Mot. to Dismiss (Doc. No. 38) at 25 (ECF page number).

[17] *Center for Arizona Policy, Inc.*, Under Advisement Ruling at 7 (internal quotation marks and citation omitted).

specificity is required" of the content standards triggering these speech regulations so as not to render the entire Act unconstitutionally vague.[18]

The Superior Court failed to properly address the claim that the term "campaign media spending" as used in the Act is unconstitutionally vague. The court merely reasoned that "Plaintiffs' challenge to three portions of the Act do not support a facial challenge of the *entire* measure based on vagueness."[19]

The Superior Court misses the mark by a mile: The *entire* Act relies upon vague terminology. The Act's twin pillars – that organizations must report donors and identify themselves and their donors on disclaimers – are both triggered by "campaign media spending."[20] And this foundational term is vague in several critical respects.

2.2.1. "Partisan" activities are vague and undefined.

The Act defines "campaign media spending" to include "partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity."[21] The Act does not further define these activities. In the federal litigation, the Commission protests that "Plaintiffs launched this broadside [against the 'campaign media spending' definition] before the Commission has passed one regulation."[22] Yet, the Commission has now released its proposed rule text, and it *still* fails to define what these activities mean. Indeed, the Commission contends that one "cannot dispute that 'partisan' in [the Act] refers to a recognized political party or party affiliation," and that it is not "plausible" that anyone could "misinterpret 'partisan'" to mean anything else.[23]

However, the Internal Revenue Service ("IRS") interprets "partisan" voter registration and get-out-the-vote activities by non-profits merely to mean "activities conducted in a biased manner that favors (or opposes) one or more candidates."[24] In other words, per the IRS, and contrary to the Commission's assertion, "partisan" activities need not necessarily refer to a political party or party affiliation.[25]

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[18] *See Buckley v. Valeo* 424 U.S. 1, 77 (1976) (internal quotation marks and citations omitted); *see also id.* at 43 (discussing how a vague speech law impermissibly "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim").

[19] *Center for Arizona Policy, Inc.*, Under Advisement Ruling at 10 (emphasis in the original).

[20] *See* Ariz. Rev. Stat. §§ 16-973, -974(C).

[21] *Id.* § 16-971(2)(a)(vi).

[22] *Americans for Prosperity, et al. v. Meyer, et al.*, Case No. 2:23-cv-00470-ROS (D. Ariz.), Defendants' Reply in Support of Mot. to Dismiss (Doc. No. 43) at 7 (ECF page number).

[23] *Id.* at 8 (ECF page number).

[24] IRS, Rev. Rul. 2007-41 (Jun. 18, 2007), 2007-25 I.R.B. at 1422, *available at* https://www.irs.gov/pub/irs-tege/rr2007-41.pdf.

[25] To be explicitly clear, the IRS provides this example of what it considers to be a "partisan" get-out-the-vote activity, notwithstanding the lack of any reference to a political party or party affiliation:

To the extent that the IRS guidance demonstrates it is indeed possible to interpret "partisan" activity in multiple ways, the Commission must clarify what this aspect of "campaign media spending" means. If – as the Commission asserts in the federal litigation – it only means activities that refer to a political party or party affiliation, then the rule must clarify this point. The proposed rule text fails to do so.[26]

2.2.2. The PASO standard is vague and undefined.

The Act also defines "campaign media spending" to include various types of public communications that "promote[], support[], attack[] or oppose[]" candidates, ballot measures, and the recall of elected officials.[27] The Act's reliance upon what is commonly known as the "PASO" standard is deeply problematic. Like the Act's regulation of "partisan" activities, the PASO standard is vague and inherently subjective. As the late U.S. Supreme Court Justice Antonin Scalia asked rhetorically of the PASO standard, "Does attacking the king's position [on a policy issue] attack the king?"[28] Who can say with any certainty?

The U.S. Supreme Court upheld a vagueness challenge to the PASO standard in a very limited context, and the Act's incorporation of the PASO standard is materially distinguishable in key respects. Specifically, federal law defines "federal election activity" ("FEA") to include "a public communication that *refers to a clearly identified candidate*" and that PASOs the candidate.[29] This provision applies primarily to how state, district, and local party committees may pay for FEA, and secondarily to how federal and state candidates may pay for FEA.[30]

The U.S. Supreme Court upheld the PASO standard in federal law only with respect to "the confines within which potential [political] party speakers must act in order to avoid triggering the

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> Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C's representative tells the voter about the importance of environmental issues and asks questions about the voter's views on these issues. If the voter appears to agree with the incumbent's position, C's representative thanks the voter and ends the call. If the voter appears to agree with Candi date G's position, C's representative re minds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls.

Id.

[26] On the other hand, if the Commission were to address this issue in the pending rulemaking, then that may conflict with its representations in the federal litigation. This is yet another reason why the Commission should hold this rulemaking in abeyance.

[27] Ariz. Rev. Stat. § 16-971(2)(a)(ii), (iv), (v).

[28] *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 493 (Scalia, J., concurring).

[29] 52 U.S.C. § 30101(20)(A)(iii) (emphasis added).

[30] *See id.* § 30125(b), (e), and (f); *see also* FEC, Explanation and Justification for Final Rules on Coordinated Communications (*hereinafter*, "FEC Coordination E&J"), 75 Fed. Reg. 55947, 55955 (Sep. 15, 2010).

[FEA] provision," and largely on the basis that "actions taken by political parties are presumed to be in connection with election campaigns."[31] Moreover, while the Court reasoned that political parties could seek advisory opinions from the FEC on whether certain communications would qualify as PASO,[32] the Court subsequently soured on forcing speakers to seek FEC advisory opinions.[33]

Unlike federal law, the Arizona law broadly applies the PASO standard to any person or organization. Unlike the political parties that the U.S. Supreme Court "presumed" would be acting "in connection with election campaigns," this same presumption cannot be applied to issue advocacy groups like Planned Parenthood Arizona, the Arizona Life Coalition, or the ACLU of Arizona, for example. Therefore, it cannot be presumed that the Act's PASO standard is constitutional when applied to these types of organizations.

Moreover, unlike federal law, which requires a communication to refer to a "clearly identified candidate" before the PASO standard can be applied, the Arizona law includes no such limitation.[34] As the U.S. Supreme Court has noted, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."[35] To Justice Scalia's point, under the Act, a public communication that "promotes, supports, attacks or opposes" a government policy could be deemed to PASO a candidate without any reference to a candidate whatsoever if a candidate happens to be closely tied to the issue.[36] The First Amendment prohibits this type of vague and unpredictable regulation of speech.[37]

Indeed, the Act's drafters apparently recognized the dangers of the PASO standard. Why else would they have limited its application to only six months before an election with respect to

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[31] *McConnell v. FEC*, 540 U.S. 93, 169 n.64 (2003). The *McConnell* Court also purported that the words "'promote,' 'oppose,' 'attack,' and 'support' . . . provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* (internal quotation marks and citations omitted). However, this is not so in practice. The FEC actually considered further defining the "PASO" standard in a rulemaking concerning coordinated communications, but ultimately did not adopt the PASO standard for that purpose, and therefore did not further define PASO. *See* FEC Coordination E&J a 55955. If the PASO standard were "explicit" and clear on its face, why would the FEC have weighed the need to further define it?

[32] *McConnell*, 540 U.S. at 169 n.64.

[33] *Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question.").

[34] *Compare* 52 U.S.C. § 30101(20)(A)(iii) *with* Ariz. Rev. Stat. § 16-971(2)(a)(ii).

[35] *Buckley*, 424 U.S. at 42.

[36] Even if the Commission were inclined to address this glaring deficiency by grafting a "reference to a clearly identified candidate" limitation into the "campaign media spending" definition by this rulemaking, it is unclear that it would have the authority to do so given the Act's plain text.

[37] *See id.* at 42-43.

candidates?[38] However, an unconstitutionally vague speech standard that is applied for only six months of the year is still unconstitutional for six months of the year. Moreover, the Act notably omits any time limitation for applying the PASO standard for communications with respect to ballot measures and recalls, and the regulation of such communications also does not hinge on whether they actually refer to any clearly identified measure or recall.[39]

Again, these glaring deficiencies render the "campaign media spending" definition unconstitutionally vague and subjective. For example, if a ballot measure seeks to enact stricter criminal sentencing laws, or if a County Attorney is facing a potential recall for seeking more lenient sentences in criminal prosecutions, is an advertisement that highlights rising crime rates and demands action by state legislators "promoting," "attacking," "supporting," or "opposing" the ballot measure or the County Attorney's recall? Who can really say with any certainty under the vague "campaign media spending" definition?

3. Conclusion

For all of the reasons discussed above, the litigation that remains pending in federal court presents a serious challenge to the constitutionality of Proposition 211. The Commission should hold off on adopting implementing regulations until that litigation and all appeals have been resolved. Proposition 211 imposes an undue burden on donor privacy and free speech. The federal judiciary should be given a chance to properly adjudicate these issues before the law is given any further effect.

Sincerely,

Matt Nese
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Eric Wang
Counsel to People United for Privacy

[38] *See* Ariz. Rev. Stat. § 16-971(2)(a)(ii).

[39] *See id*. § 16-971(2)(a)(iv), (v).