COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner - Appellant, vs. COMMISSIONER COLLEEN MATHIS, COMMISSIONER LINDA McNULTY, COMMISSIONER JOSE HERRERA, Respondents - Appellees.	1 CA-CV 12-0068 Maricopa County Superior Court No. CV2011-016442 No. CV2011-017914 (Consolidated)
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, an Independent Constitutional Body, Plaintiff/Petitioner – Appellee, vs. THOMAS C. HORNE, in his official capacity as Attorney General of the State of Arizona, Defendant/Respondent - Appellant.	

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

The trial court accepted the argument of three members of the Arizona Independent Redistricting Commission (the "Commission" and "IRC") that a governmental commission created by the Arizona Constitution, specifically authorized to expend public funds and to take legal action in adopting Congressional and legislative boundaries, is not a "public body" for purposes of the Arizona Open Meeting Law.

This decision is contrary to the plain meaning of the Open Meeting Law and to the important public policy contained therein. Wrapping themselves in the mantle of "independence" and freedom from "self-dealing and conflict of interest," the commissioners assert the ability to ignore state law on conflicts of interest and open meeting, and to take legal action without regard to the requirements of state law.

The trial court erroneously concluded that compliance with the Arizona Open Meeting Law would subject the Commission to "to political influence." The Arizona Open Meeting Law is an important requirement of all public bodies, including the Legislature, counties, cities and school districts. Obeying Arizona law does not constitute bowing to "political influence."

STATEMENT OF THE CASE AND FACTS

1. Statement of the Case

This is an appeal from a judgment granting summary judgment in favor of the Arizona Independent Redistricting Commission (the "Commission") and three of its commissioners, and against the State in two consolidated actions. Cause No. CV2011-016442 was a Petition filed by the Arizona Attorney General pursuant to A.R.S. § 38-431.06 against three members of the Commission to enforce an investigative demand regarding the Arizona Open Meeting Law. (Index of Record CV2011-016442 ("I.R. Consolidated") 1.) Cause No. CV2011-017914 was an action filed by the Commission, seeking for broad declaratory and injunctive relief, including the Open Meeting Law and the Legislative Privilege. (Index of Record CV2011-017914 ("I.R. Declaratory") 1.)

The Commission did not file a responsive pleading in Cause No. CV2011-016442, but did file a motion to consolidate the two cases. (I.R. Declaratory 3.) Commissioner Linda McNulty later filed a motion for disqualification of the Attorney General based on the advice of the Attorney General's Office regarding compliance with the Open Meeting Law having been provided to the Commission. (I.R. Consolidated 14, 15.) The trial court granted the motion to consolidate (I.R. Consolidated 21, I.R. Declaratory 8) and later granted the motion for disqualification. (I.R. Consolidated 48.)

The Attorney General (before being disqualified) had filed a motion to

dismiss the Commission's lawsuit seeking declaratory and injunctive relief. (I.R. Declaratory 8.) The Commission, after consolidation, filed a Response to the Motion to Dismiss, and Motion for Summary Judgment addressed to both cases. (I.R. Consolidated 36, 37, 38, 39, 40, 41.) The Attorney General filed a Response to the Commission's Motion for Summary Judgment, and a Cross-Motion for Summary Judgment. (I.R. Consolidated 42, 43, 44, 45, 46, 47.)

The trial court granted the motion to disqualify the Attorney General (I.R. Consolidated 48), and the Maricopa County Attorney was substituted for the State of Arizona. (I.R. Consolidated 49.) The trial court then granted the Commission's (and the commissioners') Motion for Summary Judgment and denied the State's Cross-Motion for Summary Judgment. (I.R. Consolidated 63.) Judgment was entered on December 16, 2011 (I.R. Consolidated 66), and this appeal followed. (I.R. Consolidated 67.)

2. Statement of Facts

a. Creation of the Commission

The Commission was created by Proposition 106, an initiative measure in the 2000 general election. (I.R. Consolidated 27, Exhibit A.) Proposition 106 amended the Arizona Constitution, Article 4, part 2, section 1, to authorize the creation of a new public body, the Commission. Its membership would be

nominated by the Commission on Appellate Court Appointments. Ariz. Const., Art. 4, part 2, § 1(4). Selection of four of the commissioners is by the highest ranking member of the Arizona House of Representatives, the House Minority Leader, highest ranking member of the Arizona Senate, and the Senate Minority Leader in that order. *Id*. at (6). The final commissioner is selected by a majority vote of the four selected commissioners at an open meeting called by the Secretary of State. *Id*. at (8).

Among other things, the Constitution provides that the Commission has standing in legal actions regarding the redistricting plan and the adequacy of resources provided for its operation. *Id*. at (18). The Constitution also provides that three commissioners are a quorum, and that the Commission must conduct business "in meetings open to the public with 48 or more hours public notice provided." *Id*. at (12). The Constitution is silent on the form of notice, or posting and agenda requirements.

b. The Open Meeting Law As Applied to the Commission

Since its inception, the Commission has acknowledged applicability of the Open Meeting Law. Commission agendas specifically cite to the Open Meeting Law for substantive authority for an action. (I.R. Consolidated 43, Exhibit A, paragraph 4, Affidavit of David Lakey.)

The Commission's counsel stated, during a June 30, 2011 Commission meeting, that a Commissioner could not respond to the public calls for explanations and the last time clearly stated: "As indicated on the agenda we can't – the Commission can't discuss issues that were raised or action taken . . ." (I.R. Consolidated 43, Exhibit A, paragraph 8, Affidavit of David Lakey; Exhibit A.5, Transcript of June 30, 2011 Commission meeting at 36, 44 and 91).

Since September 7, 2011, the Commission has posted 20 agendas, which provided for executive sessions. (I.R. Consolidated 43, Exhibit A, paragraph 4, Affidavit of David Lakey; Exhibit A.1). Commission agendas contain the following language:

> Call for Public Comment. This is the time for the public comment. Members of the Commission may not discuss items that are not specifically identified on the agenda. Therefore, pursuant to A.R.S. § 38-431.01(H)[the Open Meeting Law] action taken as a result of public comment . . .will be limited to . . . .

During the August 3, 2011 Commission meeting the Commissioners' counsel informed the Commission that:

> One issue that was raised with respect to the Open Meeting Law, the [A]ttorney [G]eneral obviously has the authority to conduct an Open Meeting Law investigation. The relevant statute is 38-431.06. And through that process he may issue – he may administer oaths or affirmations to any person for testimony. In other words, he can interview you all under oath as he's trying to ascertain whether or not an infraction has, in fact, occurred.

(I.R. Consolidated 43, Exhibit A, paragraph 9, Affidavit of David Lakey; Exhibit

A.6, Transcript of August 3, 2011 Commission meeting at pg. 109, lines 5-14).

The Attorney General initiated this investigation pursuant to A.R.S. § 38-431 *et. seq.* after receiving information that possible violations of the Open Meeting Law occurred. (I.R. Consolidated 1, at 7, lines 12-13.) Pursuant to that investigation, Commissioner Stertz and Commissioner Freeman testified under oath. (I.R. Consolidated 43, Exhibits B and C.)

ISSUES PRESENTED FOR REVIEW

1. Whether the initiative creating the IRC exempted it from statutory requirements, including Open Meeting Law and Conflicts of Interest Laws, that apply all other public bodies, including the Legislature.

2. Whether legislative immunity shields the IRC from inquiries about potential violations of law.

3. Whether the trial court erred in concluding that it was unnecessary for the court to consider the IRC's lack of capacity to sue the Attorney General for a declaratory judgment on the applicability of Arizona's Open Meeting laws and legislative immunity.

ARGUMENT

I. Standard of Review.

The applicability of the Arizona Open Meeting Law is a question of

statutory construction, and appellate review is de novo. *Tanque Verde Unified School Dist. v. Bernini*, 206 Ariz. 200, 205, 76 P.3d 874, 879 (App. 2003); *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997).

II. The Commission Is A Public Body.

A. The Arizona Open Meeting Law Applies Broadly to All Public Bodies.

Arizona has a strong Open Meeting Law that has been amended several times to broaden its scope. The definition of "public bodies" subject to its scope could hardly have been written more broadly:

> "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

A.R.S. § 38-431(6). The word "**all**" is used four times in this definition.

In first enacting the Open Meeting Law in 1962, the Legislature declared that:

> It is the public policy of this state that proceedings in meeting of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly.

Laws 1962, Chapter 138 § 1.

After a series of decisions that applied the Open Meeting Law narrowly[1], the Legislature emphasized the breadth and importance of the policy underlying the Open Meeting Law by adding A.R.S. § 38-431.09 in 1978:

> It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretation of this article shall construe any provision of this article in favor of open and public meetings.

The enactment of Arizona's open meeting law "was an effort to ensure that the public could attend and monitor the meetings of all public bodies." *Fisher v. Maricopa County Stadium Dist*., 185 Ariz. 116, 122-23, 912 P.2d 1345, 1351-52 (App. 1995). Exceptions to the open meeting law "should be narrowly construed in favor of requiring public meetings." *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 484, 803 P.2d 891, 894 (1990); *Johnson v. Tempe Elementary School Dist.*, 199 Ariz. 567, 569-570, 20 P.3d 1148, 1150 - 1151 (App. 2000).

When the courts have interpreted the Open Meeting Law narrowly, the Legislature stepped in to clarify the breadth of this legal requirement. In addition to the *Washington School* case noted above, the Arizona Supreme Court in *Arizona*

[1] For example, the Arizona Supreme Court held, in *Washington School Dist. No. 6 v. Superior Court*, 112 Ariz. 335, 541 P.2d 1137 (1975), that the Open Meeting Law did not extend to an advisory committee of a school board. That decision was reversed by the Legislature when it enacted Laws of 1978, Chapter 86.

Press Club, Inc. v. Arizona Board of Tax Appeals, 113 Ariz. 545, 558 P.2d 697 (1976) ruled that the statutory exemption for "any judicial proceeding" excluded proceedings of the Arizona Board of Tax Appeals from the Open Meeting Law. But in 1977 the Legislature amended A.R.S. § 38-431.08 to limit this exception to a "judicial proceeding **of any court**," (emphasis added), the effect of which was to overrule *Arizona Press Club*. *See Rosenberg v. Arizona Board of Regents*, 118 Ariz. 489, 494, 578 P.2d 168, 173 (1978).

Thus, at every opportunity for amendment, Arizona law expanded, rather than contracted, the application of the Open Meeting Law. As the Attorney General, in his *Arizona Agency Handbook* for State officers, boards, and agencies, has emphasized, "any uncertainty under the Open Meeting Law should be resolved in favor of openness in government. Any question whether the Open Meeting Law applies to a certain public body likewise should be resolved in favor of applying the law." Ariz. Agency Handbook, 7.2.2, at 2.

Arizona's expansive application of its Open Meeting Law is consistent with the approach of other states. *See, e.g., Garlock v. Wake County Bd. of Educ.*, 712 S.E.2d 158, 173 (N. C. App. 2011) ("exceptions to the operation of open meetings laws must be narrowly construed."); *Manning v. City of East Tawas*, 234 Mich.App 244, 250, 593 NW2d 649 (1999) ("the OMA should be construed

broadly in favor of openness; exceptions should be construed narrowly, with the public body bearing the burden of proving the applicability of an exemption."); *Roberts v. City of Palmdale*, 5 Cal.4th 363, 378, 853 P.2d 496 (1993).

B. The Initiative Creating the Commission Did Not Exempt it From the Open Meeting Law.

Ignoring the broad mandate provided by the Legislature, the trial court below reasoned that "had the voters wished for it to apply to the IRC, they could have incorporated it by reference or by reiterating its requirements in the Constitution." (I.R. 63, Minute Entry Order at 3. Putting aside the question of whether such a constitutional amendment might have violated the "single subject" rule, this inverted reasoning is plainly inconsistent with the Open Meeting Law.

The Legislature has mandated that the Open Meeting Law applies to "**all**" public bodies. Exclusion from the Open Meeting Law is the exception, not the rule. The exclusions or modifications to the Open Meeting Law are set forth in A.R.S. § 38-431.08. None apply in this case.

A commission or board mentioned in the Constitution is not granted implied or inherent powers apart from those expressly enumerated. See *Arizona Corporation Comm'n. v. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992); *Kendall v. Malcolm*, 98 Ariz. 329, 404 P.2d 414 (1965) (Corporation Commission has no implied powers); *Burlington Northern & Santa Fe Ry. Co. v. Arizona Corporation*

Comm'n, 198 Ariz. 604, 12 P.3d 1208 (2000) (the Corporation Commission has no implied powers that exceed those derived from a strict construction of the Constitution and the implementing statutes); *Harkins v. School Dist. No. 4*, 79 Ariz. 287, 288 P.2d 777 (1955) (State Board of Education only has those powers as the Legislature grants it); *Mirkin v. School District No. 38*, 4 Ariz. App. 473, 421 P.2d 906 (1967).

This lack of "inherent" or implied powers of constitutional commissions and boards is the law in Arizona even though the framers of the Constitution created commissions as separate, properly elected branches of state government. *See Arizona Corporation Comm'n v. Woods*, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992). Historically, the courts have "strictly" interpreted the Constitution when determining which powers the Constitution grants. *See generally, Burlington Northern And Santa Fe Railway Co. v. Arizona Corporation Comm'n*, 198 Ariz. 604, 12 P.3d 1208 (2000) (the Corporation Commission has no implied powers that exceed those derived from a strict construction of the Constitution and the implementing statutes).

The trial court's peculiar notion that the Commission is exempt from every Arizona statute unless the drafters of Proposition 106 expressly included that statute in the initiative defies both logic and established principles of legislative

interpretation. On the contrary, if Proposition 106 intended to exempt the commissioners from the coverage of a particular Arizona law, the Proposition could have defined that exemption. The absence of such express exemption results in the application of Arizona law (including the Open Meeting Law).

C. The Constitution and the Open Meeting Law Are Not In Conflict.

The Commissioners argued, and the trial court accepted, that the Constitution's requirements regarding quorum and meeting notice left the Legislature without power to apply the Open Meeting Law to the Commission. In fact, the Constitution and the Open Meeting Law are consistent and complementary, not conflicting. Arizona Constitution Article 4, part 2, section 1(12) requires forty-eight hours notice for a Commission meeting (rather than twenty-four hours as required by A.R.S. § 38-431.02). That same section also provides that although three commissioners constitute a quorum, any official action requires three or more affirmative votes.

The Arizona Open Meeting Law does not, itself, define what constitutes a quorum for public bodies. Some public bodies, either by statute or bylaw, define quorum more stringently than a simple majority of the sitting members of its governing board. For example, the Arizona Boxing Commission, a three-member board, can only take action by a concurrence of two of its members. A.R.S. § 5-

223(B). Certain zoning actions by non-charter cities and towns require a three-quarters vote of the governing board, but if any members are disqualified for conflict of interest reasons, no less than a majority of the full membership of the governing board. A.R.S. § 9-462.04. Similarly, certain county zoning regulations may only be adopted by a unanimous vote of the board of supervisors. A.R.S. § 11-823. *See also* A.R.S. § 11-251.15.

These supermajority requirements (like the Commission's quorum requirements) are entirely consistent with the Open Meeting Law. There is no basis to suggest that counties, cities and commissions are outside the Open Meeting Law because of supermajority requirements.

The notice requirement of Article 4, part 2, section 1(12) is similarly consistent with the Open Meeting Law. That a public body is legally required to post its meetings more than 24 hours in advance does not create an inconsistency with the Open Meeting Law. For example, the Arizona Game and Fish Commission has both a specific quorum requirement (three) and a one-week notice requirement for its meetings. A.R.S. § 17-202. That commission, like the Commission here, is a "public body" subject to the Open Meeting Law.

Where, as here, there is no contradiction, the Constitution and statutes are read in a manner to give meaning to both. *Cooper Manufacturing Co. v. Ferguson*,

113 U.S. 727, 733 (1885) (where a clause in the Constitution and an act of the Legislature relate to the same subject, "like statutes in *pari materia*, they are to be construed together."); *Roberts v. Spray*, 71 Ariz. 60, 70, 223 P.2d 808, 814 (1950) ("It is elementary law that every statute is to be read in the light of the Constitution" and where Constitution and statute relate to the same subject, "like statutes in *pari materia*, they are to be construed together."); *Haag v. Steinle*, 227 Ariz. 212, 215, 255 P.3d 1016, 1019 (App. 2011) ("If there are two possible interpretations of a statute, courts will adopt the interpretation that is consistent with the Constitution rather than the one that renders the enactment unconstitutional.").

D. The Separation of Powers Does Not Place the Commission Beyond the Law.

The commissioners argued to the court below that separation of powers mandates that the open meeting law not apply to them. But the separation of powers does not mandate that a commission exercising public powers and expending public funds be exempt from state law. The Arizona Corporation Commission has been characterized as a "fourth branch of government." But even that commission's constitutional genesis does not give it "procedural autonomy" in rate proceedings, free from legislative control or judicial scrutiny and review. *State ex rel. Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219, 224-25, 693 P.2d

362, 367-68 (App. 1984). Arizona's system of checks and balances does not rely solely on one agency to restrain its own agents within the proper constitutional limits. *Polaris Intern. Metals Corp. v. Arizona Corp. Comm'n,* 133 Ariz. 500, 506-07, 652 P.2d 1023, 1029-30 (1982).

Other states have recognized that separation of powers does not require that a state agency or commission be exempt from open meetings laws. In *Star Tribune Co. v. University of Minnesota Bd. of Regents*, 683 N.W.2d 274 (Minn. 2004), the board of regents formed a Presidential Search Advisory Committee to recruit a new president for the University of Minnesota. 683 N.W.2d at 278. Because some of the candidates did not want to participate in public interviews until they had an opportunity for private interviews, the regents modified the search process to allow confidential interviews with selected candidates and confidential deliberations before meeting publicly to discuss and select the finalist or finalists to be considered for president. In response to a suit by various media outlets, the regents argued that the state open meetings law did not apply because the legislature did not specifically reference university presidential search data and because only the University, and not the Regents, is named in the definition of state agency. 683 N.W.2d at 279. The Minnesota Supreme Court rejected the notion that the Regents' autonomy mandated immunity from the open meeting law. 683 N.W.2d

at 281. It noted that if Regents were exempt from the open meeting law, such an exemption would logically extend to many other state laws applicable to public bodies:

> Although the Regents expressly limit their request to a ruling with regard to the presidential search process, the rationale supporting such a holding does not contain a principled end point and could result in exempting the University from many other laws currently applied to it. ... These arguments, if given full effect, would essentially elevate the University to the status of a coordinate state entity, not answerable to state government except as it chooses or as limitations are tied to appropriations.

683 N.W.2d at 289. *See also Adams v. Commission on Judicial Performance*, 8 Cal. 4th 630, 882 P.2d 358 (1994), in which the California Supreme Court firmly rejected the argument that the application of an open meeting provision to judicial conduct hearings violated the separation of powers. 882 P.2d at 370.

In the case before this Court, the commissioners urge the same broad-granting of legal immunity. If the commissioners are not subject to the Open Meeting Law, they would undoubtedly argue that application of laws such as the Public Records Act[2] and the conflict of interest statutes[3] cannot be applied to them, lest the courts intrude on the commissioners' implied constitutional authority. Such immunity is not compelled by the constitutional separation of powers or the

[2] A.R.S. §§ 39-121 et seq.

[3] A.R.S. §§ 38-501 et seq.

express powers granted by Arizona Constitution, Article 4, part 2, section 1.

The Commissioners' reliance on *Hughes v. the Speaker of the New Hampshire House of Representatives*, 152 N.H. 276, 876 A.2d 736 (2005), is misplaced. The *Hughes* case, as well as the Wisconsin case cited to the trial court, applied the well-established rule that after a statute has been enacted and promulgated as the law, a court's sphere of inquiry is limited to whether the law itself in its final form is constitutional as to its provisions, and not whether there was a constitutional defect in the proceedings leading to its final passage. *Hernandez v. Frohmiller*, 68 Ariz. 242, 259, 204 P.2d 854, 865 (1949).

But this comity extends to the legislature and not to other public bodies, including those that exercise legislative powers. *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 384, 346 P.2d 1101, 1105 (1959). That the commissioners, in this case, exercise legislative powers – i.e., the mapping of legislative and congressional districts – does not place the commissioners beyond the reach of Arizona law.

E. Compliance With The Open Meeting Law is Not "Political Interference."

The principle underpinning of the trial court's ruling is the requirement that it "insulat[e] the IRC from interference by the political branches." Minute Entry Order at 4. This theme permeates the Commissioners' pleadings – the notion that

compliance with the Arizona Open Meeting Law is political interference.

But obeying Arizona law, including the Open Meeting Law, is not political interference. Open meeting laws in Arizona and in other states are important policy pronouncements that transcend partisan political interests by promoting confidence in public institutions:

> During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirted citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969).

The trial court here erred in equating compliance with this important tenet of Arizona law with "political interference." The trial court's conclusion, at page 5, that "prosecutors such as the Attorney General and the various county attorneys, all of whom are empowered to investigate allege Open Meeting Law violations," would use this authority to "intimidate" the members of a public body such as the Commission both insults the professional attorneys serving in these offices and ignores the role of the courts in acting as gatekeepers to dismiss actions undertaken

for purely political motives. "Official acts of public officers are presumed to be correct and legal, in the absence of clear and convincing evidence to the contrary." *Swartz v. Superior Court*, 105 Ariz. 404, 406, 466 P.2d 9, 11 (1970).

The trial court concluded that the Open Meeting Law does not apply to the Commission, and that the "open meeting" requirement of Article 4, part 2, section 1 "contains no enforcement mechanism." Although the trial court's ruling suggests the possibility of a special action to compel compliance with this requirement, the commissioners, in their briefing, urge that such a citizen suit would be limited to a "citizen with standing." (I.R. Consolidated 40, Commissioners' Response at 24.) It is apparent from this phrasing that the commissioners intend that the open meeting requirements of Article 4, part 2, section 1 would be, like the Open Meeting Law, a "permissible reference," but not a legal requirement that carries a penalty for non-compliance.

F. The Commission's Past Acknowledgment of the Application of the Open Meeting Law Is Persuasive Of Its Application.

The statutory power of the Attorney General or a county attorney to investigate, including taking testimony, where there is reasonable cause to believe there has been a violation of the Open Meeting Law, is established in A.R.S. § 38-431.06, which existed at the time the initiative establishing the Commission was adopted, and the writers of the initiative wisely choose not to include a provision

exempting the Commission from that statute.

The Commission's long-standing interpretation of its implementing authority is persuasive. *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 410, ¶ 35, 79 P.3d 86, 97 (App. 2003); *Baca v. Ariz. Dep't of Econ. Sec*., 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1998). An administrative agency's interpretation of statutes that it enforces is generally entitled to be given great weight by the courts. *Capitol Castings, Inc. v. Ariz. Dep't of Econ. Sec*., 171 Ariz. 57, 60, 828 P.2d 781, 784 (App. 1992). The Commission consistently has applied the statutory Open Meeting Law to its meeting and continues to do so.

In fact, many Commission agendas specifically cite to the Open Meeting Law for substantive authority for an action. Commission agendas specifically cite to the Open Meeting Law for substantive authority for an action. (I.R. Consolidated 43, Affidavit of David Lakey, Exhibit A, paragraph 4).

The Commission's counsel admonished the commissioners not to respond to the public calls for explanations where such discussions had not been placed on a Commission agenda in compliance with the Open Meeting Law (I.R. Consolidated 43, Affidavit of David Lakey, Exhibit A, paragraph 8; Exhibit A.5, Transcript of June 30, 2011 Commission meeting at 36, 44 and 91).

The Commission's numerous agendas, providing for executive sessions in

compliance with the Open Meeting Law, expressly acknowledge it applicability. (I.R. Consolidated 43, Affidavit of David Lakey, Exhibit A, paragraph 4). The Commission has applied not only the procedural but also the substantive provisions of the statutory Open Meeting law. The procedural issues address such things as posting notice. The substantive provisions, however, address the very ability of a body to enter into a secret executive session. A.R.S. § 38-431.03.[4] In fact, the purpose of the Commission's June 29, 2011 executive session, which was the subject of the Attorney General's Office investigation, was to review confidential procurement documents to select a mapping company pursuant to A.R.S. § 38-431.03(A)(2). (I.R. Consolidated 1, at 4). The question remains - under what authority did the Commission go into executive session on June 29, 2011 when the Open Meeting Clause is silent on holding an executive session to review confidential documents exempt from public inspection?[5]

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[4] The trial court rejected the State's argument that the Open Meeting Clause does not provide for a mechanism for going into executive session based on the Commission's need to receive confidential legal advice. (Minute Entry Order, at 3, fn. 4)

[5] Transcript of the Commission's June 29, 2011 meeting and explanation of the need to review procurement documents in executive session can be found at http://azredistricting.org/docs/Meeting-Info/Transcript-062911.pdf, at 27-29.

III. The Legislative Immunity Doctrine Is Limited To Deliberations On Legislative Action.

The State acknowledges that when the Commission performs legislative functions – i.e., mapping congressional and legislative districts – the doctrine of legislative immunity applies to its legislative deliberations. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n,* 220 Ariz. 587, 594, 208 P.3d 676, 683 (2009). An entity's action is legislative if it bears "the hallmarks of traditional legislation ... [by] reflect[ing] a discretionary, policymaking decision ... [that] may have prospective implications." *Id., quoting Bogan v. Scott–Harris*, 523 U.S. 44, 55–56 (1998).

But the existence of this legislative immunity does not place the Commission beyond the reach of Arizona law, including the Open Meeting Law, for all purposes. The Commission exercises some legislative tasks, as do counties, school boards, the State Board of Education, the Corporation Commission, cities and towns and improvement districts. But these other public bodies, including the Commission here, are not the Legislature.

Legislative immunity arises out of the Speech or Debate Clause of the United States Constitution.[6] *Arizona Independent Redistricting Comm'n v. Fields,*

[6] United States Constitution, Art. I, § 6, cl. 1, provides, in pertinent part, as follows: "[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."

206 Ariz. 130, 136-37, 75 P.3d 1088, 1094-95 (App. 2003). A common law legislative immunity similar to that embodied in the Speech or Debate Clause exists for state legislators acting in a legislative capacity. *Bogan*, 523 U.S. at 49. And most states, including Arizona, have preserved this common law immunity in state constitutions. Ariz. Const., Art. 4, part 2, §7; *Sanchez v. Coxon*, 175 Ariz. 93, 95, 854 P.2d 126, 128 (1993).

But even for members of the Legislature, this legislative privilege does not extend to cloak "all things in any way related to the legislative process." *Steiger v. Superior Court*, 112 Ariz. 1, 4, 536 P.2d 689, 692 (1975). Rather, the privilege extends to matters beyond pure speech or debate in the legislature only when such matters are "an integral part of the deliberative and communicative processes" relating to proposed legislation or other matters placed within the jurisdiction of the legislature. *Fields*, 206 Ariz. at 137, 75 P.3d at 1095, (*quoting Gravel v. United States*, 408 U.S. 606, 625 (1972)). The legislative immunity privilege does not apply to the performance of "administrative" tasks. *Id.; Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir. 2000).

The Arizona Constitution provides that the legislative authority of the state is vested "in the Legislature, consisting the Senate and the House of Representatives." Ariz. Const. Art. 4, part 1, §1. The Arizona Constitution

declares that the powers of government "shall be divided into three separate departments," that each department "shall be separate and distinct," and that each shall not exercise "the powers properly belonging to either of the others." Ariz. Const. Art. 3. This court has carefully observed these dividing lines. In *Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988), the governor asked the courts to curb the senate's allegedly unfair procedures. 156 Ariz. at 302, 751 P.2d at 962. The Arizona Supreme Court refused, holding that the separation of powers required by the constitution prohibited intervention in the legislative process." *Id*.

But the senate in *Mecham* was acting as a legislative body exercising the power of impeachment-a power peculiarly legislative and political. 156 Ariz. at 301-02, 751 P.2d at 961-62 ("Trial in the senate is a uniquely legislative and political function. It is not judicial."). Although the Court refused to interfere, it stated clearly that non-interference did not mean a lack of power to review the legality of the procedure. 156 Ariz. at 302, 751 P.2d at 962 ("This court does have power to insure that the legislature follows the constitutional rules on impeachment.").

Similarly, in *Tilson v. Mofford*, 153 Ariz. 468, 737 P.2d 1367 (1987), the court was asked to order the secretary of state to strike an initiative measure from the ballot. The Supreme Court declined to judge the proposal's text for legality or

fairness before its submission to the people, noting that courts "have the power to determine what the law is ... but not what it should contain." 153 Ariz. at 470, 737 P.2d at 1369. But the *Tilson* opinion stated that the courts "do have the duty of insuring that the constitutional and statutory provisions protecting the electoral process (i.e., the manner in which an election is held) are not violated." *Id.* (citing *Kerby v. Griffin*, 48 Ariz. 434, 444-46, 62 P.2d 1131, 1135-36 (1936)).

In *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 886 P.2d 1338 (1994), the Arizona Supreme Court was asked to review the legality of an analysis, prepared pursuant to A.R.S. § 19-124(B), by the Arizona Legislative Council of an initiative proposal for inclusion on the ballot. The Legislative Council was created by statute, A.R.S. § 41-1301, and authorized to perform functions such as bill drafting and research, maintaining a legislative reference library and procuring information for legislators and state officers. A.R.S. § 41-1304. In concluding that separation of powers and legislative immunity did not bar examination of the legality of the initiative analysis in question, the Arizona Supreme Court found that the council acted in an administrative role, rather than in a legislative capacity. 180 Ariz. at 589, 886 P.2d at 1345. This was so, even though some members of the Legislative Council were themselves legislators: "Legislative acts are not all-encompassing ... they must be an integral part of the

deliberative and communicative processes ... with respect to the consideration and passage or rejection of proposed legislation." *Id*.

And public bodies other than the Legislature, even those with legislative powers, have limited protection under the legislative immunity rubric. For example, in *Galati v. Lake Havasu City*, 186 Ariz. 131, 920 P.2d 11 (App. 1996), the court held that a city's decision not to fund a roadway improvement was not entitled to immunity. Although the city would have been protected by legislative immunity if the street design was prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, the court refused to extend the immunity to a more far-reaching exemption from Arizona law regarding negligence. 186 Ariz. at 134-35, 920 P.2d at 14-15.

The boards and commissions are not above the law. They must abide by the Open Meeting Law, just as they must abide by laws pertaining to bribery, public monies and conflict of interest statutes. This rule applies with equal force to the Commission.

IV. The Commission Lacked Capacity To Sue The Attorney General For A Declaratory Judgment On The Applicability Of Arizona's Open Meeting Laws And Legislative Immunity.

A. Standard for Review

De novo review applies to a trial court's rulings involving pure questions of

law. *Hall v. Lalli*, 194 Ariz 54, 57, 977 P.2d 776, 779 (1999).

B. The Trial Court Erred In Failing To Determine That The Commission Lacked The Capacity To Sue.

The Commission lacked standing to initiate the declaratory action because it was not given that power in its creation by Proposition 106 or in any other provision of Arizona law. Governmental entities have no inherent power and possess only those powers and duties delegated to them by their enabling statutes. *Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996). Thus, a governmental entity may be sued only if the legislature has so provided. *See Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972) (holding State Board of Education may not be sued in absence of authorizing statute). A party must have the capacity to sue before a party may commence and maintain a cause of action. *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418 (Iowa 1996) (Both the plaintiff and defendant in a lawsuit must be legal entities with the capacity to be sued).

"Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing. As a general matter, capacity concerns a litigant's power to appear and bring its grievance before the court" (*Silver v. Pataki*, 96 N.Y.2d 532, 537, 730 N.Y.S.2d 482, 755 N.E.2d 842 (2001)(citation and internal

quotation marks omitted)). The issue of capacity often arises in suits brought by governmental entities (*see e.g. Community Bd. 7 of Borough of Manhattan v. Schaffer,* 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1 (1994)). "Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*id.* at 155–156, 615 N.Y.S.2d 644, 639 N.E.2d 1).

Closely related to the capacity to sue is standing to sue. Without both capacity and standing, a party lacks authority to sue. "To have standing, a party generally must allege a particularized injury that would be remediable by judicial decision." *Bennett v. Napolitano,* 206 Ariz. 520, 525, 81 P.3d 311, 316 (2003). When determining that the IRC had standing to bring this action, the trial court decided that it did not have to decide whether the IRC had capacity to sue. The court states the following: "The Court therefore need not address whether the limited jural status of the IRC enables it to seek a declaratory judgment. . ." [I.R. Consolidated 63 at 2.] The trial court erred in equating standing to sue with the capacity to sue.

Here, the Commission's capacity to sue was expressly granted in enabling legislation. [I.R. Declaratory 6, Motion to Dismiss, at 2). "The independent

redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission." Ariz. Const. Art. 4, part 2, § 1(20). This provision gives the Commission the capacity to file a lawsuit only in a legal action regarding the redistricting plan or to secure adequate resources for the operation of the IRC. Therefore, although the court determined the Commission had standing, the trial court erred in determining that it need not decide the issue of whether the Commission had the capacity to file the lawsuit for declaratory and injunctive relief.

CONCLUSION

The three commissioners requested, and the trial court granted, a declaratory judgment of unprecedented scope. A public body, created by voter initiative to exercise state legal authority, and expend taxpayer funds, is declared to be exempt from laws governing such a public body because the drafters of Proposition 106 in 200 did not specify which statutes would apply. This declaratory judgment would result in the creation of an agency not answerable to the laws that apply to other public entities exercising governmental authority.

The drafters of Proposition 106 did not intend such extra-governmental powers, and it is doubtful such unbridled authority could be granted under Arizona's constitutional structure. The Commission, moreover, lacks the capacity

to initiate the declaratory action because it was not given that power in its creation by Proposition 106 or in any other provision of Arizona law. This Court should vacate the declaratory judgment entered by the trial court.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

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