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, 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	No. 1 CA CV 12-0068 Maricopa County Superior Court No. CV2011-016442 No. CV2011-017914

RESPONDENTS-APPELLEES COMMISSIONERS COLLEEN MATHIS, LINDA MCNULTY AND JOSE HERRERA'S ANSWERING BRIEF

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INTRODUCTION

Respondents-Appellees Commissioners Colleen Mathis ("Commissioner Mathis"), Linda McNulty ("Commissioner McNulty"), and Commissioner Jose Herrera ("Commissioner Herrera") (collectively "Commissioners") hereby join and adopt by reference the Arizona Independent Redistricting Commission's ("AIRC") answering brief, filed this date. Ariz. R. Civ. App. P. 13(f). Because the AIRC's answering brief provides extensive analysis regarding the applicability of the Open Meeting Law to the AIRC, legislative privilege, standing, and other principles of law that demonstrate why the Superior Court should be affirmed on appeal, Commissioners will not re-state those arguments here.

The Commissioners wish, however, to address an additional reason why this Court should affirm the Superior Court: There is no reasonable cause justifying the Attorney General's investigation. This case arises from Appellant's attempt to compel AIRC Commissioners Mathis, McNulty, and Herrera to respond to the Attorney General's investigative demands concerning alleged "serial communications" over the telephone. Even if the Open Meeting Law applied in this case, Appellant would lack reasonable cause to investigate these three Commissioners under the Open Meeting Law. *See* A.R.S. § 38-431.06

(establishing as a prerequisite for an Opening Meeting Law investigation "reasonable cause to believe there may have been a violation").

First, Appellant has conceded the issue of whether there was reasonable cause to believe there was an Open Meeting Law violation by failing to address it in its opening brief. Second, even if the Open Meeting Law did apply to the AIRC, the conduct Appellant alleges does not constitute an Open Meeting Law violation. As the Superior Court noted, the Supreme Court's order in a related case concerning the unlawful effort to remove Commissioner Mathis from office based on some of the same allegations that prompted the Attorney General's investigation concluded that the alleged serial communications at issue in this case do not violate the Open Meeting Law. *See* App. 12 at 2-3 (11/23/11 Order in *Arizona Independent Redistricting Commission v. Janice K. Brewer, et al.*, Arizona Supreme Court Case No. CV-11-0313-SA ("*AIRC v. Brewer*")); CR[1] 63 (12/9/11 Minute Entry) at 4 n.5; CR 66 (12/16/11 Final Judgment) at 2:24-26; *see also* Comm'rs' App. 3 (11/17/11 Order in *Arizona Redistricting Comm'n v. Brewer*, CV-11-0313-A) at 1. Third and finally, an examination of the serial

[1] Documents from the Clerk's Record are cited by "CR" and page number. Unless noted, all CR references are to the index for case no. CV2011-016442. Many documents cited are included in the Commission's Separate Appendix and are

(continued...)

communications issue further demonstrates why the Open Meeting Law clearly does not apply to the AIRC.

STATEMENT OF THE CASE

This Appeal arises out of Appellant's filing of a Petition for Enforcement of Written Investigative Demands (the "Petition") seeking to have the Superior Court determine whether or not the Attorney General[2] was empowered to investigate these three Commissioners for alleged Open Meeting Law violations. *See* CR 1 (Petition). Appellant's Petition sought to investigate and compel the testimony of Commissioners Mathis, McNulty, and Herrera based upon vague assertions that they violated the Open Meeting Law, through alleged "serial communications." *See id.* These communications purportedly consisted of Commissioner Mathis separately telephoning individual AIRC commissioners to suggest that they vote to award the AIRC's mapping consultant contract to vendor Strategic Telemetry. *Id.* at 7-9. Appellant's Petition does not allege that Commissioner Mathis communicated with more than one commissioner at a time or contend that any

(...continued)
cited by "App.," while documents cited in the Commissioners' Appendix are cited by "Comm'rs' App."

[2] The Superior Court later disqualified the Attorney General from pursuing an investigation, as the AIRC was previously his client. *See* CR 48 (10/27/11 Minute
(continued...)

substantive decisions were made or legal actions taken during those phone calls. *Id.* at 1. It also only alleges that she spoke to Commissioners Freeman and Stertz in separate conversations. *Id.* at 7-9. The Petition presents no factual allegations concerning conversations with either Commissioners McNulty or Herrera. *Id.* at 1.

Commissioners Mathis, McNulty and Herrera refused to participate in Appellant's attempt to investigate a lawful act. The Superior Court's Order, in this case, warned that applying the Open Meeting Law to the AIRC could lead to an exertion of political influence and that the threat of prosecution "can be reasonably expected to intimidate" the AIRC and Commissioners Mathis, McNulty, and Herrera. CR 63 (12/9/11 Minute Entry) at 5. The facts of this case show why the Superior Court had reason for concern. First, the Attorney General commenced his investigatory action on his own initiative without regard to his previous role as Commissioner Mathis and the AIRC's legal counsel, a situation so fraught with ethical complications that the Superior Court eventually ordered him disqualified from the case. *See* CR 48 (10/27/11 Minute Entry). Second, although investigatory action thus far has focused on the circumstances leading to the AIRC awarding a mapping consultant contract to Strategic Telemetry, the Attorney

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Entry). The Maricopa County Attorney's Office subsequently took the Attorney
(continued...)

General turned a blind eye to other irregularities during the same procurement process involving Strategic Telemetry's chief competitor for the contract, National Demographics Corporation ("NDC").[3]

In any case, the parties agree that the investigation in this matter cannot go forward unless the alleged serial communications violated the Open Meeting Law. Appellant initially sought summary judgment on the serial communications issue, but later withdrew that request as "premature," arguing to the Superior Court that the issue could be determined *after* an investigation had commenced. *See* Comm'rs' App. 2 (11/16/11 Tr. Oral Argument Mot. Hr'g) at 20:5-7, 21:3-8. The Superior Court disagreed, as it correctly viewed the serial communications question as a threshold issue. The Superior Court asked Appellant: "[I]t would be

(...continued)
General's place in this litigation.

[3] NDC, which was favored by the two Commissioners not currently under investigation, Commissioners Scott Freeman and Richard Stertz, received at least one unusual advantage during the procurement process. The Court may take judicial notice of the records that reflect that while all vendors were required to complete a pricing sheet with an estimated project budget, NDC initially submitted a blank sheet. *See Jarvis v. State Land Dept. City of Tucson*, 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969) (finding that the Court may take judicial notice of a state agency's records); Comm'rs' App. 1 (6/24/11 Mapping Consultant Evaluation) at 4. NDC later submitted its pricing sheet after all other vendors had submitted pricing sheets, and at a lower price than Strategic Telemetry, thus potentially gaining a competitive advantage. *See id.* at 4, 6.

hard to decide [whether reasonable cause for an investigation exists] without determining first whether it is in fact a violation of open meetings law to have these serial communications, wouldn't it?" *See id.* at 21:13-17. Appellant responded by conceding that "[t]he Court would need to determine" whether the alleged serial communications violated the Open Meeting Law before an investigation of the AIRC could occur. *See id.* at 21:18-20.

The Arizona Supreme Court, in *AIRC v. Brewer*, may soon settle the issue of whether the alleged serial communications violate the Open Meeting Law. *AIRC v. Brewer* is a parallel special action before the Supreme Court which challenged the Governor's removal of Commissioner Mathis, the AIRC's chairperson, for, among other reasons, violating the Open Meeting Law by engaging in the serial communications described above. On November 17, 2011, the Supreme Court issued an order restoring Commissioner Mathis as the AIRC's chairperson. *See* Comm'rs' App. 3 (11/17/11 Order in *Arizona Redistricting Comm'n v. Brewer*, CV-11-0313-A) at 1.

In a November 23, 2011 order clarifying its previous order, the Supreme Court found that, "as a matter of law," the Governor's allegation regarding the Open Meeting Law violations did not provide a "constitutional basis for removal." *See* App. 12 at 2-3 (11/23/2011 Order in *Arizona Redistricting Comm'n v. Brewer*,

CV-11-0313-A). After citation to the Arizona Constitution and the Open Meeting Law's requirements that there be a quorum present for the Open Meeting Law to take effect, the November 23, 2011, order held as follows:

> There is, however, no allegation of any non-public meeting of a quorum of the commission in the Governor's October 26, 2011 letter or in the *responses* thereto. Nor does the Governor's November 1, 2011 letter find that a non-public meeting of a quorum of the commission occurred.

See id. The *responses* referred to above include letters from all five AIRC Commissioners. Commissioners Freeman and Stertz's responses described the same alleged telephone conversations with Commissioner Mathis that Appellant seeks to investigate as purported Open Meeting Law violations. The Supreme Court's finding that the Commissioners' responses failed to allege a "non-public meeting of a quorum" shows that the purported serial communications that are the cornerstone of this appeal do not violate the Open Meeting Law. The Supreme Court further stated that it "in due course will issue an opinion more fully detailing its reasoning in this matter." *Id.* As of the filing date of this Answering Brief, that Opinion has not yet been issued.

Given the flimsiness of the assertions against Commissioners Mathis, McNulty, and Herrera, and the Supreme Court's ruling in *AIRC v. Brewer*, the Superior Court granted summary judgment to Appellees and denied Appellant's Cross-Motion for Summary Judgment and Motion to Dismiss, finding that

Appellant had no basis upon which to investigate the AIRC for Open Meeting Law violations and that Appellant lacked reasonable cause to believe that such a violation had occurred. *See* CR 63 at 4 n.5; CR 66 at 2:24-26. The Superior Court further granted Appellees Declaratory and Injunctive Relief, finding that Appellees were subject to the Open Meetings Clause of the Arizona Constitution rather than the Open Meeting Law as set forth in A.R.S. § 38-431 et seq., and that Appellant had overstepped its authority by intruding on Appellees' legislative privilege. *See* CR 63; CR 66.

Appellant appealed the Superior Court's decision to this Court, and filed an Opening Brief on February 3, 2012.

ARGUMENT

I. Appellant Has Waived Review of the Denial of Its Petition by Failing to Challenge the Superior Court's Finding of Absence of Reasonable Cause for Investigation.

"On appeal, the appellant has the burden of demonstrating to this court that there was error committed below. And upon failure to do so, we have no alternative but to affirm." *Guard v. Maricopa Cnty.*, 14 Ariz. App. 187, 188-89, 481 P.2d 873, 874-75 (App. 1971); *see also State Farm Mut. Auto. Ins. Co. v. Tarantino*, 114 Ariz. 420, 422, 561 P.2d 744, 746 (1977) (finding that an issue is conceded if not controverted in opening brief). Where there are alternative

grounds for a decision, failure to challenge one of the grounds results in waiver. *Lisa v. Strom*, 183 Ariz. 415, 420-21, 904 P.2d 1239, 1244-45 (App. 1995); *Navajo Nation v. MacDonald*, 180 Ariz. 539, 541, 885 P.2d 1104, 1106 (App. 1994).

This rule has been adopted not just by Arizona, but by the majority of jurisdictions. *Johnson v. Commonwealth*, 609 S.E.2d 58, 60 (Va. App. 2005) (collecting cases, including *Navajo Nation*, 180 Ariz. 539, 885 P.2d 1104) ("[W]e join the majority of jurisdictions holding that in 'situations in which there is one or more alternative holdings on an issue,' the appellant's 'failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue.'" (quoting *United States v. Hachett*, 245 F.2d 625, 644-45 (7th Cir. 2001))). In *Johnson*, the Virginia Court of Appeals articulated a two-step inquiry: (1) are there one or more alternative holdings on an issue that Appellant failed to address; and (2) would the alternative holding, if legally correct, "constitute a freestanding basis in support of the trial court's decision." *Id.* If an appellant has not challenged the alternative holding in this situation, reviewing courts "do not examine the underlying merits of the alternative holding." *Id.*

Here, Appellant's opening brief does not challenge the Superior Court's holding that, given the Supreme Court's finding that serial communications do not violate the Open Meeting Law, "even if the Open Meeting Law applied to the

AIRC, the State has not stated reasonable cause to believe there may have been a violation of A.R.S. § 38-431.06." CR 66 at 2:24-26. Appellant does not contest that it failed to challenge this holding, and it even has declined an opportunity to supplement its opening brief after the issue was pointed out in Appellees' Motion for Extension of Time to File Answering Brief. *See* Mot. for Extension of Time to File Answering Br., *State v. Mathis*, No. 1 CA-CV 12-0068 (Ariz. Ct. App. Feb. 14, 2012). As the serial communications issue was addressed by the Superior Court in its minute entry and in its final judgment, Appellant's failure to address this freestanding basis for the Superior Court's denial of Appellant's Petition constitutes waiver of a necessary issue. *See, e.g.*, *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17, 91 P.3d 1019, 1023 (App. 2004); *State Farm Mut. Auto. Ins. Co.*, 114 Ariz. at 422, 561 P.2d at 746. Accordingly, this Court should affirm the Superior Court's decision on the ground of waiver.

A. Affirmance Is Required as Appellant Failed to Challenge the Superior Court's Finding of No Reasonable Cause to Believe There May Have Been a Violation of the Open Meeting Law.

Appellees objected on numerous occasions to Appellant's Petition on grounds that there was no reasonable cause to believe there may have been a

violation of the Open Meeting Law.[4] The Superior Court in this case agreed, citing to the Supreme Court's November 23, 2011, order in *AIRC v. Brewer* as authority for finding that Appellant had no grounds to investigate the AIRC. The Superior Court stated in pertinent part:

> [I]t appears that the Arizona Supreme Court has concluded that serial communications are not a violation of the Open Meeting Law, although we do not yet have the benefit of the Supreme Court's written opinion on the topic. To the extent the Supreme Court does so hold, however, even if this Court found that the Open Meeting Law applied to the IRC, it would appear that the State has not stated 'reasonable cause to believe there may have been a violation' of the Open Meeting Law. A.R.S. § 38-431.06. Accordingly, even if the

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[4] *See* Comm'rs' App. 4 (Letter from Commissioner Mathis to Governor Janice K. Brewer) at 3 ("Even if the Attorney General had statutory authority to conduct an investigation of the Commission, any investigation must be supported by reasonable cause and all information must be relevant to the alleged violation. A.R.S. § 38-431.06(D). You have failed to establish either and, therefore, the Commission objects to the investigative demand."); CR 56 at 5 (Commissioner Mathis Joinder) ("Prior to the County Attorney's involvement in this case, the Attorney General declared that 'serial communications' between commissioners would constitute a violation of the Open Meeting Law. But, the State has made no effort to demonstrate that the communications at issue (even if we are to assume that they occurred the way the State posits they did) would run afoul of the Open Meeting Law. It's an issue of first impression in Arizona. And, other than citation to a non-binding, self-serving Attorney General Opinion and the Attorney General's Office's own advice to his former clients, there is *no* Arizona authority (let alone reasonable cause) to suggest that the conduct the Attorney General seeks to investigate actually *violates* anything. Just because the Attorney General subjectively believes the Open Meeting Law ought to proscribe certain conduct does not make it so."); CR 61 & 62 (Notice Supplemental Joinder) at 2 ("Respondent [Mathis] provides the Court with this recently-filed order and holding by the Supreme Court as it relates directly to the issue of serial communications raised in the State's petition for enforcement of written investigative demands pursuant to the Arizona open meeting law.").

> Open Meeting Law applied, the Court would correctly dismiss the State's action on that basis.

See CR 63 (12/9/11 Minute Entry) at 4 n.5. Appellants did not move for reconsideration on this point. This holding was incorporated into the judgment, which provided in part:

> f. For the reasons set forth above, under Article IV, pt. 2, § 1(12), there is no basis for the prosecution of the investigative demands served on the individual IRC commissioners. Likewise, even if the Open Meeting Law applied to the IRC, the State has not stated reasonable cause to believe there may have been a violation of A.R.S. § 38-431.06.
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> * * *
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> In addition, final judgment is entered denying any and all relief that the State of Arizona requested in its petition for Enforcement of Written Investigative Demands and Application for Order to Show Cause to Commissioners Mathis, McNulty, and Herrera.

CR 66 (12/16/11 Final Judgment) at 2:24-26; 3:9-11. The State stipulated to the form of this judgment, and did not seek any sort of post-judgment relief at the trial court regarding this holding.

Thus, given the Supreme Court's refusal to recognize the purported serial communications as a "non-public meeting of a quorum," the Superior Court correctly found no Open Meeting Law violation. App. 12 (11/23/2011 Order in *Arizona Redistricting Comm'n v. Brewer*, CV-11-0313-A) at 2-3; *see also* Comm'rs' App. 3 at 1 (11/17/2011 Order in *Arizona Redistricting Comm'n v.*

Brewer, CV-11-0313-A). Appellant's efforts to investigate the Commissioners rises or falls on its belief that serial communications violate the Open Meeting Law. Despite this, Appellant fails to so much as challenge the Superior Court and the Supreme Court's finding that no such violation occurred. Appellant's failure to address the Superior Court's holding that it had not "stated reasonable cause to believe there may have been a violation of A.R.S. § 38-431.06," which was a freestanding basis for the Superior Court's denial of Appellant's Petition, constitutes a waiver of Appellant's appeal on that issue. *See* CR 63 (12/9/11 Minute Order) at 4 n.5; CR 66 (12/16/11 Final Judgment) at 2:24-26. Therefore, all this Court need find to affirm is that the Superior Court's holding constituted a freestanding basis to deny Appellant's Petition. *See Lisa*, 183 Ariz. at 420-21, 904 P.2d at 1244-45; *Navajo Nation*, 180 Ariz. at 541, 885 P.2d at 1106; *Johnson*, 609 S.E.2d at 60. Appellant would only be entitled to an Order compelling compliance with its Petition, subject to modifications the court may prescribe, if:

> [The] court finds that the [written investigation] demand is proper, including that the compliance will [1] not violate a privilege and [2] that there is not a conflict of interest on the part of the attorney general or county attorney, [3] that there is reasonable cause to believe there may have been a violation of this article and [4] that the information sought or document or object demanded is relevant to the violation . . . .

A.R.S. § 38-431.06(D). As discussed above, Appellant's Petition was based on a theory that Commissioners Mathis, McNulty, and Herrera violated Arizona's Open Meeting Law by allegedly conducting "serial communications" over the telephone. Addressing this allegation, the Superior Court held that these serial communications did not give rise to reasonable cause to believe that a violation had occurred. Under A.R.S. § 38-431.06(D), the trial court cannot grant Appellant's Petition unless "there is reasonable cause to believe there may have been a *violation* of [A.R.S. § 38-431 to -431.09]." Simply stated, without reasonable cause to believe there was a violation, the Petition fails.

B. Should Appellant Attempt to Raise the Issue for the First Time in Its Reply Brief, this Would Be Improper and Would Not Cure the Waiver.

"Generally, [the Court] will consider an issue not raised in an appellant's opening brief as abandoned or conceded." *Robert Schalkenbach Found.*, 208 Ariz. at 180, 91 P.3d at 1023. Here, even after the notice of appeal was filed and Appellant had filed its opening brief, Appellees pointed out that the State had failed to address the Superior Court's denial of the Petition based on serial communications. *See* Appellees' Mot. for Extension of Time to File Answering Br., *State v. Mathis*, No. 1 CA-CV 12-0068 (Ariz. Ct. App. Feb. 14, 2012) ("Should Appellants seek leave from the Court to supplement their opening briefs

upon the issuance of an opinion in *AIRC v. Brewer*, Appellees will not oppose that request.") However, Appellant opposed the motion for extension of time, and did not seek leave from this court to supplement its opening brief. Resp. in Opp'n to Appellees' Mot. for Extension of Time at 2-3, *State v. Mathis*, No. 1 CA-CV 12-0068 at 2-3 (Ariz. Ct. App. Feb. 22, 2012).[5]

II. Appellant Cannot Establish Reasonable Cause to Investigate the AIRC for Any Purported Open Meeting Law Violation.

Prior to conducting any investigation of the AIRC, Appellant was required to establish "reasonable cause" to believe that an Open Meeting Law violation occurred. A.R.S. § 38-431.06. Arizona's Open Meeting Law applies to "gathering[s], in person or through technological devices, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action" A.R.S. § 38-431(4). A

[5] The State's argument raised for the first time in its response to Appellees' Motion for Extension of Time that "the trial court failed to afford the State with an evidentiary hearing to determine if there was reasonable cause to believe a violation of the open meeting law occurred" is a red herring. Resp. in Opp'n to Appellees' Mot. for Extension of Time, *State v. Mathis*, No. 1 CA-CV 12-0068) at 2-3 (Ariz. Ct. App. Feb. 22, 2012). First, the trial court's decision was not based on evidentiary determinations but rather statutory construction. Second, as noted above, Appellees explicitly offered to let the State supplement its opening brief. Its failure to challenge the underlying determination regarding serial communications, or this new theory that the trial court failed to afford it an evidentiary hearing, results in both arguments being waived.

quorum constitutes a majority vote of members, which in the AIRC's case means at least three of its five Commissioners. *See* A.R.S. § 38-431.03(A). It is undisputed that nothing in the Open Meeting Law states that one-on-one serial communications can create a quorum. *See* Comm'rs' App. 2 (11/16/11 Tr. Oral Argument Mot. Hr'g) at 16:7-16; 32:8-24.[6]

The Open Meeting Law further states that all meetings of public bodies must be conducted in public, with legal action taken in public meetings. A.R.S. § 38-431.01(A). "'Legal action' means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state." A.R.S. § 38-431. The Attorney General Opinion that Appellant relied upon to support its Petition does not state otherwise. *See* Op. Atty. Gen. 75-8 at 7 (1975) ("The definition of 'legal action' contemplates actions by 'a majority of the members of a governing body.' Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing

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[6] "THE COURT: And the basis for determining it's a violation of the law is the Attorney General's opinions about having these sort of serial discussions that ultimately add up to a quorum. That's not specifically stated in the open meeting law itself, is it? . . . MS. CONNOR: The serial communications, that's not specifically stated in the open meeting laws. However, the definition section does define "meeting" as a gathering in person or

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body regarding matters which may foreseeably require final action or a final decision of the governing body, constitute 'legal action' and must be conducted in an open meeting, unless an executive session is authorized.").

Although communications took place between her and other AIRC commissioners, Commissioner Mathis adamantly disputes Appellant's characterization of the nature and content of those conversations. *See* Comm'rs' App. 4 (10/31/11 Letter from Commissioner Mathis to Governor Janice K. Brewer). Contrary to Appellant's assertions, Commissioner Mathis states that she never spoke with other commissioners to line-up votes. *See Id.* at 1. Further, any statements Commissioner Mathis made regarding how she might vote would have occurred in Executive Session, not during telephone conversations, as Appellant alleges. *See id.* at 2.

Even assuming Appellant's assertions of serial communications are true, they do not provide "reasonable cause" to believe that an Open Meeting Law violation occurred. An Open Meeting Law cannot take place absent a meeting, and no meeting can take place without a quorum. *Boyd v. Mary E. Dill Sch. Dist. No. 51*, 129 Ariz. 422, 424-25, 631 P.2d 577, 579-80 (App. 1981) (affirming dismissal

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through technological devices a quorum of members who discuss, propose or take legal
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of Open Meeting law claim where alleged action taken without a quorum present); *see also Mohr v. Murphy Elementary Sch. Dist. 21 of Maricopa Cnty.*, 449 F. App'x 650, 652 (9th Cir. 2011) (affirming dismissal for failure to state a claim of alleged Open Meeting Law violation because "Arizona courts have interpreted Arizona's Open Meeting law as only applying to instances in which a quorum of a public body's members is present.")

Appellant has never alleged facts supporting a finding that a quorum of Commissioners convened in violation of the Open Meeting Law. *See* A.R.S. § 38-431(4). To the contrary, Appellant only alleged that Commissioner Mathis telephoned individual members of the Commission to suggest that they vote for Strategic Telemetry. *See* CR 1 at 7-9, 11 (alleging that Commissioners Stertz and Freeman separately received phone calls from Commissioner Mathis). No "legal action" could have taken place absent such a quorum, as at least three members of the AIRC were required to make a collective decision. A.R.S. § 38-431. Appellant's failure to establish a factual basis to assert any reasonable cause to investigate the AIRC for an Open Meeting Law violation provides this Court with sufficient grounds for affirmance.

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action. So it does explain that. . . . Comm'rs' App. 2 at 16:7-16.

As stated above, Appellant's investigatory action has been tainted by ethical missteps and evidence of political interference. Further, the "facts" Appellant has claimed in the past as providing "reasonable cause" for investigation are either nowhere in evidence or have been misstated. At the onset of this case, the AIRC's counsel prompted Appellant for information pertaining to the basis for its investigation. As set forth in the AIRC's Answering Brief, the documents the Attorney General provided to the AIRC's counsel consisted of media reports, blog posts, and clearly partisan e-mails and letters from citizens expressing their frustrations with the AIRC, Strategic Telemetry, and Chairperson Mathis personally. *See* App. 3. None of these materials contained any information alleging an Open Meeting Law violation. Further, in its Petition, Appellant's argument that it had reasonable cause to believe that an Open Meeting Violation occurred quoted from the testimony of Commissioners Stertz and Freeman. *See* CR 1 (Petition) at 7-9, 11. However, Commissioners Stertz and Freeman did not testify until after the Attorney General had issued the written investigative demands in this case. *See id.* at 7-9, 11. Therefore, any claim by Appellant that Commissioner Stertz and Freeman's testimony formed the reasonable cause for issuing the written investigative demands is factually inaccurate.

To support their serial communications theory, Appellant relied solely upon two non-binding Attorney General Opinions and the Attorney General's Office's own advice to his former clients. *See id.*; App. 2 (11/16/11 Tr. Oral Argument Mot. Hr'g) at 16:7-23. Specifically, Appellant seized upon language that originated in an Attorney General Opinion from 1975 to support its position that the serial communications alleged in this case violate the Open Meeting Law. *See* CR 1 at 3 (quoting Op. Atty. Gen. 75-8 at 7 (1975) ("It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Act, would constitute a violation which would subject the governing body and the participating members to the several sanctions provided for in the Act.")) (citing *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974)).

As such authority is insufficient, this Court should affirm the Superior Court. First, it is well-established that Attorney General Opinions are not binding on the court. *Reeves v. Barlow*, 227 Ariz. 38, 42, 251 P.3d 417, 421 (App. 2011) ("To the extent the Attorney General's opinion on this issue is contrary . . . we disagree with it."); *State v. Toulouse*, 122 Ariz. 275, 278, 594 P.2d 529, 532 (1979) ("We do not agree with the defendant's interpretation of the Attorney General's

opinion, nor are opinions of the Attorney General binding upon this court.") Second, neither of the Attorney General's Opinions cited by Appellant directly apply the issue of serial communications to specific facts. Rather, both opinions state the same language without offering any explanation or examples to illustrate their point. *See* Op. Atty. Gen. 75-8 at 7 (1975); Op. Atty. Gen. I79-4 at 3 (1979).

Third, the cases that these Attorney General Opinions rely upon are inapposite to the facts as alleged here. *Gradison* involved a planning advisory committee that convened "numerous and detailed" nonpublic in-person meetings of all members before participating in public sessions in which a zoning plan was formulated. 296 So.2d at 475. There, the Florida court held that a citizen's planning committee was bound by the state's Sunshine law, and that public bodies cannot conduct nonpublic meetings that result in "the crystallization of secret decisions to a point just short of ceremonial acceptance." *Id.* at 477 (quoting *Sacramento Newspaper Guild v. Sacramento Bd. Supervisors*, 69 Cal. Rptr. 480, 487 (Cal. Ct. App. 1968)). By contrast, even if the Court were to take Appellant's version of events as true in this case, the alleged serial communications were conducted one-on-one and were far from detailed, allegedly focusing entirely on

counting how other Commissioners might vote. *See* CR 1 (Petition) at 7-9.[7] Far from a "crystallization of secret decisions," the alleged conversations resemble nothing more than an informal poll taken of individual Commissioners, the result of which fell far short of "ceremonial acceptance." *See Gradison*, 296 So.2d at 477.

Both Attorney General Opinions also cite to *Sacramento Newspaper Guild*, which held that a gathering of all five county supervisors at a luncheon to discuss official business constituted a meeting under California's Brown Act. 69 Cal. Rptr. at 483. By contrast, the facts alleged here involve neither an in-person meeting nor a quorum of members. Other cases cited in the Attorney General's Opinions are also inapplicable. *See Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974) (board of education members who regularly held private conferences at a designated time and place and discussed a formal agenda constituted a "meeting" under Colorado Law); *Times Publ'g Co. v. Williams*, 222 So.2d 470, 474 (Fla. Dist. Ct. App. 1969) (Florida's Sunshine law is "applicable to . . . assemblage of a board or commission"). As the Attorney General's Opinions

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[7] *Gradison*, of course, is not binding or persuasive authority on this Court, and indeed, the Arizona Supreme Court has noted that its primary holding does not apply in Arizona. *See Wash. Sch. Dist. No. 6 v. Super. Ct.*, 112 Ariz. 335, 338, 541

(continued...)

and the cases contained therein are inapplicable to the facts as alleged here, Appellant had no legal authority to initiate an investigation of that AIRC.

III. The No Reasonable Cause Issue Demonstrates Why the Open Meeting Law Does Not Apply to the AIRC, Which Must Comply with Its Own Constitutional Charter.

As explained in the AIRC's answering brief and in the Superior Court's ruling, the AIRC is governed not by the Open Meeting Law, but by its own distinct Constitutional charter. It is clear that there are substantive differences between the statutory language in the Open Meeting Law and the language found in the AIRC's constitutional mandate of openness. *Compare* Ariz. Const. art. 4, Pt. 2 § 1(12) *with* A.R.S. § 38-431(4). The Constitution's language requires that when a quorum is "present," the AIRC must "*conduct business* in meetings open to the public with 48 or more hours public notice provided," Ariz. Const. art. 4, Pt. 2 § 1(12), and is markedly different from the Open Meeting Law's language that a "[m]eeting" is "the gathering, *in person or through technological devices*, of a quorum of members of a public body at which *they discuss, propose or take legal action*, including any deliberations by a quorum with respect to such action," requiring twenty-four hours' public notice. A.R.S. § 38-431(4) (emphasis added);

(...continued)
P.2d 1137, 1140 (Ariz. 1975) (holding that unlike Florida's sunshine law, the Open
(continued...)

A.R.S. § 38-431.02(C). The differences in language demonstrates that the AIRC is governed by its Constitutional mandate that its meetings be open to the public, and this constitutional mandate is separate and distinct from the requirements of the Open Meeting Law. Because the Open Meeting Law does not apply to the AIRC, this Court should affirm the Superior Court.

CONCLUSION

The Opening Meeting Law does not apply to the AIRC. Even if the Open Meeting Law did apply, Appellant had no "reasonable cause" justifying its investigation of any purported Open Meeting Law violation. Further, as stated by the Superior Court in this case, "it appears that the Arizona Supreme Court has concluded that serial communications are not a violation of the Open Meeting Law." *See* CR 63 at 4 n.5. And as the Superior Court has stated that serial communications alleged here do not violate Arizona's Open Meeting Law, Appellant's failure to raise that issue in its opening brief constitutes a concession of that issue. For the reasons articulated above (and in the answering brief filed by the AIRC), the Commissioners respectfully request that the Court affirm the Superior Court.

(...continued)
Meeting Law did not apply to advisory groups).

Respectfully submitted this 12th day of April, 2012.

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