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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CHARLENE R. FERNANDEZ, *et al.*,

Plaintiffs,

v.

COMMISSION ON APPELLATE COURT APPOINTMENTS, *et al.*,

Defendants,

and

KAREN FANN, in her official capacity as President of the Arizona Senate, and RUSSELL BOWERS, in his official capacity as the Speaker of the Arizona House of Representatives,

Intervenors-Defendants.

No. CV2020-095696

RESPONSE OF INTERVENORS TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

(Before the Hon. Janice Crawford)

Intervenors Arizona Senate President Karen Fann and Speaker of the Arizona House of Representatives Russell Bowers respectfully submit this response in opposition to the Plaintiffs' Motion for a Temporary Restraining Order.

Casting political grievances as legal wrongs, the Plaintiffs seek a judicial veto of qualified nominees to the Arizona Independent Redistricting Commission ("AIRC") duly selected by the Commission on Appellate Court Appointments ("CACA"). All of the individuals proffered by the CACA, however, are eligible in all respects for appointment to the AIRC. Because Plaintiffs' claims are fated to fail and they have adduced no evidence that extraordinary preliminary relief is necessary to avert irreparable harm or hardship, the Court should deny the Motion in its entirety.

I. Plaintiffs Cannot Succeed on the Merits of Their Claims Because Thomas Loquvam Is Not a "Registered Paid Lobbyist" and Robert Wilson Undisputedly Is "Not Registered With Either of the Two Largest Political Parties"

The gravamen of a motion for preliminary relief is the Plaintiffs' likelihood of ultimate success on the merits of their claims. *See Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, ¶ 13 (App. 2009) ("In determining whether 'serious questions' exist to support a preliminary injunction . . . the relevant inquiry is whether there are 'serious questions *going to the merits.*' Thus, whether there are 'serious questions' depends more on the strength of the legal claim than on the gravity of the issue." (internal citations omitted)); *Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407, 411, ¶ 10 (2006) (explaining that "if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger").

The deficiencies pervading the Plaintiffs' theories are easily unearthed from the face of their Complaint. According to the Plaintiffs' own recitation of the controlling facts, Thomas Loquvam has not, within the preceding three years, been compensated by a third party for "attempting to influence the passage or defeat of any legislation by directly communicating with any legislator or attempting to influence any formal rulemaking" proceeding. A.R.S. § 41-1241(11)(a). He accordingly is not a "registered paid lobbyist" within the meaning of any statute, let alone Article IV, Part 2, Section 1 of the Arizona Constitution. Loquvam's voluntary registration pursuant to an internal Code of Ethics promulgated several months by the Arizona Corporation Commission ("ACC") does not—

and could not—carry constitutional import. Similarly, the Plaintiffs' explicit concession that Robert Wilson "is and has been registered as an Independent since 2005," Compl. ¶ 24, extinguishes their concomitant contradictory insistence that he is not "registered as unaffiliated with a political party," *see* Ariz. Const. art. IV, pt. 2, § 1(3). Because Plaintiffs lack any viable avenue to success on the merits, preliminary relief is unwarranted.

A. Individuals Who Seek to Influence Corporation Commission Proceedings Are Not "Registered Lobbyists"

This Court's determination of whether Loquvam is a "registered paid lobbyist" should be premised on two familiar canons of construction. First, "[w]hen interpreting the scope and meaning of a constitutional provision . . . [courts'] primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994); *see also Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 330, ¶ 36 (2014) ("Our primary objective in construing [enactments] adopted by initiative is to give effect to the intent of the electorate." (internal quotation omitted)). Second, "[e]ach word, phrase, clause, and sentence [of a constitutional provision] must be given meaning so that no part will be void, inert, redundant, or trivial." *Cain v. Horne*, 220 Ariz. 77, 80, ¶ 10 (2009) (quoting *City of Phoenix v. Yates,* 69 Ariz. 68, 72 (1949)).

These two axioms illuminate the two operative interpretive queries: (1) Loquvam is not a "registered lobbyist," as the term was apprehended by the electorate that adopted in November 2000 the Proposition 106 measure that created the AIRC, and (2) even if he were a "lobbyist," the available evidence confirms that he was not "paid" for such lobbying services.

1. Extant Constitutional and Statutory Provisions in Effect When Proposition 106 Was Adopted Establish That Efforts to Influence the Corporation Commission Are Not "Lobbying"

Persons influencing or participating in ACC proceedings are not "lobbyists" under Arizona law. Confronting a similar interpretive endeavor (specifically, the scope of the

term "public officer" in Proposition 106), the Arizona Supreme Court instructed that the analytical lodestar is "how the term . . . has been in interpreted in Arizona law before the adoption of Proposition 106." *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128, 133, ¶ 20 (2011).

To this end, while the concept of "lobbying" has always possessed some element of definitional fluidity, it generally does not encompass communications to influence ACC proceedings. The term appears in only one other provision of the Arizona Constitution—to wit, Article XXII, Section 19, which directs that "[t]he Legislature shall enact laws and adopt rules prohibiting the practice of lobbying on the floor of either House of the Legislature, and further regulating the practice of lobbying." Although Arizona courts have not had occasion to expound this text, it connotes that "lobbying" is the act of influencing ***the Legislature***, and that regulation of such activity is the province of that branch exclusively. *See generally Adams*, 227 Ariz. at 133-34, ¶¶ 23-25 (examining usages of the term "public officer" in other provisions of the Arizona Constitution).

The governing statutes corroborate that when Proposition 106 was ratified in November 2000, "lobbying" as a legal concept was confined largely to persuasive communications directed at the legislative branch. Specifically, it encompassed "attempting to influence the passage or defeat of any legislation by directly communicating with any legislator, or in the case of bonding lobbyists, directly communicating with any school district employee or school district governing board member or attempting to influence any formal rule making proceeding pursuant to chapter 6 of this title or rule making proceedings that are exempt from chapter 6 of this title by directly communicating with any state officer or employee." A.R.S. § 41-1231(9) (2000).

Notably, statutory amendments adopted in April 2000 prescribed ***separate*** prohibitions on entertainment expenditures by "lobbyists," *see* 2000 Ariz. Session Laws ch. 364, § 4 (adding A.R.S. § 41-1232.07(A)), and entertainment expenditures by "[a] person who for compensation attempts to influence . . . matters that are pending or proposed or that are subject to formal approval by the corporation commission" or certain other enumerated

governmental bodies other than the Legislature, *see id.* (adding A.R.S. § 41-1232.07(B)).

Embedded in this linguistic formulation and statutory structure is an implicit but clear definitional differentiation between "lobbyists" on the one hand, and individuals who for compensation attempt to influence ACC proceedings on the other. An inevitable corollary is that the latter are not "lobbyists." *See generally Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249–50, ¶ 8 (App. 2006) (courts "assume that when the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language").

The point is not that Proposition 106 necessarily imported and constitutionalized any given statutory clause verbatim. Rather, the regulatory landscape as it existed in November 2000 is pivotal because it elucidates how the term "lobbying" as a legal concept was generally understood by the electorate that approved Proposition 106. *See Adams*, 227 Ariz. at 134, ¶¶ 27-29 (relying on usages of the term "public officer" in various Arizona statutes in construing its meaning in the context of Proposition 106); *cf. State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, ¶ 24 (2020) (citing taxation statutes in interpreting recently enacted constitutional amendment prohibiting certain new taxes). Indeed, had Proposition 106 intended to impart a novel and more expansive scope to the term "lobbying," its proponents could have easily formulated their own enumerated definition of the word, or at least conveyed this objective in the publicity pamphlet.[1] *See S.A. v. Superior Court In & For County of Maricopa*, 171 Ariz. 529, 531 (App. 1992) ("Examination of the publicity pamphlet to which Arizona courts have repeatedly referred in analyzing the drafters' intent and interpreting provisions of the Arizona Constitution yields nothing to cloud the apparent meaning" of disputed term (internal citations omitted)); *Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 327, ¶ 21 (2014) (reasoning that "nothing in the ballot or attendant publicity pamphlet" evidenced an intent to incorporate a particular interpretation

[1] The excerpts of the 2000 General Election Publicity Pamphlet pertaining to Proposition 106 are available at: https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf [last accessed Oct. 28, 2020].

of the initiative).

This conspicuous silence in the text of Proposition 106 and accompanying publicity pamphlet certainly fortifies—if not compels—an inference that its definition of the term "lobbying" aligned with that prescribed by the extant statutes and suggested by Article XXII, Section 19.

2. The ACC's Internal "Code of Ethics" Cannot Alter or Expand the Scope of a Constitutional Term

In insisting that Loquvam is a "lobbyist" within the meaning of Proposition 106, Plaintiffs appear to rely almost exclusively on his registration pursuant to provision in an internal Code of Ethics that the ACC adopted in June 2018, which contemplates registration by "any person, representing an industry or public service corporation whose interests will be affected by Commission decisions, and whose intent is to influence any decision, legislation, policy, or rulemaking within the Commission's jurisdiction." Ariz. Corp. Comm. Code of Ethics, Rule 5.2.[2] This argument, however, founders for at least two reasons.

First, and most fundamentally, whatever the term "registered paid lobbyist" meant in November 2000, it still means today. The provisions of the Arizona Constitution carry a fixed and definite meaning that settles at the time of their adoption. The contours of the term "registered paid lobbyist" in the Constitution do not reflexively morph to align with the regulatory dictates of other governmental bodies years or decades after the fact. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607, 617, ¶ 30 (Ariz. 2020) ("To determine the drafters' intent regarding the word 'sheet,' we consider the meaning of the word when the Constitution was adopted in 1912.").

Second, even assuming *arguendo* that subsequent statutory enactments by the Legislature pursuant to the grant of authority in Article XXII, Section 19 could imbue Proposition 106 with an altered meaning, the internal administrative pronouncements of the

[2] *Available at* https://www.azcc.gov/code-of-ethics#:~:text=The%20Arizona%20Corporation%20Commission%20is,and%20impartiality%20of%20the%20Commission [last accessed Oct. 28, 2020].

ACC certainly carry no such significance. Not only is the Code of Ethics not the product of any formal or informal rulemaking pursuant to the Arizona Administrative Procedure Act, A.R.S. §§ 41-1001, *et seq*., it governs only the conduct of the Commissioners themselves. Specifically, Rule 5.2 merely prohibits ***Commissioners*** from communicating with persons who did not register despite satisfying the requisite criteria; it does not constrain, regulate or penalize any third parties.

3. The Plaintiffs' Proposed Construction Does Not Advance the Ostensible Purpose of Proposition 106

Because the text of Proposition 106, as informed by the underlying constitutional and statutory terrain as it existed at the time of the initiative's enactment, confirms that an individual who seeks to influence ACC proceedings is not a "lobbyist," the inquiry is at an end. *See generally Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 325, ¶ 8 (2011) ("When the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine the legislature's intent because its intent is readily discernable from the face of the statute." (internal citation omitted)). It bears emphasis, however, that this construction is also consonant with the apparent animating purpose of Proposition 106's eligibility limitations. The rationale for prohibiting "paid registered lobbyists" from serving on the AIRC presumably was that such individuals may be too close to the appointing legislative leaders and may have clients whose interests would be impacted by the political repercussions of legislative or congressional redistricting. Those concerns are not germane, however, in the context of the ACC. Its Commissioners are elected statewide and matters within the ACC's jurisdiction—which is largely confined to regulating public utilities—have no plausible nexus whatsoever to redistricting decisions. Thus, while the putative "purposes" of Proposition 106 cannot supersede the measure's plain text, the conclusion that its disqualification of "lobbyists" does not extend to those who only participate in or influence ACC proceedings does nothing to undermine Proposition 106's underlying objective of ensuing a sufficient disassociation between the AIRC and the legislative branch.

In sum, at the time Proposition 106 was adopted in November 2000, the term "lobbyist" bore a specific meaning confirmed by statute and engrained in regulatory usage. It did not then—and does not now—encompass individuals who are compensated only to influence or affect matters pending before the ACC.

4. The Available Evidence Indicates That Loquvam Was Not "Paid" to "Lobby"

Finally, even if Loquvam qualified as a "registered lobbyist," he is ineligible for appointment to the AIRC only if he was also "paid" for rendering those services. *See* Ariz. Const. art. IV, pt. 2, § 1(3); *see also Arizonans for Second Chances*, 471 P.3d at 617, ¶ 28 (emphasizing that " we give meaning to "each word, phrase, and sentence" in a constitutional provision). Loquvam represented in his application, under penalty of perjury, that he is "not 'compensated for the primary purpose of lobbying on behalf of a principal.'" Application of Thomas Loquvam to the Independent Redistricting Commission, *available at* https://www.azcourts.gov/LinkClick.aspx?fileticket=My6qs9ypbto%3d&portalid=75 (quoting A.R.S. § 41-1231(13) (defining "lobbyist for compensation")). While Loquvam's statements of course do not foreclose independent judicial factfinding, the most direct and probative evidence available to the Court at this juncture—*i.e.*, Loquvam's own sworn averments based on personal knowledge—underscore that Plaintiffs are highly unlikely to succeed on the merits of their claim that Loquvam is a "paid" lobbyist.

B. Robert Wilson Was Correctly Designated By the Commission As a Nominee Who Is "Not Registered with Either of the Two Largest Political Parties in Arizona"

The CACA's roster of nominees must include ten registered Democrats, ten registered Republicans, and five individuals "who are not registered with either of the two largest political parties in Arizona." Ariz. Const. art. IV, pt. 2, § 1(5). Each nominee must have continuously maintained the same political party affiliation (or lack of any political party affiliation) during the preceding three years. *Id.* § 1(3). According to Plaintiffs, the CACA erred in including Wilson among the nominees who are not "registered with either

of the two largest political parties in Arizona." Critically, however, the Plaintiffs acknowledge that "Wilson is and has been registered as an Independent since 2005." Compl. ¶ 24. Thus, in a nutshell, Plaintiffs' argument contains its own refutation. Because Wilson undisputedly is not "registered with either of the two largest political parties in Arizona," the CACA accurately and properly designated him as a nominee who is not "registered with either of the two political parties in Arizona."

Undeterred by this unassailable syllogism, the Plaintiffs insist that identifying Wilson as not registered with either political party—even though he is in fact not registered with either political party—somehow offends "the spirit and intent" of Proposition 106. Compl. ¶ 44. At least three flaws inhere in this argument.

First, "if the constitutional language is clear, judicial construction is neither required nor proper." *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992); *Jett*, 180 Ariz. at 119 ("If the [constitutional] language is clear and unambiguous, we generally must follow the text of the provision as written."). Thus, whatever Plaintiffs posit is the "spirit and intent" of Proposition 106 cannot displace the ineluctable force of its actual text. *See Kilpatrick v. Superior Court*, 105 Ariz. 413, 421 (1970) ("[N]o legal legerdemain should be used to change the meaning of simple English words.").

Second, there is no textual, structural or extrinsic support for Plaintiffs' supposition that an unaffiliated nominee must conform to some unarticulated standard of political neutrality or bipartisanship. There are sundry reasons why an individual might choose not to register as a Democrat or Republican, ranging from political apathy to ideological purity to a visceral distaste for party labels. If, as Plaintiffs surmise, the framers of Proposition 106 had intended to condition eligibility for nomination as an independent on a political agnosticism, they easily could have prescribed detailed criteria to that end (*e.g.*, the nominee must not have made any political contributions within a certain time period, or must aver that she or he has supported a requisite number of candidates of each major political party, etc.). But they did not do so. Instead, an individual may be nominated as an independent as long as he or she has not been "registered with either of the two largest political parties

in Arizona" during the preceding three years. Ariz. Const. art. IV, pt. 2, § 1(3), (5). This Court "cannot rewrite [Proposition 106] under the guise of divining" what Plaintiffs conjecture was some disembodied underlying "intent." *In re Martin M.*, 223 Ariz. 244, 247, ¶ 9 (App. 2009); *see also Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 13 (1986) ("The constitutional text being unrestricted, it would be inappropriate for this court to restrict the guarantee by adding words of limitation 'contrary to the plain language used.'").

Third, even assuming that Plaintiffs' apprehension of the "spirit and intent" of Proposition 106 is sound, their theory is not amenable to any viable and objective method of judicial application. In essence, Plaintiffs argue that Wilson should be disqualified because they perceive him as too "closely aligned with the republican party." Compl. ¶ 43. This begets the question, however, of what it means to be "aligned" with a political party of which a nominee is undisputedly not a registered member. Relatedly, by what metrics is the political "independence" envisaged by the Plaintiffs gauged? Is it the number of candidates from a given political party for whom a nominee has in the past voiced support or opposition? The frequency of his or her support or opposition? The magnitude of the perceived support or opposition? Financial contributions? Must a nominee's past endorsement of a Republican candidate be "offset" by subsequent support for a Democratic candidate in order to maintain a degree of political "independence" satisfactory to the Plaintiffs? Does a nominee's past advocacy of public policy positions associated with one political party jeopardize her eligibility for selection as an independent AIRC nominee?

Engaging these questions will inexorably entangle this Court into a morass of speculative guesswork and subjective ruminations that are untethered from any textual underpinnings in Proposition 106 itself. *See generally Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 194, ¶¶ 20-21 (2007) (holding that the constitution's guarantee of tuition that is "nearly free as possible" is not conducive to any "judicially discoverable and manageable standards," adding that "a court cannot assess [it] . . . in the absence of an initial policy determination of a kind clearly reserved to" the other branches); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (concluding that partisan gerrymandering claims cannot be

judicially resolved, noting that courts are not equipped "to answer the determinative question: 'How much [partisanship] is too much?' . . . A court would have to rank the relative importance of . . . criteria and weigh how much deviation from each to allow."). The Court should decline the Plaintiffs' invitation to wade into that political thicket.

In sum, it is undisputed that Robert Wilson has not been registered as a member of the Republican Party or the Democratic Party since at least 2005. *See* Compl. ¶ 24. The CACA accordingly did not err or exceed its lawful authority when it nominated Wilson as an individual who is "not registered with either of the two largest political parties in Arizona." Ariz. Const. art. IV, pt. 2, § 1(5). The issue is that simple.

II. Plaintiffs Will Not Suffer Any Irreparable Injury or Inequitable Hardship in the Absence of an Injunction

The deficiencies in their claims notwithstanding, Plaintiffs are unable to articulate why an injunction or extraordinary writ is indispensable to avoid the infliction of irreparable injury or inequitable hardship. Notably, Plaintiffs do not challenge the legal eligibility of the remaining 22 nominated but as yet unappointed individuals elevated by the CACA, to include the ten Democratic nominees. Further, the Plaintiffs have not alleged that they intend to appoint—or even consider—any individual other than the ten undisputedly eligible Democratic nominees. Thus, there is no factual basis for inferring that the presence of Loquvam and/or Wilson on the roster of politically unaffiliated nominees is constraining or impeding either Plaintiff's prerogative to make their respective appointments to the AIRC. While Plaintiffs do have legal standing to contest any nominee's legal qualifications in court, *see Adams*, 227 Ariz. at 131, ¶ 9, they have supplied no reason to believe that this Court's immediate intervention is somehow indispensable to averting a substantial and irreversible injury.

Further, the balance of equities and relative hardships decisively favors the CACA and the Intervenors. The sequence of serial appointments and corresponding deadlines mandated by Proposition 106 is already underway. By seeking at the eleventh hour to upend the status quo and suspend a constitutionally ordained process, the extraordinary mandatory

injunction the Plaintiffs desire would inflict substantial prejudice on the CACA as well as Intervenor President Fann, who is constitutionally obligated to make her appointment to the AIRC immediately following that of Leader Fernandez, which in turn must occur no later than October 29, 2020. *See Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990) ("The type of [mandatory] injunction sought . . . is not a remedy favored by the courts, especially because it goes beyond simply maintaining the status quo pending a trial on the merits"). Thus, the Plaintiffs cannot compensate for the absence of "serious questions" bearing on the merits of their claims with any compelling showing of injury or hardship that will ensue without an injunction. *See TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495, ¶ 21 (App. 2013) (to obtain preliminary relief, "the movant must show either '1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and 'the balance of hardships tips sharply' in his favor.'" (internal citation omitted)).

CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' Motion for a Temporary Restraining Order and Application for Order to Show Cause in its entirety.

RESPECTFULLY SUBMITTED this 29th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

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