Exhibit B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CHARLENE R. FERNANDEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	CASE NO. CV2020-095696
v.	)	
	)	
COMMISSION ON APPELLATE COURT APPOINTMENTS, et al.,	)	
	)	
Defendants.	)	
	)	

Phoenix, Arizona
October 29, 2020
10:30 a.m.

BEFORE THE HONORABLE JANICE CRAWFORD
SUPERIOR COURT JUDGE

TRANSCRIPT: RETURN HEARING

Transcript prepared by:

VERBATIM REPORTING & TRANSCRIPTION, LLC

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1 P R O C E E D I N G S

2 THE COURT: Good morning. We are on the record in
3 CV2020 -- we've got some feedback going on in here. On
4 095696. This is Fernandez versus Commission on Appellate
5 Court Appointments. I'll take appearances beginning with
6 Plaintiff, please?

7 MR. BARTON: Good morning, Your Honor. This is
8 James Barton on behalf of the Plaintiffs Fernandez and
9 Bradley.

10 MR. KANEFIELD: Good morning, Your Honor. Joseph
11 Kanefield, along with Brunn Roysden, Michael Catlett, and Kate
12 Sawyer on behalf of the Commission on Appellate Appointments.

13 MR. LANGHOFER: Good morning, Your Honor. Kory
14 Langhofer and Thomas Basile for the proposed Intervenors,
15 Karen Fann and Rusty Bowers.

16 THE COURT: This is the time set for the return
17 hearing on Plaintiff's motion for temporary restraining order.
18 To begin, I do have the motion to intervene, and I would like
19 to ask Plaintiff and Defendant is there's any intent object to
20 that? For Plaintiff?

21 MR. BARTON: No, Your Honor, we don't object.

22 THE COURT: For Defendant?

23 MR. KANEFIELD: No objection. No objection, Your
24 Honor.

25 THE COURT: From both parties, is there -- is there

any objection then to the Court granting that motion as unopposed at this time?

MR. BARTON: No objection from Plaintiffs, Your Honor.

MR. KANEFIELD: No objections from the Defendant.

THE COURT: Okay. So, in the minute if you would please note that the motion to intervene by Karen Fann, President of the Arizona Senate, Rusty Bowers, Speaker of the Arizona House, is granted as unopposed.

I received and have read the following Plaintiff's motion for temporary restraining order, the verified complaint for special action, Defendant's response in opposition to motion for temporary restraining order, the motion to intervene, the proposed answer, and Plaintiff's notice of voluntary dismissal which dismisses the individually named Defendants. Is there anything that has been filed that I missed? From Plaintiff?

MR. BARTON: No, Your Honor.

THE COURT: And from Defendant?

MR. KANEFIELD: No, Your Honor.

THE COURT: Okay, and from the Intervenors?

MR. LANGHOFER: No, Your Honor. We -- we have a draft response to the motion that's ready to go now that our, the commencement schedule has not yet been filed.

THE COURT: Thank you. In reviewing the pleadings

1 it appears that the issue before the Court on the TRO is not
2 going to depend on testimony or evidence. And it also appears
3 that it needs to be addressed and issued today. A decision
4 has to be done today. Is either party requesting to present
5 evidence or testimony in -- in connection with the TRO, Mr.
6 Barton?
7 MR. BARTON: No, Your Honor.
8 THE COURT: Mr. Kanefield?
9 MR. KANEFIELD: No, Your Honor.
10 THE COURT: Okay. Is there any need for any of the
11 parties to do any discovery? For Plaintiff?
12 MR. BARTON: Not for the TRO, Your Honor, no.
13 THE COURT: Thank you. For the Defendants?
14 MR. KANEFIELD: No, Your Honor.
15 THE COURT: I do have some questions for -- for the
16 parties that I'd like to ask first, and then I will certainly
17 allow everybody the opportunity for any oral argument. Before
18 I begin I just want to make sure that the timeline that I'm
19 seeing is not in dispute.
20 On October 13th, 2020 the Commission transmitted the
21 list of 25 nominees that consisted of 10 Republicans, 10
22 Democrats, and five Independents, registered Independents. On
23 October 22nd the Speaker selected the first member of the IRC,
24 and on 10/23, just after midnight Plaintiffs filed the
25 verified complaint and application for TRO. There's no

1 dispute as to the dates and times of those, is that correct,
2 Mr. Barton?
3 MR. BARTON: That's correct, Your Honor.
4 THE COURT: And -- and Mr. Kanefield?
5 MR. KANEFIELD: That's correct, Your Honor.
6 THE COURT: Okay. My first question to Plaintiff is
7 if Plaintiff is successful on the merits how would the process
8 for selecting members of the redistricting committee proceed?
9 And I think what I'm asking is would the entire process have
10 to begin again? Are you asking that the --
11 MR. BARTON: Your Honor --
12 THE COURT: -- list be amended? Tell me -- tell me
13 what would happen if -- if you were successful?
14 MR. BARTON: Your Honor, if we were successful. We
15 would be asking the Court to find that the two members being
16 challenged are not eligible, and therefore, the Appellate
17 Court of Appointments to fail to send over 25 qualified
18 eligible members as necessary. So the Court on Appellate
19 Court Appointments would have to select two additional members
20 to fill those spots that had been made open. After that
21 happens the selection process would proceed.
22 There is an issue right now, of course, because the
23 Speaker of the House has already selected someon. And I -- it
24 is our position that he made a selection with the pool that he
25 had at the time that he was not challenging. And so I think

one possible option would be to say to going forward members would choose from the new pool that was constitutionally proper. I think it -- another opportunity -- another possibility would be holding that that selection was invalid. We haven't sought that, we sort of see that as he's the one that's outstanding, if he wants to say he deserves a chance to select from the new pool if he wants. But our position, the relief that we're seeking is just that the Plaintiffs in this case have the opportunity to select from a constitutionally constituted pool.

And so the relief that we're seeking is that at least the two ineligible members are removed, sent back to CACA, and then they send over a list at a minimum for the two Plaintiffs to choose from. So they have a constitutionally constituted pool to choose from. The question of whether or not the speaker would want to, or ask to choose again, or maybe in this litigation could seek to have an opportunity to choose again, that's -- we don't think that's -- that's our business, that's -- that's -- that's -- he is the one who is outstanding to deal with that. We're just looking to make sure that the Plaintiffs can choose from a pool that's been constitutionally constituted.

THE COURT: Okay. That's going to lead me to my second question. What if anything did -- did Plaintiffs do prior to following -- file -- filing this lawsuit? For

1 example, did the Plaintiffs make a request to the Commission
2 to reconsider? Did they send a letter to the Commission
3 asking to reconsider? What -- in -- in the time frame between
4 the time the list was submitted and the time the lawsuit was
5 filed, what did they do to act upon their concerns?
6 MR. BARTON: Your Honor, in the nine days between
7 the listing submitted and the filing of the lawsuit, the
8 Plaintiffs were in the process of weighing their options of
9 figuring -- they did not reach out to the Commission, that's
10 true. Of course, the Plaintiffs, maybe not themselves but
11 those allied with them, did participate in the selection
12 process to make statements to the Commission concerning these
13 two members that are on record as -- I mean, these two
14 individuals were, did receive -- there was an effort to
15 encourage the Commission not to select them for the reasons
16 that are stated in the lawsuit. But I can tell you that the
17 Plaintiffs in the nine days in between receiving the notice
18 -- the notice of the members had been sent over, and when
19 Speaker Bowers sort of surprisingly made his appointment they
20 did not take any other action. I think the, I mean, there are
21 still three months left until this has to be constituted. So
22 I think that probably played into some of the actions that
23 were taken or not taken in that -- in those nine days.
24 THE COURT: In light of the -- your statement that
25 the Plaintiffs did discourage the Commission from appointing

1 these two nominees, the -- I think its fair to say that the
2 Plaintiffs were fully aware of the basis for their challenge
3 to the qualifications at the time the list came out, fair
4 enough?
5 MR. BARTON: That's fair. Yes, Your Honor.
6 THE COURT: So, my question then becomes why -- why
7 file this after the Speaker has selected his appointment?
8 MR. BARTON: So, Your Honor, I think that there are
9 many decisions that go into whether to file this or not, and
10 how to file it, and who to challenge, and there's a lot of due
11 diligence that needs to be done when you're taking an action
12 like this. We knew that there were over three months until
13 the Commission needed to be constituted. And so this isn't
14 like the case in Adams where there was this rush to things,
15 you know, it took a long time to get in front of the
16 Commission, and there was really up against deadlines. And
17 so, you know, it was necessary to file suit as soon as you
18 had, you could.
19 In our situation we were -- we were weighing options
20 and trying to do some due diligence about which member should
21 be challenged. I mean, frankly, you know, would there be a
22 way to send something back? Are there other choices and other
23 options? What happened was without any notice to his
24 colleagues, the Speaker of the House made a selection many,
25 many months before when he had to, and that immediately

1 triggered the seven-day clock. So, at that point we had no
2 choice but to sue, and you know, within 24 hours of receiving
3 that appointment being made, in order to preserve Speaker
4 -- Representative Fernandez's ability to pick from a
5 constitutionally constituted pool.
6 So, the -- the reason -- over those nine -- the
7 reason we didn't sue immediately is because we trying to do
8 our due diligence, and do research, and figure out what was
9 the right way to move forward. I will say that of course the
10 whole -- we didn't have the whole pool until the whole pool
11 was sent over. So in other words, although we didn't know the
12 problems with these individuals, and perhaps other
13 individuals. As a part of the strategy, without going into
14 too much, you know, privileged information, as a part of the
15 strategy having the whole pool was essential too.
16 So, I think the reason why they were taking some
17 time to do due diligence was largely because we have so much
18 time until, this isn't due until January 28th. And so I think
19 that's why they -- they were taking time to make sure it was
20 done right. When they were surprised by the Speaker's choice,
21 or not the particular individual, but the fact that he had
22 made a selection, then within 24 hours they got in front of
23 the court.
24 THE COURT: Thank you. For the Defendants, if the
25 Plaintiffs have filed the verified complaint and application

1 for TRO the day before, or even an hour before the Speaker
2 made a selection, would -- would you still argue that the
3 delay was fatal?
4 MR. KANEFIELD: Your Honor, I don't believe so. I
5 mean, I think what we've outlined in our response is that
6 what's fatal to this challenge; is that the Plaintiffs waited
7 until after the pool was finalized and sent over to the
8 legislative leaders. That is clear in the constitution that
9 there's, you know, there's two parts to this process. There
10 would be the nomination process which is done by the Appellate
11 Appointments Commission through a lengthy application, due
12 diligence, interview, and ultimately selection process. And
13 the once that list is finalized that pool of nominees to use
14 the language from the constitution is sent over to the
15 leaders, and that process is done, and -- and there's no way
16 to change it.
17 And that's essentially what Plaintiffs are asking is
18 that for the Court to upend the entire process by creating new
19 pools for the different legislative leaders, and a different
20 timeline frankly because it's not clear how much time they're
21 asking for each legislative leader to have. So, yes, I think
22 the answer to your question is it would be a different
23 posture, a different claim if the suit had been brought as it
24 was in Adams case 10 years ago before the initial appointment
25 was made by the Speaker which occurred on October 22nd.

1 THE COURT: And also for Defendant, if either or
2 both of the contested nominees are not qualified, would that
3 mean that -- that the Speaker's selection is invalid?
4 MR. KANEFIELD: No, Your Honor. I think what in the
5 -- obviously our position is these candidates are qualified,
6 but that these issues were carefully vetted by the Appellate
7 Appointments Commission during the nomination process, and
8 -- and the ultimately to determine that they met the requisite
9 qualifications contained in the Arizona Constitution. If it
10 -- if it turns out that something comes to light after the
11 appointment was made of any commissioner, well then there is a
12 process for removing a commissioner that's also set forth in
13 the Arizona Constitution. It's in Section 10, sorry, of the
14 -- of provisions in the redistricting articles of the
15 constitution. It requires removal by the governor. There's
16 grounds that are stated, set forth, and then concurrent to the
17 senate. But that is the removal process that the drafters of
18 this provision, the Arizona Constitution ultimately approves
19 by the voters in 2000, it's set forth to remove someone who is
20 ultimately unqualified, or otherwise runs afoul of the removal
21 provision set forth in the constitution.
22 THE COURT: Thank you.
23 MR. LANGHOFER: Your Honor, if I may?
24 THE COURT: Yes.
25 MR. LANGHOFER: For the -- with Mr. Barton's

1 agreement we would like to put that issue to rest. The
2 Speaker's happy with his choice, and believes the pool was
3 properly constituted, even if -- even if the Court disagrees,
4 does not wish his choice to be revisited.
5 THE COURT: Thank you. For -- for the Plaintiffs,
6 in the application for the TRO you allege that the Defendants
7 sort -- short circuited the required procedure for creating
8 the pool. What -- what procedures did they short circuit?
9 What did they not do? Because it does appear to me that they
10 publicly requested applications, that they requested public
11 comment, that they held open meetings, that they assigned
12 investigations of the applicants to everybody. What is it
13 that they short circuited?
14 MR. BARTON: Your Honor, I -- I think that remark
15 has to do with changes to the rules about information that was
16 made available. I think that I -- I am -- I will admit, I'm a
17 little bit at a loss right now of -- of describing how that
18 would impact this particular proceeding as far as whether or
19 not to do the -- the restraining order. But I think that is
20 referring to rule changes that went into effect shortly
21 before, and also generally an accelerated procedure that went
22 along with the rest of the selection process. But I think we
23 will probably be able to discuss more fully as we get into the
24 trial proceedings and -- and perhaps some discovery about
25 other, what I -- what I would describe as rush processes.

1 Which put us here so far in advance, and sort of in this
2 strange position of being months and months before it needs to
3 be constituted but now on a seven-day clock.
4 THE COURT: You're -- you're not arguing that the
5 Commission and the parties are obligated or in -- in some way
6 should be waiting until the very drop dead deadline before
7 doing something, are you?
8 MR. BARTON: I'm not arguing that, Your Honor. I
9 think there is something between the drop dead deadline and
10 -- and -- and sort of taking a reasonable amount of time. All
11 that's important in this case, and what I'm asking for is
12 this, is that given that we had such an early appointment it's
13 -- it's not a problem that we filed our lawsuit, you know,
14 three months before the end of the -- the case, and that we
15 should be penalized for that, and that -- and that the fact
16 that it was so early is -- is why it's so important that we
17 have this TRO. So we have a chance to raise our claims before
18 this Court.
19 THE COURT: And I -- I think most of my other
20 questions are likely going to be addressed in the oral
21 argument because for Plaintiff many of them focus on the
22 arguments made by Defendants. So, rather than jumping ahead
23 with questions, continued questions, I may still have some at
24 the end, but Mr. Barton, this is -- this is your opportunity
25 for oral argument.

1 MR. BARTON: Thank you, Your Honor, and I suppose I
2 will actually be brief because I'm anticipate -- I'm
3 interested in hearing what -- what -- what questions that
4 -- that you have about -- about this matter. I mean, I think
5 that the hearing we have today on the temporary restraining
6 order is really governed by the fact that the balance of harm
7 tips so sharply in favor of granting the temporary restraining
8 order. There's just no harm to the State by enjoining the
9 operation of the seven-day limit. This gives us an
10 opportunity to investigate these claims that have been raised,
11 and it doesn't hurt anyone.
12 You heard, you know, there was something in the --
13 in the opposition that suggests that some problem is the rest
14 of the three other selectors have more time than the Speaker
15 did to review the candidates. I don't think that's a harm.
16 Frankly, the Speaker had all the time he wanted. He could
17 have waited, you know, as long as he wanted to. Not as long
18 as he wanted but, I mean, he could have waited much more
19 deeply into the -- the three months that remained before
20 making his selection. He made his selection, you just heard
21 Mr. Langhofer say he's happy with that selection, so he
22 evidently had enough time. So, I don't think there's any harm
23 suffered by the State as a result of us delaying this process
24 so that we can have a chance to look into the claims.
25 Given that, on how strongly the -- and as opposed to

1 Leader Fernandez, who would be required to announce, make a
2 selection from a pool that we have alleged is
3 unconstitutionally constituted. That is an irreparable harm
4 for her because after she makes her selection it becomes set
5 in stone. She can't go back and undo a selection that she's
6 already made. And so, with the balance of harm tipping so
7 strongly, our burden really then is just to show that there's
8 a serious question. And I think there is more than a serious
9 question as regards to the paid lobbyist, Mr. Loquvam, was
10 paid by his employer. They required him to register as a
11 lobbyist. He's a paid lobbyist, and he is I think just
12 plainly, and perhaps there's some discovery to go into, and
13 maybe some motion practice to get around that, but I think we
14 are very likely to succeed on that. I don't think he's
15 qualified. We've certainly raised a -- a serious question.
16 I will admit that when it comes to Mr. Wilson it is
17 a more subtle question. This issue of you being registered as
18 an Independent, but in every way behaving as a Republican
19 partisan. I -- I will admit that that's a -- a more subtle
20 question but I think it's frankly very important. And I think
21 in our constitutional history we have recognized that you
22 can't -- when you're trying to, you know, perpetrate a -- a
23 fraud of the system, if you're trying to challenge the purity
24 of the election, that is something that's not recognizable
25 before this Court.

1 And so, I think it is valuable for this Court to
2 take the time to hear depositions, let Mr. Wilson speak under
3 oath, let us have an opportunity to really look at all of the
4 work that he's done for state candidates. And to investigate
5 whether or not it's -- it's -- it's in fact true that Mr.
6 Wilson has executed an artifice or scheme to short circuit the
7 selection process, and to allow himself to appear as an
8 Independent when in fact he is a Republican partisan. And I
9 think those two members have more than presented a serious
10 question. And given the sharp balance of harms in favor of
11 granting the TRO, I think we've met our burden and we would
12 very much ask the Court to issue the TRO.
13 I will say I do want to point out that Speaker
14 Bowers made his selection in midday at about 3:00 a week ago.
15 And it is our hope, I know you said that you recognized that
16 these two are due by today, it is our -- our strong hope that
17 we can have a ruling early afternoon. Because -- and the
18 reason for that is Leader Fernandez would be concerned that if
19 she let more than 168 hours pass, more than the number of
20 hours of seven days, that her -- that her selection might be
21 challenged as forfeited. And so to the extent that we have a
22 ruling before then that, that's important to us. With that I
23 -- I -- I would be happy to take your questions on specific
24 matters.
25 THE COURT: I'm -- I'm going to save substantive

1 questions for the end of the arguments, but when we're talking
2 about the ruling I would like to get a clarification on that.
3 MR. BARTON: On the timing and the ruling?
4 THE COURT: Yes. So, you're -- you're looking or a
5 signed ruling, I understand that. I think one of my questions
6 is if the TRO is denied what does that do to the whole case?
7 MR. BARTON: If the -- if the TRO is denied then we
8 will move forward with the case because not only does the
9 speaker, I mean not only does Leader Fernandez, and Leader
10 Bradley have the constitutional right to select qualified
11 members, their qualified -- their selections have a right to
12 vote on a chair from a pool of qualified members. And so, we
13 would -- we would move forward with doing the best we can to
14 get a real pool of -- of five qualified Independents in there
15 as well. So, I think if a TRO is denied it certainly makes
16 things much more complicated because now we have -- we have
17 members making selections from a constitutionally infirmed
18 pool of candidates, and -- but it doesn't -- it doesn't in the
19 litigation for sure.
20 THE COURT: Thank you. Mr. Kanefield?
21 MR. KANEFIELD: Your Honor, thank you. I'll -- I'll
22 try to be brief. I'm going to, I hate to repeat arguments
23 we've already made in our -- in our response, but let me just
24 go through them because you may -- make sure they're questions
25 that the Court might have. Obviously we believe that the

1 Commission did a very good job of doing what it's
2 constitutionally required to do in creating this list. We
3 disagree that it constitutionally infirmed that these
4 candidates were carefully vetted to make sure that they met
5 all of the constitutional qualifications, and there's three
6 reasons obviously why we believe the TRO should be denied.
7 First, as I mentioned earlier, that the claim is
8 untimely. I told the Court that there is two parts to this
9 process, there's a nomination and an appointment process. The
10 nomination process is now complete. It was completed upon the
11 Speaker's appointment of David Neal to the Commission, and any
12 questions about qualification of people on that -- in that
13 pool of nominations would have to have been brought for that.
14 We also, on the merits, that claim fails as Mr. Barton I think
15 essentially conceded that the claim against Mr. Wilson has no
16 place in this courtroom, Your Honor. I mean, these are
17 allegations of partisan considerations that -- that -- that
18 the Plaintiffs are alleging Mr. Wilson has partisan leanings
19 Republican wise, but that in no way, shape, or form do they
20 argue that he has not otherwise met the clear qualifications
21 of the constitution.
22 Those -- those concerns are questions about any
23 partisan leanings of a candidate questionably can be taken
24 into consideration if at all by the commissioner, I suppose
25 during the vetting process of candidates, and of course, the -

1 - the Plaintiffs can take that into consideration as they
2 consider the pool of nominations. And if they believe that he
3 leans partisan -- as a partisan Republican then they obviously
4 can decline to -- to make -- to appoint him, and no injury
5 would otherwise occur. So, and also just -- just to note,
6 Your Honor, I mean, the fact that Mr. Wilson voted in a
7 Republican primary I think in -- in two to three elections,
8 and a Democratic primary in another election, says nothing to
9 the qualifications that he otherwise must possess to -- to be
10 considered for a Plaintiff to be additionally commissioned.
11 But it also, it's really a reflect of -- of our constitutional
12 system here with respect to the primary, in Arizona we have an
13 open primary.
14 If you are otherwise unaffiliated with one of the
15 registered political parties, you may choose to vote in one of
16 the party primaries. You can do that in every primary except
17 the presidential preference selection. It's a very common
18 thing to occur, it's a great thing I suppose for voters who
19 live in districts where they may be affiliated with a party
20 that is otherwise not the dominant party. Where a candidate
21 selection may -- may most likely would occur in the primary,
22 and then it gives them a say, but it doesn't necessarily say
23 anything about their partisan leanings. With respect to
24 hosting candidates in their place of business, again, nothing
25 in the constitution says anything about that, that would

1 otherwise disqualify him, and -- and to make that point one
2 more time. The Plaintiffs can take that into consideration as
3 they make their selection.
4 Mr. Loquvam is -- the allegation is that he is a
5 paid registered lobbyist because he is registered to lobby for
6 the Corporation Commission. Well, that also is a non-starter,
7 as we've outlined in our response. A paid registered lobbyist
8 is a lobbyist registered under Title 41 of Arizona Revised
9 Statutes. That means it's someone who is registered with the
10 Secretary of State to either lobby the Arizona Legislature, or
11 to lobby a state agency with respect to rule making. We know
12 how the Court -- at least the Arizona Supreme Court has
13 approached interpretation of this provision of the
14 constitution.
15 Because 10 years ago when then Speaker Adams was
16 concerned about the qualifications of certain people that were
17 -- that were put in that pool by the Commission, they had to
18 determine whether or not a couple of those applicants were
19 -- three of those applicants, nominees were public officers.
20 That comes from the same subsection of the constitution that
21 also contains paid registered lobbyists. The Court looked to
22 have that term as interpreted, applied in other sections of
23 the constitution, to come to how to (indiscernible) its
24 meaning and what the people -- what the citizens meant when
25 they put that in the constitution in 2000.

1 Here, we know in 2000 -- or actually dating back to
2 statehood, that the Arizona Constitution requires that the
3 legislature to create while governing lobbying, that's
4 contained in Article 22, Section 19 of the Arizona
5 Constitution, and they've done just that as I noted in Title
6 31. So, to the extent that -- that Mr. Loquvam is registered
7 with the Corporation Commission, and I -- I might note, Your
8 Honor, is we attached his application to our response motion.
9 He was very up front about that. He disclosed that out of an
10 abundance of caution, so that -- that -- that consideration
11 was made by the Commission on Appellate Appointments, and
12 ultimately they determined that that was not disqualifying for
13 all of the reasons that I just set forth.
14 The other -- also, not to get too deep into it
15 because I think the fact that he was not a registered lobbyist
16 with the Secretary of State in the legal question presented to
17 the Court, but there are also questions with -- that revolve
18 around whether someone is paid, obviously registered, and
19 actually lobbies, and your -- we -- we have no allegations of
20 any of the sort that -- that Mr. Loquvam has done any such
21 thing with the Arizona Legislature, or any state agency with
22 respect to rule making.
23 Finally, we obviously disagree with the Plaintiffs
24 that there's a serious question for all the reasons I've just
25 stated, but if the Court were to reach the -- the balance of

1 harms they -- they clearly favor the Defendants in this
2 situation. What the Plaintiffs are asking the Court is to
3 completely rewrite the procedure, or the constitutional
4 procedure for selecting members of the Appellate Appointments
5 Commission. The drafters of this provision were very careful
6 to outline a timeline, and very specific with respect to that
7 timeline. And also, as I noted there's a process in case
8 someone slips through that is otherwise does not meet the
9 constitutional qualifications for ultimately for removal. But
10 in this situation it would be improper for the Court to
11 rewrite the timeline, to rewrite the procedure by which the
12 pool of nominees is -- is constituted, to rewrite the timeline
13 by which the legislative leaders make their appointments. And
14 so, therefore, Your Honor, we respectfully -- respectfully
15 request that you deny the temporary restraining order.
16 THE COURT: For the -- for the Intervenors, yes?
17 MR. KORY LANGHOFER: Thank you, Your Honor. One
18 thing that's very clear in the constitution is the seven-day
19 deadline. It was approved by the people and it insures that
20 everyone has a level playing field, an amount of time that
21 everyone has to make their -- to do the research and make
22 their selections has been set forth in the constitution. We
23 should not set aside such a very clear constitutional
24 requirement based on what is at best an arguable violation
25 that wasn't brought to the Court's attention before the first

1 selection was made and the timelines were set in motion. On
2 the merits I think there's no need for me to repeat what's
3 been said in Mr. Kanefield's brief and in his arguments, so I
4 won't just focus on that. The -- the technical requirement is
5 seven days, and we shouldn't put that aside as an arguable
6 issue about Mr. Loquvam's qualifications.
7 THE COURT: Thank you. Mr. -- Mr. Kanefield, a
8 couple of questions in regards to the paid lobbyist. It -- it
9 seems to me that the phrase in the constitution served as a
10 registered paid lobbyist is -- is framed broadly, and doesn't
11 suggest that it's qualified as only being a lobbyist being
12 registered with the Secretary of State. I understand that the
13 argument is that the -- the ACC didn't have that requirement.
14 But it seems to me that the requirement to register with the
15 ACC in order to communicate with elected officials regarding
16 EPCOR; is only necessary because his intent is to influence
17 its decisions, or his intent is to communicate with the ACC in
18 connection with it decisions. And as such isn't that squarely
19 within the definition of lobbying under Arizona law?
20 MR. KANEFIELD: Respectfully, no, Your Honor.
21 Obviously these terms are not defined. You know, and I've
22 mentioned the Adams case which I think is a good case for the
23 Court to review in terms of how it goes about interpreting the
24 meaning. I told you the reason why we believe textually that
25 term applies specifically to lobbyists who are registered at

1 the Secretary of State's Office. But if you go beyond the
2 text of the constitution itself, and just look at the plain
3 meaning, lobbying is generally understood to be lobbying the
4 legislature. And if you look at the purpose of creating this
5 Redistricting Commission, they -- the drafters and ultimately
6 the voters wanted to remove this process from the legislature,
7 that's who drew these lines in statehood and put -- putting it
8 in the hands of an independent commission.
9 So, they were trying to distance those involved with
10 the redistricting process of congressional legislative maps
11 from people that might otherwise have a vested interest. Who
12 most notably were the legislators themselves. Obviously,
13 because they would want -- desire to draw districts that
14 were favorable to their own reelection, but also to those
15 involved in the process of -- of creating legislation who
16 might benefit from of how the legislature is ultimately
17 composed after the districting is complete.
18 So, that draws that nexus between lobbyists as -- as
19 the drafters set forth here in -- in Section 3 of the
20 constitutional provision at issue, and -- and -- and the
21 qualification to -- to serve. So, I think with the
22 Corporation Commission as you know, Your Honor, that -- that
23 didn't even exist at the time in 2000. My understanding, and
24 we put this in our -- in our response is -- is lobbying the
25 Corporation Commission isn't legislative in -- in the sense

1 that it is when you lobby the legislature and the -- and the
2 Corporation Commission. It's almost more of an ethical rule
3 than it is a lobbying rule. Because they really want to know
4 anybody who is communicating with the Commission for any
5 reason, and putting that out on the public record.
6 So, if you go down that road and you start -- and
7 you interpret this to mean a lobbyist can be anything, any
8 other state agency through rule making, or any political
9 subdivision does to its own ordinance creation, process, or
10 what not; then you're opening the door to precluding many
11 qualified people from serving on the -- on the Commission that
12 -- that were clearly, was not within the intent of the framers
13 who drafted this.
14 MR. LANGHOFER: Your Honor, I'll make one
15 supplemental observation there, and that is that in April of
16 2000 the statutory definition of lobbying was changed. And
17 so, that in -- in November of 2000 when the districting
18 measure was considered and approved by the voters, there was a
19 statutory definition of lobbying, and it did not include
20 context, not to the Corporation Commission. That's in the
21 brief that we have prepared to filed for you, now that
22 (indiscernible) take that over to you.
23 THE COURT: Thank you. Mr. Kanefield, just a follow
24 up question. The dissent in Adams, and I -- I understand that
25 Adams would certainly be binding on me if we were talking

1 about a judge, or a -- a tribal judge. But the dissent in
2 Adams suggested that the court was interpreting a provision
3 without regard to the actual broad language, and basically
4 said that they were now reading inconsistent with the actual
5 broad language. And that to further that objective the
6 broadest possible restrictions were placed on potentially
7 interested parties. Does that change your argument about what
8 a lobbyist is and isn't under this -- under this provision?
9 MR. KANEFIELD: No, Your Honor. But with all due
10 respect, I believe that was the Chief -- Chief Justice
11 Brutinel's dissent. I -- I think the majority got it right in
12 that -- in that Chief Justice Brutinel is actually the chair
13 of the commission that's this ground is on. But I believe
14 that -- that the majority got it right in -- in terms of how
15 it approached interpreting that provision of the constitution,
16 and respectfully disagree with the opinion, the dissenting
17 opinion of -- of now Chief Justice Brutinel.
18 THE COURT: Okay, thank you. So, that I don't
19 forget I was just handed a note. The court's website had the
20 wrong number listed, so the media was not able to hear the
21 first parts of the hearing. What we are going to do is at the
22 end of the hearing we are going to allow it to be replayed to
23 anybody who wants to listen in for what they've -- what
24 they've missed. And I apologize for that, we're -- we're
25 doing our best with some of the struggles with media, and then

1 the new -- the new way we have to do things.
2 Let me go through my notes to make sure I don't have
3 any further questions, and --
4 (Pause)
5 THE COURT: For Plaintiffs, I don't -- I don't
6 recall an argument on this but would you please address the
7 Defendant's arguments that the claims are not redressable
8 because the Court cannot alter the pool of nominees and that
9 the legislatures must make their selection from the same pool
10 of nominees as used by the Speaker. And it appears at the
11 very beginning you appeared to concede that the Speaker's
12 selection is valid and it can, he doesn't have to choose
13 again. We can recreate a pool, and then it can just simply go
14 to the -- to the next representative that selects.
15 MR. BARTON: Yes, Your Honor. So, the -- the -- the
16 situation that right is -- is -- we're faced with right
17 now is that we can either keep the time frame sort of marching
18 along as it is, and mandate that Leader Fernandez and Leader
19 Bradley choose from an unconstitutionally constituted pool,
20 that would violate the constitution; or -- or we can pause and
21 join the seven-day requirement, and then require that the
22 -- and then ultimately, that's the easy question, and then
23 ultimately require the court, the Appellate Court of
24 Appointments to send over a constitutionally proper pool. And
25 then allow the remainder to pick from that constitutionally

1 proper pool.
2 The idea that because one constitutional violation
3 has already happened, that is the Speaker has chosen -- I
4 don't know if it's a violation or not but he's chosen from a
5 constitutionally infirmed pool of candidates. That doesn't --
6 that doesn't prevent this Court from taking steps to make sure
7 that the other selections follow the constitution. And I just
8 think it's incorrect to say that the Court is powerless and
9 has to just stand by and watch this unconstitutionally
10 constitute a pool go forward because the speaker hurried up
11 and got his selection in the door.
12 I don't think that's true, and I -- and I certainly
13 think it raises a serious question for us to examine, and to
14 think about what is the appropriate constitutional remedy to
15 make sure that when the voters put this in place that the pool
16 of candidates were properly chosen, and that we would keep out
17 the people that the voters chose to keep out. So, I think
18 that's, that's sort of my two part answer there.
19 THE COURT: Thank you.
20 (Pause)
21 THE COURT: Is there anybody who would like to
22 respond to Mr. Barton's explanation to me on my questions?
23 No?
24 MR. LANGHOFER: No, Your Honor, just because we're
25 still satisfied with his selection.

1 (Pause)
2 THE COURT: Mr. Barton, this is your motion, so I'm
3 going to give you the last word.
4 MR. BARTON: Your Honor, I think we've explored the
5 issues well today. I think it's obvious that the seven day --
6 in joining the seven day is an easy choice. The balance of
7 harms tips so strongly towards granting the temporary
8 restraining order, and I think we definitely raised serious
9 questions. So I would hope that you would grant the temporary
10 restraining order.
11 THE COURT: Thank you. And I do understand that
12 time is of the essence. I will get my ruling out as soon as
13 possible. In any event, I -- I will commit to you that it
14 will be very early this afternoon. It will be a signed
15 ruling. I will instruct my -- my office to email the three of
16 you a copy of that ruling so that your -- that you have the
17 earlier opportunity to receive that. We will get it filed and
18 obviously released as appropriate.
19 Regardless of the ruling, I will anticipate setting
20 a status conference probably within the next 10 days on the
21 case to see how it's going to go forward. I am inclined to
22 think that all of you may be busy the first part of next week,
23 so we'd want to push it to the week after the election before
24 a status conference. And I don't think that would have any
25 impact on -- on any of the issues that in front of me

1 dependent upon my ruling.
2 Thank you very much, Counsel. I do want to -- I do
3 want to thank you very much for all the hard work on these
4 -- on these pleadings. They were very thorough, very
5 instructive, and I do understand the time crunches that you
6 were all under, so they are very much appreciated. And with
7 that we are adjourned.
8 (Proceedings concluded at 11:14:37 a.m.)
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1 C E R T I F I C A T E

2 I, KIMBERLY C. McCRIGHT, CET, certified electronic
3 transcriber, do hereby certify that the foregoing pages 1
4 through 31 constitute a full, true, and accurate transcript
5 from electronic recording of the proceedings had in the
6 foregoing matter.

7 DATED this 20th day of November, 2020.

8

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10 /s/ Kimberly C. McCright
Kimberly C. McCright, CET
11 Certified Electronic Transcriber

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