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Secretary of State
State of Arizona

January 5, 2016

VIA EMAIL

Governor's Regulatory Review Council
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Governor's Regulatory Review Council
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Re: Request to Return the Citizen Clean Elections Commission 5-Year Report, Declare Rules R2-20-109(F) & (G) Materially Flawed, and Order the Commission to Repeal the Offending Rules

Dear Council Members,

The Council's mission is to determine "whether a rule is clear, concise, understandable, legal, consistent with legislative intent, within the agency's statutory authority, and whether the benefits of a rule outweigh the cost." *See* https://grrc.az.gov. If a rule does not meet these criteria, the Council must send it back to the agency in question. *See id.* Such is the case here.

The Citizens Clean Elections Commission is intended to function as a PayPal service: it generates funding from court surcharges and other government revenues, and distributes that money to statewide and legislative candidates ("participating candidates") that opt to run their campaigns with public funding. And like any responsible escrow service, the Clean Elections Commission must set basic conditions under which the public money may be drawn down. Hence, the Clean Elections Commission is authorized to "adopt rules to implement [its] reporting requirements," "enforce [the] article" comprising the Citizens Clean Elections Act,[1] "ensure that money from the fund is . . . spent as specified in [the] article," and otherwise "adopt rules to carry out the purposes of [the] article." A.R.S. §§ 16-956(A)(6)-(7), (C). But nowhere in the Citizens Clean Elections Act is the charge to act an all-encompassing campaign finance super-regulator—especially in a way that conflicts with the Secretary of State's authority. Yet this is

[1] Arizona campaign finance statutes are found in Title 16, Chapter 6. Article 1, A.R.S. §§ 16-901 – 925, which are comprised of traditional campaign finance statutes that privately-financed candidates are exclusively governed by. Article 2 is comprised of the Citizens Clean Elections Act, A.R.S. §§ 16-940 – 961, which was added to Chapter 6 in 1998.

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what the Clean Elections Commission has morphed into in recent years. No longer content with regulating just "participating candidates," it increasingly seeks to regulate all of Arizona campaign finance in ways that were never imaged by voters who passed the Citizens Clean Elections Act in 1998. This has real consequences for privately-financed candidates, political committee and business groups that play in only privately-financed races, and any other person seeking to exercise his or her First Amendment rights without fear of government sanction.

The Clean Elections Commission is no doubt well-intentioned, but has been operating as if immune from oversight during this period of regulatory mission creep. Its enabling statutes are insulated from amendment due to the Voter Protection Act, while its regulations are exempt the rule-making protections of the Administrative Procedure Act. *See* Ariz. Const. Art. 4, Pt. 1 § 1(6); A.R.S. § 16-956(C). Unfortunately this unique legal posture has bred insularity. But no person, board, commission or agency is completely beyond oversight.

Of course, the Secretary of State's office has repeatedly urged the Clean Elections Commission to amend, repeal or refrain from adopting various rules that go beyond the Commission's authority—to no avail. Accordingly, this Council stands as the final check against the Clean Election Commission's regulatory overreach. Indeed, this is why the Council was created in the first place.

As discussed further below, the offending regulations have been superimposed into two particular rules in R2-20-109(F) & (G). This represents a small minority of Clean Elections Commission regulations, but has wide-ranging consequences if not put in check. **Accordingly, the Secretary of State's office requests that the Council: (1) return the Clean Elections Commission 5-year report with respect to Rules R2-20-109(F) & (G) pursuant to A.R.S. § 41-1056(C); (2) declare Rules R2-20-109(F) & (G) materially flawed pursuant to A.R.S. § 41-1056(E); and (3) require the Clean Elections Commission to repeal the offending regulations on or after July 2016 pursuant to A.R.S. § 41-1056(E).**

The Council Has Jurisdiction Over The Clean Elections Commission

As a preliminary matter, there is nothing unique about the Clean Elections Commission that would exempt it from the 5-year review process, or the Council's resulting powers from that review process. The relevant statute requires that "each agency" shall review all of its rules every five years. *See* A.R.S. § 41-1056(A) (emphasis added); *see also* A.R.S. § 41-1001(1) (an "agency" means any "commission" or other administrative unit of this state). This review requirement expressly "includ[es] rules made pursuant to an exemption," such as those promulgated by the Clean Elections Commission. *See* A.R.S. § 16-956(C).

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Additionally, the Council should be confident that the Clean Elections Commission's traditional defenses do not apply here. On one hand, the Voter Protection Act merely precludes the Legislature from repealing or amending the Citizens Clean Elections Act. *See* Ariz. Const. Art. 4, Pt. 1 § 1(6)(B)-(C). The VPA has no applicability to the Council, nor does it preclude the Council from performing its statutory obligations. On the other hand, nothing in the Citizens Clean Elections Act insulates the Commission from all regulatory oversight. The Citizens Clean Elections Act merely provides that "Commission rule making is exempt from title 41, chapter 6, article 3," which governs the APA process by which rules are promulgated. A.R.S. § 16-956(C) (emphasis added). However, the Council's review powers are derived from Article 5, and therefore not diminished by any exemption found in the Citizens Clean Elections Act. *See* A.R.S. § 41-1056.

Accordingly, there is nothing unique about the Clean Elections Commission that would insulate it from the Council's oversight responsibility.

Several Provisions in Rule R2-20-109(F) & (G) Are Invalid.

1. R2-20-109(F)(2)

Rule R2-20-109(F)(2) is invalid because it improperly piggy-backs off A.R.S. § 16-917(A).

The underlying statute, A.R.S. § 16-917(A), provides: "A [person] that makes independent expenditures for literature or an advertisement relating to any one candidate . . . shall send by certified mail a copy of the campaign literature or advertisement to each candidate named . . . twenty-four hours after depositing it at the post office for mailing, twenty-four hours after submitting it to a telecommunications system for broadcast or twenty-four hours after submitting it to a newspaper for printing."[2]

The Clean Elections Commission regulation states that "Any person required to comply with A.R.S. § 16-917 shall [also] provide a copy of the literature or advertisement to the

[2] An "independent expenditure" is a communication that expressly advocates the election or defeat of a clearly identified candidate and is not made in coordination with any candidate. *See* A.R.S. § 16-901(15). Independent expenditures play an increasingly important role in campaigns after the United States Supreme Court, in 2010, held that corporations and labor unions could lawfully conduct such expenditures. *Citizens United vs. FEC*. The impact of this decision, among other advances in campaign financing, has marginalized the Clean Elections Commission and thus created the temptation for the Commission to create a new mission through aggressive enforcement.

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Commission at the same time." R2-20-109(F)(2). Additionally, the Clean Elections Commission has defined "literature and advertisement" to include "electronic communications, including emails and social media messages or posting, sent to more than 1,000 people." *Id.* This regulation is void on several grounds.

First, the Clean Elections Commission is not authorized to adopt rules to implement statutes found in Article 1, which is outside the Citizens Cleans Elections Act. **The Clean Elections Commission may only "[e]nforce this article" and "adopt rules to carry out the purposes of this article" which means the Citizens Clean Elections Act in Article 2.** *See* A.R.S. §§ 16-956(A)(7), (C) (emphasis added). Since A.R.S. § 16-917 is found in Article 1, the Clean Elections Commission has no authority to enact rules under that statute.

Second, the underlying statute in A.R.S. § 16-917 is limited to "literature or advertisements" that are distributed through non-electronic means. A person must provide a copy only after "depositing it at the post office for mailing," "submitting it to a telecommunications system for broadcast," or "submitting it to a newspaper for printing." A.R.S. § 16-917(A). Yet the Clean Elections Commission has stretched the statute beyond its plain meaning, not to mention created confusion in the regulated community, by adding emails and "social media messages" to the notification requirement.[3] Had the Legislature intended to include electronic communications within the statute's purview, it would have said so.

Finally, and perhaps most alarming, the Clean Elections Commission enacted subsection (F)(2) after A.R.S. § 16-917(A) had been struck down on constitutional grounds by the 9th Circuit in 2003.[4] The Secretary of State's office has repeatedly communicated to the regulated

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[3] This "social media" component is so draconian, for example, that it would require a person to submit each Facebook posting or Twitter message to the Clean Elections Commission within 24 hours, based merely on the fact that a person has at least 1,000 followers on social media.

[4] *See Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. 2003) ("In the absence of any evidence to suggest that PACs are more likely to distort facts or confuse voters than are the candidates themselves or that PAC speech warrants special treatment, the state has not met its burden of demonstrating that § 16–917(A) will 'maximize voter education' or prevent confusion."); *Id.* at 1011-12 ("[T]he fit between § 16-917(A) and the statute's purpose is poor at best. First, the state fails to meet its objective of providing candidates notice. By not requiring actual notice but instead requiring only that the communication be sent to the candidate via certified mail . . . [thereby] restricting PACs from providing notice via the most expeditious available, § 16-917(A) places a greater burden on speech than is necessary to simply provide notice to candidates."); *Id.* at 1012-13 ("[T]he statute is also under-inclusive in that it fails to reach many kinds of negative campaigning that would relate to the purported legislative

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community that A.R.S. § 16-917 is unenforceable, yet subsection (F)(2) remains a trap for the wary.

Accordingly, for the reasons outlined above, Rule R2-20-109(F)(2) is void in its entirety.

2. R2-20-109(F)(3)

Rule R2-20-109(F)(3) is partially invalid because it unlawfully expands the Clean Elections Commission's jurisdiction over persons that make independent expenditures exclusively in privately-financed races.[5] The Clean Elections Commission has no business playing regulator where no "participating candidate" is involved.

(a) *Aberrant Reference to A.R.S. § 16-913*

Under long-existing authority, A.R.S. §§ 16-941(D) and 16-958 in the Citizens Clean Elections Act required any person that conducted an independent expenditure to file certain reports with the Secretary of State. However, those reports were essentially limited to identifying the candidate supported/opposed and the amount of the expenditure. And, as originally passed, Rule R2-20-109(F)(3) merely verbatim implemented this statutory reporting requirement.

The goal of these reporting provisions was to provide the Clean Elections Commission information in order to potentially provide "matching funds" to participating candidates. For example, if an outside group spent $100,000 to attack a "participating candidate," the Clean Elections Commission used the independent expenditure report as a basis provide that candidate with "matching funds" in order to level the playing field. This matching funds provision was struck down by the United States Supreme Court in 2011, so there is no continuing rationale for

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purpose. [Thus,] [b]y differentiating between PACs and individuals or candidates, the notice requirement fails to 'fit' its purpose of limiting negative campaigning and unnecessarily restrains the right of association protected by the First Amendment."). The specific deficiencies identified in *Bayless* have not been cured by subsequent amendments to the statute. Moreover, a recent Supreme Court decision casts further doubt on the statute's constitutionality. *See Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S.Ct. 2806, 2811 (2011) ("This Court has repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech[.]").

[5] A "participating candidate" is one that accepts money from the Citizens Clean Elections Fund to run his or her campaign for legislative or statewide office. *See* A.R.S. § 16-961(C)(1).

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the independent expenditure reports. *See Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S.Ct. 2806, 2811 (2011).

In 2013, with the number of "participating candidates" plummeting and the Clean Elections Commission suddenly adrift without a mission, the Commission amended subsection (F)(3) to provide that "Any person making an independent expenditure on behalf of a candidate and not timely filing a campaign finance report as required by A.R.S. § 16-941(D), A.R.S. § 16-958, **or A.R.S. § 16-913** shall be subject to a civil penalty." (emphasis added). The addition substantively changes subsection (F)(3) because A.R.S. § 16-913—which is found in Article 1, and is not part of the Citizens Clean Elections Act—requires political committees to file comprehensive campaign finance reports, including the identity, address, occupation and employer of every donor. In other words, although the Citizens Clean Elections Act does not contain any provision that would require donor disclosure, the Clean Elections Commission borrowed this authority from Article 1 and created jurisdiction over campaign finance reports for the first time.

The Clean Elections Commission justifies this power grab under A.R.S. § 16-942(B), which allegedly imbues the Commission with authority to issue penalties for violating "any reporting requirement imposed by this chapter"— which would include Article 1 statutes as well.[6] (emphasis added). However, even if the Clean Elections Commission could enforce some campaign finance reporting requirements under A.R.S. § 16-913 (it cannot for the reasons discussed below), it certainly cannot do so when it comes to races involving privately-financed candidates.

First, A.R.S. § 16-942(B) makes that clear when it provides that "the candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection." *Id.* (emphasis added). Only "participating candidates" have

[6] The statute is terribly confusing: "In addition to any other penalties imposed by law, the civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. The candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection." A.R.S. § 16-942(B). Unfortunately, the statute is voter-protected, and therefore not easily subject to amendment for clarification purposes.

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"campaign accounts," since that term is specific to the Citizens Clean Elections Act. *See* A.R.S. § 16-946(B)(5) (contributions must be deposited "in the candidate's campaign committee's account"); A.R.S. § 16-948 (titled "Controls on participating candidates' campaign accounts"); A.R.S. § 16-951 (governing payments to "the campaign account of each candidate"); A.R.S. § 16-952 (requiring additional payments "to the campaign account of a participating candidate"); A.R.S. § 16-953 (governing return of monies from "the candidate's campaign account"); A.R.S. § 16-958(C) (cash and checks must be deposited into "the candidate's campaign account"). Nowhere in Article 1 do the traditional campaign finance statutes reference "campaign accounts."

Further evidence is the fact that A.R.S. § 16-942(B) references the "adjusted primary or general election spending limit," which again only applies to participating candidates. *See* A.R.S. § 16-941 (imposing expenditure controls with respect to the "adjusted . . . election spending limit"); A.R.S. § 16-945(A)(2) (ceiling on expenditures exceeding the "election spending limit"); A.R.S. § 16-951 (providing funding up to the "election spending limit"); A.R.S. § 16-952 (providing for increases to the "election spending limit"); A.R.S. § 16-959 (inflationary adjustments to the "election spending limit"); A.R.S. § 16-961(G)-(I) (defining the various "election spending limits"). Again, no comparable provision appears in Article 1.

Moreover, the statute read as a whole provides further evidence that the independent expenditure must involve a "participating candidate." *See* A.R.S. § 16-942(A) (referencing "by or on behalf of a participating candidate"); § 16-942(C) (referencing the "adjusted primary election spending limit and adjusted general election spending limit"); § 16-942(D) (referencing "any participating candidate"). **Thus, since the Clean Elections Commission has no jurisdiction over independent expenditures that do not involve a "participating candidate," it cannot force a person that makes such expenditures to file campaign finance reports under A.R.S. § 16-913.**

Second, the Clean Elections Commission cannot use A.R.S. § 16-942(B) to enforce A.R.S. § 16-913 because these two statutory provisions fundamentally conflict. A.R.S. § 16-942(B) contemplates penalties of "one hundred dollars per day for candidates for the legislature and three hundred dollars per day for statewide office," however A.R.S. § 16-913(J) provides that "a political committee and the candidate . . . who violated this section are subject to the penalty prescribed in section 16-918." That statute provides a penalty of "ten dollars per business day" . . . "up to a maximum of four hundred fifty dollars." A.R.S. § 16-918(B). **Since the penalties fundamentally conflict under Articles 1 and 2, the Clean Elections**

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Commission cannot logically enforce the reporting requirements in A.R.S. § 16-913 by imposing penalties under A.R.S. § 16-942(B).

Finally, even if the Clean Elections Commission has authority to regulate campaign finance reports under A.R.S. § 16-913, this provision should be stricken as duplicative of existing legal requirements. **The Secretary of State already regulates campaign finance reports and therefore any conflicting requirement in R2-20-109(F)(3) will only create the risk of conflicting or duplicative enforcement.**

(b) *Explicit References to "Non-Participating Candidates"*

The subtle jurisdictional grab over independent expenditures involving privately-financed candidates was followed by a more explicit attempt when Rule R2-20-109(F)(3) was amended again in 2015. The rule now reads in pertinent part:

> Any person making an independent expenditure on behalf of a candidate, participating or non-participating, and not timely filing a campaign finance report as required by A.R.S. § 16-941(D), A.R.S. § 16-958, or A.R.S. § 16-913 shall be subject to a civil penalty as described in A.R.S. § 16-942(B). An expenditure advocating against one or more candidates shall be considered an expenditure on behalf of any opposing candidate or candidates. This subsection and A.R.S. § 16-942(B) applies to any political committee that accepts contributions or makes expenditures on behalf of any candidate, participating or nonparticipating, regardless of any other contributions taken or expenditures made.

See Exhibit 1 to 5-year Report, pgs. 1-2 (emphasis added).

For the reasons discussed above, however, A.R.S. § 16-942 cannot be stretched to include authority over independent expenditures that have no connection to "participating candidates." Any references to "non-participating" therefore should be stricken from the Rule, just as it read prior to October 2015.

* * *

In summary, taking into account all of the foregoing deficiencies, Rule R2-20-109(F)(3) should be revised as follows in order to conform with Arizona law:

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Any person making an independent expenditure on behalf of a PARTICIPATING candidate~~, participating or non-participating,~~ and not timely filing a campaign finance report as required by A.R.S. § 16-941(D)~~,~~ AND A.R.S. § 16-958~~, or A.R.S. § 16-913~~ shall be subject to a civil penalty as described in A.R.S. § 16-942(B). An expenditure advocating against one or more candidates shall be considered an expenditure on behalf of any opposing candidate or candidates. This subsection and A.R.S. § 16-942(B) applies to any political committee that accepts contributions or makes expenditures on behalf of any PARTICIPATING candidate, ~~participating or nonparticipating,~~ regardless of any other contributions taken or expenditures made. Penalties imposed pursuant to this subsection shall not exceed twice the amount of expenditures not reported. Penalties shall be assessed as follows:

a. For an election involving a candidate for statewide office, the civil penalty shall be $300 per day.

b. For an election involving a legislative candidate, the civil penalty shall be $100 per day.

c. The penalties in (a) and (b) shall be doubled if the amount not reported for a particular election cycle exceeds ten (10%) percent of the applicable one of the adjusted primary election spending limit or adjusted general election spending limit.

d. The dollar amounts in items (a) and (b), and the spending limits in item (c) are subject to adjustment of A.R.S. § 16-959.

3. R2-20-109(F)(4)-(11)

This series of rules, promulgated in 2014, represent yet another unwarranted extension of jurisdiction over entities that conduct independent expenditures, regardless of whether a "participating candidate" race is involved. The rules are sold as a safe harbor for corporations and labor unions who allegedly seek refuge from the independent expenditure reporting requirements under A.R.S. § 16-914.02, but really they are designed to entice (bully) those entities into preemptively submitting to the Clean Elections Commission's jurisdiction. **Since the Clean Elections Commission has no jurisdiction in the first place to enforce A.R.S. § 16-914.02, the rules are void and should be stricken in their entirety.**

This is another case of the Clean Elections Commission seeking to enforce an Article 1 campaign finance statute. In 2010, in the wake of the United States Supreme Court's decision in *Citizens United*, the Legislature enacted A.R.S. § 16-914.02. This statute was intended to ensure

that corporations—newly empowered to conduct independent expenditures in the wake of *Citizens United*—were at least required to notify the Secretary of State of the expenditure, the amount spent, the candidate supported/opposed, the communication medium utilized, and the date of expenditure. *See* A.R.S. § 16-914.02(D).[7]

The new law closely paralleled—indeed, exceeded in scope—an existing Clean Elections Commission reporting statute with respect to independent expenditures. A.R.S. § 16-941(D) provides that "any person who makes independent expenditures relating to a particular office . . . shall file reports with the secretary of state . . . identifying the office and the candidate or group of candidates whose election or defeat is being advocated." (emphasis added). In other words, both statutes required reports to be filed with the Secretary of State's office, except in recently passing A.R.S. § 16-914.02 the Legislature required more information be reported than A.R.S. § 16-941(D) ever required.

In view of this, the Clean Elections Commission could have deemed any A.R.S. § 16-914.02 report as compliant with A.R.S. § 16-941(D), especially since A.R.S. § 16-941(D) was a vestige of the era when matching funds were (unconstitutionally) dispensed. Yet the Clean Elections Commission pounced on A.R.S. § 16-914.02's passage and initiated a rulemaking—one intended to seize jurisdiction under the guise of creating a safe harbor. The rule essentially provides:

- Any corporation/union that intends to comply with A.R.S. § 16-914.02 may seek an exemption from the Clean Elections Commission from reporting under A.R.S. § 16-941(D). R2-20-109(F)(4).
    - Any corporation/union not granted an exemption must file a separate (duplicative) report according to A.R.S. § 16-941(D) (even though the same information had already been filed pursuant to A.R.S. § 16-914.02). R2-20-109(F)(6).
- In addition to the notarized corporate/union executive authorization already required under A.R.S. § 16-914.02, the corporation/union must file an additional notarized authorization with the Clean Elections Commission promising to fully comply with A.R.S. § 16-914.02. R2-20-109(F)(5).

[7] As a condition of conducting independent expenditures, the statute also required a notarized statement from a corporate/union executive affirming that the expenditure was authorized by the corporation/union. A.R.S. §§ 16-914.02(B), (E).

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- The Clean Elections Commission executive director is the sole decision-maker whether an exemption is granted. R2-20-109(F)(7).
- For any corporation/union granted the exemption, "All Commission rules and statutes related to enforcement apply to exempt entities" and "The Commission may audit these entities." R2-20-109(F)(8).
- Any person may file a complaint with the Clean Elections Commission alleging that any exempt corporation/union violated the terms of the exemption, including an alleged violation of A.R.S. § 16-914.02(K). Subsection K, in turn, provides that a corporation/union may be transformed into a PAC—and therefore must disclose the identities of all its donors and contributors—if its primary purpose is deemed to be influencing an election. R2-20-109(F)(9).[8]

The effect of these provisions is far-reaching. First, the Clean Elections Commission furtively brought a host of corporations and unions within its jurisdiction by dangling both the "carrot" of exemption and the "stick" of civil penalties. Most rational and risk-averse actors—concerned about the target that would be placed on their backs if they refused the Clean Elections Commission's offer of "protection"—would apply for the exemption and keep their fingers crossed. But entities that do not spend in "participating candidate" races should have no reason to expect Clean Elections Commission involvement in their affairs in the first place.

Second, the new rule made corporations and unions dependent upon the executive director's discretion, giving him a direct role (free of any Clean Elections Commission vote in open session) in determining which corporations are "legitimate" or not. Although the director's decision is an appealable agency action, vesting power in one individual to determine whether a prospective corporation will faithfully comply with A.R.S. § 16-914.02 and "all Commission rules" sets a dangerous precedent.

Third, corporations and unions paid the heavy price of being subjected to "all Commission rules," including rules that otherwise would have never have ensnared such entities. For example, Rule R2-20-211 provides that the "Executive Director . . . [may] issue subpoenas requiring the attendance and testimony of any person by deposition and to issue subpoenas duces tecum for the production of documentary or other tangible evidence." Such a subpoena could be issued "[o]n the basis of information ascertained by the Commission in the normal course of carrying out its statutory responsibilities," even if no one had filed a complaint against the

[8] Rule R2-20-109(F)(10)-(11) contain additional provisions related to the exemption, but are not at issue here.

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corporation or union. R2-20-207. Thus, in many ways, these corporations and unions became subject to regulation akin to what "participating candidates" would expect.

Fourth, the rule subjected corporations and unions to free-ranging audits, which would allow the Clean Elections Commission to demand that any exempt entity open its books akin to an IRS audit. In fact, the audit authority was strengthened in October 2015. R2-20-109(F)(8), as originally promulgated, allowed the Clean Elections Commission to "audit any exempt entity pursuant to Article 4 of these rules." Article 4, in turn, outlines the prophylactic procedures employed when auditing "participating candidates'" accounts. But the rule was recently amended to simply state: "The Commission may audit these entities," which means the Clean Elections Commission is no longer bound by Article 4, and therefore may conduct the audit in any manner it sees fit. This represents an awesome power to wield over corporations and unions, simply because those entities exercise their First Amendment rights to engage in political speech.

Finally, and perhaps most dangerous, the rule created an incentive for "any person" to file a complaint alleging that a corporation should be treated as a PAC. (Of course, the executive director qualifies as "any person" and therefore he need not hesitate to self-initiate a complaint.) And it will be tempting to do so. The leading edge in campaign finance wars of late is whether or not certain corporations are "primarily" devoted to electoral purposes. This is the fulcrum of the so-called "dark money" debate. The 2010 statute, A.R.S. § 16-914.02(K), states that a corporation (and theoretically a union) can be transformed into a PAC if it meets the "primary purpose" criteria. But this determination lies exclusively within the Secretary of State's jurisdiction. By elbowing its way into A.R.S. § 16-914.02(K) determinations, therefore, the Clean Elections Commissions gave itself the authority to order an entity to register as a PAC and subject that PAC to all the reporting requirements incident to PAC status. In other words, the Clean Elections Commission could force a tax exempt social welfare organization or trade association to publicly disclose its donors through those PAC campaign finance reports. This represents a remarkable power that no voter, in enacting the Citizens Clean Elections Act in 1998, could have foreseen the Clean Elections Commission possessing.

In summary, the Clean Elections Commission took advantage of the Legislature's fortuitous passage of A.R.S. § 16-914.02 in 2010 to further expand its own jurisdiction—all under the guise of a "safe harbor" exemption. For the reasons stated above with respect to A.R.S. §§ 16-913 and 16-917, **the Clean Elections Commission has no authority to enact regulations to supplant Article 1 statutes that fall outside the Citizens Cleans Elections Act. The Act only authorizes the Clean Elections Commission to "enforce this article" and "adopt rules to carry out the purposes of this article," meaning Title 16, Chapter 6, Article**

2. *See* A.R.S. §§ 16-956(A)(7) & (C). Accordingly, the entirety of Rules R2-20-109(F)(4)-(11) are void.

Moreover, the Council is authorized to scrutinize rules that are duplicative, not in accordance with legislative intent, and whose costs outweigh the benefits. The Legislature expressly charged the Secretary of State with enforcing the statute. *See* A.R.S. § 16-914.02(J) (reasonable cause determinations are only made by the Secretary of State). Since there is no justification for the Clean Elections Commission to create a parallel enforcement regime—especially one that will no doubt conflict with the Secretary of State's jurisdiction—Rules R2-20-109(F)(4)-(11) must be stricken.

4. R2-109(F)(12)

The tip of the regulatory iceberg came in October 2015, when the Clean Elections Commission promulgated its version of a "dark money" regulation. The Secretary of State's office, alongside the business community, vociferously opposed the regulation.

In essence, Rule R2-20-109(F)(12) creates a bizarre formula under which "an entity" will be found to be a political committee under Arizona law. The Clean Elections Commission allegedly needed this rule because the Legislature passed H.B. 2649 in April 2015, which inserted a "primary purpose" test in A.R.S. § 16-901(20)(f) (the definition of a "political committee") that essentially mirrored the existing corporate/union primary purpose test in A.R.S. § 16-914.02(K). The Clean Elections Commission's executive director testified against H.B. 2649 and was ultimately rebuffed. But only one month after the Governor signed the bill, the Clean Elections Commission initiated a rulemaking to preemptively define what it believed the "primary purpose" test should entail, even though the Secretary of State's office retained exclusive jurisdiction to make political committee determinations.

In reality, Rule R2-20-109(F)(12) was just the latest iteration of the Clean Elections Commission's effort to muscle its way into the Secretary of State's jurisdiction. It was the final step needed to complete the regulatory agenda in place since 2013:

- 2013: the Clean Elections Commission passes R2-20-109(F)(3) and assumes authority over A.R.S. § 16-913, which requires campaign finance reports to be filed with the Secretary of State.
- 2014: the Clean Elections Commission passes R2-20-109(F)(5) & (9) and assumes authority over A.R.S. § 16-914.02, which requires corporations and unions to file notifications and potentially register as a PAC with the Secretary of State.

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- 2015: the Clean Elections Commission passes R2-20-109(F)(12) and assumes authority over A.R.S. § 16-901(20)(f), which is the gateway decision in all of campaign finance: under what circumstances will someone be forced to register as a political committee?

In other words, with this final puzzle piece in place, the Clean Elections Commission has everything it needs to create a completely parallel system of campaign finance enforcement in Arizona, irrespective of whether a "participating candidate" is involved. And this parallel system will have two effects: in some cases the Clean Elections Commission will issue duplicative penalties for conduct already sanctioned by the Secretary of State's office, and in other cases the Commission will contradict the Secretary of State's office when the two bodies reach conflicting decisions. Either way, those seeking to exercise their First Amendment rights will now have to live under two regulatory regimes.

Rule R2-20-109(F)(12) is invalid for the same reasons that Rules R2-20-109(F)(1) & (3)-(11) are: the Clean Elections Commission may only "enforce this article" and "adopt rules to carry out the purposes of this article," meaning Title 16, Chapter 6, Article 2. *See* A.R.S. §§ 16-956(A)(7) & (C). Thus, the Clean Elections Commission has no jurisdiction to opine under what circumstances one becomes a "political committee."

This is implicit in the Citizens Cleans Elections Act itself. Under A.R.S. § 16-947(A), which describes the very first steps of the public funding process, a prospective candidate must "file an application with the secretary of state." This application is generated through the Secretary of State's web filing system, which requires that a candidate form a campaign committee and file a statement of organization with the Secretary of State's office as a condition precedent. Indeed, the Clean Elections Commission's campaign finance handbook states that, as a prerequisite for public funding, "the statement of organization must be filed with the Secretary of State's office." *See* "Elections from A to Z, for AZ", pg. 1, *available at* http://www.azcleanelections.gov/docs/default-source/publications/candidate-guide-2016.pdf?sfvrsn=0. In other words, the Citizens Clean Elections Act assumes that any entity required to establish a political committee has already done so before any Cleans Elections Commission statutes or regulations come into play. The Act is otherwise silent on the Clean Elections Commission's authority to itself determine who should be considered a political committee. **Without express statutory authorization, the Clean Elections Commission cannot create this "political committee" authority out of thin air.**

Finally, in addition to be stricken as duplicative, contrary to Legislative intent, and on the basis that costs outweigh the benefits, Rule R2-20-109(F)(12) fails because the Cleans Elections Commission failed to procedurally follow its own statute in providing public comment. A.R.S. § 16-956(C) requires the Clean Elections Commission to "adopt rules in

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public meetings . . . with at least sixty days allowed for interest parties to comment." The Clean Elections Commission was set to adopt R2-20-109(F)(12) on October 29, 2015 following a 60-day comment period, but due to extreme confusion over the rule's verbiage, the commissioners amended the rule on the fly during the public meeting. The Clean Elections Commission posted the amended rule the same day, and then held a telephonic meeting the following day on Friday, October 30, 2015 to pass the final rule.

The Clean Elections Commission argued that the 60-day comment period had not been re-triggered because the changes were "technical," but A.R.S. § 16-956(C) contains no such exception. Indeed, the 60-day provision would be rendered meaningless if the Clean Elections Commission could decide for itself what amendments did and did not trigger the comment period. **Since the Clean Elections Commission failed to follow its own enabling statute in enacting R2-20-109(F)(12) without the requisite 60-day comment period under A.R.S. § 16-956(C), the rule must be stricken.**

5. R2-20-109(G).

R2-20-109(G) purports to allow the Clean Elections Commission to enforce campaign contribution limits applicable to privately-financed candidates. But even though the enabling statute in A.R.S. § 16-941(B) references privately-funded ("non-participating") candidates, it makes clear that the Secretary of State retains enforcement authority. A.R.S. § 16-941(B) provides that "a non-participating candidate shall not accept [excessive] contributions . . . [and] [a]ny violation of this subsection shall be subject to the civil penalties and procedures set forth in section 16-905, subsections J through M and section 16-924." (emphasis added). Importantly, A.R.S. § 16-905 outlines the Secretary's enforcement process.

Under subsection (J), the penalty for any violation of contribution limits "is subject to a civil penalty imposed as prescribed in section 16-924," the Secretary of State's exclusive enforcement statute. Alternatively, under subsection (K), "[a]ny qualified elector may file a sworn complaint with the attorney general" in order to enforce contribution limits. If neither the Secretary of State nor the Attorney General move quick enough, an individual may file a civil lawsuit pursuant to subjection (L). Nowhere in this process does the Clean Elections Commission play a role. Indeed, § 16-941(B)'s express incorporation of § 16-924 makes clear that the Secretary of State handles all enforcement matters against non-participating candidates. **Since the Secretary of State retains exclusive authority to enforce contribution limits, R2-20-109(G) should be stricken in its entirety.**

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Conclusion

The Commission lacks jurisdiction to regulate any campaign finance matter governed under Article 1. That includes regulation of non-participating candidates, political committees, or any corporations and unions that are subject to the Secretary of State's exclusive jurisdiction. This renders the most of Rule R2-20-109(F) & (G) invalid as a matter of law. *See Stearns v. Ariz. Dept. of Revenue*, 212 Ariz. 333, 336 (App. 2006) (agencies may exercise only those powers delegated by their enabling statute); *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 530 (1994) ("An administrative agency . . . must exercise its rule-making authority within the parameters of its statutory grant; to do otherwise is to usurp its legislative authority.").

"[I]f the construction given by the agency is not consistent with the enabling legislation, the interpretation—whether expressed in regulation, policy, or otherwise—is invalid." *Sharpe v. Arizona Health Care Cost Containment System*, 220 Ariz. 488, 494 (App. 2009); *see also R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 371 (1997) (striking agency rules that were not consistent with enabling legislation).

This is why the Council was created: to act as a check against regulatory overreach. And the Clean Elections Commission has unfortunately become an agency that must be held in check. **Accordingly, the Secretary of State's office requests that the Council: (1) return the Clean Elections Commission 5-year report with respect to Rules R2-20-109(F) & (G); (2) declare Rules R2-20-109(F) & (G) materially flawed; and (3) require the Clean Elections Commission to repeal the offending regulations on or after July 2016 pursuant to A.R.S. § 41-1056(E).**

Very truly yours,
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Attachments