**SUPREME COURT OF ARIZONA**

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| STATE OF ARIZONA *ex rel.* MARK BRNOVICH, Attorney General,<br><br>Petitioner,<br><br>v.<br><br>SUSAN BITTER SMITH,<br><br>Respondent. | Case No.: CV-15-0356-SA |

**REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION**

**-AND-**

**CONDITIONAL MOTION TO WITHDRAW PETITION**

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## INTRODUCTION

The State of Arizona *ex rel.* Mark Brnovich, Attorney General, hereby replies in support of the Petition for Special Action. Given Ms. Bitter Smith's resignation, Petitioner also conditionally moves to withdraw the Petition.

With Ms. Bitter Smith's resignation, this case is moot and no longer merits exercise of the Court's original jurisdiction.[1] *See* Part I, *infra*. Petitioner's sole requested relief is a writ of *quo warranto* directing Ms. Bitter Smith to "cease functioning" as a Commissioner. [Petition at 8, 48.] This relief is now unnecessary because Ms. Bitter Smith voluntarily resigned. Moreover, this case is not capable of repetition yet evading review, and there is no need for an advisory opinion, given this Court has previously decided two cases under A.R.S. § 40-101.

If the Court nevertheless accepts jurisdiction, it should conclude that Ms. Bitter Smith was ineligible under § 40-101 as a matter of law. *See* Part II, *infra*. First, even if the Court agreed with Ms. Bitter Smith that § 40-101 applies only to the particular legal entities of a company with which a Commissioner has a direct relationship, Ms. Bitter Smith is still ineligible because she has direct relationships with legal entities that are subject to regulation under the Commission's affiliated interest rules, Ariz. Admin. Code ("A.A.C.") R14-2-801

[1] Petitioner has no reason to doubt that Ms. Bitter Smith will vacate office, and its motion to withdraw is conditional simply because this Reply is due several days before Ms. Bitter Smith's resignation date and this Court's conference.

to -806. *See* Part II(A), *infra*. Ms. Bitter Smith cannot refute the applicability of those rules or their effect for purposes of § 40-101.

Second, and more fundamentally, a company's internal structure as a parent with subsidiaries does not matter for application of a conflict of interest provision in this context. *See* Part II(B), *infra*. Ms. Bitter Smith never addresses the cases cited in the Petition (at 37) showing that courts do not draw such distinctions when applying conflict-of-interest statutes to public officials, particularly officials exercising quasi-judicial power. In addition, the contrary rule would mean that a utility holding company executive could simultaneously serve as a Commissioner because the regulated utility is a separate legal entity from its holding company—an absurd result. Finally, these are particularly weak facts for Ms. Bitter Smith's argument because cable television, broadband internet, and telephone are marketed and billed to customer as a "bundle" of services.

Third, Ms. Bitter Smith has a prohibited pecuniary interest because of her over $150,000 annual salary as the full-time executive director and lobbyist of the Southwest Cable Communications Association ("SWCCA"). *See* Part II(C), *infra*. Ms. Bitter Smith does not persuasively refute that this qualifies under § 40-101.

Finally, § 40-101 is not void for vagueness. *See* Part III, *infra*. Ms. Bitter Smith is not a proper party to even argue this point because her conflict is clearly prohibited by § 40-101. Her hypothetical arguments about Berkshire Hathaway,

banks, and vendors cannot save her when the facts of this case—a substantial salary to serve as a full-time lobbyist and trade association executive for cable companies that bundle cable, internet, and telephone services—clearly fall within § 40-101. In addition, this Court has twice construed § 40-101, and those cases provide guidance regarding its meaning. The timing of this Petition—brought less than three months after the Attorney General's Office received a complaint—does not show arbitrary enforcement. Lastly, Ms. Bitter Smith's subjective belief that she is eligible under § 40-101 is irrelevant.

## I. Due to Ms. Bitter Smith's Resignation, This Case Is Moot and No Longer Merits Original Jurisdiction in This Court.

Petitioner conditionally moves to withdraw the Petition, in the event Ms. Bitter Smith vacates office pursuant to the resignation she submitted to the Governor. *See* ARCAP 26(b); [Dec. 18, 2018 Notice to the Court ("Notice") at 3]. Petitioner sought a writ of *quo warranto* directing Ms. Bitter Smith to "cease functioning" as a Commissioner. [Petition at 8, 48.] When Ms. Bitter Smith leaves office, no live issues will remain, and this Court should dismiss the Petition as moot. *See, e.g.*, *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 230 (App. 1985).

The two discretionary exceptions to mootness are not present. First, this case does not present an issue that is "capable of repetition yet evading review." *Id.* (citation and internal quotation marks omitted). Indeed, this Court has twice

decided the eligibility of Commissioners under § 40-101 or its predecessor (showing that the issues do not evade review), and Ms. Bitter Smith could have avoided mooting this case by not resigning. Second, with Ms. Bitter Smith's resignation, this case is no longer "of such public importance to justify a departure from the general rule" of not deciding moot cases. *See J.R. Francis Const. Co. v. Pima Cnty.*, 1 Ariz. App. 429, 430 (1965). Ms. Bitter Smith will no longer function as a statewide official, and the two previous opinions of this Court provide sufficient guidance regarding § 40-101's meaning.

Neither case Ms. Bitter Smith cites compels a contrary result. [Dec. 18, 2015 Notice at 1.] *Corbin v. Rodgers* involved applying the public-importance exception to mootness. *See* 53 Ariz. 35, 39 (1938). As discussed above, this case need not be decided to provide public officials with adequate guidance because two published opinions of this Court—*Jennings* and *Jones*[2]—provide guidance regarding § 40-101's meaning. Neither party contends the Court's guidance in those cases is inadequate, incomplete, or incorrect. Accordingly, any future case under § 40-101 will be likewise guided by those cases, and Ms. Bitter Smith does not present compelling reasons the Court should modify or clarify existing law.

*Corbin* is also procedurally distinguishable because neither party took voluntary action to moot that case. Rather, the case was mooted by an intervening

[2] *Jennings v. Woods*, 194 Ariz. 314 (1999); *State ex rel. Bullard v. Jones* (*Jones*), 15 Ariz. 215 (1914).

decision of the Superior Court. 53 Ariz. at 38. Here, Ms. Bitter Smith, who now asks for guidance on behalf of future public officials, voluntarily mooted the case by resigning. Accepting jurisdiction would encourage later defendants to violate eligibility statutes, resign when challenged to avoid any possible liability, but still seek a decision from the Court in the absence of an actual case or controversy.

The other case cited by Ms. Bitter Smith, *Campbell v. Harris*, expressly declined to decide the moot issue, instead issuing a decision only about the case's procedural posture. 131 Ariz. 109, 111 (App. 1981). That case became moot by Campbell's elected term on the school board expiring, not his voluntary resignation. *Id.* It is therefore easily distinguishable.

Even if the instant case fell within an exception to mootness, it would not warrant exercising this Court's original jurisdiction. Petitioner filed directly in this Court rather than Superior Court because "this case involve[d] a statewide official's eligibility for office, require[d] prompt resolution, and can be decided solely on issues of law." [Petition at 11.] Upon Ms. Bitter Smith's resignation, however, neither of the first two reasons for accepting original jurisdiction remains. Ms. Bitter Smith will cease being a statewide official, and the question of her eligibility therefore no longer requires prompt resolution by this Court. The only remaining factor is this dispute's resolvability on issues of law. That factor alone is insufficient for original jurisdiction, particularly given the guidance

already provided in *Jennings* and *Jones*.[3] For all these reasons, Petitioner requests the Court to dismiss the Petition or decline jurisdiction based on mootness.

## II. As Shown in the Petition, Each of Three Categories of Conflicts Makes Ms. Bitter Smith Ineligible under § 40-101.

### A. Ms. Bitter Smith's Status as an Authorized Lobbyist for Two Cox Affiliates Makes Her Ineligible under § 40-101.

Ms. Bitter Smith's role as an authorized lobbyist for two affiliates of Cox Enterprises, Inc. ("Cox")—CoxCom, LLC ("CoxCom") and Cox Communications Arizona, LLC ("Cox Communications Arizona")—creates "official relation[s]" to those entities, and those entities are "subject to regulation" by the Commission under § 40-101. [Petition at 26-32.] This reason alone makes Ms. Bitter Smith ineligible to hold office as a Commissioner.

Because Ms. Bitter Smith is registered as a lobbyist directly for CoxCom and Cox Communications Arizona, the first element of § 40-101 is met. Serving as an authorized lobbyist clearly creates an "official relation" under § 40-101 for the same reason that serving as a licensed securities salesperson created an official relation in *Jennings*, 194 Ariz. at 322 n.10 ¶ 32. [Petition at 26-27.] Indeed, Ms. Bitter Smith does not dispute this, but rather disputes only whether her

[3] The Response (at 5-9) confirms that the material facts presented in the Petition are undisputed. The only factual issues identified by Ms. Bitter Smith are whether Petitioner contends that non-interconnected VoIP is subject to Commission regulation or that broadband internet is subject to Commission regulation because VoIP data travels over the internet. [Response at 24-25.] The Petition is not arguing either as a basis for Ms. Bitter Smith's ineligibility. *See* Part II(B), *infra*.

relationships through SWCCA qualify (*see* Part II(B), *infra*). [See Response at 36-37.]

The second element of § 40-101 is also met because CoxCom and Cox Communications Arizona are "subject to regulation" by the Commission under the affiliated interest rules, A.A.C. R14-2-801 to -806. [Petition at 29-32.] Ms. Bitter Smith does not dispute that Cox Arizona Telcom, L.L.C. ("Cox Arizona Telcom") is a "utility" under R14-2-801(8). [Response at 16-17.] She disputes only whether the triggering of the affiliated interest rules for CoxCom and Cox Communciations Arizona renders them "subject to regulation" by the Commission for purposes of § 40-101. It plainly does.

Most significantly, CoxCom as a "holding company" must obtain Commission approval for any organization or reorganization. A.A.C. R14-2-801(4) (defining "holding company"); *id.* at 803(B), (C) (governing transaction approval for organization or reorganization of holding companies). As shown in the Petition (at 31), this means that CoxCom cannot be reconfigured within Cox's corporate structure or merged with another entity without Commission approval. *Id.* at 801(5). As another example, CoxCom cannot transfer its membership interest in Cox Arizona Telcom without Commission approval. *Id.* Cox Communications Arizona also cannot acquire any interest in Cox Arizona Telcom without such approval. *Id.* at 801(5), 803(A).

Ms. Bitter Smith does not dispute this, but rather attempts to minimize it by claiming that the rules apply only to the utilities themselves, and that the Commission's power to reject an organization or reorganization is circumscribed by 803(C). [Response at 20.] The first point is incorrect, and the second is irrelevant. Rule 803(A), by its plain terms, applies not just to a "utility" but also to an "affiliate,"[4] and Rules 803(B) and (C) follow from 803(A). [Petition at 30-31.] CoxCom and Cox Communications Arizona, as affiliates, are therefore squarely covered by the Rule's plain language.[5] With respect to Ms. Bitter Smith's second point, the fact that certain factors in 803(C) guide the power to reject a transaction means only that standards exist for the Commission's exercise of discretion, not that these entities are not "subject to regulation" under § 40-101. The power to reject transactions in Rule 803 is far more significant than "the initial filing of articles of incorporation, the payment of an annual fee, and the submission of annual reports." *Jennings*, 194 Ariz. at 329 ¶ 74.[6]

[4] "Affiliate" includes a holding company because it covers an entity "directly . . . controlling" a utility. A.A.C. R14-2-801(1).

[5] Indeed, if CoxCom was reorganized within Cox's structure or transferred its interest in Cox Arizona Telcom, then it would be CoxCom (or even CoxCom's parent), not Cox Arizona Telcom, that was taking action subject to regulation. This shows that Ms. Bitter Smith's interpretation of Rule 803 is incorrect.

[6] Since Rule 803 makes CoxCom and Cox Communications Arizona "subject to regulation," this Reply will not go through a point-by-point refutation of Ms. Bitter

Finally, Ms. Bitter Smith incorrectly downplays the significance of the Court's unanimous decision in *Arizona Corporation Commission v. State ex rel. Woods*, 171 Ariz. 286 (1992). That case captured the framers' intent and the necessity of giving the Commission some power over affiliates and holding companies, given the development of utilities creating holding companies and affiliates. *Id.* at 289-90; *see also* John D. Leshy, THE ARIZONA STATE CONSTITUTION 357 (2d ed. 2013) ("The [C]ommission's most important and extensive power is over public service corporations as defined by [Article 15, Section 2]."). To be sure, the affiliated interest rules are tied to utilities, but it is incorrect to say that they apply only to the utilities themselves. As in many legal contexts, a person or entity can voluntarily subject itself to the jurisdiction of a body. Here, that happens by taking control of a regulated utility through ownership or otherwise. A.A.C. R14-2-801(1) (defining "control"); *see also Ariz. Corp. Comm'n.*, 171 Ariz. at 295-97 (discussing need to regulate transactions that affect the financial position of utility companies).

Ms. Bitter Smith's remaining arguments fail. She cites A.R.S. § 40-285 as evidence that the affiliated interest rules can apply only to utilities. [Response at 22.] But the language of Rule 803 is different from § 40-285, and as discussed above, that Rule applies specifically to affiliates, not simply any third party that

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Smith's arguments regarding other Commission powers under Rules 801 to 806, but it incorporates the Petition's relevant portion herein. [Petition at 29-32.]

transacts with a utility. Second, Ms. Bitter Smith's argument that the Commission is considering changes to the affiliated interest rules (Response at 2-3) is similarly inapposite because the relevant question—at least prior to Ms. Bitter Smith's resignation—was whether she was ineligible when she was elected. See *Jennings*, 194 Ariz. at 330 ¶ 82 (Commissioner ineligible under § 40-101 when elected cannot "cure the defect once in office" but rather is excluded from office altogether.). Finally, Ms. Bitter Smith argues that R14-2-806 shows that an affiliate and holding company is merely an "affected" entity. [Response at 23.] As shown above, the rules make clear that affiliates are actually subject to Commission approval and reporting requirements.

### B. Ms. Bitter Smith's Role as Executive Director and Designated Lobbyist for SWCCA Makes Her Ineligible under § 40-101.

Ms. Bitter Smith's role as the Executive Director and designated lobbyist for SWCCA causes her to be "in the employ of, or holding an official relation to" entities subject to Commission regulation and makes her ineligible to serve as a Commissioner under § 40-101. This is because Ms. Bitter Smith's "official relation[s]" through SWCCA to the Arizona cable affiliates of Cox, Comcast Corporation ("Comcast"), Cequel Corporation ("Suddenlink"), and Time Warner Cable Inc. ("Time Warner") extend for purposes of § 40-101 to those companies'

other affiliates—including those providing phone service regulated by the Commission.[7]

First, contrary to Ms. Bitter Smith's argument (Response at 36-37), she does possess "official relation[s]" to SWCCA's active members. She is SWCCA's Executive Director and designated lobbyist. [Petition at 10 (citing A.R.S. § 41-1231(3).] Her salary constitutes forty percent of SWCCA's budget, and the only other SWCCA employee is a part-time administrative assistant. [Petition at 23, 34.] When companies join—and retain membership in—SWCCA, they are effectively hiring Ms. Bitter Smith. [*Id.* at 34.] Also, Ms. Bitter Smith is a registered lobbyist directly for Cox affiliates, providing an alternative basis for finding an "official relation" to those affiliates. [*Id.* at 32 n.11.]

Ms. Bitter Smith's contention that the word "relation" somehow narrows § 40-101 to exclude the members of SWCCA likewise fails. [Response at 36-37.] Although Ms. Bitter Smith notes the Petition did not attempt to define "relation," she does not deny she has a "relation" to SWCCA members. Indeed, any such

[7] Ms. Bitter Smith does not generally dispute that those four companies have affiliates that provide telephone service regulated by the Commission. She appears to dispute this only in the specific case of Suddenlink and whether it was in fact necessary for its subsidiary Mercury Voice & Data, LLC to obtain a CC&N. [Response at 25-26.] The fact that Mercury Voice & Data, a sophisticated company, obtained a CC&N strongly indicates that it was required to do so. For this case, however, it is irrelevant because Ms. Bitter Smith does not dispute that the Arizona telephone affiliates of Cox, Comcast, and Time Warner were required to obtain CC&Ns.

argument would clearly fail because Ms. Bitter Smith and SWCCA's members share "[a] logical or natural association[;] . . . [a] connection." *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1482 (5th ed. 2011).[8]

Second, Ms. Bitter Smith's "official relation[s]" to the Arizona cable affiliates of Cox, Comcast, Suddenlink, and Time Warner extend to those companies' affiliates that provide Commission-regulated phone service. [Petition at 36-43.] The Court can reach this conclusion by interpreting the words "official relation" or "a corporation or person subject to regulation" in § 40-101 to cover the affiliates with the same ultimate parent. Either way, Ms. Bitter Smith never even attempts to address the cases cited by the Petition (at 37-38) that apply conflict-of-interest provisions across affiliates for those exercising quasi-judicial power. Petitioner is not disputing that affiliates are separate legal entities; rather, this does not matter for a conflict of interest statute such as § 40-101. [Response at 27-28.]

Ms. Bitter Smith also never attempts to reconcile her narrow construction of § 40-101 with the fact that it would mean a utility holding company executive could serve on the Commission (at least in the absence of the affiliated interest

[8] Moreover, the cases cited in the Response (at 37) do not exclude a designated lobbyist, such as Ms. Bitter Smith. A designated lobbyist performs lobbying, which can include representing a company before Legislators and State officials on legislation, rulemaking and procurement, and it therefore involves substantial trust and authority. [Petition at 27-28.] This is certainly a sufficient "relation," analogous to the holding that Commissioner West had an official relation as a securities salesperson. *Jennings*, 194 Ariz. at 322 n.10 ¶ 32; [Petition at 32-33].

rules or a pecuniary interest) simply because the utility holding company and the utility are separate legal entities. [Petition at 38-39 (citing *Jennings*, 194 Ariz. at 327 ¶ 65 (assessing whether interpretation of § 40-101 "creates an untenable result or otherwise fails to 'effect the [statute's] object'. . . and 'promote justice'") (citations omitted)).] Petitioner's proposed rule—that affiliates with the same ultimate parent are covered by § 40-101—is workable and consistent with the statute's language and policy.[9]

This case involves particularly weak facts for Ms. Bitter Smith's argument because the cable companies market and sell cable television, broadband internet, and telephone as "bundled" services. [Petition at 16-17, 40-42.] Therefore, the "bundle" is an important tool for attracting and retaining customers. And, of course, when a telephone affiliate makes money, the profits flow up to its parent company—the same place where cable and internet profits flow.

[9] Ms. Bitter Smith criticizes the Petition for pointing to "[Intermediate Subsidiaries]." This is irrelevant for Cox, where CoxCom (an entity for which Ms. Bitter Smith is directly registered as a lobbyist) is the direct parent of Cox's Arizona cable and telephone affiliates. For the other entities, the intermediate subsidiaries were omitted for clarity because the test advocated by the Petition is the same *ultimate* parent, which comports with how the companies themselves present information to the Commission. [Petition at 39-40 (citing Commission filings by companies that point to their ultimate parents).]

If the Court adopted a more fact-based approach to parents and subsidiaries, then this would create uncertainty and allow § 40-101 to be skirted via complex corporate structures. [Petition at 38.]

Ms. Bitter Smith's hypotheticals do not compel the contrary result. She offers the example of a conglomerate owning a public utility and a car dealership. This bears no relationship to the realities of a cable, internet, and telephone "bundle." In addition, Ms. Bitter Smith does not dispute that if the conglomerate were a single legal entity, a person "in the employ of, or holding an official relation to" the conglomerate would be ineligible.[10] Her only defense is that the conglomerate's internal structuring and the separation of a trade association makes a difference. Under the cases cited in the Petition, however, what controls is whether the relationship would create bias or the appearance of bias, such that the person could not sit as an impartial officer exercising quasi-judicial power.

Finally, Ms. Bitter Smith's recusal record is relevant because it shows that she recognized the appearance of a conflict from voting on matters involving the telephone affiliates of the cable companies that are SWCCA members. [Response at 38.] As the Petition notes, Ms. Bitter Smith adopted a policy of recusing on such votes, but she was not always successful. [Petition at 42.] She also did not recuse on votes of these companies' competitors and votes affecting telephone service generally. [*Id.* at 42-43 & n.19.] The Response (at 38) generally cites *State v. Ross*, 214 Ariz. 280 (App. 2007), but that case stands only for the

[10] There is no requirement that the employment or official relation somehow must be in a regulated part of the company. This makes sense because § 40-101 governs eligibility, not the scope of the Commission's regulatory authority.

proposition that the Court must look at the terms of the conflict statute and, as a criminal case, involves the rule of lenity.

### C. Ms. Bitter Smith's Over $150,000 Annual Salary as Executive Director and Designated Lobbyist for SWCCA Creates a Prohibited Pecuniary Interest under § 40-101.

Ms. Bitter Smith is also ineligible under § 40-101 because her over $150,000 annual salary as Executive Director and designated lobbyist of SWCCA, paid by membership dues, means that she is "pecuniarily interested" in SWCCA members and members' affiliates subject to Commission regulation. [Petition at 43-47.] Ms. Bitter Smith's Response fails to show that her salary is not a pecuniary interest, and she instead argues that SWCCA's members are not subject to Commission regulation. She further relies on this Court's analysis of Arizona's *criminal* conflict of interest statute, A.R.S. § 38-501 *et seq.*, which is distinguishable.

Ms. Bitter Smith's SWCCA salary is a pecuniary interest in SWCCA's members, and her attempts to distinguish this Court's reasoning in *Jones* and *Jennings* do not show otherwise. Regarding *Jones*, she correctly points out the Court's conclusion that prohibiting Commissioners from owning insurance policies would be an absurd result. [Response at 30-31.] But the Court in *Jones* also noted that the absurd result was avoided by a statutory exemption allowing Commissioners to own insurance policies. *Jones*, 15 Ariz. at 227-28. Implicit is

the recognition that the language now codified at § 40-101 is broad. That recognition is important in applying the statute to Ms. Bitter Smith's SWCCA salary. Similarly, *Jennings* recognizes that, under *Jones*, § 40-101's prohibition of pecuniary interests is broad. 194 Ariz. at 324-25 ¶ 52. The Court also distinguished "'doing business with' and 'being in business with' a regulated corporation," suggesting that the former was lawful and the latter was not. *Id.* at 329 ¶ 76. Here, Ms. Bitter Smith is in business with regulated entities, not merely doing business with them as a customer.[11]

The cases from other jurisdictions cited in the Petition likewise show that other courts have concluded monetary gain and employment benefits are pecuniary interests. [Petition at 44-46.] These cases illustrate how Ms. Bitter Smith's pecuniary interest is similar to interests other courts have concluded are sufficient to reverse a decision of a public utilities commission, *Petition of Northern States Power Co.*, 414 N.W.2d 383, 386 (Minn. 1987), and remove public utilities commissioners from office, *State ex rel. Blankenship v. Freeman* (*Blankenship II*),

[11] Ms. Bitter Smith incorrectly asserts that the *Jennings* Court "defined" pecuniary interest under § 40-101. [Response at 33-34.] More accurately, the pecuniary interest prong of § 40-101 was not at issue in *Jennings*, and one passage of that opinion stated that "[t]he term 'pecuniary interest' equates with an equity or ownership interest." 194 Ariz. at 329 ¶ 75. This is but one way a pecuniary interest may exist. As noted above, the very next portion of *Jennings* recognized that pecuniary interest is a broader idea.

447 P.2d 782 (Okla. 1968). Ms. Bitter Smith's analysis of these cases does not show that her SWCCA salary is not a pecuniary interest. [Response at 32-33.]

Finally, Ms. Bitter Smith's attempt to import potential limitations into § 40-101 from A.R.S. § 38-503 fails. Section 40-101 and its predecessor include more remote interests than what this Court has said is required to establish criminal liability under § 38-503. *See Hughes v. Jorgenson*, 203 Ariz. 71, 73 ¶ 8 (2002). This makes sense given the respective penalties for violating each statute. Violating § 40-101 is a civil matter resulting in ineligibility or removal from office, while § 38-503 imposes *criminal* liability. *See* A.R.S. § 38-510. Accordingly, the rule of lenity does not apply to § 40-101, and establishing a Commissioner's interest as "remote" is not a defense. *Compare* A.R.S. § 38-510(D).

**III. Section 40-101 Is Not Void for Vagueness.**

Ms. Bitter Smith conflates several inapplicable concepts in arguing that § 40-101 is void for vagueness, none of which establishes that § 40-101 is unconstitutional under Petitioner's construction. As a threshold matter, Ms. Bitter Smith lacks standing to raise a void for vagueness challenge because, except in First Amendment challenges, "a person to whose conduct a statute clearly applies may not successfully challenge it for vagueness[,]" "[e]ven if . . . [the] statute is vague in some particulars[.]" *State v. Kaiser*, 204 Ariz. 514, 517 ¶ 5 (App. 2003) (citation and internal quotation marks omitted); *see also State v. Musser*, 194 Ariz.

31, 32 ¶ 5 (1999). Ms. Bitter Smith has three categories of conflicts to which § 40-101 clearly applies—"official relation[s]" as an authorized lobbyist for two Cox affiliates; "official relation[s]" through SWCCA to Cox, Comcast, Suddenlink, and Time Warner; and "pecuniar[y] interest[s]" in those companies because of her over $150,000 annual salary from SWCCA. *See* Part II, *supra*. Moreover, these companies market, sell, and operate cable television, broadband internet, and telephone as an integrated bundle of services for customers. *See* Part II(B), *supra*. Because Ms. Bitter Smith is clearly covered by § 40-101, her hypothetical arguments [Response at 22, 24] regarding Berkshire Hathaway, banks, and vendors are irrelevant. *See Musser*, 194 Ariz. at 32 ¶ 5; *Kaiser*, 204 Ariz. at 517 ¶ 5.

Even if this Court considers Ms. Bitter Smith's constitutional challenge, it fails. Courts "presume that the legislature acts constitutionally." *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 9 (2014) (citation and quotation marks omitted). A statute is void for vagueness "when it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it." *Aros v. Beneficial Arizona, Inc.* 194 Ariz. 62, 67 (1999) (citation and internal quotation marks omitted).[12] "Similarly, a

[12] Although Arizona courts have considered void for vagueness arguments in civil cases, the courts recognize the doctrine "is especially important in the context of criminal law." *See State v. Takacs*, 169 Ariz. 392, 394 (App. 1991) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *see also State v. Sanner Contracting Co.*, 109 Ariz. 522, 524 (1973) ("The central consideration in void-

statute does not violate due process merely because it is susceptible to more than one interpretation." *Id.* Statutes are not unconstitutional "simply because a member of the public may not be able to readily determine how far she can go before she violates the law." *Golob v. Ariz. Med. Bd. of State*, 217 Ariz. 505, 513 ¶ 29 (App. 2008) (citing *Fuenning v. Superior Court In and For Maricopa Cnty.*, 139 Ariz. 590, 598 (1983)). The Petition and this Reply analyze the construction of § 40-101 in detail, and show that the statute is not vague.

The voters' election of Ms. Bitter Smith does not force the Court into the narrow interpretation of § 40-101 Ms. Bitter Smith advocates. The policy that discourages overturning an election must be balanced with the policy against conflicts of interest addressed by § 40-101 in a way that gives effect to both, which is exactly what this Court did in *Jennings*. This Court was well aware that finding § 40-101 was violated meant the Court would "upset the results of a popular election," *Jennings*, 194 Ariz. at 331 ¶ 84, but the Court was not deterred from fairly construing the statute according to its language.

Ms. Bitter Smith's length of service as a *de facto* Commissioner also does not show § 40-101 is arbitrarily enforced or that Petitioner delayed enforcement. Petitioner does not *sua sponte* investigate the eligibility of each electoral candidate

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for-vagueness cases is that a statute or ordinance *which creates a crime* must be subject to being understood by persons of common intelligence." (emphasis added)).

and is not tasked by law with doing so. Indeed, this action (filed in November) stems from Petitioner receiving a citizen complaint in September—less than three months earlier. *Jennings* specifically permitted a *quo warranto* proceeding to be initiated after an election, and that holding should settle any question here. *See Jennings*, 194 Ariz. at 320 ¶¶ 20-21. In addition, Ms. Bitter Smith is currently conflicted, so the action is also proper based on a continuing violation of § 40-101.

Finally, Ms. Bitter Smith's subjective belief when she was elected (and afterwards) that she held no official relationship or pecuniary interest in an entity subject to Commission regulation does not require the Court to find the statute void for vagueness. [Response at 41.] Ms. Bitter Smith's state of mind is irrelevant because § 40-101 is a strict liability statute. Furthermore, Section 40-101 does not prohibit conduct, but is a conflict of interest statute that proscribes eligibility requirements to serve as a Commissioner. *See Martin v. Reinstein*, 195 Ariz. 293, 317 ¶¶ 79-80, 85 (App. 1999) (rejecting void for vagueness argument in part because challenged statute did not "proscribe 'conduct'"). The statute and this Court's decisions interpreting it provide adequate guidelines for successfully abiding by it, and Ms. Bitter Smith's misinterpretation of § 40-101's scope does not show the statute is unconstitutionally vague. *See Fuenning*, 139 Ariz. at 598.

## CONCLUSION

For the foregoing reasons, Petitioner conditionally moves to withdraw its Petition. Alternatively, if the Court exercises its discretion to accept review and decide the legal issue raised in the Petition, then it should conclude that Ms. Bitter Smith has three categories of conflicts under § 40-101, each of which by itself makes her ineligible to serve as a Commissioner. Those conflicts are her "official relation[s]" as an authorized lobbyist for two affiliates of Cox; her "official relation[s]" through SWCCA to Cox, Comcast, Suddenlink, and Time Warner; and her "pecuniar[y] interest[s]" in those companies because of her over $150,000 annual salary as the Executive Director and designated lobbyist for SWCCA.

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

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