CENTER for COMPETITIVE POLITICS
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BY EMAIL (comments@azcleanelections.gov)

Arizona Citizens Clean Elections Commission
Attn. Alec Shaffer
1616 W. Adams, Suite 110
Phoenix, AZ 85007

Re: Comments regarding revised draft rules; Ariz. Admin. Code R2-20-109(F)

Dear Commissioners:

The Center for Competitive Politics ("CCP") submits these comments in response to the revised draft rules that the Commission proposed at its July 23 meeting.

Those rules, if adopted, would make a number of unlawful changes to Ariz. Admin. Code R2-20-109(F).[1] The latest version of the proposal appears either to suffer from a serious drafting error or, if the drafting is intentional, to be a brazen attempt to disregard state law as plainly stated in the relevant statute.

As a preliminary matter, the Commission's attempt to justify this rulemaking under the statute with the additional verbiage at proposed Ariz. Admin. Code R2-20-109(F)(12) cannot be taken seriously. Contrary to the Commission's assertion in the revised rule text, Ariz. Rev. Stat. § 16-942 clearly does not give the Commission the authority to impose civil penalties for violations of reporting requirements that "are applicable to 'political committees'" generally.

The only civil penalties the Commission is authorized to impose are for: (1) a "violation of any contribution or expenditure limit" by a candidate participating in the Citizens Clean Election Program, *see* A.R.S § 16-942(A) (*hereinafter*, "participating candidates"); and (2) any "violation by or on behalf of a candidate of any reporting requirement imposed by this chapter." *See id.* § 16-942(B). The reference to "any reporting requirement imposed by this chapter" refers to campaign finance reports filed by participating candidates. *See id.* § 16-942(C). All other civil penalties for violations of the Arizona campaign finance laws are addressed under Ariz. Rev. Stat. § 16-924 and are outside of the Commission's jurisdiction.

To the extent that the campaign committees of participating candidates are "political committees," *see id.* § 16-901(3), the Commission's assertion in proposed Ariz. Admin. Code

[1] In previous comments, we, along with other commenters, opined that rules on this issue would be contrary to the statute and the Commission's authority.

R2-20-109(F)(12) may technically be true in some instances. However, the Commission's intent in proposing this rulemaking is clearly not limited to regulating participating candidates.

Turning to the apparent drafting error or intentional legal error in the revised rule, the Commission acknowledges that recently enacted H.B. 2649[2] defines a "political committee" as any entity that "meets *both* of the following requirements: (i) is organized, conducted or combined for the primary purpose of influencing the result of any election . . . *and* (ii) knowingly received contributions or makes expenditures of more than five hundred dollars in connection with any election during a calendar year . . . ." Ariz. Admin. Code R2-20-109(F)(12) (emphasis added).

The words "both" and "and" mean that *both* conditions must be met in order for an entity to be regulated as a political committee: (1) the entity must have the "primary purpose of influencing the result of an election"; *and* (2) the entity must "knowingly receive[] contributions or make[] expenditures of more than five hundred dollars in connection with any election during a calendar year." *See* Merriam-Webster, "Both," *at* http://www.merriam-webster.com/dictionary/both (defining "both" to mean "the one as well as the other <both of us>") and "And," *at* http://www.merriam-webster.com/dictionary/and (defining "and" as a "function word to indicate connection or addition . . .").

Yet, the Commission somehow has taken the two distinct and conjunctive parts of the statutory definition of a "political committee" – "*both*" of which are necessary – and has conflated them, so that an entity becomes a political committee simply by virtue of exceeding the contributions and expenditures thresholds. Specifically, the Commission's revised proposal provides that the "primary purpose" standard may be met if an entity has made expenditures or has accepted contributions during a calendar year totaling $500 or more. Proposed Ariz. Admin. Code R2-20-109(F)(12)(b). In other words, the Commission has effectively written the first condition (the "primary purpose" standard) out of the statute, so that an entity may become a political committee if it merely meets the second condition in the statute (making expenditures or accepting contributions of $500 or more per year).

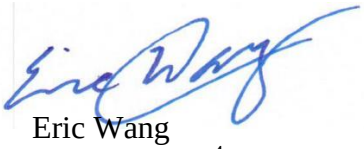
Either there is a drafting error in the revised rule, the Commission misunderstands the words "both" and "and" in the statute, or the Commission has simply disregarded the plain text of the statute. Regardless of why the revised proposal reads the way it does, it is plainly contrary to the statute and the Commission would be acting *ultra vires* in adopting it. *See, e.g., Grove v. Ariz. Crim. Intelligence System Agency*, 143 Ariz. 166, 169 (Ariz. Ct. App. 1984) ("a rule adopted by an administrative agency must be in accordance with the statutory authority vested in it . . . and must [not be] in contravention of any expressed statutory provision").

In addition to being contrary to the statute, by effectively erasing the "primary purpose" standard from the political committee definition, the revised proposal also imposes unconstitutionally burdensome registration and reporting requirements on entities that only incidentally engage in political speech. *See, e.g. Citizens United v. Fed. Election Comm'n*, 558

[2] The revised draft refers to the legislation as "H.R. 2649." The Commission apparently means H.B. 2649. *See* Ariz. State Legislature, HB2649, *at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2649.

U.S. 310, 337 (2010) (holding that corporations may not be forced to conduct their political speech only through political committees because "PACs are burdensome . . . expensive to administer and subject to extensive regulations"); *Wisc. Right to Life v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (holding that the government may not impose a "pervasive [PAC] regulatory regime on issue-advocacy groups that only occasionally engage in express advocacy"); *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576, 597 (8th Cir. 2013) (holding that the government may not "condition[] the right to speak on 'cumbersome ongoing regulatory burdens,' regardless of [an entity's] major purpose").[3] There is a reason the Legislature imposed a "primary purpose" standard in the definition of a "political committee." By blithely rewriting the relevant statute, arrogating to itself extra-statutory powers, and ignoring long-standing First Amendment precedents, the Commission has committed a trifecta of elementary legal errors, and conclusively demonstrated why rulemaking in this area is best left to the Secretary of State.

Respectfully yours,



Eric Wang
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[3] The U.S. Court of Appeals for the Ninth Circuit has distinguished between one-time reporting requirements tied to making particular political expenditures versus ongoing PAC reporting requirements triggered by incidental political activity, suggesting that, while the former is constitutionally permissible, the latter is unconstitutionally burdensome. *See Yamada v. Snipes*, Case No. 12-15913 (9th Cir. 2015), *slip op.* at 35 n.9; *see* also *Delaware Strong Families v. Biden*, Case No. 14-1887 (3rd Cir. 2015), *slip op.* at 17 n.10.

CCP contends that one-time, "event-driven" reporting requirements often are unconstitutionally burdensome as well. Regardless, Arizona's political committee requirements are of the ongoing and perpetual variety, on which broad judicial consensus exists that such requirements may not be imposed on groups that engage in political speech only incidentally. Per the Arizona Secretary of State, before a political committee may terminate its reporting requirements, it must first "dispose of any excess funds." *See* Ariz. Sect'y of State, Campaign Finance Popular Questions, "How does a political committee terminate?", *at* http://www.azsos.gov/elections/campaign-finance-reporting. This means that organizations that make political expenditures only once or occasionally face the Hobson's choice of either having to file perpetual reports as PACs or else liquidate their bank accounts and close up shop.

[4] Eric Wang is also Special Counsel in the Election Law practice group at the Washington, DC law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its clients.