APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **David Daniel Weinzweig.**

2. Have you ever used or been known by any other legal name? **Yes.** If so, state name: **David Daniel Clemen.** My natural father, Harvey Clemen, died in 1977. My mother married Dr. Sol Weinzweig in 1978. Dr. Weinzweig adopted me in 1987.

3. Office Address: **Arizona Court of Appeals**
1501 West Washington Street
Phoenix, Arizona 85007

4. How long have you lived in Arizona? **49 years.** Born in Phoenix: St. Joseph's Hospital. What is your home zip code? **85260.**

5. Identify the county you reside in and the years of your residency. Maricopa County. 49 years.

6. If nominated, will you be 30 years old before taking office? Yes. If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? Yes.

7. List your present and any former political party registrations and approximate dates of each: I have been a registered Independent since 2014. Before that, I was a registered Republican from 1989 to 2004 and a registered Democrat from 2004 and 2014.

8. Gender: Male.
Race/Ethnicity: White.

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received. **I received my education exclusively in Arizona with brief interludes in Washington, D.C. and Israel.**

University of Arizona
Tucson, Arizona
Attended: 1989-1992 (graduated in 3 1/2 years)
Bachelor of Arts

Hebrew University
Jerusalem, Israel
Attended: 1992

Arizona State University
Tempe, Arizona
Sandra Day O'Connor College of Law
Attended: 1994-1997
Juris Doctorate

10. List major and minor fields of study and extracurricular activities.

- **University of Arizona**

  Political Science—Major
  Near East Studies—Minor

  American Israel Public Affairs Committee, Intern
  Washington, D.C.
  Winter 1991—Spring 1991

  U.S. Holocaust Museum
  Research Volunteer
  Washington, D.C. Winter 1991—Spring 1991

  U.S. Senate Judiciary Committee, Intern
  Subcommittee on Monopolies, Antitrust and Consumer Rights
  Washington, D.C. Spring 1991—Summer 1991

  U.S. Senator John McCain, Intern
  Phoenix, Arizona Summer 1991

  University of Arizona, Student Liaison
  American Israel Public Affairs Committee
  1989-1990

  University of Arizona, Student Liaison
  Zionist Organization of America
  1989-1990

- **Hebrew University**

International relations with emphasis on the genesis of terrorism in the Middle East.

- **Arizona State University College of Law**

  Law with emphasis on commercial litigation, professional responsibility and health care law.

  Arizona State University College of Law
  President, Jewish Law Students Association
  1995-1996

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

My first year of law school, I received Honors for both Legal Method and Writing and Legal Research and Writing. My professor for both classes was former Chief Justice Rebecca Berch. I later taught Legal Method and Writing to first-year ASU law students as a Student Instructor and received a scholarship to defer tuition in my final year.

Between my second and third year of law school, my parents had a serious accident returning from San Diego which took my adopted father's life and left my mother clinging to life in a California hospital. Once she was discharged, I moved back into my childhood home to care for my mother. The accident also prevented me from working between the second and third years.

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

Supreme Court of Arizona
October 18, 1997

U.S. Court of Appeals for the Ninth Circuit
2007

U.S. Court of Appeals for the Tenth Circuit
2012

U.S. District Court for the District of Arizona
December 4, 1997

U.S. District Court for the Western District of Oklahoma (pro hac vice)
March 22, 2004

U.S. District Court for the Northern District of Texas (pro hac vice)
September 15, 2005

U.S. District Court for the District of Nevada (pro hac vice)
August 14, 2007

U.S. District Court for the District of Nevada (pro hac vice)
February 3, 2010

U.S. District Court for the District of Nevada (pro hac vice)
July 25, 2011

U.S. District Court for the District of Utah (pro hac vice)
June 18, 2012

Third Judicial District Court, State of Utah (pro hac vice)
July 9, 2012

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No.**

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No.**

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
ARIZONA COURT OF APPEALS Judge	2018—present	Phoenix
ELLMAN WEINZWEIG LLC Founder	2017	Phoenix
ARIZONA ATTORNEY GENERAL'S OFFICE Senior Litigation Counsel	2012 — 2017	Phoenix
LEWIS AND ROCA LLC Associate Income Partner Equity Partner	2002 — 2012	Phoenix
ARIZONA ATTORNEY GENERAL'S OFFICE Assistant Attorney General Antitrust Unit	2000 — 2002	Phoenix
BONNETT FAIRBOURN FRIEDMAN & BALINT	1998 — 2000	Phoenix
PESKIND HYMSON & GOLDSTEIN	1997	Scottsdale

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Arizona Court of Appeals
(2018-2021)

Current	*Former*
Division One	
Chief Judge Peter Swann	Justice James Beane
Vice Chief Judge Kent Cattani	Judge Jon Thompson
Judge Cynthia J. Bailey	Judge Diane Johnsen
Judge Michael J. Brown	Judge Kenton Jones
Judge Jennifer B. Campbell	
Judge Maria Elena Cruz	
Judge Brian Y. Furuya	
Judge David B. Gass	
Judge Randall M. Howe	
Judge Paul J. McMurdie	
Judge James B. Morse Jr.	
Judge Jennifer M. Perkins	
Judge Samuel A. Thumma	
Judge D. Steven Williams	
Judge Lawrence F. Winthrop	
Division Two	
Judge Garye Vasquez	
Judge Karl Eppich	
Judge Christopher P. Staring	
Judge Peter Eckerstrom	
Judge Sean Earl Brearcliffe	
Judge Philip Espinosa	

Ellman Weinzweig
(2017-2018)

Robert Ellman

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

2012 — 2017

Constitutional Litigation and Appeals	60%
Class Action Litigation and Appeals	30%
Advice, AG Opinion Committee, and Training	10%

In 2017, Rob Ellman and I co-founded Ellman Weinzweig. We represented clients in constitutional litigation and appeals. Before that, my practice was diverse, interesting and always challenging. From 2012 to 2016, I defended the State of Arizona in high-profile complex and constitutional litigation and appeals, including a number of class actions. Most frequently, I defend state statutes against constitutional challenges in state and federal court. I defended constitutional challenges against state criminal laws and capital punishment methods, election laws, education laws, free speech laws, tax laws, abortion laws, government spending laws, and more.

Representative matters. Appeals. *NAACP, et al. v. Horne, et al.*, 626 Fed.Appx. 200 (9th Cir. 2016) (argued) (constitutional standing); *Torres, et al. v. Goddard, et al.*, 793 F.3d 1046 (9th Cir. 2015) (argued) (search and seizure class action under the Fourth Amendment); *Levinson v. Public Broadcasting Service, et al.*, 495 Fed.Appx. 815 (9th Cir. 2012) (argued) (equal airtime for United States presidential candidate); *Gallardo, et al. v. State*, 336 P.3d 717 (Ariz. 2014) (state constitution challenge to population-based statute); *Arizona Citizens Clean Elections Com'n v. Brain*, 322 P.3d 139 (Ariz. 2014) (state constitution challenge to campaign finance law); *City of Scottsdale v. State*, 352 P.3d 936 (Ariz. Ct. App. 2015) (argued) (municipal challenge to state law protection of commercial free speech for human billboards).

Lower courts. *First Amendment Coalition v. Ryan*, CV-14-01447-NVW (D. Ariz.) (Eighth Amendment method-of-execution challenge); *Antigone Books LLC, et al. v. Horne, et al.*, CV-14-02100-SRB (D. Ariz.) (First Amendment challenge to state "revenge porn" statute); *NAACP, et al. v. Horne, et al.*, CV-13-01079-DGC (D. Ariz.); *Tinsley, et al. v. McKay, et al.*, CV-15-00185-ROS (D. Ariz.) (constitutional challenge to child welfare programs and practices); *Arizona Citizens Clean Elections Com'n, et al. v. Bennett*, CV2013-010338 (Maricopa Super. Ct.) (campaign contribution limits); *City of Scottsdale v. State*, CV2014-003467 (Maricopa Super. Ct.) (commercial speech); *Gallardo, et al. v. State, et al.*, CV2013-017137 (Maricopa Super. Ct.) (election laws); *NFP Org. of Phoenix, Inc., et al. v. Brewer, et al.*, CV-13-01869-GMS (D. Ariz.) (retail tobacco laws); *Town of Colorado City, et al. v. State, et al.*, CV-11-08037-DGC (D. Ariz.) (FLDS Church, government corruption and trust seizure).

I also counseled my fellow government attorneys in the executive and legislative branches on practical and legal issues, from teaching legal writing and persuasion to complex litigation and conflicts of interest. Much of that practice is and must remain confidential.

I served on the Attorney General Opinion Committee, which authored published legal opinions in response to formal requests from state and county officials. I frequently sat on internal moot court panels to prepare Assistant Attorneys General for arguments before the Ninth Circuit Court of Appeals, Arizona Supreme Court and Arizona Court of Appeals.

17. List other areas of law in which you have practiced.

I spent ten years with the Lewis and Roca law firm, principally representing corporate and government clients in complex and routine litigation, including general commercial, antitrust, consumer fraud, securities fraud, common law fraud, bankruptcy, real estate, election, contract, fiduciary duty, product liability, patent, trademark, franchise, unfair trade practices, racketeering, construction and design defect, fraudulent transfer, life and disability insurance defense, tortious interference, defamation, corporate governance, tax, unfair competition, trade secret, employment, immigration, and bad faith matters.

Representative matters. *Pardae v. Holder*, 454 Fed. Appx. 547 (9th Cir. 2011) (argued); *In re Coyotes Hockey, LLC, et al.*, CV2009-BK-09488 (Bankr. D. Ariz. 2009) (represented CEO of Research in Motion, Jim Balsillie, in an adversary proceeding to acquire National Hockey League franchise); *VEGAS.com, LLC, et al. v. Tix Corporation, et al.*, CV2009-7746 (C.D. Cal. 2009); CV2009-2362 (D. Nev. 2009) (represented VEGAS.COM in complex commercial litigation regarding ticket distribution business for Las Vegas Strip hotels and venues); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, CV2011-0918 (D. Nev. 2011) (represented Lens.com in complex intellectual property litigation against top contact lens retailer).

Antitrust law. I have substantial experience in antitrust law, both in private practice and the public sector. From 2000 to 2002, I served as the principal Assistant Attorney General in the Antitrust Section of the Arizona Attorney General's office, where I investigated and prosecuted violations of state antitrust law. I was Arizona's lead counsel in several national antitrust investigations and lawsuits involving the pharmaceutical and healthcare industries.

I co-chaired the Antitrust and Trade Regulation Practice at Lewis and Roca. I defended and pursued all forms of antitrust litigation, including claims of monopoly maintenance, attempted monopoly, refusals to deal, price fixing, market division, exclusive dealing, resale price maintenance, group boycott and price discrimination. I provided guidance to institutional clients on antitrust issues. I trained our clients on antitrust law and compliance.

Transactional. I have also helped clients in a broad range of

transactional matters, including guidance on general commercial and contract laws, corporate governance, employment benefits, pension plan laws and requirements, licensing, election laws, criminal laws, foreign corrupt practices, and immigration laws.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state. **None.**

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

In private and public practice, I have drafted scores of appellate briefs and hundreds of motions, responses, and replies, along with discovery requests, discovery answers, legal opinions, compliance manuals, trial briefs, and more.

Statutes: As Senior Litigation Counsel, I help legislative counsel recraft and revise Arizona statutes when successfully challenged on constitutional grounds. For instance, I helped recraft the "Revenge Porn" statute that passed in 2016 and the panhandling statute that passed in 2013.

Rules: I served on the District of Arizona Local Rules of Practice Advisory Committee and Local Rules Civil Practice Subcommittee from 2012 to 2017. This Committee reports on and proposes amendments to the local rules.

Jury instructions: Between 2011 and 2014, I served on the State Bar of Arizona, Civil Jury Instructions Committee, which drafts and vets civil jury instructions for use in state courts.

Negotiations: I have negotiated a wide range of litigation settlements in constitutional and commercial disputes.

Compliance manuals: While in private practice, I drafted corporate compliance manuals in the areas of antitrust law and the foreign corrupt practices act.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **Yes.** If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

I represented the Arizona State Board of Nursing in matters before the Office of Administrative Hearings. I also represented the Arizona School Facilities Board before the Office of Administrative Hearings in matters

involving several construction projects.

b. The approximate number of these matters that you appeared as:
Sole Counsel: 3
Associate Counsel: 5

21. Have you handled any matters that have been arbitrated or mediated?
Yes. If so, the approximate number of matters in which you were involved as:
Sole Counsel: 10
Chief Counsel: 5
Associate Counsel: 25

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

FIRST CASE:

Antigone Books L.L.C., et al. v. Brnovich
CV14-02100-SRB (D. Ariz.)
September 2014 to August 2015

Plaintiffs: Antigone Books L.L.C., Intergalactic, Inc., D/B/A, Bookmans, Changing Hands Bookstore Inc., Copper News Book Store, Mostly Books, Voice Media Group, Inc., American Booksellers Foundation for Free Expression, Association of American Publishers, Freedom to Read Foundation, and National Press Photographers Association. Represented by:

Lee Rowland
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
lrowland@aclu.org

Richard M. Zuckerman
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700
richard.zuckerman@dentons.com

Defendants: Arizona Attorney General Mark Brnovich, Apache County Attorney Michael B. Whiting, Cochise County Attorney Edward G. Rheinheimer, Coconino County Attorney David W. Rozema, Gila County Attorney Bradley D. Beauchamp, Graham County Attorney Kenny Angle, Greenlee County Attorney Derek D. Rapier, La Paz County Attorney Tony Rogers, Maricopa County Attorney Bill Montgomery, Mohave County Attorney Matthew J. Smith, Navajo County Attorney Brad Carlyon, Pima County Attorney Barbara Lawall, Pinal County Attorney Lando Voyles, Santa Cruz County Attorney George Silva, Yavapai County Attorney Sheila Polk, Yuma County Attorney Jon R. Smith.

Summary: Ten publishers, bookstores, and media organizations sued the State of Arizona and all 15 county attorneys for injunctive and declaratory relief to enjoin enforcement of an Arizona statute that criminalized the unjust and invasive evil known as "revenge porn." A.R.S. § 13-1425. Plaintiffs claimed that the statute was unconstitutional under the First Amendment because it infringed on protected speech and freedom of the press. Plaintiffs further claimed that the statute violated the Commerce Clause. The eventual settlement required the assent of many stakeholders and resulted in amended legislation. H.B.2001, Fifty-Second Legislature, Second Regular Session.

Significance: A settlement was necessary to stem the growing scourge of revenge porn. Revenge porn generally refers to the malicious practice of jilted ex-lovers who seek revenge against former mates by posting their sexually graphic images online without consent, often with their contact information. Before the settlement, this disturbing practice had fallen through the statutory cracks, causing irremediable damage to innocent victims.

SECOND CASE:

State of Arizona v. Stericycle, Inc.,
CV2002-018153 (Maricopa County Super. Ct.)
February 2001 to September 2002

Defendant: Stericycle, Inc. Represented by:

Charles A. Blanchard
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
(202) 942-5805
Charles.Blanchard@aporter.com

Summary: After an exhaustive investigation, the Arizona Attorney General filed civil antitrust charges against Stericycle, Inc., the dominant national medical waste disposal provider. The antitrust claims stemmed from a

1997 market division agreement between Stericycle and Browning-Ferris Industries under which Stericycle acquired all customers in Arizona while Browning-Ferris acquired all customers in Colorado and Utah. Under the settlement, Stericycle was required to pay civil penalties and attorneys' fees to the State in quarterly installments over a three-year period. To spark additional competition, Stericycle also agreed to provide up to 50,000 pounds of incineration treatment services per month to third-party haulers in Arizona.

Significance: This investigation, negotiation, and settlement resulted in a consent decree that modified business practices and fostered competition in the billion-dollar medical waste removal market. In addition, the Arizona settlement caused other state governments and private plaintiffs to pursue antitrust claims against the corporate defendant.

THIRD CASE:

SDMS, P.C. v. Siemens Medical Solutions USA, Inc.
CV2005-051908 (Maricopa County Super. Ct.)
August 2005 to March 2009

Plaintiff: SDMS, P.C. Represented by:

James Craft General Counsel
Apogee Physicians
2525 E Camelback Rd, Suite 1100
Phoenix, AZ 85016-4282
james.craft@apogeephysicians.com
(602) 778-3613

Summary: This case involved complex antitrust claims against an international medical equipment manufacturer. Lewis and Roca represented the defendant manufacturer.

Significance: This case was significant because it involved national and international practices of the manufacturer. The negotiated settlement was significant because it capped nearly four years of contentious, hard-fought litigation in expert and fact-intensive antitrust litigation against a publicly-traded, international conglomerate.

23. Have you represented clients in litigation in Federal or state trial courts? **Yes.** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: 60

State Courts of Record: 40

The approximate percentage of those cases which have been:

Civil:	98%
Criminal:	2%

The approximate number of those cases in which you were:

Sole Counsel:	25
Chief Counsel:	25
Associate Counsel:	50

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case or wrote a response to such a motion: 50%
You argued a motion described above: 25%
You made a contested court appearance: 25%
You negotiated a settlement: 20%
Court rendered judgment after trial: 2%
Jury rendered a verdict: 2%
The number of cases you have taken to trial: 4 (bench and jury trials)

24. Have you practiced in the Federal or state appellate courts? Yes. The approximate number of your appeals which have been:

Civil:	25
Criminal:	1*

* Also defended constitutional challenges to criminal statutes and criminal investigations. These cases often turned on criminal law issues such as probable cause.

The approximate number of matters in which you appeared:

As counsel of record on the brief:	25
Personally in oral argument:	8

25. Have you served as a judicial law clerk or staff attorney to a court? No.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not

negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

FIRST CASE:

NAACP, et al. v. Horne, et al.
626 Fed. Appx. 200 (9th Cir. 2015)
September 2012 to December 2015
Circuit Judge Clifton
Circuit Judge Owens
Chief District Judge Smith (Rhode Island)

2:13-cv-01079-DGC (D. Arizona)
May 2013 to October 2013
District Judge David Campbell

Plaintiffs: National Association for the Advancement of Colored People National Asian Pacific American Women's Forum. Counsel:

American Civil Liberties Union
Foundation Alexa Kolbi-Molinas
(argued)
Susan Talcott Camp
125 Broad Street, 18th Floor
New York, New York 10004

Daniel Pochoda
American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, Arizona 850

Defendants: Arizona Attorney General, Arizona Medical Board, Executive Director Lisa Wynn. Counsel: Me (argued).

Summary and significance: This case involved an equal protection challenge against an Arizona statute that prohibited health care providers from offering abortion as an instrument of selection for parents who want children of a particular gender or race. A.R.S. § 13-3603.02 and § 36-2157. Plaintiffs NAACP and NAPAWF (represented by the ACLU) claimed that the

Arizona statute stigmatized their pregnant female members.

The State prevailed in the District of Arizona and the Ninth Circuit Court of Appeals on the argument that stigmatic harm is too abstract and generalized to meet constitutional standing requirements in equal protection litigation. The Ninth Circuit released its decision only seven days after oral argument in San Francisco.

SECOND CASE:

Torres, et al. v. Goddard, et al.
793 F.3d 1046 (9th Cir. 2015)
September 2012 to July 2015
Circuit Judge Alex Kozinski
Circuit Judge Stephen Reinhardt
Circuit Judge Jay Bybee

2:06-cv-02482-SMM (D. Arizona)
September 2012
District Judge Stephen McNamee

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*Representative Plaintiff*s: Javier Torres and Lia Rivadeneyra, on behalf of putative class. Counsel:

Hughes Socol Piers Resnick & Dym, Ltd.
Christopher J. Wilmes (argued)
Matthew J. Pi
70 West Madison Street, Suite 4000
Chicago, Illinois 6060
(312) 604-2636
cwilmes@hsplegal.com

Defendants: State of Arizona, Former AG Terry Goddard, Former AAG Cameron Holmes. Counsel: Me (argued).

Summary and significance: This class action lawsuit concerned joint law enforcement efforts to seize the illicit proceeds from human smuggling and narcotics trafficking on Arizona's southern border. Plaintiffs asserted a Fourth Amendment challenge to civil forfeiture operations of the Arizona Attorney General's Office, the Arizona Department of Public Safety, the Phoenix Police Department, the Arizona Department of Financial Institutions, and the federal Bureau of Immigration and Customs Enforcement. The dispute implicated and required argument on civil and criminal laws, state

action immunity, and class action issues. The State prevailed in the District of Arizona and Ninth Circuit Court of Appeals.

The appeal raised issues of national importance to state and federal prosecutors and civil forfeiture law. The published decision found that prosecutors are entitled to absolute immunity for alleged misconduct in civil forfeiture proceedings.

THIRD CASE:

City of Scottsdale v. State of Arizona,
237 Ariz. 467, 352 P.3d 936 (App. 2015)
December 2014 to August 2015
Judge Kent Cattani
Judge Patricia Norris
Judge Patricia Orozco

Maricopa Cty. Super. Ct.
CV2014-003467
May 2014 to November 2014
Judge Robert Oberbillig

Plaintiff: City of Scottsdale. Counsel:

Scottsdale City Attorney Bruce Washburn (argued)
Senior Assistant City Attorney Lori Davis
3939 North Drinkwater Boulevard Scottsdale, Arizona 85251

Defendant: State of Arizona. Counsel: Me (argued), Robert L. Ellman.

Intervenors: James Torgeson, Sign King, LLC. Counsel:

Clint Bolick (argued)
Goldwater Institute
500 East Coronado Road Phoenix, Arizona 85004
(602) 462-5000

Summary: This litigation and appeal had substantial ramifications for the balance of power between municipalities and the State of Arizona. The City banned all sign-spinners (aka sign-walkers) from operating on public lands in direct conflict with an Arizona statute that prohibited such municipal ordinances. The City sued the State, alleging the statute violated the Arizona Constitution and the rights of charter cities.

Significance: The published decision from the Arizona Court of Appeals addressed an issue of statewide importance. It clarified the scope of charter city rights outside the election context and confirmed that Arizona municipalities cannot criminalize what the State expressly permits.

FOURTH CASE:

Pardae v. Holder
454 Fed. Appx. 547 (9th Cir. 2011)
March 2009 to October 2011
Circuit Judge Stephen Reinhardt
Circuit Judge Betty Fletcher Circuit
Judge Wallace Tashima

Appellee: United States Attorney General Eric Holder. Counsel:

David Nicholas Harling Ronald E. Lefevre
U.S. Department of Justice
Civil Division, Office of Immigration Litigation
450 5th Street, N.W.
Washington, D.C. 20044
(202) 305-7184

Appellant: Adeque Pardae. Counsel: Me (argued), Lawrence Kasten

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Summary and significance: This Ninth Circuit appeal involved revolting facts and substantial consequences. Our pro bono client was a Liberian national who had witnessed and experienced ghastly horrors and atrocities in his homeland, including the beheading of his father. A federal judge ordered that he be deported to Liberia, but he feared torture upon his return. We prevailed in moving the Ninth Circuit for a deferral of his removal to Liberia under the Convention Against Torture.

FIFTH CASE:

Colorado City v. United Effort Plan Trust, et al.
March 2011 to May 2015

District of Arizona, United States District Court, 11-CV-08037
District Court Judge David Campbell

Salt Lake County Court, Third Judicial District, Case No. 053900848

In the Matter of the United Effort Plan Trust
Judge Denise Lindberg

Plaintiffs: Town of Colorado City
Counsel: Jeffrey Matura
Graif Barrett & Matura PC
1850 North Central Avenue, Suite 500
Phoenix, Arizona 85004
(602) 462-9999

Intervenors: State of Arizona
Counsel: Me

State of Utah
Counsel: Joni Jones
Office of the Utah Attorney General
P.O. 140856
Salt Lake City, Utah 84114-0856
(801) 366-0100

Defendant: Special Fiduciary Bruce Wisan. Counsel:
Jeffrey L. Shields Mark L. Callister
Callister Nebeker & McCullough
Zions Bank Building, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
(801) 530-7300

Summary: This lawsuit involved the Town of Colorado City, Warren Jeffs, and the United Effort Plan Trust. The UEP Trust was established as a charitable and religious trust in 1942 to be controlled by the Fundamentalist Church of Jesus Christ of Latter-Day Saints. The Trust owned 95 percent of land in Colorado City and Hildale. After the arrest of FLDS leader Warren Jeffs, the Attorneys General of Utah and Arizona later seized and reformed the UEP Trust to protect its beneficiaries after the Trust had failed to defend two lawsuits alleging child abuse on behalf of former FLDS members. Colorado City sought a declaration that this seizure and reformation violated its First Amendment right to exercise its religion. The State prevailed in the District of Arizona.

Significance: Good government. The Attorneys General of Utah and Arizona stepped in to protect the powerless residents of Colorado City from a tyrannical dictator who engaged in unspeakable misconduct under the

banner of religious freedom. It served as a reminder that no government or leader can oppress and manipulate its citizens or disregard their bedrock constitutional rights and civil liberties.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

Arizona Court of Appeals
Division One
Appointed: December 2017
Retained: November 2020

The Arizona Legislature created the Arizona Court of Appeals in 1964. The Court serves as an intermediate appellate court with two divisions: Division One, based in Phoenix, and Division Two, based in Tucson. Division One started with three judges and, over time, expanded with the state's population to its current complement of 16 judges. *See* Arizona Court of Appeals, Division One, 2018: The Year in Review.

Division One decides appeals in a wide variety of substantive areas, including civil, criminal, juvenile, family, mental health, probate, and tax law. Along with considering appeals from superior court decisions, administrative decisions first considered by the superior court and some matters from limited jurisdiction courts, Division One also reviews decisions made by the Arizona Industrial Commission in workers' compensation cases, by the Arizona Corporation Commission and the Arizona Department of Economic Security appeals board, and considers "special action" petitions seeking pre-judgment and emergency relief. *See* Arizona Court of Appeals, Division One, 2018: The Year in Review.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

State v. King, 250 Ariz. 433 (App. 2021)

Counsel: Lacey Stover Gard, Andrew Reilly, Arizona Attorney General
Counsel: Larry A. Hammond, Joseph N. Roth, Osborn Maledon PA
Counsel: Katherine Puzauskas, Arizona Justice Project
Counsel: Robert McKirgan, Daniel Arellano, Lewis Roca

Summary and significance: A jury convicted Petitioner Hope King of eight counts of felony child abuse in 2002, and she was sentenced to the mandatory minimum of four consecutive ten-year prison terms. Ten years later, King petitioned the superior court for post-conviction relief under Arizona Rule of Criminal Procedure 32.1(e), seeking a new trial based on "newly discovered scientific evidence" that enabled a clinical psychologist in 2010 to conclude that King suffered from postpartum psychosis in 2001 when she caused serious physical injury to her infant daughter. After an evidentiary hearing, the PCR court granted post-conviction relief, ordering that King receive a new criminal trial because the scope of diagnostic criteria for postpartum psychosis had expanded since her 2002 trial.

The State of Arizona petitioned for review. We granted review and relief, reversing the PCR court's order because King could have been diagnosed with postpartum psychosis before her criminal trial, even if the likelihood of diagnosis later improved when medical science expanded the menu of diagnostic criteria.

State v. Wallace, 1 CA-CR 17-0638, 2018 WL 6695724 (Ariz. App. 2018)

Counsel: Jaimye L. Ashley, Mohave County Attorney's Office
Counsel: Jill L. Evans, Mohave County Legal Advocate's Office

Summary and significance. Fourth Amendment. Exclusionary rule. My only dissent.

In re Cortez, 247 Ariz. 534, 535 (App. 2019)

Counsel: Molly Patricia Brizgys, ACLU Foundation of Arizona
Counsel: Abigail Jensen, Southern Arizona Gender Alliance

Summary and significance. This case required us to decide whether an applicant must show good cause to change names under A.R.S. § 12-601. The superior court here summarily denied—with prejudice—Valeria Cortez's application to change names for lack of good cause. We reversed and remanded because good cause is not required under the statute.

Mendoza v. State, 1 CA-CV 18-0350, 2020 WL 85401 (Ariz. Ct. App. Jan. 7, 2020)

Counsel: John P. Leader The Leader Law Firm
Counsel: Joel B. Robbins, Anne E. Findling, Robbins & Curtin, PLLC
Counsel: Christopher J. Zachar, Zachar Law Firm, PC, Phoenix
Counsel: Douglas C. Northup, Fennemore Craig, P.C.

Summary. This was a wrongful death action. Mendoza appealed the superior court's exclusion of her expert witnesses and its entry of summary judgment for the State of Arizona and the Arizona Department of Transportation. We affirmed in part, reversed in part and remanded for further proceedings.

Simms v. Arizona Racing Commission, et al., __Ariz.__, 2021 WL 710786 (App. 2021)

Counsel: Paul Charlton, Karl Tilleman, Douglas Janicik, Dentons US
Counsel: Nicole M. Goodwin, Greenberg Traurig, LLP
Counsel: Michael C. Manning, James M. Torre, Stinson, LLP
Counsel: Camila Alarcon, Christopher Hering, Gammage & Burnham
Counsel: Stacy W. Harrison, Orrick Herrington & Sutcliffe, LLP

Summary and significance. Most recent published opinion. This case determined when the Arizona Racing Commission may accept and decide appeals of licensing decisions made by the Arizona Department of Gaming.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

My diverse professional experience has allowed me to develop expertise in many areas-from private practice to public service; from carrying the mantle for indigent plaintiffs to defending institutional clients in complex litigation; from spending ten years with a large, multi-state law firm to spending six years representing the interests of my home state; from sitting on state and federal rules committees to helping build a prestigious award program that honors Arizona lawyers for public service, community service and excellence. This kaleidoscope of experience and expertise has served me well on the bench.

I have assumed the lead in many cases that required quick mastery of unfamiliar and complicated subject matter and have thus become skilled at acquiring knowledge quickly. I consistently immerse myself in these cases until I understand them, soup to nuts, whether they present an issue of

constitutional dimension, the Convention Against Torture, the Foreign Corrupt Practices Act, corporate legal department practices and benchmarks, pension rights, employment benefits, or municipal sign regulations. I would do the same on the Arizona Court of Appeals.

I have made meaningful contributions on important rules and practice committees charged with shaping and reshaping the landscape of state and federal litigation, including the Arizona Supreme Court's Civil Justice Reform Committee and the Local Rules of Practice Advisory Committee of the U.S. District Court for the District of Arizona.

I have organized and hosted exceptional legal programs for Arizona attorneys, including the Judge Learned Hand Awards Program and a popular lecture by Judge Richard A. Posner of the Seventh Circuit Court of Appeals, who spoke at length about the importance of judicial independence, touting the achievements of Arizona's merit selection system.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **Yes.**

National Football League Players Association
Contract Advisor, FY 1999
Contract Advisor, FY 2000
Contract Advisor, FY 2001

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **Yes.**

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.**

33. Have you paid all state, federal and local taxes when due? **Yes.**

34. Are there currently any judgments or tax liens outstanding against you? **No.**

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No.**

36. Have you ever been a party to a lawsuit, including an administrative

agency matter but excluding divorce? **Yes.** Recently filed lawsuit against several judges and justices. *Kraft v. State of Arizona*, CV20-2004-PHX-SPL.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No.**

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No.**

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.**

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**

41. If you performed military service, please indicate the date and type of discharge. **None.**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **None.**

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **None.**

44. List and describe any sanctions imposed upon you by any court. **None.**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No.**

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No.**

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended,

terminated or asked to resign by an employer, regulatory or investigative agency? **No.**

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No.**

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No.**

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes.** I have authored and co-authored treatise chapters on corporate in-house legal practices, antitrust law, and consumer protection.

Thoughtful Legal Writing (book expected in 2022)

Co-Author, *Arizona Law*, CONSUMER PROTECTION LAW AND DEVELOPMENTS, American Bar Association (2017 Annual Review)

Co-Author, *Arizona Law*, CONSUMER PROTECTION LAW AND DEVELOPMENTS, American Bar Association (2016)

Co-Editor, *Arizona Law*, STATE ANTITRUST PRACTICE AND STATUTES, American Bar Association (3rd ed. 2004)

Co-Author, Chapter 30, *Benchmarking*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL, Thomson Reuters and Association of Corporate Counsel (2017) (with G. Sonny Cave, On Semiconductor Corporation, Senior Vice-President and General Counsel)

Co-Author, Chapter 30, *Benchmarking*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL, Thomson Reuters and Association of Corporate Counsel (2011) (with G. Sonny Cave, Corporation, Senior Vice-President and General Counsel)

Author, *Paradigm Shift: The Meaning of Value for Institutional Clients in a Recession* (Summer 2011)

Co-Author, *Litigation Holds*, THE SHIELD, Blue Cross/Blue Shield (2007)

Author, *Ask the Legal Professionals: Antitrust*, THE BUSINESS JOURNAL (Sep. 24, 2004)

Co-Author, *Antitrust Revived: Plaintiff Numbers May Be On Upswing*, ARIZONA ATTORNEY (Dec. 2003)

Co-Author, Chapter 10, *Private Suits*, Antitrust Law Developments, American Bar Association (2003 Annual Review)

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.**

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes.**

From 2012 to 2017, I served on the Continuing Legal Education Committee of the Arizona Attorney General's Office, which organizes an array of legal education programs for Assistant Attorneys General and state employees.

I teach a popular course on persuasive legal writing to Arizona attorneys. Here's a description:

> With help from Stephen King, Chief Justice John Roberts, Paul Clement, Mark Twain and other luminaries, this seminar reveals the secrets of persuasive legal writing. Persuasive advocates understand the singular importance of their audience-state and federal judges-and aspire to craft and present an argument and narrative that resonates with the tribunal.
>
> David Weinzweig teaches this entertaining three-hour seminar designed to improve the legal writing and persuasive skills of attorneys in all forms of litigation, from trial court to appeal. He explores the critical tools that great legal writers use to persuade judges.

The program is designed to improve the persuasive skills of all public and private lawyers, whether litigation or administrative practice, including legal writing, theory, legal research, fact research, and oral argument. Attached at Attachment A is a selection from legal writing seminar. I have also taught trial and deposition practice for state government attorneys across the United States in conjunction with the National Association of Attorneys General.

> Legal Writing with the Luminaries, Arizona Voice for Crime Victims (February 5, 2021)

Effective Legal Writing, Arizona State University Law School (February 18, 2021)

Effective Legal Writing, Arizona State University Law School (September 3, 2020)

From Brandeis to Kagan: Jewish Supreme Court Justices, Jewish National Fund (April 30, 2020)

Legal Writing with the Luminaries, Arizona Attorney General's Office (January 30, 2020)

Legal Writing with the Luminaries, Arizona Court of Appeals (November 4, 2019)

Effective Legal Writing, Arizona State University Law School (September 5, 2019)

From Brandeis to Kagan: Jewish Supreme Court Justices, Arizona Jewish Lawyers Association (March 7, 2019)

Effective Legal Writing, Arizona State University Law School (January 24, 2019)

Learn Legal Writing with the Luminaries, State Bar of Arizona (November 14, 2018)

Legal Writing, Arizona Attorney General's Office (June 11, 2018)

Expert Witness Training, National Attorneys General Training & Research Institute, Lansing, Michigan (September 8-9, 2016)

Persuasion 101: Legal Writing, Department of Economic Security and Child Support Services Section (June 24, 2016)

Persuasion 101: Legal Writing, Office of the Arizona Attorney General (May 9, 2016)

Arizona Attorney General: Overview, The Wiseguise Group, Scottsdale, Arizona (April 29, 2016)

Persuasion 101: Legal Writing, Office of the Arizona Attorney General (January 2015)

Advanced Trial Advocacy Faculty, National Attorneys General Training & Research Institute (February 10-14, 2014)

Deposition Training, National Attorneys General Training & Research Institute, New Orleans, Louisiana (November 2012)

Benchmarking: Metrics and Methodologies, State Bar of Arizona (March 23, 2012)

Benchmarking Public Law Practice: Performance Metrics, Annual Civil Division Leadership Program, Office of the Arizona Attorney General (2012)

Benchmarking for Corporate Law Departments, Arizona Corporate Counsel Forum (July 2011)

Mergers and Acquisitions, Arizona State Bar Annual Convention (June 17, 2011)

Alternative Fee Arrangements for Litigation Matters, Lewis and Roca (May 5, 2010)

Anatomy of a Lawsuit: Drafting and Responding to Written Discovery, Lewis and Roca (November 18, 2009)

A Titanic Shift in Antitrust Enforcement, Antitrust Developments, Arizona State Bar Annual Convention (June 29, 2009)

Current Issues in Antitrust, Arizona State Bar Annual Convention, Tucson, Arizona (June 20, 2008)

Drafting and Responding to Written Discovery, Motions to Compel and Confidentiality Orders, Lewis and Roca (November 2, 2007)

Antitrust Basics: A Primer, Arizona State Bar Annual Convention (June 29, 2007)

Supreme Court Update, Arizona State Bar, Antitrust Section (2006)

Antitrust and Intellectual Property in the Supreme Court's 2005-2006 Term, Intellectual Property and Antitrust Sections, State Bar of Arizona, Arizona Club (December 2005) "

Antitrust and Intellectual Property in the Supreme Court's 2005-2006 Term, Intellectual Property and Antitrust Sections, State Bar of Arizona, Arizona Club (December 2005)

53. List memberships and activities in professional organizations, including

offices held and dates. Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes.** List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

Arizona Supreme Court
Commission on Judicial Performance Review
Member
2020-Present

City of Phoenix
Judicial Selection Advisory Board
Member
2019-Present

Arizona Supreme Court
Committee on Judicial Education and Training
Member
2019-Present

Arizona Supreme Court
Committee on Civil Justice Reform
Member
2016–2017

U.S. District Court for the District of Arizona
Local Rules of Practice Advisory Committee
Member
2012—2017

Arizona Attorney Magazine
Editorial Board of Directors, 2007
Editorial Board of Directors, 2008
Editorial Board of Directors, 2009

National Football League Players Association
Contract Advisor, FY 1999
Contract Advisor, FY 2000
Contract Advisor, FY 2001

Host, Richard A. Posner lecture
Judicial Independence (2006)
Arizona State University College of Law

State Bar of Arizona
Civil Jury Instructions Committee
Member 2011-2012

State Bar of Arizona
Antitrust Law Section
Chair, 2004-2005
Chair, 2009-2010
Vice-Chair, 2003-2004
Vice-Chair, 2008-2009
Executive Council, 2003-2009

Seminar Chair, Antitrust, State Bar Convention, June 2007
Seminar Chair, Antitrust, State Bar Convention, June 2008
Seminar Chair, Antitrust, State Bar Convention, June 2009

Arizona State University College of Law, Alumni Association
Director, 1999-2003

Judge Learned Hand Awards Program
American Jewish Committee
Chair, November 13, 2007
Chair, November 18, 2008
Chair, March 17, 2009
Co-Chair, March 16, 2010

Pro bono legal services:

I represented various indigent and vulnerable clients in private practice who could not afford to hire their own attorney. For instance, I represented an indigent immigrant from Liberia before the Ninth Circuit who feared torture if returned to his homeland. *See question no. 28, fourth case*. While at Lewis and Roca, I twice received the John P. Frank Pro Bono Honor (2004, 2011).

54. Describe the nature and dates of any relevant community or public service you have performed.

I have devoted much of my life and career to public and community service. I have served on the Arizona Court of Appeals since February 2018. Before that, I served three Arizona Attorneys General over more than six years of public practice, including from 2012 to 2017, defending the State of Arizona in its highest profile and most sensitive matters. I defended the State when its statutes or practices were challenged as unconstitutional in state and federal courts. And a decade before that, I served as the principal Assistant Attorney

General in the Antitrust Unit, where I investigated and prosecuted violations of state antitrust law.

As a community volunteer, I built and chaired the Judge Learned Hand Awards Program, which became the "gold standard" to honor Arizona attorneys for community and public service. During my tenure, I expanded the independent Selection Committee to reflect Arizona's diverse bar, assembling the finest collection of justices, judges, public officials, law professors, corporate executives and private practitioners in Arizona. As former Chief Justice Ruth McGregor said in March 2009:

> One of the most impressive things about the [Judge Learned Hand] Awards is the independent Selection Committee that nominates, vets and selects the honorees. The Committee is comprised of leaders—distinguished in their own right—some of the finest our legal community has to offer. Justices and judges. The Mayor. Attorney General. Law school deans. Current and former State Bar presidents. Past and present U.S. Attorneys. Corporate executives. Law professors. Public and private lawyers.

Before law school, I interned in Washington, D.C. with the United States Senate Judiciary Committee, the American Israel Public Affairs Committee, and the still-unbuilt United States Holocaust Museum. Also before law school, I interned for three United States Senators: John McCain, Howard Metzenbaum, and Dennis DeConcini. In high school, I volunteered for former Senator Jon Kyl's second congressional campaign in 1988.

I have been involved with the Jewish community my entire life, but only began assuming leadership positions in college as a reaction to campus anti-Semitism and Holocaust denials that seemed to go unchecked. Since then, I have devoted substantial time, effort, and emotion to assist Jewish non-profit organizations, including the American Jewish Committee and the American Israel Public Affairs Committee, with positions ranging from vice-president to volunteer. I have attended AJC and AIPAC retreats and conferences throughout the United States over the past 30 years.

In 2006, I was awarded the Comay Fellowship from the American Jewish Committee, which is annually awarded to less than 10 persons identified as emerging leaders across the United States. As a fellow, I traveled the world with eminent Jewish dignitaries as we met the Israeli Prime Minister, the Emir of Qatar, and the leaders of Jordan and Morocco.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

Best Lawyers in America ® (2012)
Antitrust Litigation

Martindale-Hubbell AV Rating ®
Preeminent and Outstanding Attorney

National Leadership Fellow (2005)
American Jewish Committee

John P. Frank Pro Bono Honor (2004, 2011)
Lewis and Roca

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

Judge, Arizona Court of Appeals
Appointed: December 2017
Retained: November 2020

Have you ever been removed or resigned from office before your term expired? No.

Have you voted in all general elections held during the last 10 years? Yes.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

I am passionate about my family. I have a wonderful wife and three beautiful children who supply me with unlimited happiness and a healthy dose of life perspective. My wife, Lauren Weinzweig, is a partner with the Nelson Law Group, where she specializes in health care law.

Parents must create and facilitate brilliant, enduring memories for their children. In that regard, I enjoy spending quality time with my family at our cabin in Munds Park, hiking in the woods and fishing at Lake Odell.

I have played tennis on and off for most of my life. While in high school, I participated in tournaments across the southwest and achieved a top 25 ranking in the southwest region of the United States Tennis Association.

I am an avid reader. I love judicial biographies. I am drawn to books about writing, Abraham Lincoln, the Holocaust, true crime, and Middle East history.

I have great enthusiasm for my hometown and its sports teams. I have been a diehard Cardinals fan since 1987. My brother and I had season tickets for their first season in Sun Devil Stadium, where we nearly melted in the Arizona sun.

That passion led me to become a licensed National Football League player agent from 1999 to 2001. To gain my license, I passed a bar-like exam on the NFL collective bargaining agreement in Washington, D.C., given and graded by the NFL Players Association.

My first love was the Phoenix Suns. I was hired as a Suns ball boy before I could drive. At that time, the Suns still played at Veteran's Memorial Coliseum—the "Madhouse on McDowell." While unpaid, that position still represents the pinnacle of my professional life and my all-time favorite job—meeting, watching, and retrieving errant basketballs for the likes of Michael Jordan, Larry Bird, Larry Nance, Walter Davis, Charles Barkley, Magic Johnson, and Kareem Abdul-Jabbar.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? Yes.

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

My background is unique, consequential, and locally-sourced. My mom survived the Holocaust, making me a second-generation Holocaust survivor, just a smidge off from witnessing the indescribable first hand. My mom is Marion Weinzweig, child Holocaust survivor and author of Lonely Chameleon: An Autobiography of a Child Holocaust Survivor (Vesuvius Press 2016).

My mom's story is one of courage, resilience, and survival. Born during the Holocaust, she lived with her parents in a Polish ghetto until late 1942, when the Nazis redoubled their efforts to exterminate the Jews—sweeping from town to town, searching from house to house—leaving chaos and genocide in their wake. At the last minute, her helpless parents facilitated her clandestine removal from the Polish ghetto, but she was eventually discarded in a ditch

outside a Polish convent where she was hidden from the Nazis: orphaned, malnourished, lice-ridden, and alone.

By war's end only her father (my grandfather) survived. He was alone and barely alive, but determined to find his daughter, which he did. Growing up in Phoenix, my grandfather would occasionally visit and I would ask about the serial number tattooed to his forearm. He never answered me, but I would learn he had survived Auschwitz, where most prisoners were immediately killed and the few who remained to work had serial numbers tattooed on their left arms.

My mom lost her innocence, her childhood, and her family to the gas chambers of Treblinka and Auschwitz, she managed to escape the fate of six million brothers and sisters, ultimately to settle in the Grand Canyon State. That unique narrative has imbued me with an unbending dedication to the rule of law and the principles of our constitutional democracy.

I am a local product, too. Born, raised, and educated in Arizona-Madison No. 1 Middle School, Camelback High School, the University of Arizona, and then Arizona State University for law school, now called the Sandra Day O'Connor College of Law. I am forever indebted to the State of Arizona, inspired by its pioneers, invested in its success, and dedicated to its future.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention. **Attachment B.**

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes.**

62. Attach a brief statement explaining why you are seeking this position. **Attachment B.**

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website. **See Attachment C.**

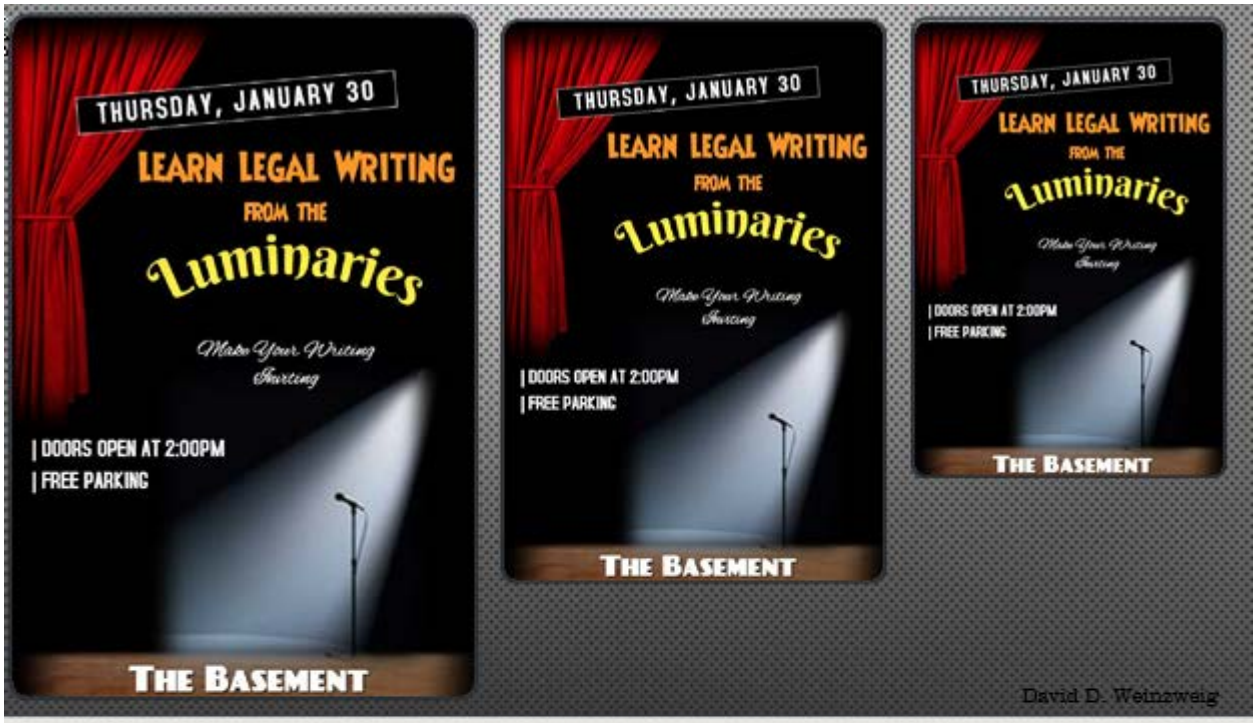
64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally

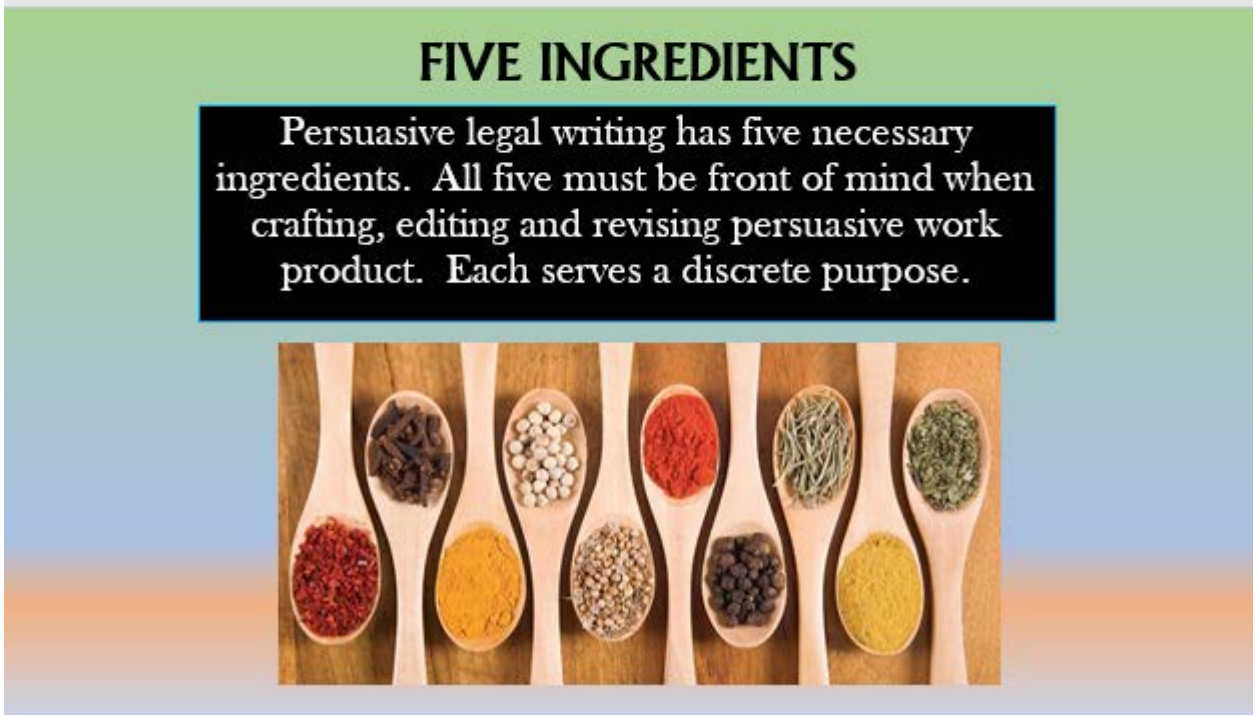
drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website. **See Attachment D.**

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews. **See Attachment E.**

-- INSERT PAGE BREAK HERE TO START SECTION II (CONFIDENTIAL INFORMATION) ON NEW PAGE --

Attachment A





Theodor Geisel

"So the writer who breeds
More words than he needs
Is making a chore for the reader who reads.
That's why my belief is
The briefer the brief is
The greater the sigh of the reader's relief is."

Less is far more

Spending more time thinking out issues and honing arguments imbues lawyers with greater confidence that they have resolved the difficult intellectual issues.

An advocate must analyze and prioritize arguments so only the most persuasive are raised and not lost in the underbrush of irrelevance.

APPRECIATE YOUR AUDIENCE

An effective advocate understands the singular importance of his or her audience—state and federal judges. The persuasive advocate thus aspires to craft and present an argument and narrative that resonates with the tribunal.

11 IDEAS FOR THE FIRST SENTENCE

Depending on your goals, analysis and strategy, you might use the first sentence to:

educate with context

introduce a persuasive theme

frame the dispositive issue

simplify the complex

explain what you want

draw the sting

LEAD

RECITE FACTS WITH PURPOSE AND PACE

A persuasive advocate recounts the relevant facts with purpose, specificity, and style.

Facts must both inform and persuade. Amplification and diminution.

Targeted detail and specifics can inspire confidence, facilitate pace, and set the tone.

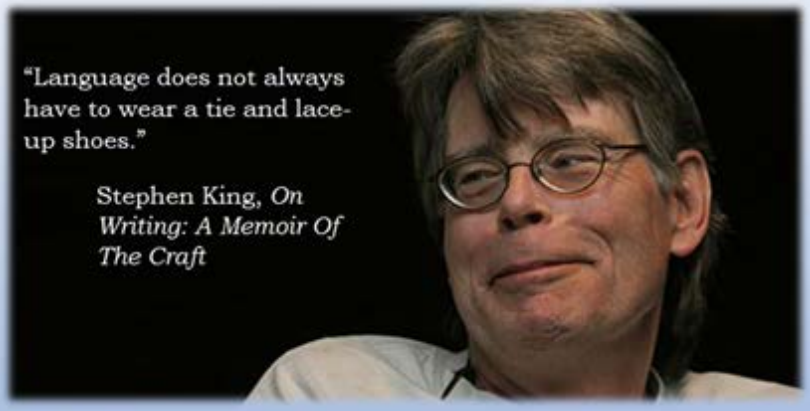
WORD SELECTION

Words are the TOOLS of our profession.

A carpenter selects tools based on the particular job at hand.

He does not blindly reach into his toolbox and grab whatever is touched first. He would never pull a screwdriver to cut tile or grab a hammer to patch drywall.

Relax and communicate.



WORD SELECTION

Persuasion and grammatical correctness are independent concepts with different and often conflicting ends.

Unpersuasive

Show the reader. Let readers reach their own conclusion based on a concrete factual foundation. Do not reach a conclusion for the readers. Do not characterize.

The reader should arrive at the desired conclusion after navigating your offering.

No shortcuts

Adverbs often indicate an unfinished product. The persuasive advocate spends the time and energy required to persuade. Adverbs should never be used as a shortcut for advocates who lack the time or ammunition to make their argument.

SPOILER ALERT

There are no literary shortcuts to substitute for facts, law, or logic.

Attachment B

60. Provide additional information.

As the son of a Holocaust survivor, my DNA is ingrained with an unbending dedication to life, liberty, and the pursuit of happiness. I know the importance of freedom and transparency, having lost much of my family to authoritarianism and intolerance. An unfathomable lapse in humanity.

Against that backdrop, if elevated to our highest court, I promise to honor and respect the timeless work product of our founding fathers, to tackle my weighty responsibilities with humility, an open mind, a robust work ethic and a firm moral compass. I pledge to cherish and safeguard the ideals of our constitutional democracy and to honor our separation of powers. I pledge to recognize and place singular importance in the rule of law, to check my personal beliefs and opinions at the courthouse steps, and to remain impartial and objective in the decisional process. These are my core values, not a hollow promise.

62. Brief statement explaining why you are seeking this position.

I love my current job and would be thrilled to remain and retire on the Arizona Court of Appeals, but, in many ways, the Arizona Supreme Court represents my finish line.

Arizona is my lens, my backdrop, my narrative. I was born, raised and educated here. I am forever indebted to the Grand Canyon State, inspired by its pioneers, invested in its success and dedicated to its future. The Supreme Court represents the pinnacle for someone like me, a singular chance to serve the people who molded and steered me toward a meaningful life in public service.

Beyond that, I love a good challenge. The harder, the better. As Teddy Roosevelt observed, “Never throughout history has a man who lived a life of ease left a name worth remembering.” I’m also commitment to growth and improvement and believe the human mind only grows and strengthens if thrown into new and difficult roles.

Attachment C

Richard Rice[1]
Division Chief Counsel
Civil Division
Acting Attorney General
Firm State Bar No. 14000

David D. Weinzweig (018687)
Senior Litigation Counsel
Daniel P. Schaack (010715)
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Telephone: (602) 542-7989
Fax: (602) 364-2214
David.Weinzweig@azag.gov
Daniel.Schaack@azag.gov

Attorneys for Defendant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION; et al. Plaintiffs, v. KEN BENNETT, Arizona Secretary of State, Defendant, and ANDY BIGGS, President of the Arizona State Senate; and ANDREW M. TOBIN, Speaker of the Arizona House of Representatives, Defendant-Intervenors.	No. CV2013-010338 **DEFENDANT'S AMENDED RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** (Assigned to the Honorable Mark Brain) Oral Argument: September 10, 2013 at 1:30 p.m.

Secretary of State Bennett asks the Court to deny the motion for preliminary injunction because Plaintiffs are not likely to prevail on the merits of their claim.

[1] Attorney General Thomas C. Horne has recused himself from this matter and has delegated Richard Rice, Division Chief Counsel, Civil Division, to serve as the Acting Attorney General in this case.

Although Secretary Bennett had hoped to remain a nominal party to this matter, his regulatory role precluded the option.

PRELIMINARY STATEMENT

This case concerns the Voter Protection Act, a unique and impactful limitation on representative democracy in the Arizona Constitution, which places heightened restrictions on the legislature to amend "initiative measures" and prevents the legislature from repealing such measures.

At issue is House Bill 2593, which amends various campaign-finance limitations in ARIZ. REV. STAT. § 16-905. Plaintiffs claim that HB 2593 is unconstitutional and invalid because Section 16-905 qualified for VPA protection and the legislature ignored its requirements.

Plaintiffs are mistaken. The VPA is potent medicine for a serious condition—not to be lightly prescribed as Plaintiffs deem retroactively necessary, but rather to be thoughtfully conferred when so directed by the people—both expressly and knowingly.

By its plain terms, the VPA extends only to initiative measures passed in 1998 and later. Section 16-905, although an initiative measure, was passed in 1986—12 years short of VPA protection.

Nor did the contribution limits in Section 16-905 acquire VPA protection based on their connection to or cross-reference in the Clean Elections initiative measure of 1998. VPA protection extends to initiative measures alone. Arizona courts have defined "measure" in the Constitution as a finite act or resolution, not to include all general principles advanced or laws cross-referenced therein.

What is more, the 8,995-word Clean Elections initiative never informed Arizona voters what those (Section 16-905) contribution limits were. And it can hardly be assumed that voters raced to their local law library based on one cross-reference to Section 16-905 and familiarized themselves with its comprehensive contents. Voters

could not have imagined their votes would freeze in place, forever, an unknown and undisclosed universe of precise dollar limits.

It is ironic that Plaintiffs insist the legislature "may not do indirectly what it is prohibited from doing directly." Mot. at 13. Plaintiffs protest too much. If anyone seeks to accomplish something indirectly here, it is Plaintiffs, who hope to infuse a discrete and finite 1998 initiative with impactful limitations on constitutional rights that were not included in the universe of regulations submitted to and passed by the people.

And even if Section 16-905 once qualified for VPA protection, it no longer would. Plaintiffs assert the legislature amended Section 16-905 in 2007 in accordance with VPA requirements. Once amended by legislators, Section 16-905 would have lost its character and form as the initiative passed by the people and instead morphed into standard legislation, untethered from VPA requirements.

BACKGROUND

A brief summary of the relevant initiatives and statutes is necessary before turning to the merits.

- **The Campaign Finance Reform Initiative—November 1986**

On November 4, 1986, Arizona voters passed The Campaign Finance Reform Act (Proposition 200), which set precise financial limits on campaign contributions from individuals and political committees to state and local candidates. *See* 1986 General Election, Arizona Publicity Pamphlet at 32-39 (Nov. 4, 1986). With more than 30 sections and subsections, the Reform Act provided a comprehensive and definitive source for contribution limits, set forth guidelines and procedures for contributions, and specified penalties and remedies for breaking the law. *Id.* It was codified at A.R.S. § 16-905, and became effective on December 16, 1986.

The Reform Act provided a mechanism for the Secretary of State to adjust limits on a regular biannual schedule to account for economic realities. *Id.* The Act provided:

"The secretary of state shall, biennially, adjust to the nearest ten dollars the amounts in subsections A through E of this section by the percentage change in the metropolitan Phoenix consumer price index, as defined in Section 43-251, and publish the new amounts for distribution to election officials, candidates and campaign committees." *Id*. at 33.

Section 16-905 has been amended several times since 1986, including amendments in 2007, 2009, and 2010. The legislature raised contribution limits in 2007 as part of larger election-related bill, which included several changes to Clean Elections. *See* 2007 Ariz. Sess. Laws, ch. 277. The 2009 amendment provided that the "use of a candidate's personal monies is not subject" to the contribution limits of Section 16-905. *See* 2009 Ariz. Sess. Laws, ch. 114, § 7. The 2010 amendment provided that "[c]ontributions to political parties and contributions to independent expenditure committees are exempt from the limitations of this subsection." *See* 2010 Ariz. Sess. Laws, ch. 209, § 13.

In its most recent regular session, the legislature again amended Section 16-905 with HB 2593 to increase contribution limits. HB 2593 passed with a majority of votes in the House (32-23) and Senate (17-13). The Governor signed it into law on April 11, 2013.

To be clear, though belittled as a "casual[]" process by Plaintiffs, HB 2593 traversed the standard, well-worn path required of a bill to become a law. As many learned from Schoolhouse Rock, HB 2593 began as "just a bill" and worked its way through our equivalent of Capitol Hill—four legislative committees, majority votes in the House and Senate, and then signed by the Governor into law. Plaintiffs simply claim that standard operating procedure was not enough here.

- **Voter Protection Act—November 1998**

A pair of initiative measures were submitted to voters in November 1998 to restrict the legislature from amending or repealing initiative measures. Medical-marijuana

advocates submitted the Voter Protection Act (Proposition 105).[2] As marketed, the VPA would "plac[e] certain limits" on the legislature's authority to amend or repeal initiative measures. *See* 1998 General Election Pamphlet at 43-51 (Nov. 3, 1998). An initiative could be amended only upon a three-fourths vote in both houses and repeals were prohibited. *Id*. It applied only to initiative measures "decided by the voters at or after the November 1998 general election." *Id*. at 47 (emphasis supplied).

The alternative provision was Proposition 104, which likewise would have limited legislative authority to amend or repeal measures. *Id*. at 33-42 (Nov. 3, 1998). An initiative could not be amended without a two-thirds vote in both houses and repeals were prohibited for five years, with a two-thirds vote required thereafter. *Id*. Unlike the VPA, however, Proposition 104 would have applied to all initiative measures—whether decided before or after the November 1998 general election. *Id*. at 36.

The difference in scope between the initiative measures became a central issue in the campaign. Proposition 104 supporters warned that the VPA—Proposition 105—would not extend protection to initiatives passed before 1998, including, in particular, the Campaign Finance Reform Initiative and its campaign finance limits. *Id*. at 49.

. . .

. . .

[2] Contrary to Plaintiffs' motion, Proposition 105 was not driven by "the Legislature's continued disdain for voter-driven campaign finance limits in particular," but was instead authored and funded almost exclusively by medical marijuana advocates. *Compare* Mot. at 4; *with* Ariz. State Senate Staff, 43rd Leg., 2d Reg. Sess., Fact Sheet for H.C.R. 2015 (May 27, 1998).

Arizona voters defeated Proposition 104 while the VPA passed. Thus, the Constitution was amended as follows:

> The legislature shall not have the power to repeal an initiative measure approved by a majority of the votes cast thereon or to repeal a referendum measure decided by a majority of the votes cast thereon.
>
> The legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon, or to amend a referendum measure decided by a majority of the votes cast thereon, unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure.

ARIZ. CONST. art. 4, pt. 1, § 1(6)(B) and (C).

- **Arizona Citizens Clean Elections Act—November 1998**

The Arizona Citizens Clean Elections Act was also passed by initiative in November 1998 (as Proposition 200). *See* 1998 General Election Pamphlet at 60-92 (Nov. 3, 1998). The initiative exceeded 8,500 words. It created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. *Id*.

Plaintiffs' lawsuit hinges on a particular subsection of the Clean Elections measure, A.R.S. § 16-941(B), which, in turn, references the contribution limits in the Campaign Finance Reform Statute as follows: "Notwithstanding any law to the contrary, a nonparticipating candidate shall not accept contributions in excess of an amount that is twenty percent less than the limits specified in § 16-905, subsections A through E, as adjusted by the secretary of state pursuant to § 16-905, subsection H. Any violation of this subsection shall be subject to the civil penalties and procedures set forth in § 16-905, subsections J through M and § 16-924."

ARIZONA COURT OF APPEALS

DIVISION ONE

CITY OF SCOTTSDALE, an Arizona municipal corporation, Plaintiff-Appellant, v. STATE OF ARIZONA Defendant-Appellee. JIM TORGESON and SIGN KING LLC, Intervenors.	No. 1 CA-CV-14-0798 A Maricopa County Superior Court No. CV 2014-003467 Hon. Robert Oberbillig

APPELLEE'S ANSWERING BRIEF

Mark Brnovich
Attorney General
(Firm No. 14000)

David D. Weinzweig (No. 018687)
Senior Litigation Counsel
Robert L. Ellman (No. 014410)
Senior Litigation Counsel
1275 West Washington
Phoenix, Arizona 85007-2926
Telephone: (602) 542-8027
Fax: (602) 542-8303

Attorneys for the State of Arizona

INTRODUCTION

This case is about a direct conflict between Arizona Revised Statute § 9-499.13, which defines the parameters of municipal regulation for human sign-walkers to access and operate in traditional public fora, and Scottsdale City Code § 16-353, which bans human sign-walkers from all public fora in the City of Scottsdale.

At issue is a common advertising practice where individuals, known as "sign-walkers," hold business signs on the roadside that advertise goods and services. This practice is common throughout Arizona and not unique to any particular town or community.

Plaintiff City of Scottsdale forbids the practice as criminal under Scottsdale City Code § 16-353 (the "Local Ordinance"), prohibiting people from holding business signs on public streets and sidewalks within Scottsdale's borders. The State of Arizona expressly allows and protects the practice under Arizona Revised Statute § 9-499.13 (the "State Law"), which directs that Arizona municipalities must treat sign-walkers no differently than other pedestrians.

Plaintiff sued the State here, assailing the State Law as an infringement on its charter city authority. Plaintiff urges an unprecedented expansion of charter authority under the Arizona Constitution that would imbue all charter cities and towns with broad, unilateral discretion to regulate any issues arising on their streets

and in their communities—whether or not the issue is common to other Arizona cities and without regard to general state laws.

Plaintiff misconstrues a municipal charter as the local equivalent of a Declaration of Independence. Plaintiff offers no Arizona decision so interpreting the Constitution and fails to account for or distinguish the bevy of adverse Arizona decisions that gut its arguments, including several decisions against the City of Scottsdale itself.

At bottom, a local ordinance or charter is invalid under Arizona law if and when it conflicts with state law on general laws and issues of statewide reach and concern, even if the concern is shared at state and local levels.

To be sure, charter cities are interested in the health, safety, and aesthetics of their communities, and often regulate in the areas under power delegated from the Arizona legislature. But the issue in this case is not whether health, safety, and aesthetics are proper areas for municipal regulation; not whether charter cities generally have power to regulate their streets; and not whether and to what extent local governments can regulate commercial speech under the First Amendment. Instead, the sole issue is whether charter cities are permitted to forbid and criminalize a common, statewide practice that Arizona law expressly permits. The answer is "no."

After briefing and oral argument, the trial court applied controlling precedent to reach an unsurprising conclusion—holding that the Local Ordinance is invalid because it conflicts with the State Law on a matter of statewide interest rather than purely local concern. This Court should affirm.

STATEMENT OF FACTS

The Ordinance. The City of Scottsdale is an Arizona political subdivision and charter city. (R. 28, ¶¶ 1-2.)[1] At issue is the Local Ordinance in Scottsdale's City Code that directs:

> No person shall have, bear, wear or carry upon any street, any advertising banner, flag, board, sign, transparency, wearing apparel or other device advertising, publicly announcing or calling attention to any goods, wares, merchandise, or commodities, or to any place of business, occupation, show, exhibition, event or entertainment. The provisions of this subsection do not apply to the wearing of apparel without remuneration for doing so or business identification on wearing apparel.

Scottsdale Rev. Code § 16-353(c).

Plaintiff has interpreted and enforced the Local Ordinance as a complete ban on human-held signs in public streets: "Sign walkers are not allowed to conduct their business on public streets which is defined as all that area dedicated to public use for public street purposes and includes roadways, parkways, alleys, and sidewalks." (R. 28, ¶ 8.)

[1] "R.___" refers to the Maricopa County Superior Court Clerk's Index of Record and pertinent docket number(s).

Lower Court Decision. After briefing and oral argument, the Superior Court granted the State's motion for summary judgment and dismissed Plaintiff's lawsuit on August 18, 2014. (R. 43.) The court found that State Law preempted the Ordinance, that the "sign spinner" field was a matter of statewide concern, and that "the valid local municipal interests of regulating a city's own sidewalks, aesthetics, and safety are not purely local matters to which the city has a sovereign right to regulate in a manner inconsistent with the state law." (R. 43.)

Plaintiff appealed.

ISSUE PRESENTED FOR REVIEW

At issue is whether the Arizona Constitution empowers charter cities under Article 13, Section 2 to unilaterally prohibit and criminalize unpopular conduct as a purely local concern if, when, or because it happens on their streets and in their communities, whether or not the conduct is unique or common to other Arizona cities, and whether or not the State has contrary laws.

ARGUMENT

I. The Superior Court correctly held that charter municipalities do not have broad, unilateral discretion under the Arizona Constitution to criminalize common, statewide practices without limitation or oversight from the Arizona legislature.

A. Standard of Review

The Superior Court granted summary judgment for the State after the parties agreed to brief the dispositive legal issue in cross-motions for summary judgment.

That decision is reviewed under a *de novo* standard. *City of Tempe v. Outdoor Systems, Inc.*, 201 Ariz. 106, 109, ¶ 7 (App. 2001). This Court "may affirm a summary judgment even if the trial court reached the right result for the wrong reason." *Guo v. Maricopa County Med. Ctr.*, 196 Ariz. 11, 15, ¶ 16 (App. 1999).

B. A city charter is not the local equivalent of the Declaration of Independence.

Plaintiff argues that the Arizona Constitution erects a legal fortress around charter cities within which they can craft local ordinances to rid their streets and sidewalks of sign-wielding people who offend their aesthetic sensibilities, ostensibly protecting their inhabitants from distracted drivers—regardless of contrary state statutes and immune from state legislative control. Plaintiff's argument hinges on Article 13, Section 2 of the Constitution, which provides that cities or towns of at least 3,501 residents may "frame a charter for [their] own government consistent with, and subject to the laws of the state." Invoking this provision, Plaintiff asserts a constitutional right to prohibit and even criminalize a common, statewide advertising practice that Arizona law expressly permits.

It doesn't work. Plaintiff's argument fails to distinguish fact from fiction when it comes to charter autonomy under the Arizona Constitution and the relationship between the State and its 19 charter towns and cities. The Constitution does not confer unilateral license on all charter towns and cities to prohibit and criminalize unpopular conduct if, when, or because it happens on their streets and

Attachment D

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Petitioner*,

v.

HOPE LYNETTE KING, *Respondent*.

No. 1 CA-CR 17-0543 PRPC
FILED 02-04-2021

Petition for Review from the Superior Court in Maricopa County
No. CR2001-003384
The Honorable Michael D. Gordon, Judge

REVIEW GRANTED;
RELIEF GRANTED; REVERSED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Lacey Stover Gard, Andrew S. Reilly
Counsel for Petitioner

Osborn Maledon PA, Phoenix
By Larry A. Hammond, Joseph N. Roth
Co-Counsel for Respondent

Arizona Justice Project, Phoenix
By Katherine Puzauskas
Co-Counsel for Respondent

Lewis Roca Rothgerber Christie LLP, Phoenix
By Robert H. McKirgan, Daniel A. Arellano
Counsel for Amicus Curiae International Association for Women's Mental Health; National Advocates for Pregnant Women; National Association of Social Workers; National Women's Health Network; Postpartum Support International; Tucson Postpartum Depression Coalition; Margaret Spinelli; Michelle Oberman; Teresa Twomey

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OPINION

Judge David D. Weinzweig delivered the Opinion of the Court, in which Judge Maria Elena Cruz joined. Presiding Judge Michael J. Brown dissented.

W E I N Z W E I G, Judge:

¶1 A jury convicted Petitioner Hope King of eight counts of felony child abuse in 2002, and she was sentenced to the mandatory minimum of four consecutive ten-year prison terms. Ten years later, King petitioned the superior court (the "PCR court") for post-conviction relief under Arizona Rule of Criminal Procedure 32.1(e), seeking a new trial based on "newly discovered scientific evidence" that enabled a clinical psychologist in 2010 to conclude that King suffered from postpartum psychosis in 2001 when she caused serious physical injury to her infant daughter. After an evidentiary hearing, the PCR court granted post-conviction relief, ordering that King receive a new criminal trial because the scope of diagnostic criteria for postpartum psychosis had expanded since her 2002 trial.

¶2 The State of Arizona petitions for review. We grant review and relief, reversing the PCR court's order because King could have been diagnosed with postpartum psychosis before her criminal trial, even if the likelihood of diagnosis later improved when medical science expanded the menu of diagnostic criteria.

BACKGROUND

¶3 Paramedics responded to an emergency call from King's apartment in February 2001 to find an unresponsive, "limp" infant in respiratory distress. The infant was King's daughter, then nine months old. She had dried blood stains around her nose and mouth; her chest cavity was slightly deformed. The infant was rushed to the hospital, where tests revealed a broken jaw, blood on the brain and in her eyes, two skull fractures and 15 broken ribs. King admitted to police that she inflicted the injuries. The State charged King with attempted murder and eight counts of felony child abuse.

¶4 A public defender, Bruce Peterson, was appointed to lead King's defense. Peterson generally understood that postpartum mothers could develop mental health issues and harm their children, and he believed King had mental health issues based on her frequent crying episodes in his presence. Peterson thus hired Dr. Richard Rosengard, a psychologist, to evaluate King's mental health. Dr. Rosengard personally examined King and interviewed her. Although her account of events has now changed, the medical records show that in 2001 King denied having "auditory or visual hallucinations" or suicidal thoughts. She "admitted to biting her daughter on the arm," but "could not tell [Dr. Rosengard] why." Based on his examination and King's answers, Dr. Rosengard authored a written report, diagnosing King with several mental disorders, including "major affective disorder, depression" and "posttraumatic stress disorder." Dr. Rosengard's report never examined whether King suffered from postpartum mental illness; indeed, the word "postpartum" never appears in his report.

¶5 What happened next is unclear. Although not mentioned in the PCR petition, Peterson would later testify he retained a second unnamed pretrial "postpartum expert," who agreed that King had no postpartum insanity defense. The record is largely silent about this second expert. There is no written report, no contemporaneous description of a report, no opinions or conclusions, no correspondence and no indication of how or why this second expert reached the opinion.

A. Trial, Direct Appeal and First Petition for Post-Conviction Relief

¶6 At the 2002 trial, Peterson argued that King did not intentionally or knowingly harm her infant daughter and instead "snapped," pointing to "a history of mental disorders in her family and her inability on th[at] particular day to control [a] switch." The prosecution called 13 witnesses. King called none, and she presented no other evidence. The jury convicted King of eight counts of child abuse but hung on attempted murder.

¶7 At sentencing, King offered evidence and argument to show she suffered from postpartum mental illness when she committed the offenses, including letters from family members who described her misconduct as an "aberration[]." King herself emphasized that she suffered from a "debilitating disorder" known as postpartum depression and "was never prepared for [its] severity." She wrote the judge only weeks after her criminal trial, stressing that she "was extremely mentally not stable due to

a serious disorder that is truly now being shined upon with a whole new light." She recounted the disorder's "awful" symptoms, including her "difficulty controlling emotions," "cr[ying] for no apparent reason," sleeping too much or not at all, and never wanting to leave the house. The court sentenced King to the minimum mandatory, mitigated sentence of four consecutive ten-year terms. The trial judge remarked that "even if the mental health experts didn't tell us, it's obvious that to do what [King] did must involve serious mental health issues."

¶8 On direct appeal to this court, King raised two evidentiary issues but did not mention her mental condition. We affirmed the convictions and sentences. *State v. King* (*King I*), 1 CA-CR 02-0889, ¶ 21 (Ariz. App. Oct. 9, 2003) (mem. decision).

¶9 King sought post-conviction relief from the superior court in 2004, arguing her mandatory sentence was "grossly disproportional" and thus unconstitutional. She emphasized her "mental health," but only as a circumstance "support[ing] a finding that [her] 40-year prison term is grossly disproportionate to her crimes." The superior court summarily dismissed King's petition. We denied review. *State v. King* (*King II*), 1 CA-CR 05-0439-PRPC (order filed Jan. 6, 2006).

B. 2010 Diagnosis

¶10 Around five years later, a nonprofit group retained Dr. Christina Hibbert, a clinical psychologist, to examine King and "provide [an] expert opinion" on whether King suffered from "postpartum mental illness" when she abused the child.

¶11 Dr. Hibbert reviewed King's medical records and twice examined King in person before releasing her written conclusions in December 2010. Dr. Hibbert determined that King suffered from postpartum psychosis in 2001 and pointedly criticized Dr. Rosengard's pretrial evaluation:

> Considering the time frame of the abuse (within the first year postpartum), it seems obvious to this examiner that postpartum mental illness must be ruled out. This report does not mention the term 'postpartum,' however, and clearly Ms. King was not evaluated for postpartum mental illness in this evaluation.

¶12 Dr. Hibbert expressed dismay that King never received "a thorough mental health examination" for postpartum issues, especially

given the "serious," "obvious" and "clear" mental health issues. Dr. Hibbert also reported a greater "general awareness and understanding" of postpartum disorders among the medical community since 2002. Even so, Dr. Hibbert lamented the failure of "legal, medical and mental health professionals helping Ms. King at the time of her trial [who] did not comprehend perinatal mental illness."

C. 2012 Petition for Post-Conviction Relief

¶13 In April 2012, King filed a successive petition for post-conviction relief under Rule 32.1(e), requesting a new criminal trial based on Dr. Hibbert's 2010 diagnosis of postpartum psychosis, described as "a disease that many in the medical community were not fully aware of" in 2002 because it had "not yet [been] fully researched or understood." She floated a related, even if inconsistent, claim of ineffective assistance of counsel, arguing her trial counsel "failed to discover and raise postpartum psychosis to negate the specific intent of King's convictions or as an affirmative insanity defense."

¶14 The State opposed King's petition, countering that her 2010 diagnosis did not present "newly discovered material evidence" under Arizona Rule of Criminal Procedure 32.1(e). The State framed its position against a historical backdrop, arguing that "information about postpartum depression and postpartum psychosis was available" and "could have been discovered [before King's original trial] through reasonable diligence." It offered a dozen published decisions "from [courts] across the country [that] discuss[ed] postpartum psychosis" in the 49-year period leading to King's trial.[1] The State also pointed to a dozen law reviews and legal periodicals that explored the merits of King's precise defense from coast (California) to

[1] *See Murray v. St. Mary's Hosp.*, 113 N.Y.S.2d 104, 105 (1952); *Pfeifer v. Pfeifer*, 280 P.2d 54, 55 (Cal. Dist. App. 1955); *Schuler v. Berger*, 275 F. Supp. 120, 122 (E.D. Pa. 1967); *Burch v. Burch*, 398 So.2d 84, 86 (La. App. 1981); *Commonwealth v. Comitz*, 530 A.2d 473, 475 (Pa. Super. 1987); *Edwards v. Arlington Cty*, 361 S.E.2d 644, 647 n. 5 (Va. App. 1987); *People v. Massip*, 271 Cal. Rptr. 868, 873 (App. 1990); *In re Cory M.*, 2 Cal. App. 4th 935, 941 (1992); *Bahrenfus v. Psychiatric Sec. Rev. Bd*, 853 P.2d 290, 292 n. 3 (Or. App. 1993); *In re Elizabeth R.*, 35 Cal. App. 4th 1774, 1778 (1995); *In re Adoption No. 12612*, 725 A.2d 1037, 1040 (Md. 1999); *People v. Sims*, 750 N.E.2d 320, 325 (Ill. App. 2001).

coast (New York) before King's trial.[2] And, lastly, it emphasized that postpartum psychosis was covered in the popular press before King's trial, citing ten examples between 1987 and 1997.[3]

¶15 Most important here, the cable network MSNBC reported on the scourge of postpartum psychosis in April 2001. That story, *A Mother's*

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[2] *See* Marcia Baran, *Postpartum Psychosis: A Psychiatric Illness, a Legal Defense to Murder, or Both?,* 10 Hamline J. Pub. & Pol'y 121 (1989); Lori A. Button, *Postpartum Psychosis: The Birth of a New Defense?*, 6 Cooley L. Rev. 323 (1989); John Dent, *Postpartum Psychosis and the Insanity Defense*, 1989 U. Chi. Legal F. 355 (1989); Anne Damante Brusca, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 Hofstra L. Rev. 1133 (1990); Debora K. Dimino, *Postpartum Depression: A Defense For Mothers Who Kill Their Infants*, 30 Santa Clara L. Rev. 231 (1990); Christine Anne Gardner, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?,* 24 New Eng. L. Rev. 953 (1990); Jennifer L. Grossman, *Postpartum Psychosis-A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. Det. L. Rev. 311 (1990); Laura E. Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide,* 38 UCLA L. Rev. 699, 701 (1991); Megan C. Hogan, *Neonaticide and the Misuse of the Insanity Defense,* 6 Wm. & Mary J. Women & L. 259, 285-286 (1999); Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness,* 6 Psychol. Pub. Pol'y & L. 1098, 1106 (2000) (Arizona professors noting that "[p]ostpartum psychosis often involves hallucinations or delusions, severe depression, and thought disorder").

[3] *See* Ann Japenga, *Ordeal of Postpartum Psychosis: Illness Can Have Tragic Consequences for New Mothers,* L.A. Times, Feb. 1, 1987; Maud S. Beelman, *Mother Convicted of Murdering Baby: Killing Spurs Debate on Postpartum Depression,* L.A. Times, May 10, 1987; Marianne Yen, *High-Risk Mothers; Postpartum Depression, in Rare Cases, May Cause an Infant's Death,* Wash. Post, Aug. 23, 1988; Constance L. Hays, *Mother on Trial in 2 Deaths Had Postpartum Psychosis, Lawyer Says,* N.Y. Times, Sept. 7, 1988; Eric Lichtblau, *Postpartum Psychosis Key to Murder Defense,* L.A. Times, Sep. 24, 1988; Eric Lichtblau, *Expert: Massip Suffered Classic Maternal Psychosis,* L.A. Times, Oct. 20, 1988; Mary Peterson Kauffold, *After Birth is There a Better Way to Treat Postpartum Disorders?*, Chi. Trib., Jul. 9, 1989; *Mom Who Drowned Baby Acquitted as Mentally Ill,* Orlando Sentinel, Sep. 12, 1991 ("[The] judge said the woman may have suffered from postpartum psychosis"); *Mother Innocent in Baby's Death,* Bos. Globe, Sep. 12, 1991; Anna Cekola, *Mother Faces Trial in Death of Newborn*, L.A. Times, Jan. 21, 1997 ("Postpartum psychosis gained national attention as a legal defense nearly 10 years ago").

Confession, aired nationally less than three months after King's arrest. Featured as an expert was Dr. Diane Barnes, the same medical expert hired over 15 years later by King's PCR counsel.

¶16 The PCR court ultimately held an evidentiary hearing on King's "newly discovered scientific evidence" claim in 2017. Her PCR counsel conceded that postpartum psychosis was a known and diagnosed condition well before King's trial but argued that "[w]hat has changed is how widely known, researched and understood the diagnostic presentation [and] the symptom presentation" have become. The PCR court heard testimony from King and Peterson, her defense attorney. Although she denied them in 2001, King now told the PCR court she had suffered from postpartum delusions and hallucinations after childbirth, adding that violent and "weird" visual images and voices would "pop into [her] head."

¶17 The PCR court heard from three medical experts. Dr. Hibbert and Dr. Barnes testified on King's behalf, and Dr. Steven Pitt testified for the prosecution. All three medical experts agreed "it was possible to have diagnosed King properly in the 2001 time frame." Based on King's jail medical records, Dr. Barnes opined that King suffered from "bipolar disorder with psychotic features" in 2001. Dr. Barnes acknowledged that postpartum psychosis had been recognized for "hundreds and hundreds and hundreds of years," but noted how "the scope of symptoms has broadened considerably since 2001." Yet, Dr. Barnes still avowed that she "personally" could have diagnosed King before her 2002 criminal trial. For her part, Dr. Hibbert opined that "a postpartum woman" is more likely "to get an accurate diagnosis today" than in 2002, but she agreed with Dr. Barnes that King "could have" been diagnosed in 2001 "[w]ith the right person evaluating."

¶18 Dr. Pitt, a local forensic psychiatrist, testified that "postpartum psychosis" is merely a label for "a series of psychotic symptoms" and "[t]here's nothing new or different about psychotic features in 2002 than . . . today." Then and now, he claimed that a reasonable mental health professional would have asked whether King presented "psychotic symptomatology" or "experienced perceptual disturbances, either visual or auditory." Dr. Pitt further opined that no "special experience" was needed to diagnose this form of psychosis and the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") "does not affect the understanding or recognition of the psychotic symptomology."

¶19 The PCR court granted King's petition in a minute entry. On one hand, the court acknowledged that postpartum psychosis was a known

and diagnosed condition long before King's 2002 trial, and all three PCR medical experts agreed that King could have been diagnosed in 2002. Even so, the court found that King's 2010 diagnosis was newly discovered evidence, pointing to "advancements in understanding postpartum psychosis."[4] From this judgment, the State appeals.[5]

DISCUSSION

¶20 Arizona Rule of Criminal Procedure 32.1(e) provides that a convicted defendant can obtain a new criminal trial if "newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence." Ariz. R. Crim. P. 32.1(e). A fact is "newly discovered" only if (1) it was discovered after trial or sentencing, (2) the petitioner exercised due diligence to discover it before trial, and (3) it is material and not merely cumulative or solely for impeachment. *Id.* at (e)(1)–(3); *see also State v. Amaral*, 239 Ariz. 217, 219, ¶ 9 (2016). Our supreme court has described this ground for post-conviction relief as "disfavored" and warned courts to proceed "cautiously" before granting new trials based on newly discovered evidence. *State v. Serna*, 167 Ariz. 373, 374 (1991).

¶21 We review the PCR court's grant of post-conviction relief for an abuse of discretion and its findings of fact for clear error. *State v. Pandeli*, 242 Ariz. 175, 180, ¶¶ 3-4 (2017). An abuse of discretion includes both legal error and a PCR court's failure to "adequately investigate the facts necessary to support its decision." *Id.* at ¶ 4. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *State v. Burr*, 126 Ariz. 338, 339 (1980) (citations omitted). We defer to the PCR court's credibility evaluations of witnesses who testified at the PCR hearing. *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988).

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[4] The PCR court described the 2010 diagnosis as a "2015 diagnosis" based on 2015 "medical wisdom."

[5] By all accounts, the PCR court's order represented a first. All 50 states have similar post-conviction relief rules that permit convicted defendants to obtain a new trial based on newly discovered material evidence. Yet no one—not the PCR court, not King and not the dissent—has pointed to even one published or unpublished case in which any court from any state has granted a new trial based on medical advancements in the science of postpartum depression or psychosis.

¶22 On this record, we reverse. The decision of the PCR court misinterpreted and misapplied the requirements of Rule 32.1(e), and the PCR court did not account for uncontested facts conflicting with the decision.

A. King's 2010 Diagnosis Was Not A Newly Discovered Material Fact

1. *The PCR court misinterpreted and misapplied Rule 32.1(e) and Arizona decisional law*

¶23 The State argued that King's 2010 diagnosis was not "newly discovered" evidence under Rule 32.1(e) because she raised a disorder that was known to and diagnosed by "mental-health experts" before her trial. The PCR court rejected the State's interpretation as "unyielding," "rigid," and "undu[ly] focused on the fact that postpartum psychosis was a recognized medical condition." Instead, the PCR court first examined the second requirement of Rule 32.1(e) and then concluded King "met her evidentiary burden" because "neither [her] nor her counsel, through the exercise of reasonable diligence, could have understood and therefore discovered her postpartum psychosis at the time of trial."[6]

¶24 This was legal error. To secure post-conviction relief, King had the burden to prove *each* requirement of Rule 32.1(e), beginning with "the first requirement" that her post-conviction diagnosis was "in fact" newly discovered and ending there if unproven. *State v. Bilke*, 162 Ariz. 51, 53 (1985) (describing the "first requirement" as whether the proffered evidence is newly discovered); *Serna*, 167 Ariz. at 374; *State v. Harper*, 823 P.2d 1137, 1143-44 (Wash. App. 1992) (holding that due diligence prong "need[] not be addressed" where new psychiatric opinion did not meet first prong). By inverting or collapsing this first requirement and the second requirement of reasonable diligence, the PCR court took a deep,

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[6] We do not suggest the first and second requirements are unconnected. Petitioners who present a previously unknown medical condition would necessarily satisfy the due diligence requirement. *See Amaral*, 239 Ariz. at 220-21, ¶ 14.

unnecessary and futile dive into whether King and her defense attorney performed due diligence to locate the 2010 diagnosis before her 2002 trial.[7]

¶25 The PCR court's approach also conflicts with Arizona decisional law. Our supreme court has twice considered whether a post-conviction medical diagnosis or scientific advancement presented "newly discovered" evidence. *See Amaral*, 239 Ariz. 217; *Bilke*, 162 Ariz. 51.

¶26 *Bilke* came first. Petitioner Bilke was diagnosed with post-traumatic stress disorder ("PTSD") in 1987, more than ten years after his 1974 conviction. The supreme court held that Bilke presented a colorable claim for post-conviction relief based on the post-trial diagnosis, reasoning that the disorder and now-common acronym were unknown to medical science when Bilke was tried and convicted and that Bilke "could not have been diagnosed until years after [his] trial." *Amaral*, 239 Ariz. 217, 221, ¶ 18 (discussing *Bilke*).

¶27 King cannot meet the *Bilke* standard. The record shows that postpartum psychosis was recognized and diagnosed by medical science for hundreds if not thousands of years prior to King's trial, and the disorder had been raised as a defense by defendants accused of similar crimes for decades.

¶28 *Amaral* later confirmed *Bilke*'s holding. Petitioner Amaral was convicted of various felonies; each committed as a juvenile. *Id.* at 218, ¶ 2. Amaral moved for post-conviction relief in 2012 based on scientific advancements in juvenile psychology and neurology since his 1993 trial. *Id.* at 219, ¶ 6. The supreme court held that "advances in juvenile psychology and neurology" were not newly discovered evidence because "juvenile behavioral tendencies and characteristics were generally known [before Amaral's trial], and the trial judge contemplated Amaral's youth and attendant characteristics" and "personal idiosyncrasies" at sentencing. *Id.* at 219, 221, ¶¶ 8, 17.

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[7] The dissent contends that whether evidence is "newly discovered" is not a "threshold question" under Rule 32.1(e), "but rather, must be considered concurrently with the rest of the elements," citing *Bilke* in support. *Infra* ¶ 76 n. 17. That argument, however, conflicts with *Bilke* and *Amaral*, neither of which envisions or articulates a free-floating balancing test that implicates all elements at once. To the contrary, *Bilke* described the "first requirement" as showing "the evidence [is] newly[] discovered." 162 Ariz. at 53.

¶29 Most important here is how *Amaral* framed, contrasted and applied *Bilke*:

> Unlike Amaral, Bilke suffered from a condition that existed at the time of the trial but was not yet recognized by mental health professionals and, consequently, could not have been diagnosed until years after the trial. Thus, at the time of sentencing, it would have been impossible for the trial judge in *Bilke* to have assessed the petitioner's actions in light of his disorder. In contrast, Amaral's juvenile status and impulsivity were known at the time of sentencing and were explicitly considered by the trial judge. Hence, his condition was not newly discovered.

Id. at 221, ¶ 18.

¶30 *Amaral* does not help King's petition. First, King and her defense attorney in fact urged the sentencing judge in 2002 to consider her actions in light of her disorder. Second, just as Amaral offered evidence based on "*advances* in juvenile psychology and neurology" that "supplement[ed] then-existing knowledge of juvenile behavior," *id.*, ¶ 17 (emphasis added), King offers "*advancements* in understanding postpartum psychosis" that supplement or confirm then-existing knowledge of postpartum behavior. Applied here, *Amaral* teaches that "newly discovered" evidence:

- Does *not* mean broadened research into supplemental diagnostic criteria, even if it reduces the likelihood of misdiagnosis;

- Does *not* mean a greater professional awareness or appreciation of suspected risks and known mental disorders, even if this development bolsters or perfects a previously available but marginal defense; and

- Does *not* mean expanded training or the geographic assimilation of specialized knowledge from experts in California to generalists in Arizona, even if this development increases the chances of diagnosis.

See, e.g., *Henry v. State*, 125 So. 3d 745, 750-51 (Fla. 2013) (newly discovered evidence is not a revised medical definition drawn from "decades of advancement in neuroscience"); *Shuman*, 836 N.E.2d at 1090-91 (newly discovered evidence is not advancements reported in medical, scientific and academic circles); *McSwain*, 676 N.W.2d at 258 (Murray, J., concurring)

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

DAVID MICHAEL WALLACE, *Appellee*.

No. 1 CA-CR 17-0638
FILED 12-20-2018

Appeal from the Superior Court in Mohave County
No. S8015CR201601681
The Honorable Billy K. Sipe, Jr., Judge *Pro Tempore*

REVERSED

COUNSEL

Mohave County Attorney's Office, Kingman
By Jaimye L. Ashley
Counsel for Appellant

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellee

W E I N Z W E I G, J., dissenting:

¶18 I respectfully dissent.

¶19 I concur that Trooper Callister had reasonable suspicion to stop the defendant's vehicle, perform a field sobriety test and pose investigative questions. His reasonable suspicion ended, however, when he returned the defendant's license and registration. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). At that point, the officer needed to either release the defendant or articulate an objective, reasonable suspicion that the defendant was engaged in additional, specific criminal conduct. *Id.*

¶20 The trial court examined the evidence, heard testimony from the officer at an evidentiary hearing, personally assessed the credibility of all witnesses and found the officer lacked a reasonable suspicion to curtail defendant's liberty beyond the initial traffic-stop. *State v. Sweeney*, 224 Ariz. 107, 111, ¶12 (App. 2010) ("We generally review the denial of a motion to suppress with deference to the trial court's factual determinations, including its evaluation of the credibility of witness testimony."). And, to reiterate, this court must "view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Peltz*, 242 Ariz. 23, 29, ¶ 20 (App. 2017) (citation omitted).

¶21 The majority holds that Trooper Callister had reasonable suspicion to extend the traffic stop and continue his questioning based on his belief that defendant Wallace was *either* hauling illegal drugs *or* had illegal drugs in his system. Although it does not match *which* facts indicate reasonable suspicion for *which* offense, the majority generally holds that the officer had reasonable suspicion to extend the stop and pursue other criminal conduct because the defendant (1) was returning from a vacation to Las Vegas, but lacked a stable job, (2) was very nervous, (3) became more nervous when informed he would only receive a warning, (4) had facial twitches, (5) maintained constant eye-contact with the officer, (6) had red and watery eyes, and (7) drove a rental car.

¶22 Based on the universe of evidence and testimony presented to the trial court, these seven facts are insufficient to spark an objective, reasonable suspicion of ongoing criminal conduct. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (circumstances or factors that do not reliably distinguish between suspect and innocent behaviors are insufficient to establish reasonable suspicion because they may cast too wide a net and subject all travelers to "virtually random seizures"). I believe the officer's suspicion instead teetered on common behavior that "would subject nearly

everyone to a continued, intrusive detention following a routine traffic stop." *Sweeney*, 224 Ariz. at 113, ¶ 24.

¶23 I first note the defendant passed a field sobriety test—indeed, the officer cut the test short "because it was clear that Mr. Wallace did not have any impairment to drive." This must not be minimized because it colors the entire narrative.

¶24 The officer testified that the defendant's Las Vegas vacation, "fairly pricey" Circus Circus accommodations and part-time job building pools represented a "red flag" that drugs were in the vehicle, describing the vacation as "unusual" if "money might be an issue." The trial court reasonably concluded that this "red flag" represented the officer's subjective assessment—namely, that the Circus Circus hotel was too expensive for someone with part-time employment—and emphasized that reasonable suspicion is an objective inquiry. *State v. Teagle*, 217 Ariz. 17, 23, ¶ 25 (App. 2007) (the Fourth Amendment requires that an officer have some minimal, objective justification for a detention). I share his conclusion, reticent to believe that part-time workers cannot drive to Las Vegas to meet friends without arousing the reasonable suspicion of law enforcement.

¶25 The officer heavily relied on defendant's nervousness to arouse his reasonable suspicion, including "the twitching of the face and the staring that he did," which the officer attributed to "nervousness" rather than a biological reaction to illegal drugs. As the trial court explained, however, "the courts consistently hold that nervousness typically adds nothing to the reasonable suspicion analysis." *See, e.g.*, *Sweeney*, 224 Ariz. at 110, 113, ¶¶ 9, 24 ("Appellant displayed an overly nervous demeanor, even after the officer told him that he was to receive a warning and not a citation. Appellant's demeanor included a shaking hand, heavy breathing and twitching cheeks. . . . [T]hese factors did not give rise to objective reasonable suspicion of anything.").

¶26 I am particularly confused by the officer's emphasis on the defendant's nervousness *after* told he would *not* receive a traffic ticket, which he characterized as abnormal. And that's true. The defendant's reaction was counterintuitive because a motorist would be expected to express relief—maybe with an audible sigh—after informed of his good fortune. But strange behavior is meaningless unless tethered to suspicions of *particular* criminal conduct. As relevant here, it is unclear how defendant's counterintuitive reaction to getting a warning would spark a reasonable suspicion that he was *either* transporting drugs or has drugs in his system. Indeed, impairment had been ruled out.

¶27 Also problematic is the officer's vacillating attitude on eye contact, which creates a no-win situation for the driving public. In particular, the officer testified that his suspicions are aroused when motorists make *too much* eye contact or *too little* eye contact, leaving motorists to his subjective assessment of appropriate eye contact, which falls somewhere in between. *Sweeney*, 224 Ariz. at 113, ¶ 24. At a minimum, the court reasonably found that defendant's eye contact was not "a significant factor" towards reasonable suspicion.

¶28 And last, exhausted travelers often have red, watery eyes when driving long distances. The officer never testified that relevant training or experience led him to believe Wallace's red and watery eyes were an indication of drug use. *State v. O'Meara*, 198 Ariz. 294, 296 (2000) (factors that do not reliably distinguish between suspect and innocent behaviors are insufficient to establish reasonable suspicion because they may cast too wide a net and subject all travelers to "virtually random seizures").

¶29 Although I understand and respect the holding of my colleagues, I do not believe the officer had reasonable suspicion to extend the traffic stop and would thus affirm the superior court's suppression order.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

RONALD A. SIMMS,
Plaintiff/Appellee-Cross Appellant,

v.

ARIZONA RACING COMMISSION;
JEREMY E. SIMMS, an individual;
TP RACING, LLLP, a limited liability limited partnership,
and BELL RACING, LLC, a limited liability company,
Defendants/Appellants-Cross Appellees.

No. 1 CA-CV 18-0546
FILED 2-23-2021

Appeal from the Superior Court in Maricopa County
No. LC2016-000505-001
The Honorable Dawn M. Bergin, Judge

VACATED AND REMANDED

COUNSEL

Dentons US, LLP, Phoenix
By Paul K. Charlton, Karl M. Tilleman, Douglas D. Janicik
Co-Counsel Plaintiff/Appellee/Cross Appellant Ronald A. Simms

Greenberg Traurig, LLP, Phoenix
By Nicole M. Goodwin
Co-Counsel for Plaintiff/Appellee/Cross Appellant Ronald A. Simms

Orrick Herrington & Sutcliffe, LLP, Los Angeles, California
By Stacy W. Harrison, Nathan J. Novak
Co-Counsel for Plaintiff/Appellee/Cross Appellant Ronald A. Simms

Stinson, LLP, Phoenix
By Michael C. Manning, James M. Torre
Counsel for Defendants/Appellants/Cross Appellees Jeremy E. Simms, TP Racing LLLP, Bell Racing LLC

Gammage & Burnham, PLC, Phoenix
By Camila Alarcon, Christopher L. Hering
Counsel for Defendant/Appellant/Cross Appellee Arizona Racing Commission

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OPINION

Presiding Judge David D. Weinzweig delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge James B. Morse Jr. joined.

W E I N Z W E I G, Judge:

¶1 This appeal marks another chapter in the protracted and acrimonious feud between brothers Jeremy ("Jerry") and Ronald ("Ron") Simms over the rights to Turf Paradise. Their fraternal animus has spawned a vast web of administrative duels, lawsuits and appeals. This chapter requires us to decide when the Arizona Racing Commission may accept and decide appeals of licensing decisions made by the Arizona Department of Gaming's director.

FACTS AND PROCEDURAL BACKGROUND

¶2 We recount the facts in the "light most favorable to the Commission's decision." *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 334 (App. 1984).

A. Turf Paradise and the Simms Brothers

¶3 Turf Paradise is a thoroughbred and quarter horse racetrack located about 25 miles from downtown Phoenix. Jerry and Ron acquired Turf Paradise in 2000 through a limited partnership, TP Racing, L.L.L.P. ("TPR"). Jerry held a 55 percent interest in TPR; Ron and Ron's trust held a 32 percent interest. Jerry and Ron formed J & R Racing, LLC ("J & R") to serve as TPR's general partner, imbued with exclusive authority to manage TPR's affairs. Jerry and Ron each owned a 50 percent interest in J & R. Ron owned his through RASCD, Inc.

¶4 Jerry and Ron's business relationship deteriorated and then disintegrated, ending in a pair of 2010 lawsuits asserting competing claims and counterclaims. Jerry and TPR sued Ron and one of Ron's corporations for defaulting on a promissory note associated with a land transfer. Ron responded with 40 counterclaims, including claims for breach of contract and breach of fiduciary duty. The superior court issued two injunctions in

those lawsuits; the first prevented Jerry from exceeding his managerial authority under J & R's operating agreement, *Simms v. Simms*, 1 CA–CV 11–0525, 2012 WL 2795978 (Ariz. App. July 3, 2012); the second prevented Jerry from removing J & R as TPR's general partner without justification, *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489 (App. 2013).

B. Ron Loses His License and Is Ousted

¶5 The quarrel then shifted to the administrative arena. TPR asked the Arizona Department of Racing ("ADOR") to renew its three-year racing permit in 2012. During the renewal process, ADOR Director Bill Walsh learned that Ron's individual racing license had expired and ordered that Ron "may not take part in, directly or indirectly, or have any personal interest in the operation of [TPR]." Director Walsh said ADOR was concerned about Ron's "fitness" to participate in TPR and promised to "thoroughly scrutinize[]" Ron's future license applications. Years later, the superior court in this case would receive evidence that Jerry sparked or stoked Ron's regulatory troubles by delivering ten binders of adverse information to Director Walsh.

¶6 Ron formally applied for a new racing license in November 2013. Unbeknownst to Ron, Director Walsh decided to deny Ron's application and solicited input from Jerry's attorney in drafting the "notice of denial." Jerry's attorney was pleased with Director Walsh's draft and privately praised him for an "A+ job." Director Walsh's final notice of denial listed ten grounds for rejecting Ron's application. Walsh also warned that TPR's "application for renewal of its three year permit" would be considered only after Ron was removed from any role in or connection to the business.

¶7 Given the denial of Ron's application, the superior court dissolved both injunctions against Jerry and TPR. Just hours later, the TPR partners (absent Ron) voted to dissociate Ron from TPR and replace J & R as general partner with Bell Racing, a new company Jerry had formed. Jerry assumed control of Turf Paradise with these maneuvers, at least for the time being.

C. The Office of Administrative Hearings, Arizona Department of Gaming and Arizona Racing Commission

¶8 Ron appealed the denial of his racing license. *See* A.R.S. § 5-104(D). The Office of Administrative Hearings held a 21-day hearing over ten months before an administrative law judge ("ALJ"). In June 2015, the ALJ recommended that Director Walsh's decision be reversed and Ron be

issued a racing license. Among his findings and conclusions, the ALJ determined that Ron was "qualified to be licensed by ADOR," "has sufficient good repute and moral character to satisfy the statutory requirement for a license," and "did not violate the racing laws" or the Commission's regulations "when he was previously licensed or granted a permit."

¶9 At that point, Arizona law required "the director" to reject or modify the ALJ's decision. *See* A.R.S. § 5-104(D) ("The decision of the administrative law judge becomes the decision of the director unless rejected or modified by the director within thirty days."). Two weeks after the ALJ's decision, however, the legislature refashioned ADOR into a division of the Arizona Department of Gaming ("ADOG"). This administrative shuffle meant that ADOG's director considered the ALJ's decision rather than Director Walsh. The ALJ's decision then became ADOG's final decision (hereinafter, the "ADOG Decision") because ADOG's director did not reject or modify the ALJ's decision "within thirty days" after its release. *See id.*

¶10 Jerry and TPR appealed the reversal of Ron's license denial to the Commission under A.R.S. § 5-104(D), urging the Commission to "reject and reverse" the ADOG Decision "pursuant to Ariz. Admin. Code R9-2-124(A), A.R.S. § 5-104(D), and A.R.S. § 41-1092.08(C)." Ron moved to dismiss the appeal for lack of "standing," arguing that neither Jerry nor TPR was a "person aggrieved" under the Commission's rules. *See* Ariz. Admin. Code R19-2-124(A)(1). The Commission rejected Ron's argument, voting 3-2 that Jerry and TPR had "aggrieved person status."

¶11 The Commission held a hearing and received extensive briefing from the parties before reversing the ADOG Decision, again "denying [Ron] an owner's license to participate in or be employed at any horse race track licensed to operate in the State of Arizona." The Commission found that Ron did "not have sufficient good repute and moral character to satisfy the statutory requirement for a license and that granting [Ron] a license would not serve the best interest of the safety, welfare, economy, health and peace of the people of the State." *See* A.R.S. § 5-108(A)(1)(b), (h). The Commission also found that Ron violated Arizona's racing laws when he was previously licensed, A.R.S. § 5-108(A)(1)(c); willfully violated the Commission's rules and regulations, A.R.S. § 5-108(A)(1)(g); knowingly made false statements of fact to ADOR, A.R.S. § 5-108(A)(3); did not meet "his monetary obligations in connection with racing meetings," A.R.S. § 5-108(A)(4); and failed to inform ADOR in writing of material changes in his license application, A.R.S. § 5-108(A)(1)(j).

D. The Superior Court

¶12 Ron timely appealed the Commission's decision to the superior court, raising 25 procedural, evidentiary and constitutional arguments. *See* A.R.S. §§ 41-1092.08(H), 12-905(A). As relevant here, Ron argued that the Commission erred by hearing Jerry and TPR's appeal because neither had standing as "persons aggrieved," that ADOR and the Commission deprived Ron of due process and equal protection in the first instance, and that the Commission's decision was unsupported by sufficient evidence.

¶13 The superior court heard oral argument. It also reviewed written memoranda, the administrative record and supplemental evidence of the parties, but held no evidentiary hearing. *See* A.R.S. § 12-910(A), (B). The court then vacated the Commission's decision and reinstated the ADOG Decision, reasoning that Jerry and TPR did not "qualify as aggrieved persons" under R19-2-124(A)(1). The court did not define the term "person aggrieved," but rejected the dictionary "definition of 'aggrieved' [as] entirely too broad and therefore unworkable," and found the Commission's rule "is not designed" to resolve or "delve into whatever disputes exist between the partners."

¶14 Because it vacated and reversed the Commission's decision on standing grounds, the superior court did not decide whether the Commission erred on the merits or violated Ron's constitutional rights. The court did, however, reject Ron's due process arguments against former ADOR Director Walsh, reasoning that Ron had no constitutionally protected property interest in a racing license and that "Walsh was not acting in a quasi-judicial capacity when he denied Ron's license." Ron sought nearly $11 million in attorney fees and costs, which the court described as "patently unreasonable" and awarded Ron $225,000 in fees and costs.

¶15 The Commission, Jerry, Ron and TPR timely appealed and cross-appealed, asserting errors at every stage of the licensure process, beginning with former Director Walsh's original denial and ending with the superior court's reversal of the Commission's decision. We have jurisdiction. *See* A.R.S. § 12-913.

DISCUSSION

¶16 The superior court determined that Jerry and TPR lacked standing to appeal the ADOG Decision to the Commission. Arizona courts, however, are "not constitutionally constrained" to impose standing

minimums, and this case does not present the doctrine of prudential standing, which cautions Arizona courts to "exercise restraint [and] refrain from issuing advisory opinions" to ensure that "cases [are] ripe for decision" and "issues [are] fully developed between true adversaries." *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209, ¶8 (2019).

¶17 Even so, the Commission must follow the administrative rules it promulgates, including limitations on who may appeal rulings to the Commission. *Cochise Cty. v. Ariz. Health Care Cost Containment Sys.*, 170 Ariz. 443, 445 (App. 1991) ("An administrative agency must follow the rules it promulgates."); *cf. Ariz. Dep't of Water Res. v. McClennen*, 238 Ariz. 371, 376, ¶ 29 (2015) (distinguishing the concept of standing from "the question of who is statutorily authorized, as an 'interested person,' to file objections in an ADWR administrative proceeding").

¶18 At issue here is Arizona Administrative Code R19-2-124(A)(1), "Appeal of Director's Rulings," which provides:

> A person aggrieved by a ruling of the Director may appeal to the Commission. An appeal shall be filed in writing to the office of the Commission within 30 days after service of the Director's ruling.

¶19 Arizona courts interpret the Commission's rules de novo, using the standard rules and tools of statutory construction. *Saguaro Healing LLC v. State*, 249 Ariz. 362 (2020). The "fundamental purpose" of this exercise is to ascertain the Commission's intent. *Marlar v. State*, 136 Ariz. 404, 410-411 (App. 1983). We accord no "deference to any previous determination that may have been made on the question by the [Commission]." A.R.S. § 12-910(E).

¶20 We must determine what the Commission meant when it issued R19-2-124(A)(1), limiting prospective challengers to "person[s] aggrieved," and then we must decide whether Jerry and TPR so qualified. At the outset, we recognize that "person aggrieved" is ambiguous here because the Commission never defines it and the term is "subject to more than one reasonable meaning." *See McClennen*, 238 Ariz. at 375, ¶ 24. For several reasons, however, we hold that Jerry and TPR were "person[s] aggrieved" under the Commission's regulations.

¶21 First, we interpret the Commission's administrative rules to "further the statutory policy" contained in its enabling statute. *See Cooke v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 141, 144, ¶ 13 (App. 2013) (quoting *Marlar*, 136 Ariz. 404, 411 (App. 1983)). The legislature created the Commission to

"protect and promote public health, safety and the proper conduct of racing and pari-mutuel wagering." A.R.S. § 5-104(A)(2). The legislature broadly authorized the Commission to "hear any appeal of a decision of the [ADOG] director" and imbued the Commission with ultimate control to "approve or reject [the director's] decisions." *See* A.R.S. § 5-104(B) ("The director is subject to ongoing supervision by the commission, and the commission may approve or reject decisions of the director in accordance with rules established by the commission."); *see also* A.R.S. § 5-104(D) ("The commission may hear any appeal of a decision of the director in accordance with [the Uniform Administrative Hearing Procedures Act].").[1]

¶22 A broad definition of "person aggrieved" is therefore appropriate to ensure the Commission receives the information and opportunity it requires to discharge its codified job description. *See Goodman*, 136 Ariz. at 205 (the legislature intended for the Commission "to strengthen the regulation of the racing industry in Arizona"). A narrow interpretation, by contrast, would diminish the Commission's plenary statutory authority, possibly shielding an ADOG director's licensing decisions from Commission scrutiny. *See Goodman*, 136 Ariz. at 205 (the legislature intended for the Commission "to strengthen the regulation of the racing industry in Arizona").

¶23 Long ago, our supreme court interpreted the identical phrase "person aggrieved" in a comparable administrative context. *Mendelsohn v. Superior Court*, 76 Ariz. 163, 166 (1953). At issue there was a statute authorizing only a "person aggrieved" to appeal the issuance of a liquor license. *Id.* at 166. At the outset, the court recognized that "person

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[1] The Commission has two distinct paths to hear and decide a racing licensing dispute. The Commission may allow the administrative process to run its course—as it did here—waiting both for an ALJ to hear the case and make a recommendation and for ADOG's director to accept or decline that recommendation *before* jumping into the fray and "mak[ing] the final administrative decision," A.R.S. § 41-1092.08(C), (F), which the superior court may then review, A.R.S. §§ 41-1092(5), 12-902(A)(1), 12-905(A). Alternatively, the Commission may supplant the Office of Administrative Hearings and "review the decision of the agency head" in the first instance, A.R.S. § 41-1092.08(C), acting "in accordance with" the Commission's rules, A.R.S. § 5-104(B). The second path, however, limits the pool of appellants to "adversely affected" parties "who exercised any right provided by law to comment on the action being appealed." A.R.S. § 41-1092.03(B). Because the Commission did not supplant the Office of Administrative Hearings here, the "adversely affected" limitation did not apply.

aggrieved" has no meaning "[a]part from its syntactical and sociological setting." *Id.* at 166 (addressing transfer of liquor license and noting, "There is nothing intrinsic and peculiar to the phrase, qua phrase, that leads one unwaveringly to one conclusion or the other."). With that backdrop, the court declined to limit "the right of appeal to the applicant while denying it to the citizens" because that interpretation "would run counter to the spirit of strict regulation permeating the whole of the Act." *Id.* at 170.

¶24 So too here. Arizona's strict regulation of gaming and horse racing likewise supports greater Commission oversight and a more robust definition of "person aggrieved" to "assur[e] ample opportunity for investigation of the qualifications of the applicant and the exigencies of the public." *Mendelsohn*, 76 Ariz. at 169.

¶25 Second, a narrow definition of "person aggrieved" would conflict with the Commission's other rules, which describe and contemplate an expansive regulatory role. *See* A.A.C. R19-2-101(E) ("The Commission may sustain, reverse, or modify *any* penalty or decision imposed by the Director." (emphasis added)); A.A.C. R19-2-124(A)(3) ("When an appeal is filed, the Commission *shall* review the record and may affirm, reverse, or modify the Director's ruling or conduct other proceedings the Commission deems appropriate." (emphasis added)). These "statutorily authorized regulation[s] [are] unambiguous [and] 'we apply [them] without further analysis.'" *See Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 558, ¶ 16 (2018) (quoting *Glazer v. State*, 237 Ariz. 160, 163, ¶ 12 (2015)).

¶26 Third, although "person aggrieved" is undefined, the Commission's rules broadly define "person" to include owners, nominators, lessees and lessors. R19-2-102(30), (38), (44). Just as important, by using "person aggrieved," rather than "applicant aggrieved" or "party aggrieved," the Commission intended a "broader" pool of prospective challengers, beyond "only a person whose application had been denied." *See Mendelsohn*, 76 Ariz. at 169-170. "Had the [Commission] meant to limit the right [to appeal] . . . it could have used, and doubtless would have used, a more limited term." *Id.* For instance, the word "applicant" appears over 100 times in the Commission's rules. Furthermore, the Commission limits who may appeal the director's "final decision concerning a breeder's award" to an "aggrieved party." R19-2-116(D)(10) (also titled "Appeal of Director's Rulings").

¶27 Jerry and TPR also contend they were "aggrieved" because Ron's licensure troubles threatened TPR's then-pending application to renew its racing permit. *See*, *e.g.*, A.R.S. §§ 5-108(A)(2)(e) (Commission may

decline to renew an organization's racing permit if substantial evidence exists that its owners, "officers, managerial employees, directors or substantial stockholders have[] committed acts of moral turpitude in this state or have willfully violated a material racing statute of this state or a material rule or regulation of the commission"); -108.05(C) (authorizing revocation of license held by an organization "controlled or operated directly or indirectly by" a person who violates A.R.S. § 5-115). On this record, however, the inverse appears true. Once Ron's license was reinstated, TPR could renew its racing permit and move forward.

¶28 More compelling, however, Jerry and TPR assert a genuine, specific interest in vacating/reversing the reinstatement of Ron's license. They contend Ron has already used the reinstatement decision as a sword in court, claiming it proves that Jerry and TPR engaged in fraud. They also argued to the Commission that Ron had commenced a court proceeding with his license reinstated to remove Jerry from TPR's management, dissolve the company and sell its assets, including Turf Paradise. These allegations would support the Commission's determination that Jerry and TPR were "person[s] aggrieved" by the ADOG Decision. *See Aggrieved*, Black's Law Dictionary (11th ed. 2019) (listing definitions for "aggrieved," including "having legal rights that are adversely affected," "having been harmed by an infringement of legal rights," "angry or sad on grounds of perceived unfair treatment"). In sum, Jerry and TPR qualify as "person[s] aggrieved" under the Commission's rules.[2]

A. Due Process Claims—Former Director Walsh

¶29 The superior court rejected Ron's due process claim against the Commission based on former Director Walsh's conduct, finding that (1) Ron had no constitutionally "protectable property interest" in a license he

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[2] Ron cites *McClennen*, 238 Ariz. 371, for the proposition that "person aggrieved" is a "term of art recognized by courts as narrowing the field of prospective applicants to those who fall within the relevant statute's 'zone of interest.'" But the supreme court in *McClennen* applied fundamental principles of statutory construction, as we do here. Indeed, the court distinguished the concept of "standing" from "the question of who is statutorily authorized, as an 'interested person,' to file objections in an [Arizona Department of Water Resources'] administrative proceeding under § 45–172(A)." 238 Ariz. at 376, ¶ 29. Beyond that, *McClennen* never mentioned, much less applied, the "zone of interest" test.

"seek[s] but do[es] not have," and (2) "Walsh was not acting in a quasi-judicial capacity when he denied Ron's license."

¶30 Ron contends this was error. We need not reach the merits of his argument, which is moot because Ron already received a fair and impartial hearing before the ALJ. *BT Capital, LLC v. TD Serv. Co. of Ariz.* 229 Ariz. 299, 300-01, ¶ 9 (2012) ("[A] case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties.") (quoting *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127, ¶ 5 (App. 1998)); *see Horne v. Polk*, 242 Ariz. 226, 234 (2017) (holding that the proper remedy for a due process violation based on bias is a new "determination by a neutral decision maker"). Ron seeks to defend the ALJ's decision here.

B. Due Process Claims—The Commission

¶31 Ron contends the Commission's proceeding was tainted with serious due process violations. For instance, Ron claims that Jerry dined with Commissioner Lawless the night before the Commission's vote to reverse the ADOG Decision. Ron also claims that Commissioner McClintock said "I'm pulling for you" in a text message to Jerry. *See State ex rel. Corbin v. Ariz. Corp. Comm'n*, 143 Ariz. 219, 226 (App. 1984) ("[D]ue process is violated when the agency decision-maker improperly allows ex parte communications from one of the parties to the controversy.").

¶32 The Commission, Jerry and TPR counter that Ron was owed no due process because he had no protectable property interest. *See Shelby Sch.*, 192 Ariz. at 168, ¶ 55 ("Due process protection vests only when a person has a [protectable] property interest."). We disagree. "[T]here are certain 'fundamental' procedural requisites which a person is entitled to receive at [a quasi-judicial] administrative hearing." *Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 371 (App. 1987). The Commission held a formal hearing at which it "consider[ed] evidence and appl[ied] the law to facts it f[ound]." *Stoffel*, 162 Ariz. at 451. The Commission also has a statutory duty to ensure due process rights in its proceedings. *See* A.R.S. §§ 5-104(D), 41-1092.01(E), -1092.03(B), -1092.07(A), (B), (C).

¶33 We remand for the superior court to hear and consider Ron's due process claims against the Commission on a complete record. The parties vigorously dispute the context and validity of Ron's accusations, but we are not factfinders on appeal and cannot meaningfully consider the issues on this record. *State v. Schackart*, 190 Ariz. 238, 247 (1997). On remand, the superior court may conduct an evidentiary hearing to evaluate

Ron's claims of Commission bias. *See State v. Herrera*, 232 Ariz. 536, 543, ¶ 13 (App. 2013) ("Remand may be appropriate when the trial court is in a better position than the appellate court to clarify whether a potential error actually occurred."). The court may choose to hear sworn testimony about these ex parte communications, including from the commissioners, Jerry and former Director Walsh. *See* A.R.S. § 12-910(A), (B), (E).[3] Given Ron's unresolved challenges to the Commission's process, we do not address his evidentiary arguments.

C. Attorney Fees

¶34 We vacate the superior court's award of attorney fees against the Commission because Ron has not "prevail[ed] by an adjudication on the merits." A.R.S. § 12-348(A); *accord Horne v. Polk*, 242 Ariz. 226, 234, ¶ 31 (2017). We likewise deny Ron's request for attorney fees on appeal under A.R.S. § 12-348(A)(2). Jerry and TPR did not request fees and costs.

CONCLUSION

¶35 We vacate the superior court's order and remand for further proceedings consistent with this opinion.

AMY M. WOOD • Clerk of the Court
FILED: AA

[3] We deny Ron's Request for Judicial Notice because the material is irrelevant to our resolution of this appeal. We likewise deny Jerry and TPR's Motion to Strike Portions of Ron's Reply Brief.

Attachment E

Judicial Report

Back To List Print View

Maricopa County Voters Only

Hon. David D. Weinzweig
Court of Appeals Division I
Appointed: 2018
View Decisions

100% of the Commission Voted Judge Weinzweig MEETS Judicial Performance Standards
33 Commissioners Voted 'Meets'
0 Commissioners Voted 'Does Not Meet'

Full Bio

2020	**Attorney Surveys** Distributed: 256 Returned: 31 Detailed Report **Score** (See Footnote)	**Superior Court Judge Surveys** Distributed: 58 Returned: 11 Detailed Report **Score** (See Footnote)
Legal Ability	84%	86%
Integrity	91%	98%
Communication	98%	n/a
Temperament	100%	n/a
Admin Performance	100%	100%

Hon. David D. Weinzweig — **2020 Attorney Survey Responses**

Key: **SU** = Superior **VG** = Very Good **SA** = Satisfactory **PO** = Poor **UN** = Unsatisfactory

	SU		VG		SA		PO		UN		Mean	Total
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.		
1. Legal reasoning ability	8	42%	4	21%	4	21%	3	16%	0	0%	2.89	19
2. Knowledge of law	6	33%	6	33%	3	17%	3	17%	0	0%	2.83	18
3. Decisions based on laws and facts	8	42%	4	21%	3	16%	3	16%	1	5%	2.79	19
4. Clearly written, legally supported decisions	6	35%	5	29%	4	24%	2	12%	0	0%	2.88	17
Category Total	**28**	**38%**	**19**	**26%**	**14**	**19%**	**11**	**15%**	**1**	**1%**	**2.85**	**73**
2. Integrity												
5. Basic fairness and impartiality	8	50%	2	13%	2	13%	4	25%	0	0%	2.88	16
6. Equal treatment regardless of race	7	88%	1	13%	0	0%	0	0%	0	0%	3.88	8
7. Equal treatment regardless of gender	7	64%	2	18%	1	9%	1	9%	0	0%	3.36	11
8. Equal treatment regardless of religion	7	78%	2	22%	0	0%	0	0%	0	0%	3.78	9
9. Equal treatment regardless of national origin	7	88%	1	13%	0	0%	0	0%	0	0%	3.88	8
10. Equal treatment regardless of disability	8	80%	2	20%	0	0%	0	0%	0	0%	3.80	10
11. Equal treatment regardless of age	7	78%	2	22%	0	0%	0	0%	0	0%	3.78	9
12. Equal treatment regardless of sexual orientation	7	88%	1	13%	0	0%	0	0%	0	0%	3.88	8
13. Equal treatment regardless of economic status	7	64%	1	9%	0	0%	3	27%	0	0%	3.09	11
Category Total	**65**	**72%**	**14**	**16%**	**3**	**3%**	**8**	**9%**	**0**	**0%**	**3.51**	**90**
3. Communication												
14. Attentiveness	9	60%	2	13%	4	27%	0	0%	0	0%	3.33	15
15. Deameanor in communications with counsel	8	57%	3	21%	3	21%	0	0%	0	0%	3.36	14
16. Appropriate restrictions on counsel during argument	1	100%	0	0%	0	0%	0	0%	0	0%	4.00	1
17. Relevant questions	8	53%	3	20%	3	20%	1	7%	0	0%	3.20	15
18. Preparation for oral argument	8	62%	2	15%	3	23%	0	0%	0	0%	3.38	13
Category Total	**34**	**59%**	**10**	**17%**	**13**	**22%**	**1**	**2%**	**0**	**0%**	**3.33**	**58**
4. Temperament												
19. Dignified	8	57%	2	14%	4	29%	0	0%	0	0%	3.29	14
21. Courteous	9	64%	1	7%	4	29%	0	0%	0	0%	3.36	14
22. Patient	8	62%	2	15%	3	23%	0	0%	0	0%	3.38	13
23. Conduct that promotes confidence in the court and judge's ability	8	62%	1	8%	4	31%	0	0%	0	0%	3.31	13
Category Total	**33**	**61%**	**6**	**11%**	**15**	**28%**	**0**	**0%**	**0**	**0%**	**3.33**	**54**
5. Admin Performance												
24. Promptness in making rulings and rendering decisions	7	41%	2	12%	8	47%	0	0%	0	0%	2.94	17
Category Total	**7**	**41%**	**2**	**12%**	**8**	**47%**	**0**	**0%**	**0**	**0%**	**2.94**	**17**

Hon. David D. Weinzweig **2020 Superior Court Judge Survey Responses**

Key: **SU** = Superior **VG** = Very Good **SA** = Satisfactory **PO** = Poor **UN** = Unsatisfactory

	SU		VG		SA		PO		UN		Mean	Total	No Resp
1. Legal Ability	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.	Num.	Pct.			
1. Legal reasoning ability	10	71%	1	7%	1	7%	1	7%	1	7%	3.29	14	0
2. Knowledge of the law	10	71%	1	7%	1	7%	1	7%	1	7%	3.29	14	0
3. Decisions based on law and facts	10	71%	1	7%	1	7%	1	7%	1	7%	3.29	14	0
4. Clearly written, legally supported decisions	10	71%	1	7%	1	7%	1	7%	1	7%	3.29	14	0
Category Total	**40**	**71%**	**4**	**7%**	**4**	**7%**	**4**	**7%**	**4**	**7%**	**3.29**	**56**	
2. Integrity													
5. Basic fairness and impartiality	10	83%	0	0%	1	8%	1	8%	0	0%	3.58	12	0
6. Equal treatment regardless of race	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
7. Equal treatment regardless of gender	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
8. Equal treatment regardless of religion	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
9. Equal treatment regardless of national origin	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
10. Equal treatment regardless of disability	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
11. Equal treatment regardless of age	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
12. Equal treatment regardless of sexual orientation	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
13. Equal treatment regardless of economic status	5	83%	0	0%	1	17%	0	0%	0	0%	3.67	6	0
Category Total	**50**	**83%**	**0**	**0%**	**9**	**15%**	**1**	**2%**	**0**	**0%**	**3.65**	**60**	
3. Admin Performance													
14. Promptness in making rulings and rendering decisions	5	50%	3	30%	2	20%	0	0%	0	0%	3.30	10	0
Category Total	**5**	**50%**	**3**	**30%**	**2**	**20%**	**0**	**0%**	**0**	**0%**	**3.30**	**10**	