

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 65)**

PERSONAL INFORMATION

1. Full Name: **Keith Joseph Miller**
2. Have you ever used or been known by any other name? **No.**
3. Office Address: **Fennemore Craig, P.C.
2394 E Camelback Rd, Suite 600
Phoenix, AZ 85016**
4. How long have you lived in Arizona? **Since 2009; permanently since 2015.**
What is your home zip code? **85233**
5. Identify the county you reside in and the years of your residency.
Maricopa County, 2009-2011, 2015-present.
6. If nominated, will you be 30 years old before taking office? yes no

If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? yes no
7. List your present and any former political party registrations and approximate dates of each: **Republican, 1997-present.**

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)
8. Gender: **Male** Race/Ethnicity: **White**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

Hillsdale College, Hillsdale, Michigan. B.S., Class of 2003.

Columbia Law School, New York, New York, J.D., Class of 2008.

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

Hillsdale College:

Majors: Mathematics, History

Extracurricular Activities:

- Honors Program, member
- Student Federation, representative, vice-president
- Mu Alpha Fraternity, founder, vice-president
- *Hillsdale Collegian* newspaper, contributor
- Chamber Choir, baritone
- Parliamentary debate team, member
- Tower Players theater, actor

Columbia Law School:

Extracurricular Activities:

- Federalist Society, chapter board member
- Columbia Journal of Asian Law, staff editor

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

Hillsdale College:

Magna Cum Laude

Departmental Honors in Mathematics

Departmental Honors in History

Columbia Law School:

Harlan Fiske Stone Scholar

**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.

- **United States Court of Appeals for the Ninth Circuit** (August 6, 2015)
- **United States Court of Appeals for the D.C. Circuit** (December 15, 2015)
- **United States District Court for the District of Arizona** (July 27, 2015)
- **United States District Court for the District of North Dakota (pro hac vice)** (April 22, 2019)
- **United States District Court for the District of Columbia***
- **Supreme Court of California** (December 2, 2008)
- **Supreme Court of Arizona** (December 18, 2012)

*While I have filed documents as a government attorney, I have no date of admission.

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***. If so, explain.

*While the answer to this question is “No,” for the sake of completeness I want to raise one occurrence. I took and passed the Michigan Bar Exam in 2012, but prior to submitting my character and fitness materials, I changed my mind about becoming licensed in Michigan and abandoned my application.

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
Fennemore Craig, P.C. Associate Attorney	2020 - present	Phoenix, AZ
Arizona Attorney General's Office Assistant Attorney General	2015 – 2019	Phoenix, AZ
Hillsdale College Assistant Legal Counsel; Assistant Director of Career Services	2011 – 2015	Hillsdale, MI
Hon. James A. Teilborg (D. Ariz.) Law Clerk	2009 – 2011	Phoenix, AZ
O'Melveny & Myers, LLP Associate Attorney	2007, 2008-09	Newport Beach, CA
Alliance Defending Freedom Blackstone Intern	2006	Scottsdale, AZ
<i>Attended Columbia Law School</i>	2005 – 2008	New York, NY
The Heritage Foundation Research Assistant	2003 – 2005	Washington, DC

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.

See Attachment A (Fennemore Craig, P.C.)

See Attachment B (Arizona Attorney General's Office)

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.

Fennemore Craig, P.C. (2020–present)

Since joining Fennemore Craig, P.C., as an Associate in January of 2020, I have primarily practiced in business litigation. In that role, I have represented a variety of clients in matters pending in state and federal courts, as well as in mediation. I have also represented clients in matters pending before state and local administrative agencies.

Real Estate Litigation (50% of Practice): My practice has been primarily focused on representing businesses and individuals in real estate and related civil and commercial litigation. This constitutes approximately half of my law practice, and includes issues of breach of contract, breach of restrictive covenants, breach of implied partnership agreement, lease interpretation, tortious interference with business expectancies, construction liens, and other matters. I have drafted demand letters, complaints, disclosure statements, discovery requests and responses, dispositive motions, discovery dispute motions, and other documents.

Commercial Litigation (20% of Practice): I have also represented individuals and corporate clients in complex commercial litigation involving business disputes and torts. In this context I have encountered issues including fraudulent and negligent misrepresentation, breach of contract, and breach of fiduciary duty. I have drafted complaints, disclosure statements, discovery requests and responses, and other documents.

Environmental Compliance and Litigation (10% of Practice): Building off of my prior experience as counsel for the Arizona Department of Environmental Quality and several of my cases with the Federalism Unit, I have served several environmental and natural resources clients, including dealing with financial responsibility for underground storage tanks and CERCLA litigation issues.

Appellate and Electoral (10% of Practice): I have also assisted on multiple appellate issues, drafting briefs and procedural motions. In addition, I assisted on a ballot access case on behalf of an independent candidate for president in 2020.

Arizona Attorney General's Office (2015–2019)

I had the opportunity to be involved with several pieces of high profile litigation, appellate challenges, and amicus briefs as part of the Federalism Unit in the Solicitor General's Office as well as the Special Litigation Unit. I also worked in the Environmental Enforcement Section as counsel to the Arizona Department of Environmental Quality. In addition, I served on the Opinions Review Committee and the Ethics Review Committee.

Appeals and Amicus Briefs (40% of Practice): The Federalism Unit led a multi-state coalition challenging the 2015 Ozone NAAQS Rule promulgated by the EPA. We argued this case before the D.C. Circuit, where I sat second chair to Solicitor General Dominic Draye. I also collaborated in drafting multiple cert. petitions to the Supreme Court. In addition, I personally drafted eight amicus briefs on various constitutional and federalism issues, and coordinated with the offices of other state attorneys general to obtain joinders on dozens of other amicus briefs.

Environmental Enforcement (30% of Practice): I represented the Environmental Enforcement Section in various matters including, settlements of air quality violations, allocations of financial responsibility between multiple responsible parties in the underground storage tank context, an appeal of a Water Quality Appeals Board decision to the Superior Court, and various smaller matters.

Constitutional Litigation (20% of Practice): I litigated in state and federal court on several constitutional issues, defending the State's Proposition 123, challenging whether the Arizona Board of Regents was offering tuition "as nearly free as possible," and several other constitutional challenges.

Internal Committee Work (10% of Practice): I served on both the Ethics Review Committee and the Opinions Review Committee. In the former role, I joined with colleagues to review ethical issues faced by "the State's largest law firm." In the latter role, I drafted several Attorney General's Opinions on various issues of law and reviewed and offered feedback on dozens of other draft opinions.

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

Copyright. Trusts and Estates.

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. **N/A.**

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.

<i>Gulf Petrochem FZC v. Liberty Petroleum Trading International LLC, et. al.,</i> No. 2:19-cv-01550-SMM (D. Ariz.). Participated in 2020.	
United States District Court for the District of Arizona (Senior Judge Stephen M. McNamee)	
<u>Counsel for Plaintiff:</u> Robert G. Shaffer rschaffer@holdenwillits.com 602-508-6210 Nelson A.F. Mixon nmixon@holdenwillits.com 602-508-6223 <u>Counsel for Defendants LK Trading LLC and Shovan Das:</u> Paul C. Miniclier pcm@minilaw.net (504) 864-1276	<u>Counsel for Defendants Liberty Petroleum Trading International LLC, and Patrick and Shannon Kallestad:</u> Andrea L. Marconi amarconi@fennemorelaw.com 602-916-5335 Keith J. Miller kjmiller@fennemorelaw.com 602-916-5369 <u>Counsel for Defendants Liberty Petroleum Trading International LLC</u> David B. Goldstein dbg@hgplaw.com 480-991-9077
<p>This case involved an shipping deal gone bad. Defendants had made a deal to sell petroleum coke or “petcoke” to Plaintiff, but had been unable to deliver the agreed upon promise. My firm was retained in the case when Plaintiff moved to amend its complaint to add claims for fraud.</p> <p>I drafted an opposition to the motion to amend that creatively recast what Plaintiffs believed was a Rule 15, F.R.C.P, Motion to Amend as a Rule 16, F.R.C.P. Motion, moving the standard from “freely given” to “good cause.” Shortly after this filing, the parties agreed to settle the case rather than continue to accrue legal bills.</p>	

County of Riverside v. The Conrad Rogers Group, Inc., et al.,
CASE NO. MCC2001246 (Sup. Ct. of California, Cty. of Riverside Sep. 28, 2020)

Superior Court of California, County of Riverside, Southwest Justice Center.

Counsel for Plaintiff:

Sarah K. Moore.
samoore@rivco.org
951-955-6300

Counsel for Defendants

Keith J. Miller
kjmiller@fennemorelaw.com
602-916-5369

This case involved an abatement of a public nuisance in the form of unpermitted cultivation of marijuana on a rural piece of property. The Defendant was an unknowing landlord who was working to get the issue resolved when the County hastily filed this action.

I was retained to address this issue. After the County rebuffed our initial settlement efforts, I drafted an Answer with several affirmative defenses. After this filing, our settlement efforts were successful and the County dismissed the entire case.

San Simon Dust Enforcement – Arizona Department of Environmental Quality v. David’s Agrigold Farms.

Arizona Department of Environmental Quality Enforcement Action

Counsel for Arizona Department of Environmental Quality:

James T. Skardon
james.skardon@azag.gov.
602-542-8535

Keith J. Miller
kjmiller@fennemorelaw.com
602-916-5369

Counsel for Defendant David’s Agrigold Farms:

Phillip F. Fargotstein
pfargotstein@fennemorelaw.com
602-916-5453

This case involved a dust event that closed the I-10 for multiple days. While the immediate situation had been remedied, and a stipulation had been entered resolving some issues, the question of the appropriate penalty was left to be resolved. I was involved preparing the settlement demand and negotiating with the violator to reach a settlement.

The actual statutory ground for the implementation of the penalty had not been previously used, so there was some novel legal analysis involved.

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:	15
State Courts of Record:	25
Municipal/Justice Courts:	1

The approximate percentage of those cases which have been:

Civil:	100%
Criminal:	0%

The approximate number of those cases in which you were:

Sole Counsel	0%
Chief Counsel:	30%
Associate Counsel:	60%

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 (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:	30%
You argued a motion described above	5%
You made a contested court appearance (other than as set forth in the above response)	15%
You negotiated a settlement:	10%
The court rendered judgment after trial:	3%
A jury rendered a verdict:	0%

The number of cases you have taken to trial:

Limited jurisdiction court	1
Superior court	1
Federal district court	0
Jury	0

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

24. Have you practiced in the Federal or state appellate courts? **Yes.** If so, state:

The approximate number of your appeals which have been:

Civil:	15*
Criminal:	0
Other:	0

*Includes amicus briefs.

The approximate number of matters in which you appeared:

As counsel of record on the brief:	2
Personally in oral argument:	0

25. Have you served as a judicial law clerk or staff attorney to a court? **Yes.** If so, identify the court, judge, and the dates of service and describe your role.

I served as a judicial law clerk for Judge James. A. Teilborg from 2009 through 2011. While my first months were spent as a volunteer law clerk, from March 2009 through October 2010, I served as a special law clerk assisting the Judge in managing a multi-district litigation related to the mortgage crisis. In addition, I assisted in drafting dozens of judicial opinions related to both criminal and civil matters, and attended trial proceedings and arguments.

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.

<p><i>Michael Pierce v. Douglas A. Ducey, et. al.,</i> No. CV-16-01538-PHX-NVW, 2018 WL 1472048 (D. Ariz. March 26, 2018).</p>	
<p>United States District Court for the District of Arizona (Judge Neil V. Wake)</p>	
<p><u>Counsel for Plaintiff:</u> Andrew Jacob ajacob@grsm.com 602-794-2495</p> <p><u>Counsel for Defendant State of Arizona:</u> Keith J. Miller kjmiller@fennemorelaw.com 602-916-5369</p> <p>Joseph E. La Rue laruej@mcao.maricopa.gov 602-686-3099</p>	<p><u>Counsel for Defendant Governor Ducey:</u> Honorable Michael T. Liburdi Michael_Liburdi@azd.uscourts.gov 602-322-7655</p> <p>Anni L. Foster afoster@az.gov 602-542-1455</p> <p>Kathryn Hackett King kate@burnsbarton.com 602-753-4510</p> <p>Timothy Berg tberg@fennemorelaw.com 602-916-5421</p> <p>Theresa Dwyer Theresa.Dwyer@pinnaclewest.com 602-250-4598</p> <p>Theodore B. Olson toolson@gibsondunn.com 202-955-8668</p> <p>Matthew McGill mmcgill@gibsondunn.com 202-887-3680</p>

Plaintiff filed this action seeking an injunction prohibiting Arizona from implementing Proposition 123's changes to the Arizona Constitution on the theory that these changes violated the Enabling Act by making changes that required congressional consent. These changes affected the level of distribution of assets from Arizona's land trust for public schools. Plaintiff named both the State of Arizona, my client, and Governor Ducey in his official capacity as Defendants.

I participated in drafting a Motion to Dismiss for lack of Article III standing as well as sovereign immunity and appeared for oral argument of that motion. While the State was dismissed on the basis of sovereign immunity, the trial judge denied the motion as to standing and the case continued with Governor Ducey as the lone defendant. Ultimately, the Ninth Circuit reversed the district court on the issue of standing and in light of subsequent Congressional action which mooted the issue. *See Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020).

Rasean Clayton v. Kanye West, et al.,
No. CV 2020-010553 (Sep. 3, 2020).

Kanye West, et al. v. Rasean Clayton, Arizona Supreme Court No. CV-20-0249-AP/EL (June 24, 2021).

Superior Court of the State of Arizona, Maricopa County (Judge M. Scott McCoy);
Arizona Supreme Court.

(Many of the defendants were indispensable parties (*i.e.*, the counties which would print the ballots) and their counsel played little to no role in the case, filing no motions or responses to any motion. They are included for completeness, but may have limited information on account of this fact).

Counsel for Plaintiff:

Mary R. O'Grady
mogrady@omlaw.com
602-640-9000

Joseph N. Roth
jroth@omlaw.com
602-640-9000

Counsel for Defendant Kanye West:

Timothy A. LaSota
tim@timlasota.com
602-515-2649

Drew Watkins
awatkins@hvjt.law
540-341-8808

Counsel for Defendants Kanye West
and His Designated Presidential
Electors:

Timothy Berg
tberg@fennemorelaw.com
602-916-5421

<p>Joshua D. Bendor jborador@omlaw.com 602-640-9350</p> <p><u>Counsel for Defendant Kate Hobbs:</u> Dustin Romney dustinr@wb-law.com 602-606-2810</p> <p>Kara Karlson Kara.Karlson@azag.gov 602-542-4951</p> <p><u>Counsel for Maricopa County Defendants:</u> Andrea Cummings cummings@mcao.maricopa.gov 602-506-8541</p> <p>Joseph E. La Rue laruej@mcao.maricopa.gov 602-506-4317</p> <p><u>Counsel for Apache County Defendants:</u> Joseph D. Young jyoung@apachelaw.net 928-337-7560</p> <p><u>Counsel for Cochise County Defendants:</u> Christine J. Roberts CRoberts@cochise.az.gov 520-432-8700</p> <p>Britt Hanson BHanson@cochise.az.gov 520-432-8700</p> <p><u>Counsel for Coconino County Defendants:</u> Rose Marie Winkeler rwinkeler@coconino.az.gov 928-679-8200</p>	<p>Keith J. Miller kjmiller@fennemorelaw.com 602-916-5369</p> <p><u>Counsel for Greenlee County Defendants:</u> Kenneth A. Angle kanglegca@gmail.com 928-428-3620</p> <p><u>Counsel for La Paz County Defendants:</u> Ryan Dooley rdooley@lapazcountyaz.org 928-669-6116</p> <p><u>Counsel for Mohave County Defendants:</u> Ryan Esplin ryan.esplin@mohavecounty.us 928-753-0719</p> <p><u>Counsel for Navajo County Defendants:</u> Jason Moore jason.moore@navajocountyaz.gov 928-524-4026</p> <p><u>Counsel for Pima County Defendants:</u> Daniel Jurkowitz daniel.jurkowitz@pcao.pima.gov 520-724-5700</p> <p><u>Counsel for Pinal County Defendants:</u> Craig Cameron craig.cameron@pinal.gov 520-866-6271</p> <p><u>Counsel for Santa Cruz County Defendants:</u> Charlene Laplante claplante@co.santa-cruz.az.us 520-375-7780</p>
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<p><u>Counsel for Gila County Defendants:</u> Jefferson Dalton jdalton@gilacountyaz.gov 928-402-8638</p> <p><u>Counsel for Graham County Defendants:</u> Jeremy O. Ford jford@greenlee.az.gov 928-865-4108 Ext. 237</p>	<p><u>Counsel for Yavapai County Defendants:</u> Matthew Black matthew.black@yavapai.us 928-771-3344</p> <p><u>Counsel for Yuma County Defendants:</u> William J. Kerekes Bill.Kerekes@yumacountyaz.gov 928-817-4300</p>
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Plaintiff filed this action seeking to enjoin Arizona’s election officials from placing an independent candidate’s presidential electors on the 2020 ballot pursuant to the nonpartisan nomination process set forth in A.R.S. § 16-341. Plaintiff argued, inter alia, that Mr. West’s status as a member of the Wyoming Republican Party barred him from availing himself of the process set forth in A.R.S. § 16-341.

I substantially drafted the opposition to the requested injunctive relief, which was due less than 48 hours after my firm took the case. After the trial judge granted the requested injunction, I substantially assisted in the drafting of an expedited appeal to the Supreme Court. While that appeal was pending, Plaintiff brought a second preliminary injunction on the grounds that Mr. West’s campaign had not submitted sufficient signatures because some of the campaign’s non-resident petition gatherers had failed to register as circulators with the secretary of state before collecting signatures. Again, I drafted the response in opposition.

The Supreme Court of the State of Arizona ultimately ruled for Plaintiff, though reached that holding on different grounds than the trial court.

<p><i>Murray Energy Corp. v. Environmental Protection Agency</i>, 15-1385 (936 F.3d 597 (D.C. Cir. 2019)). Original petition filed as <i>State of Arizona, et al. v. Environmental Protection Agency</i>, 15-1392 (consolidated at 15-1385).</p>
<p>United States Court of Appeals for the D.C. Circuit</p>
<p>(A total of 85 attorneys appeared on the briefs in this consolidation of multiple challenges of an EPA regulation. For the sake of space, I have listed only the lead counsel with substantial direct involvement).</p>

<p><u>Lead Counsel for State Petitioners:</u> Honorable John R. Lopez, IV jlopez@courts.az.gov 602-452-3396</p> <p>Dominic E. Draye drayed@gtlaw.com 602.445.8425</p> <p>Keith J. Miller kjmiller@fennemorelaw.com 602-916-5369</p> <p>Misha Tseytlin misha.tseytlin@troutman.com 312-759-5947</p> <p>Daniel Lennington dan@will-law.org 414-727-9455</p>	<p><u>Counsel for Respondent Environmental Protection Agency.:</u> Justin D. Heminger justin.heminger@usdoj.gov (202) 514-5442</p> <p>Simi Bhat simi.bhat@usdoj.gov 202-532-5563</p> <p><u>Counsel for Public Health and Environmental Petitioners:</u> Seth L. Johnson sjohnson@earthjustice.org 202-667-4500</p> <p><u>Lead Counsel for Industry Petitioners:</u> James R. Bieke jbieke@sidley.com 202-736-8848</p>
<p>In this action, Arizona led a coalition of ten states in challenging the EPA’s Final Rule revising the National Ambient Air Quality Standard for Ozone (the Ozone “NAAQS”). The 2015 Ozone NAAQS lowered the primary ozone standard from 75 parts per billion to 70 parts per billion. Due to the presence of uncontrollable background ozone, many locations would be unable to meet these ozone standards even if they prohibited all human activity. Petitioner states joined several industry groups in filing petitions challenging the new standard. On the other hand, several public health and environmental groups filed petitions challenging the rule as insufficiently protective.</p> <p>I played a substantial role in preparing the briefing in this matter and sat at counsel’s table as Solicitor General Draye argued the case before a panel of the D.C. Circuit. Ultimately, the Court upheld the EPA’s Rule.</p>	

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.). **N/A.**

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

While working at Hillsdale College as in-house counsel, I coached the college's AMTA Mock Trial team for two seasons. During the time I coached the team, Hillsdale achieved its greatest ever success finishing the 2014 Season ranked in the top 100 schools in the entire country in the AMTA "Bonus Bids" Rankings metric, and missing out on a bid to the national championship competition by a single ballot. While training these undergraduates in both civil and criminal procedure as well as the evidentiary rules, I functioned as a "judge" for countless hours.

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.** If so, give details, including dates.

Growing up (1992-1999), I mowed lawns, delivered newspapers, flipped burgers, took movie tickets, and worked in a t-shirt screen printing shop. Through college (1999-2003), I held a series of work-study jobs each semester and then worked as a graphic designer each summer.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.**
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? **No.**
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 serve in the military, please indicate the date and type of discharge. **N/A.**
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. **N/A.**
43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **N/A.**
44. List and describe any sanctions imposed upon you by any court. **N/A.**
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.**

<p style="text-align: center;">PROFESSIONAL AND PUBLIC SERVICE</p>

50. Have you published or posted any legal or non-legal books or articles? **Yes.**

If so, list with the citations and dates.

- *Evangelicals Don't Love Trump*, The Federalist, September 14, 2015.
- *Awakening to the Need for Budget Accountability*, (co-authored with Alison Acosta Fraser), Heritage.org, June 24, 2005.
- *House Lawmakers Should Enforce Their Own Budget*, (co-authored with Brian Riedl), Heritage.org, March 16, 2005.
- *Amtrak Bankruptcy: It's Time*, (co-authored with Ronald Utt), Heritage.org, March 16, 2005.
- *House Rules: An Important Step for Spending Restraint*, (co-authored with Alison Acosta Fraser), Heritage.org, December 20, 2004.
- *Another Pork-Laden Omnibus Spending Bill*, (co-authored with Brian Riedl), Heritage.org, November 22, 2004.
- *Debt-Limit Increase Signals the Need for Budget Reform*, (co-authored with Alison Acosta Fraser), Heritage.org, November 17, 2004.
- *Legislative Branch Appropriations: The Beginnings of Fiscal Restraint?*, (co-authored with Alison Acosta Fraser), Heritage.org, July 21, 2004.
- *Is This Finally the Week for Budget Process Reform?*, (co-authored with Alison Acosta Fraser), Heritage.org, June 23, 2004.
- *Social Security Reality*, NationalReview.com, June 30, 2004.
- *Breaking Free: Public School Lessons and the Imperative of School Choice* (Review of the book by Sol Stern), The Insider, Summer 2004.

- *Unfunded and Unnecessary: The Truth About So-Called “Pay Parity”*, (co-authored with Alison Acosta Fraser), Heritage.org, March 31, 2004.
- *Cutting Spending and Living to Tell About It*, (co-authored with Alison Acosta Fraser), Heritage.org, March 22, 2004.
- *“PART” of the Solution: The Performance Assessment Ratings Tool*, (co-authored with Alison Acosta Fraser), Heritage.org, February 9, 2004.

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.** If so, describe.

I have presented several continuing legal education presentations, usually summarizing some development in my area of practice for the benefit of my colleagues.

53. List memberships and activities in professional organizations, including offices held and dates.

- **The Federalist Society for Law and Public Policy** (member from 2005 to present, elected board member of Columbia Law School student chapter 2007–08).
- **Christian Legal Society** (member from 2015 to present, board member of Phoenix Attorneys’ chapter from 2016 to present).

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? **No.**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services, legal related volunteer community activities or the like. **N/A.**

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

As a board member of the Christian Legal Society for the past four years, I have not only organized multiple continuing legal education presentations and receptions at two State Bar of Arizona Annual Conventions, but also mentored around a dozen ASU law students.

Just this year, I started coaching my son’s flag football team, which competes

in the Canyon Athletic Association's junior high division.

My wife and I homeschool our children and in that context have hosted dozens of events for other people in our pod, including dinners, soccer games, fantasy football drafts, camping trips, book clubs, and reunions.

My son and I have served our small church by assisting with the weekly grounds crew work group, mowing lawns, trimming trees and performing other maintenance tasks.

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

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

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.

My interests outside the practice of law center around my family and the outdoors. Currently, my wife home schools our three oldest (13, 12, and 8) which added to the soccer, flag-football, golf, swimming, piano, and violin practices and performances makes for a chaotic, though satisfying home life.

I love the Arizona desert and take great joy in the native plant garden I designed, installed, and continue to develop at my home in Gilbert. It includes palo verde trees, cacti, brittle brush, and even a rescue Sonoran Desert Tortoise. I also try to get out into the desert as much as possible through hiking; this May, I completed my first rim-to-rim hike of the Grand Canyon.

I am an eager sportsman, playing softball, basketball, and ultimate frisbee whenever time allows. I have completed three marathons, though not too quickly. My motto is "Just Keep Running."

My nightstand is always covered with a stack of books; in the past few years the books that most inspired me were Robert Penn Warren's *All the King's Men*, Tom Wolfe's *A Man in Full*, Marilynne Robinson's *Gilead*, and P.D. James' *The Children of Men*.

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 county's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

I am something of a hillbilly who made good. My story isn't quite as dramatic as J.D. Vance's from his memoir *Hillbilly Elegy*, but I cannot help but see the parallels to my own life. Growing up, as I did, amongst Pentecostals in the Missouri Ozarks, in a family who bought day-old pastries from the back of the grocery store, it was a bit of an upset for me to be the first of my relations to attend law school, much less get accepted by Columbia Law School. I have endeavored to make the best of the opportunities that I have been given, but I never forget that getting a bunch of education does not confer superior rights on anyone. The law must be applied equally to both the rich and poor; the law protects both the strong and the vulnerable.

This last point is especially meaningful to me because of my baby brother Arthur. Arthur has Down Syndrome. When my parents pass, he will come under my care. Knowing him and loving him has indelibly changed me.

Growing up in a large family, I learned the value of hard work. In high school, I made hamburgers at a Wendy's, pruned apple trees alongside migrant workers, and cleaned the aisles at the "dollar" theater. These jobs were tough, but necessity required me to earn enough to put myself through college.

While I was not born or raised in Arizona, I have deep roots here. My mom grew up in Sierra Vista and went to the University of Arizona and my wife grew up in Ahwatukee and followed her mother and grandmother to Arizona State. (Suffice to say that I try to remain neutral when the Territorial Cup comes around.) My family attends a small church located on an old-growth orange orchard in northeast Mesa, so I have some delicious first-hand experience with that one of the "Five Cs."

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

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. **See Attachment C.**
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.

Writing Sample One: Excerpt from Brief This is an excerpt from a brief in Opposition to a Motion for Partial Summary Judgment on the issue of whether lien rights had been preserved. **See Attachment D.**

Writing Sample Two: Attorney General Opinion I17-002 (R16-019) Attorney General Opinions are subject to several layers of review before issuance, and often reflect the collaborative effort of several attorneys. I have chosen this opinion as one that primarily and substantially reflects my own authorship and analysis. The issue involved whether the State Board of Nursing had the power to authorize registered nurse practitioners to order and interpret x-rays. **See Attachment E.**

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

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

ATTACHMENT A

Attorneys at Fennemore Craig, P.C.

Fennemore Craig, P.C., has offices in Arizona, California, Colorado, and Nevada. I have listed the directors and associates at the Phoenix office as well as those in other offices with whom I have directly worked on matters.

Fennemore Craig, P.C.

ABDO, AMY
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AMES, SCOTT K.
ANDERSON, ROBERT D.
AUSTIN, ANTHONY W.
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BERG, TIMOTHY J.
BETHEA, JOHN D.
BIGELOW, SABRINA
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BLACK, PATRICK J.
BOND, JAMES
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CALLAWAY, KATHLEEN E.
CASTER, LAUREN J.
CATLETT, JESSICA
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COHAN, SHANNON
CURTIS, RYAN C.
EFIRD, SAMUEL S.
EVANOFF, CHRIS
FARGOTSTEIN, PHILLIP F.
FERRIGNI, LAUREN
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GLASCOCK, ALEXIS J.
GOOCH, J. CHRISTOPHER
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HANKS, GREGG
HARRIS, RAY K.
HEAP, DAVID N.
HEISERMAN, BRIAN J.
LUNDSTROM HILL, KRISTI
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MCCARVILLE, DAVID A.
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MINER, DON J.
NESVIG, MARK A.
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WARD, EMILY
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ATTACHMENT B

**Attorneys at the Office of the
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I have worked directly with the attorneys below. Other attorneys within the Arizona Attorney General's Office are included in the following pages

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Paula Bickett

Jeffrey Cantrell

David Cole

Curtis Cox

Evan Daniels

Aaron Duell

Dominic Draye

Matthew Du Mee

Jason Easterday

Drew Ensign

Brock Heathcotte

Shilpa Hunter-Patel

Michael Hrnicek

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Andrew Pappas

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Jennifer Perkins

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HORVATH, ROSEMARIE R
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JESSEN, KATHERINE H
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MALHOTRA, MONICA
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MANLUCU, VALERIE R
MANSUR, ERIKA C
MANTY, ZACHARY R
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MCGRODER, CAROLINE E
McKAY, CALEB S
MCKAY, NEIL T
MEDIATE, CARMINE V
MEHES, KRISTI M

MEISLIK, ALYSE C
MELVIN, LEILA E
MERSCHEN-PEREZ, ALICIA L
METZ, KALON W
MOLINA, KEILA E
MOLITOR, BRIAN J
MOODY, KAREN E
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MORRIS, COLBY R
MORRISSEY, KELLEY J
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NAHIGIAN, SANDRA L
NAPOLITANO, ANTHONY R
NARANJO, NANSI D
NAVEN, TYNE R
NEUVILLE, LISA A
NIES, DANIEL E
NIMMO, MICHELLE R
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NOWLAN, REX C
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PIGNATELLA CAIN, AMY S
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STURTZ, ASHLEY D
SWEENEY, KATHLEEN P
SWINFORD, ROBERT L
TABER, ALEXANDER M
TEASDALE, SCOT G
THORSON, AMY M
TIBBEDEAUX, LISA M
TODD, JOHN P

TRAPNELL, JORDON J
TRUMAN, EDWARD B
UHRMAN, BARRY H
UPDIKE, BENJAMIN H
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VALDEZ, ALEJANDRA
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VALENZUELA, MICHAEL F
VALEROS, JENILEE M
VAMPOTIC, MICHAEL J
VILLARREAL-REX, KRISTI L
WAGNER, KELLY M
WALKER, DARYL R
WAN, HOLLY
WATSON, TIMOTHY
WHITE, CHRISTOPHER P
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WILLIAMS, MATTHEW K
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WORCESTER, BROOKE A
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ZAGORSKI, STEVEN B
ZEISE, CARL E
ZINMAN, JANA M
ZWILLINGER, DORIANE F

ATTACHMENT C

Personal Statement

I did not always want to be a judge. As a young man, I respected the rule of law and believed that, all too often, judges legislated from the bench and subverted the Constitution. But my varied experiences in the practice of law compel me now to seek an appointment to the Arizona Court of Appeals to use my judgment to strengthen the rule of law in the State of Arizona.

When I enrolled at law school, I harbored a studied reluctance to aspire to serve as a judge. I had read Justice Scalia's *A Matter of Interpretation* the previous summer and had been marked by his scathing diagnosis:

[F]irst-year law school is so exhilarating [] because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges.

Antonin Scalia, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 7 (Princeton University Press, 1997). "Not me!" I thought, "I'll resist the siren call to be a philosopher-king."

Since my admission to the bar, I have experienced much of the diversity of civil law practice: I have litigated as an associate at a large firm, served as in-house counsel for a liberal arts college, and represented the State under Attorney General Mark Brnovich. These diverse contexts gave me a broad understanding of what judging really looks like. I have observed both wise and unwise judges affect the matters that my clients brought before them. I have learned that judges need both searching intelligence to understand the matter before them and also the humility to allow themselves to be restrained by the law.

I have observed the Arizona Court of Appeals function as exactly that sort of court. Its members are typified by both legal acumen and prudential judgement.

Crucially, they are unafraid to follow the law where it leads, a characteristic praised by a different quotation by Justice Scalia:

If you're going to be a **good and faithful judge**, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong.

Ilya Shapiro, *Scalia Will Be Impossible to Replace*, Cato.org, Feb. 15, 2016 (emphasis added). I believe that I would be able to strengthen this good and faithful court.

Therefore, I have now revisited my youthful resolution. While I still maintain that Justice Scalia was correct in objecting to philosopher-king judges, I have come to value the good and faithful judge. I believe that I possess the requisite virtues to serve with distinction in this role. In brief, I want to be Justice Scalia's idea of the good and faithful judge.

ATTACHMENT D

Response to Motion Excerpt

1 **B. Counterclaimant Validly Preserved Its Mechanic’s Lien Rights**

2 Arizona’s mechanic’s lien statutes require subcontractors, “as a necessary
3 prerequisite to the validity of any claim of lien,” to provide “a written preliminary twenty
4 day notice as prescribed by this section.” A.R.S. § 33-992.01(B). Section 33-992.01(C)
5 prescribes the required content of the notice: (1) “[a] *general description* of the labor,
6 professional services, materials, machinery, fixtures or tools furnished or to be furnished”
7 (collectively, the “Services”); (2) “an estimate of the total price” for the Services; (3) the
8 name/address of the person furnishing the Services; (4) the name of the person who
9 furnished the Services; (5) the name of the person who contracted for the purchase of the
10 Services; (6) a “description of the jobsite sufficient for identification”; and (7) the specific
11 statement set forth in Section 33-992.01(C)(5). Movant’s argument focuses solely on
12 Counterclaimant’s description of the Services furnished or to be furnished and its estimate
13 of the total price for the Services.¹

14 In order to perfect a mechanic’s lien, a lien claimant must demonstrate “substantial
15 compliance with each statutory requirement consistent with its purpose.” *Marco Crane*
16 *& Rigging Co. v. Masaryk*, 236 Ariz. 448, 450, ¶ 8. (App. 2014). This standard is the
17 result of reconciling countervailing principles:

18 Arizona's lien statutes are remedial in nature and should be liberally
19 construed to primarily protect laborers and materialmen who enhance the
20 value of another’s property. *Performance Funding, L.L.C. v. Ariz. Pipe*
21 *Trade Trust Funds*, 203 Ariz. 21, 24, ¶ 10 (App. 2002). At the same time,
22 the statutory requirements for perfecting a mechanic’s lien must be strictly
23 followed. *MLM Constr. Co. v. Pace Corp.*, 172 Ariz. 226, 229 (App. 1992).
These seemingly inconsistent principles are harmonized by requiring that
all the statutory steps for perfecting a lien be followed, but permitting
substantial compliance with any particular step so long as the purposes of
the mechanic's lien statutes are achieved. *Id.*

24 *Fagerlie v. Markham Contracting Co., Inc.*, 227 Ariz. 367, 371, ¶ 13 (App. 2011).

25 _____
26 ¹ Section 3 of the Notices clearly identifies Counterclaimant as the entity that furnished
27 the Services and sets forth Counterclaimant’s address. Section 4 identifies Movant as the
28 entity that contracted for the purchase of the Services. Section 4 provides an address and
legal description for the jobsite. The specific statement required by A.R.S. § 33-
992.01(C)(5) is set forth at the top of the Notices.

1 There is substantial compliance so long as the notice provides sufficient
2 information to allow a stranger to the transaction to identify both what labor the lien
3 claimant has provided and to which specific property any future lien will attach. A.R.S.
4 § 33-992.01(C)(1) (a “general description of the labor . . . furnished or to be furnished
5 and an estimate of the total price thereof”); (C)(4) (a “legal description, subdivision plat,
6 street address, location with respect to commonly known roads or other landmarks in the
7 area or any other description of the jobsite sufficient for identification”); *see generally*
8 *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134 (App. 2011). The statutory scheme
9 also includes a “thirty percent” rule, limiting the maximum amount of a future lien to
10 thirty percent more than the amount in a preliminary twenty day notice. A.R.S. § 33-
11 992.01(G). If the scope of the Services expands beyond the original agreement, an
12 amended preliminary twenty day notice must be filed. A.R.S. § 33-992.01(J). The two
13 aspects of Counterclaimant’s Notices that Movant has challenged, the description of the
14 Services and the estimated total price of the Services, fully complied with these
15 requirements.

16 *1. Counterclaimant’s Notices Generally Described the Labor to Be Performed*

17 The Notices described the Services performed by Counterclaimant as those of a
18 “Drywall Contractor.” First Preliminary 20-Day Notice, § 1 (Declaration, Exh. E);
19 Amended Preliminary 20-Day Notice, § 1 (Declaration, Exh. I). The sufficiency of
20 this description is demonstrated by the terms of the subcontract between Movant and
21 Counterclaimant, which describes Counterclaimant’s work as “[a]ll ‘Drywall’ work
22 complete, in accordance with , in accordance per plans dated 2/26/2016,
23 specifications dated 1/23/2015 and standards dated April 2015, including any
24 applicable State, County, and City requirements . . .” This use of the term “‘Drywall’
25 work” in the contract to describe the portion of the plans, specifications and design
26 standards for Counterclaimant’s work demonstrates that the term “drywall” has a well-
27 defined meaning in the construction trade. Hence, the description in the Notices fully
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1 satisfies the requirement for a “general description of the labor furnished” set forth in the
2 first prong of Section 33-992.01(C)(1).

3 In attempting to argue to the contrary, Movant relies on *Delmastro*. MPSJ at 10-
4 12. *Delmastro*, however, did not turn on the description of the services or the estimated
5 total price for the services. Instead, the issue in *Delmastro* was whether the lien claimant
6 had provided a sufficient description of the jobsite as required by Section 33-
7 992.01(C)(4). The notice in *Delmastro* identified the jobsite as a building, structure, or
8 improvement located at “2190 W. River Road” in “Tucson, Pima County, Arizona,” that
9 was “legally described as . . . Tutor Time Child Care.” 228 Ariz. at, ¶ 4. The problem
10 with this description arose from the fact that, at the time the notices were filed, the owner,
11 VDG, owned two blocks – Block 1 and Block 3 – at 2190 W. River Road. *Id.* at, ¶ 3.
12 Delmastro performed services solely at Block 1, the location of the Tutor Time Child
13 Care, yet it proceeded to record a lien against both Block 1 and Block 3. The overbreadth
14 of Delmastro’s lien was particularly problematic because, prior to its recordation, Taco
15 Bell had purchased Block 3 from VDG. *Id.* at, ¶ 5.

16 The Court of Appeals concluded that Delmastro’s lien was invalid and that
17 Delmastro was liable for wrongful recording of the lien, because Delmastro had reason
18 to know it had no basis for any lien against Block 3. *Id.* at, ¶¶ 10, 14-15. Delmastro knew
19 that it did not perform any work at Block 3 and its description of the property and work
20 performed contained in its notice “were insufficient to further the purpose of the statute,”
21 i.e., to put a notice recipient for Block 3 on notice that “a lien might attach to this
22 property.” *Id.* at, ¶¶ 15, 25.

23 Although dicta in the *Delmastro* court mentions the statutory requirement “to
24 provide a description of the work it had performed,” the court’s problem with Delmastro’s
25 preliminary notice focused solely on the property description, *not* that it failed to provide
26 a general description of the work performed by Delmastro. Any implication in the motion
27 (e.g., MPSJ at 11 (citing 228 Ariz. at, ¶¶ 37)) that the *Delmastro* court interpreted the
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1 statute to require something more precise than the “general description of the labor . . .
2 furnished or to be furnished” is incorrect. The *Delmastro* court merely upheld the standard
3 set forth in *Westinghouse Electric Supply Co. v. Western Seed Production Corp.*, 119
4 Ariz. 377 (App. 1978) (construing a prior version of the statute and holding the question
5 is whether a stranger to the transaction could ascertain the property to which the lien
6 attached).

7 Movant cites no authority other than *Delmastro* for the idea that a “general
8 description” like “drywall contractor” is insufficient to comply with a “general
9 description” requirement. Counterclaimant’s description of the Services furnished or to
10 be furnished in Section 1 of the Notices fully satisfies the requirement of the first clause
11 of A.R.S. § 33-992.01(C)(1).

12 2. *Counterclaimant’s Notices Provided Cost Estimates that Preserved the Lien*

13 Movant also challenges the “estimate[s] of the total price” provided in
14 Counterclaimant’s Notices on the grounds that they varied in amount, were inconsistent
15 with Counterclaimant’s pay applications, and exceeded the amount specified in the
16 drywall subcontract, the amount of the liens ultimately recorded by Counterclaimant, and
17 the amount owed to Counterclaimant in the litigation as forecast by Counterclaimant’s
18 testimonial expert, Movant, however, has not cited a single authority that
19 invalidates a preliminary twenty-day notice on the ground that the “estimate of the total
20 price” set forth in the notice exceeded the amount that the claimant was ultimately owed.

21 The absence of such authority is not surprising in light of the “thirty percent” rule,
22 which requires lien claimants to file amended preliminary twenty day notices if the scope
23 of the Services *expands* beyond the original agreement. This rule makes it clear that (i)
24 the statute does not require precision in the amount of the estimate, and (ii) the estimate
25 may be deficient only when it understates that amount of the lien that is ultimately
26 claimed. The estimates in the Notices, even though they overstate the amount of the lien
27 ultimately claimed by Counterclaimant, fully satisfy the statutory purpose of providing
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1 notice of the potential maximum size of a lien that may attach to the property. *See Marco*
2 *Crane*, 236 Ariz. 448, at ¶8.

3 Movant’s argument that the Notices are deficient because the estimates exceed the
4 amount of Counterclaimant’s prior pay applications for work previously performed is
5 frivolous on its face. The statute requires an estimate of the total price of “the labor,
6 professional services, materials, machinery, fixtures or tools furnishes *or to be*
7 *furnished.*” Movant repeatedly misconstrues the Notices as somehow indicating the
8 value of the completed work, as opposed to the estimate of the completed drywall scope
9 of work. Accordingly, Movant’s comparison of the amounts stated in the Notices
10 estimates with the work previously performed is wholly inappropriate and legally
11 irrelevant.

12 Moreover, the use of the word “estimate” and the requirement for the estimate to
13 encompass work “to be furnished” demonstrates that the estimate need not capture
14 precisely the amount that might ultimately be owed under the Subcontract. Movant’s
15 only legal authority for its assertion that an estimate must accurately match the future,
16 *MLM Constr. Co, Inc. v. Pace Corp.*, 172 Ariz. 226 (App. 1992), is completely inapposite.
17 In that case, the twenty-day notice lacked an essential element (the language disclaiming
18 that the notice is a lien) that is indisputably present in both Notices here. Movant does
19 not challenge the existence of the estimate, only its precision. Therefore, the rule of *MLM*
20 *Construction* does not apply.

21 Movant’s reliance on California’s mechanic’s lien statutory regime is similarly
22 unavailing. *Rental Equip., Inc. v. McDaniel Builders, Inc.*, 91 Cal. App. 4th 445, 109
23 Cal. Rep. 2d 922 (2001), involved preliminary notices that *understated* the amount
24 ultimately claimed in the lien, with a flat \$10,000 estimate, when the work performed was
25 more than twice that amount. The California court found that an “estimate” as used in
26 the California statute, “requires a derived figure, arrived at by rational analysis.” *Id.* at
27 447.

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ATTACHMENT E

Arizona Attorney General Opinion



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>April 26, 2017</p>	<p>No. I17-002 (R16-019)</p> <p>Re: whether Arizona Administrative Code Rule 4-19-508(B)(3) authorizes a registered nurse practitioner to order and interpret radiographic tests</p>
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To: Joey Ridenour
Arizona State Board of Nursing

Questions Presented

Is Arizona Administrative Code (A.A.C.) Rule 4-19-508(B)(3), in which the Arizona State Board of Nursing authorized registered nurse practitioners to order and interpret radiographic tests (x-rays), consistent with Arizona law?

Summary Answer

Yes. A.A.C. R4-19-508(B)(3) is consistent with Arizona law because (1) the “use” of x-rays does not include “ordering” or “interpreting” x-ray images and (2) the Nursing Board has licensed RNPs to order and interpret x-ray images.

Background

The Arizona Radiation Regulatory Agency (ARRA) “regulate[s] the use, storage and disposal of sources of radiation” in the State. A.R.S. § 30-654. Under this regulatory authority, the Medical Radiologic Technology Board of Examiners (MRTB), a division of ARRA,

administers the radiologic technologist (RT) certification process. A.R.S. § 322803(A). RT certificate holders are allowed “to apply ionizing radiation to individuals at the direction of a licensed practitioner for general diagnostic or therapeutic purposes.” A.R.S. § 32-2801(18). In lay terms, this means that ARRA licenses the use of x-ray machines in the health care context. However, Arizona law also contains a broad exception to this licensing authority: dentists, physician assistants, chiropodists, veterinarians and those “licensed in this state to practice medicine, surgery, osteopathy, chiropractic or naturopathic medicine” do not need “to obtain any other license for the use of a diagnostic X-ray machine, but these persons are governed by their own licensing acts.” A.R.S. § 30-672(D).

Responsible for regulating the practice of nursing in Arizona, the Arizona State Board of Nursing (Nursing Board) is authorized to “adopt rules establishing those acts that may be performed by a registered nurse practitioner in collaboration with a licensed physician.” A.R.S. § 32-1606(B)(12). Pursuant to this authority, a rule adopted in 1987 by the Nursing Board authorizes a registered nurse practitioner (RNP) to “[o]rder and interpret laboratory, radiographic, and other diagnostic tests.” A.A.C. R4-19-508(B)(3). RNPs are registered nurses who have completed an advanced nurse practitioner education program and have “an expanded scope of practice within a specialty area that includes . . . diagnosing, performing diagnostic and therapeutic procedures, and prescribing, administering and dispensing therapeutic measures, including legend drugs, medical devices and controlled substances.” A.R.S. § 32-1601(20)(d) and (v).

Arizona law provides that “[n]o person may use ionizing radiation on a human being unless the person is a licensed practitioner or the holder of a certificate as provided in this chapter.” A.R.S. § 32-2811(A). ARRA believes that the administrative rule’s authorization for

RNPs to “[o]rder and interpret . . . radiographic . . . tests” without obtaining an RT certificate is contrary to Arizona law for two reasons. First, ARRA contends that persons prohibited to “use ionizing radiation” under Arizona law are necessarily prohibited from ordering and interpreting x-ray images. Second, ARRA contends that only those professions explicitly named in Section 30-672(D) qualify as exempt “licensed providers” and RNPs are not expressly listed.

Analysis

A. “Use,” In A.R.S. § 32-2811(A), Does Not Include “Order” or “Interpret”

Courts interpret statutes by looking first to the plain language of the law as the best indicator of the legislature’s intent. *Premier Physicians Grp, PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016). Words and phrases should be given their commonly accepted meanings unless a special definition is given or the context requires otherwise. *State v. Cox*, 217 Ariz. 353, 356 ¶ 20 (2016); *see also* A.R.S. § 1-213 (“Words and phrases shall be construed according to the common and approved use of the language.”). Courts “seek to harmonize statutory provisions and avoid interpretations that result in contradictory provisions”. *Navarro*, 240 Ariz. at 195 ¶ 9.

The primary text at issue is the statutory limitation on who may “use” x-ray equipment. *See* A.R.S. § 32-2811(A) (no “person may *use ionizing radiation on a human being*.”). In general, the word “use” primarily signifies a direct physical manipulation of an object (“use a hammer”), but it can also indicate a more nebulous benefit derived from an object (“use a surrogate”). The statutory context indicates that the text refers to a direct form of “use,” specifically the physical act of applying ionizing radiation to a human being with an x-ray device.

Context affirms the adoption of the primary—direct-physical-manipulation—meaning of “use” for at least three reasons. First, a conflict between the administrative rule and the statute

exists only if “use” includes “order” and “interpret.” This serves the Legislature’s intent to keep radiation regulations from inappropriately or unnecessarily interfering with the use of x-ray technology in the practice of medicine. *See* A.R.S. § 32-2811(C) (“Nothing in this chapter relating to technologists shall be construed to limit, enlarge or affect in any respect the practice of their respective professions by duly licensed practitioners.”) The Legislature empowered both the Nursing Board and ARRA to effectively regulate their respective fields without either board encroaching on the other.

Second, it would be absurd to read the statute to say no person (other than a licensed practitioner) may “interpret” an x-ray image without ARRA approval given the fact that ARRA provides no certification entitling *anyone* to interpret an x-ray image. Indeed, radiologist assistants—advanced RTs who possess additional training beyond what is required to obtain an RT certificate—are specifically prohibited from interpreting x-ray images. A.R.S. § 32 2819(E).

Third, including “order” in the meaning of “use” would also be unworkable. Subsection B of § 32-2811 says that an RT can only apply radiation “while operating in each particular case at the direction of a licensed practitioner.” In other words, an RT who may “use” x-ray equipment must be ordered to take an x-ray image before doing so. But if “use” includes “order” then the holder of a certificate under § 32-2811(A) would already be authorized to order an x-ray. It would be absurd to conclude that the legislature would authorize the holder of a certificate to “order” x-rays but to take x-rays only when ordered by someone else to do so.

B. RNPs are Licensed Practitioners Under A.R.S. § 32-2811(A)

Under Arizona law, a RNP is a licensed registered nurse who is certified, has completed an approved nurse practitioner education program, and has an expanded scope of practice. A.R.S. §§ 32-1601(19–20). RNPs’ broad scope of practice is circumscribed by a Nursing Board

empowered to “establish[] those acts that may be performed by a registered nurse practitioner in collaboration with a licensed physician.” A.R.S. § 32-1606(B)(12).

ARRA’s authority to regulate radiation does not reach so far as to interfere with the use of x-ray technology in the provision of health care. *See* A.R.S. § 32-2811(C) (“Nothing in this chapter relating to technologists shall be construed to limit, enlarge or affect in any respect the practice of their respective professions by duly licensed practitioners.”) Dentists, physician assistants, chiropodists, veterinarians and those “licensed in this state to practice medicine, surgery, osteopathy, chiropractic or naturopathic medicine” do not need “to obtain any other license for the use of an X-ray machine, but these persons are governed by their own licensing acts.” A.R.S. § 30-672(D). ARRA is neither competent nor authorized to dictate to a licensed medical professional when it may be necessary to order an x-ray examination or how to interpret an x-ray image. Instead, licensed medical professionals, including RNPs, are “governed by their own licensing acts.” *Id.* Here, the Nursing Board’s rule allowing licensed RNPs to order and interpret x-rays exempts RNPs from ARRA’s regulatory purview.

ARRA points to a 1982 attorney general opinion that concluded that a RNP’s authority to administer medications and treatment was not sufficient to authorize RNPs to order and interpret x-rays. *Op. Ariz. Att’y Gen. I82-034 (1982)*. After analyzing the governing statutes for the nursing profession, Attorney General Corbin concluded that “the ability to administer medications and treatment” was not “sufficient authorization to order and interpret radiographs.”

Id. at 3. However, the next sentence turns the applicability of this conclusion on its head:

Further, inasmuch as the Board has not promulgated any rules that would otherwise permit professional nurse practitioners to order or interpret radiography examinations, they may not engage in these activities.

Id. In 1987 the Nursing Board promulgated A.A.C. R4-19-508(B)(3) and “otherwise permit[ed]” RNPs to order and interpret x-rays. RNPs, governed as they are by their own licensing acts, are