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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court No. R-20-0035
	)	
RULE 28, IRC NOMINATION PROCEDURES	)	
	)	
	)	Comment on Revised Petition to Amend the Procedures for Nominations for the Independent Redistricting Commission
	)	
	)	
	)	
	)	

Pursuant to Ariz. R. Sup. Ct. 28(e), Phoenix Newspapers, Inc., which publishes *The Arizona Republic*, KPNX-TV Channel 12, a division of Multimedia Holdings Corporation, Scripps Media, Inc., which owns and operates ABC 15 (also known as KNXV-TV, Channel 15) and publishes the website "abc15.com," and Meredith Corporation, which, through its wholly owned subsidiary KPHO Broadcasting Corporation, owns and operates KTVK 3TV ("3TV") and KPHO-TV

("CBS5") and publishes azfamily.com (collectively, the "News Organizations"), submit the following comments on the April 2, 2020 revised petition of the Commission on Appellate Court Appointments to amend, on an emergency basis, Rules 128 through 134 of the Arizona Rules of the Supreme Court. Specifically, and for the reasons set forth in this Comment, the News Organizations oppose the Arizona Supreme Court's April 3, 2020 emergency amendment of Supreme Court Rule 131, previously numbered as Rule 132, and respectfully request that it be rescinded.

Preliminary Statement

"Historically, this state has always favored open government and an informed citizenry." *See* Ariz. R. Sup. Ct. 123; *Ariz. Newspapers Ass'n v. Superior Court*, 143 Ariz. 560, 564 (1985). This commitment to openness and transparency is not a dusty artifact of Arizona's Territorial days, but remains a vibrant part of this state's form of self-governance in the electronic age. *See, e.g.*, *Lake v. City of Phoenix,* 222 Ariz. 547, 550-51 ¶¶ 13-14 (2009) (recognizing that public records existing in electronic format are subject to disclosure in that format). As this Court has repeatedly recognized, these values of open government and an informed citizenry allow the public to "monitor the performance of public officials" and subject them to "public scrutiny." *Id.* Despite this state's historic and abiding commitment to openness and transparency, the Commission on Appellate Court Appointments has

submitted a petition on an emergency basis, which this Court has granted, that would undermine these principles when that Commission performs one of its most vital duties: reviewing the applications of candidates to serve on the Independent Redistricting Commission. When appointed, a handful of these candidates will define Arizona's legislative and congressional districts for the decade to come.

In 2000, the voters of Arizona brought the Independent Redistricting Commission into existence through Proposition 106 ("Prop 106"), a citizen initiative that vested the authority to draw legislative district boundaries in an independent, impartial Commission instead of the state legislature. Prop 106 was intended to "open[] up the system to public scrutiny." Ariz. Sec'y of State, General Election 2000 Publicity Pamphlet 57 (Nov. 7, 2000), https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf. Indeed, the Independent Redistricting Commission was designed to develop legislative district boundaries in "open meetings throughout the State – not backroom dealing." *Id.* However, some key aspects of the Court's emergency amendment of the Rules are inconsistent with the public's right to monitor the government's establishment of an independent public body, whose duty it will be to draw legislative district boundaries, fairly and openly, for the decade ahead.

As amended, Supreme Court Rule 131 contains three new provisions that impair public scrutiny of applications to the Independent Redistricting Commission:

(1) Rule 131(d) creates an undefined, potentially limitless "confidential section" of the application form; (2) Rule 131(e)(1) exempts from public disclosure *any information* designated by third parties as confidential; and (3) Rule 131(e)(2)-(3) creates new and needless exemptions for "personal" notes and "procedural" emails created by members of the Commission on Appellate Court Appointments. Such amendments run contrary to the history of the Supreme Court Rules governing nominations for the Independent Redistricting Commission and ignore decades of well-established Arizona Supreme Court authority in support of the public's right to monitor the activities of public bodies and officials.

Effective since September 7, 2010, the Rules governing applications to the Independent Redistricting Commission had provided – until the Court's April 3, 2020 emergency amendments – that "the contents of all applications that relate to the applicant are public information and shall be made available to the public," making only one exception for the "names and contact information of persons listed as references." Ariz. R. Sup. Ct. 132(c) (2010). Although the recent emergency changes to the Rules may seem innocuous, they expand dramatically the scope of what could potentially constitute "confidential" information, concealing communications and other records that could show bias or entanglements of potential Independent Redistricting Commission members and those who wish to promote or impede their selection. These particular amendments should be

reconsidered and rejected, as they serve only to sow public distrust of a process in which fairness and independence are the most vital ingredients.

Factual Background

In November 2000, Arizona voters approved Prop 106, a citizen initiative that vested the authority to draw legislative district boundaries in the Independent Redistricting Commission. In so doing, voters affirmatively chose to institute an impartial and transparent process for drawing legislative district boundaries, an exercise that has profound and enduring impacts on voters' representation in the state and federal governments each decade. As evidenced through arguments in favor of Prop 106 in the 2000 Publicity Pamphlet, voters intended to increase transparency and oversight in drawing legislative districts.[1]

Then-Arizona Attorney General Janet Napolitano explained to voters:

> [Prop 106] allows you, the citizen, to have a voice in drawing the boundaries for your legislative and congressional districts. *Through open meetings throughout the State – not backroom dealing – we will have a process run by the public*. This initiative takes redistricting out of the hands of incumbents who too often draw district lines to protect their seats rather than to create fair, competitive legislative and congressional districts. *This initiative is fair to all Arizonans because it opens up the system to public scrutiny*; it eliminates conflicts of interest by taking the process of redistricting out of incumbents' hands; and, it just might encourage more people to run for public office. *We need a politically neutral commission to handle redistricting.*

[1] Courts look to the publicity pamphlet for insight when evaluating the electorate's intent in proposing and enacting an initiative. *Calik v. Kongable*, 195 Ariz. 496, 500 ¶ 16 (1999).

Ariz. Sec'y of State, General Election 2000 Publicity Pamphlet 57 (Nov. 7, 2000), https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf (emphasis added). Arizona's electorate approved Prop 106, ushering in a new era of impartial and transparent redistricting.

The elaborate constitutional scheme for appointing Independent Redistricting Commission members is carefully constructed to maintain the impartial character of the Commission:

> No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, *who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process*.

Ariz. Const. art. IV, part 2, sec. 1(3) (emphasis added). Candidates for appointment to the Independent Redistricting Commission are nominated by the Commission on Appellate Court Appointments. Ariz. Const. art. IV, part 2, sec. 1(6).

Through its rule-making authority, the Arizona Supreme Court has established procedures governing the application process for the Independent Redistricting Commission. *See* Ariz. R. Sup. Ct. 126-133. Effective since September 7, 2010, Rule 132 provided previously that "the contents of *all applications* that relate to the applicant are *public information* and *shall be made*

available to the public," making only one specific exception for the "names and contact information of persons listed as references." Ariz. R. Sup. Ct. 132(c) (2010) (emphasis added).

On April 3, 2020, the Chief Justice summarily approved significant changes to the scope of the Rules governing applications for the Independent Redistricting Commission that could drastically limit the transparency of such applications. He did so only one day after changes to the Rules were proposed by the Commission on Appellate Court Appointments – a body that he chairs. Even more concerning, such changes were imposed "on an emergency basis," "effective[] immediately" and without public comment. *See* Order Amending Rules 128-134 of the Arizona Rules of the Supreme Court on an Emergency Basis, *In the Matter of Rule 28, IRC Nomination Procedures*, No. R-20-0035 (Ariz. Sup. Ct., Apr. 3, 2020) (hereinafter, the "Order"). These Comments are respectfully submitted to avoid the unforeseen adverse consequences of the proposed amendments to Rule 131.

Discussion

I. THE EMERGENCY AMENDMENTS TO RULE 131 ERODE TRANSPARENCY IN THE SELECTION OF MEMBERS TO THE INDEPENDENT REDISTRICTING COMMISSION AND UNDERMINE PUBLIC CONFIDENCE IN THE REDISTRICTING PROCESS.

Arizona voters created the Independent Redistricting Commission so that redistricting would occur through open meetings subject to public scrutiny "to create

fair, competitive legislative and congressional districts." *See* Ariz. Sec'y of State, General Election 2000 Publicity Pamphlet 57 (Nov. 7, 2000), https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf. Consistent with this spirit and intent of transparency, Arizona's courts and legislature have recognized that the Independent Redistricting Commission is subject to Arizona's Open Meetings Law and Public Records Law. *See State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 125 ¶ 88 (App. 2012) (concluding Open Meetings Law applies to Independent Redistricting Commission); A.R.S. § 38-431(6) (defining Public Body to include Independent Redistricting Commission); A.R.S. § 39-121.1(2) (defining "public body" to include a commission or committee of the state).

As this state's highest court recognized nearly 40 years ago, "[d]emocracy blooms where the public is informed and stagnates where secrecy prevails." *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 561 (1971); *cf. Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606 (1982) (noting, in context of criminal trials, that openness "enhances the quality and safeguards the integrity of the factfinding process, with benefits to . . . society as a whole. [It] fosters an *appearance of fairness, thereby heightening public respect for the judicial process.*") (emphasis added). Instead of promoting openness and respect for the selection process, revised Rule 131 blocks access to public records concerning the selection of members to the

Independent Redistricting Commission and raises the specter of undue, and unchecked, influence.

A. Revised Rule 131(d) Forbids Scrutiny of Key Elements of Applications for the Independent Redistricting Commission, Which Are Public Records.

Supreme Court Rule 132(c) previously provided for a reasonable, carefully delimited exception to an otherwise broad mandate of public access to applications for membership on the Independent Redistricting Commission:

> **The contents of all applications that relate to the applicant are public information and shall be made available to the public** on the Commission's website. The *names and contact information of persons listed as references shall be kept confidential* to protect the privacy of third parties, and the *confidential third-party information contained in the application shall not be made available to the public*.

Ariz. R. Sup. Ct. 132(c) (2010) (emphasis added). For the past decade, Rule 132(c) provided that only names and contact information of third parties listed as references would be kept confidential to protect their privacy. The last clause of the above-quoted paragraph serves not to expand the scope of such protected information, but merely clarifies that such confidential information regarding third parties shall not be made available to the public.

By contrast, Rule 131(d) now provides that "*[a]ll information* in response to questions contained in the confidential section of the application form shall *not* be made available to the public to protect the privacy of third parties." Ariz. R. Sup. Ct. 131(d) (emphasis added). Under the emergency amendments, the Rule now

permits an undefined, potentially elastic "confidential section" of the application form, which could include any number of questions relevant to candidates' political affiliation, past conduct and other pertinent topics. No section of the application form should be per se confidential. Previous Rule 132(c) struck the right balance: the names and contact information of third parties – designated as references by the applicants, not the third-parties themselves – would be redacted with a scalpel, not a blunt instrument. As currently drafted, Rule 131(d) contains no practical limitation on what information may be designated "confidential" and therefore exempt from public scrutiny.

B. Rule 131(e)(1) Creates a Limitless Exemption from Public Disclosure for *Any* Information Designated by Third Parties as Confidential.

As proposed by the Commission on Appellate Court Appointments and accepted by the Chief Justice, Rule 131(e) creates an entirely new exception to public scrutiny: specifically, any "[w]ritten information provided to the Commission by a third party regarding an applicant, . . . which the third party designates . . . as confidential." Ariz. R. Sup. Ct. 131(e)(1). Such a broad exception in practice means that any individual who comments on an applicant for the Independent Redistricting Commission – a public body entrusted with a task fundamental to the exercise of democracy across the state – can hide his or her comments from the public indefinitely *without any justification*.

Potentially, and as a practical matter, this emergency rule amendment allows some to wield undue influence in promoting their choices and others to end the candidacies of worthy candidates without any accountability. By shrouding in secrecy all comments about candidates for public office that are submitted by anyone who designates them confidential, Rule 131(e)(1) transforms a transparent application process into a vehicle for misinformation and mischief. To recall this Court's apt observation in another context, this is not how democracy blooms, but rather how it "stagnates where secrecy prevails." *Jennings*, 107 Ariz. at 561.

C. Rule 131(e)(2)-(3) Would Create Improper Exemptions from Public Disclosure for Materials Generated by the Commission on Appellate Court Appointments.

Rule 131(e)(2)-(3) further allows members of the Commission on Appellate Court Appointments to maintain the secrecy of any "notes that are generated for personal use" and all "procedural emails sent between commissioners." Ariz. R. Sup. Ct. 131(e)(2)-(3). Such provisions illogically assume that members of the Commission on Appellate Court Appointments could keep "personal" notes while evaluating an application for the Independent Redistricting Commission and that email correspondence between members of the Commission on Appellate Court Appointments could be characterized as solely procedural and devoid of substance.

Logic and experience indicate precisely the contrary: notes taken by a member of the Commission on Appellate Court Appointments in his or her official

capacity could not be merely "personal," but would instead have some bearing on the evaluation of an applicant. *See Griffis v. Pinal Cty.*, 215 Ariz. 1, 4 ¶ 10 (2007) (noting that documents related to the activities public officials "undertake *in the furtherance of their duties*" are public records but documents of a "purely private or personal nature" are not). Emails regarding procedural topics, such as whether the Commission on Appellate Court Appointments has a quorum or should proceed in some form of executive session, can have a substantial impact on matters of great public concern. As amended, Rule 131(e)(2)-(3) creates the unnecessary risk and temptation for Commissioners to designate as "personal" or "procedural" documents that should instead by subject to public scrutiny.

Notes and emails created by the Commissioners of the Commission on Appellate Court Appointments regarding nominations for the Independent Redistricting Commission fall squarely within this Court's definition of public records. *See, e.g.*, *Lake*, 222 Ariz. at 549 ¶ 8 (2009) (noting that Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public documents") (quoting *Griffis*, 215 Ariz. at 4 ¶ 8). In contrast, purely "personal" notes and emails fall *outside* the Public Records Law and require no special exemption in Rule 131. *E.g., Griffis,* 215 Ariz. at 4 ¶ 10. Accordingly, such documents should not be exempted from disclosure to the public by an emergency

amendment to the Court's Rules, which opens the door to the concealment of records by public officials that may be of legitimate public concern.

D. As Amended, Rule 131 Is Antithetical to the Tenets of Transparency and Democracy on Which the Independent Redistricting Commission is Based.

The Independent Redistricting Commission promotes the most basic principle of democracy – self-government. Nothing could be more important to self-government than the public's right to know information relevant to the impartiality and qualifications of those who will be responsible for drawing fair legislative district boundaries – and the process by which they are selected. The new exemptions from public disclosure under emergency Rule 131 would prevent the public from monitoring this essential governmental function. *Cf. Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("[T]he public cannot monitor judicial performance adequately if the records of judicial proceedings are secret.").

By creating broad exemptions from public inspection for (a) potentially limitless "confidential" information, (b) all information designated as confidential by third parties and (c) "personal" notes and "procedural" emails, Rule 131 permits the Commission on Appellate Court Appointments to circumvent the Arizona Public Records Law and stymie public scrutiny of the Independent Redistricting Commission. Such a system does not advance Arizona's historic and abiding commitment to transparency and open government, but rather invites distrust of

official activities that could be avoided by rescinding the emergency amendments of Rule 131.

Conclusion

For the foregoing reasons, the Arizona Supreme Court should decline to adopt permanently the emergency amendments of Rule 131 and reinstate the original language contained in Supreme Court Rule 132 (2010).

DATED this 29th day of May, 2020.

Respectfully submitted,

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