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**ARIZONA SUPERIOR COURT**

**MARICOPA COUNTY**

13 LOUIS HOFFMAN, a qualified elector; and  
14 AMY CHAN, a qualified elector,

15 Plaintiffs,

16 v.

17 MICHELE REAGAN, in her official capacity as  
18 Arizona Secretary of State; and STATE OF  
19 ARIZONA,

20 Defendants.

21 STEVE YARBROUGH and J.D. MESNARD, in  
22 their official capacities,

23 Intervenor Defendants.

) No. CV2018-007353

)  
) **BRIEF OF AMICI CURIAE LEAGUE OF**  
) **WOMEN VOTERS OF ARIZONA AND**  
) **ARIZONA ADVOCACY NETWORK**

) (Assigned to Hon. Teresa Sanders)  
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24  
25 The League of Women Voters of Arizona (“LWVAZ”) and the Arizona Advocacy  
26 Network (“AzAN”) submit this brief as *amici curiae* in support of Plaintiffs’ Application for

1 Preliminary Injunction. The parties have consented to the filing of this brief. Therefore, filed  
2 concurrently herewith is *Amici's* Unopposed Motion for Leave to File Amicus Brief.

3 **I. Introduction.**

4 This case concerns the constitutionality of House Concurrent Resolution 2007 (“HCR  
5 2007”), a legislative enactment that refers two key amendments to the Arizona Citizens Clean  
6 Elections Act (the “Act”) to the voters of Arizona in the November 2018 general election. One  
7 of the proposed amendments prescribes a very particular policy change by statutorily  
8 prohibiting candidates running under the Act from providing money to political parties or  
9 certain types of consultants; the other amendment is a serious structural change that would  
10 subject the independent rulemaking power of the Arizona Citizens Clean Elections  
11 Commission (“Commission”) to the Governor’s Regulatory Review Council (“GRRC”).  
12 *Amici* agree with Plaintiffs [*see* Reply at 12] that “[w]hat the Legislature has done is to take  
13 one provision that it thinks would appeal to voters and combine it with another provision that  
14 is wholly unrelated but difficult to understand,” thus violating the constitutional single-subject  
15 rule.

16 *Amici* submit this brief to provide the Court with: (1) a description of the broad statutory  
17 powers of GRRC, (2) historical context regarding the designed independence of the  
18 Commission, and (3) a description of a recent dispute between the Commission and GRRC.  
19 This information will assist the Court in determining that HCR 2007 violates the single-subject  
20 rule.

21 **II. Interest of the *Amici Curiae*.**

22 Both proposed *amici* have strong institutional connections to the Act and to the  
23 independence of the Commission in its solemn duty of administering the Act. From their very  
24 inception two decades ago, the Act and the Commission have operated – as both were  
25 specifically designed – largely free from the changing winds of partisan politics at the state  
26 level to ensure that candidacy for statewide and legislative offices can be a viable choice for

1 everyday Arizonans. The Commission’s independence, therefore, is the very cornerstone of its  
2 existence.

3 *Amicus* LWVAZ is a non-profit, non-partisan political membership organization, the  
4 fundamental goal of which is to empower citizens to shape better communities worldwide. It  
5 seeks to achieve this goal by, among other things, building public participation in the  
6 democratic process and engaging communities in promoting positive solutions to public policy  
7 issues through education and advocacy. LWVAZ is a strong supporter of the Act and the  
8 Commission because they provide opportunity for maximum citizen participation as  
9 candidates, uninhibited by the costs of running a campaign. LWVAZ was concerned about  
10 HCR 2007 as it made its way through the Legislature, a concern it shared via committee  
11 testimony and in multiple “Alert” emails sent to its membership.

12 *Amicus* AzAN is a non-profit, non-partisan organization devoted to defending and  
13 deepening Arizona’s commitment to democracy. It believes the cornerstones of such a  
14 democracy are meaningful voting rights and access to the ballot, political decisions driven by  
15 voters instead of money, and a fair and independent judiciary. AzAN believes that the Act and  
16 Commission are critical to these goals because of the opportunity they provide to candidates to  
17 run for state office without having to raise large sums of money from private sources. AzAN  
18 often defends the Commission and its work at the Legislature and in the media, and is  
19 dedicated to ensuring the survival of Arizona’s only independent, bipartisan body that guards  
20 against the influence of unaccountable spending in elections. AzAN was also concerned about  
21 HCR 2007 from its very inception, providing testimony opposed to its passage in committees  
22 in both the House and Senate, and alerting its supporters by email on multiple occasions. In  
23 addition, AzAN’s Executive Director authored an op-ed piece that opposed HCR 2007 as a  
24 “full-scale assault on Clean Elections and accountable government.” Joel Edman, *Misleading*  
25 *House resolution would gut Clean Elections*, ARIZ. CAPITOL TIMES (Mar. 8, 2018), available  
26

1 at <https://azcapitoltimes.com/news/2018/03/08/misleading-house-resolution-would-gut-clean->  
2 [elections/](https://azcapitoltimes.com/news/2018/03/08/misleading-house-resolution-would-gut-clean-).

3 *Amici* in a particular case should “provide information, perspective, or argument that  
4 can help the . . . court beyond the help that the parties’ lawyers [have] provide[d].” Ariz. R.  
5 Civ. App. P. 16(b)(1)(C)(iii). LWVAZ and AzAN do just that below.

### 6 **III. Argument.**

#### 7 **A. GRRC Is a Partisan State Entity with Unfettered Authority to Approve,** 8 **Modify, and Reject Non-Exempt Agency Action.**

9 GRRC is a seven-person council that serves at the behest of the Governor. A.R.S. § 41-  
10 1051(A). The Governor appoints six members to the Council and the seventh seat is filled by  
11 the current Director or Assistant Director of the Department of Administration, which is also a  
12 political appointment. *Id.*; *see also* A.R.S. § 41-701(C) (“The director [of the Department of  
13 Administration] shall be appointed by the governor with the advice and consent of the senate  
14 and shall serve at the pleasure of the governor.”). The Governor deems that one member of the  
15 Council represents the business community, one represents small business, and another  
16 represents “the public interest.” A.R.S. § 41-1051(A). One of the six appointed members must  
17 be nominated by the President of the Senate, and another must be selected from a short list  
18 submitted by the Speaker of the House. *Id.* Pursuant to A.R.S. § 38-211(D), all members of  
19 GRRC serve at the pleasure of the Governor.

20 GRRC was first established by Executive Order in 1981 by then-Governor Bruce  
21 Babbitt to examine proposed administrative rules that were predicted to have an economic  
22 impact on the State, and its purview has grown exponentially since its inception. [*Governors’*  
23 *Regulatory Review Council (GRRC)*, Secretary of State (Sept. 2, 2016),  
24 [https://azlibrary.gov/sla/agency\\_histories/governors%E2%80%99-regulatory-review-council-](https://azlibrary.gov/sla/agency_histories/governors%E2%80%99-regulatory-review-council-)  
25 [grrc](https://azlibrary.gov/sla/agency_histories/governors%E2%80%99-regulatory-review-council-)] In 1986, the Arizona State Legislature codified the existence of GRRC in A.R.S. §§ 41-  
26 1051, *et seq.*, and granted it the authority to review all rules proposed by state agencies,

1 regardless of whether those rules were anticipated to have an economic impact on the State.  
2 [Debra K. Davenport, *A Performance Audit and Sunset Review of the Governor’s Regulatory*  
3 *Review Council* (Feb. 21, 2006), <https://www.azauditor.gov/sites/default/files/06-01.pdf>, p. i]  
4 In 1995, the Legislature again considerably expanded GRRC’s role when it gave GRRC final  
5 approval authority “over all proposed administrative rules” originating from any agency other  
6 than those exempted from the rulemaking process. [*Id.* at p. 1]

7 A.R.S. § 41-1051, *et seq.*, makes clear that virtually no agency may promulgate or  
8 maintain a rule without explicit GRRC approval. Not only does GRRC have rulemaking  
9 power under the Administrative Procedures Act (*see* A.R.S. § 41-1051(E) (“The council may  
10 make rules pursuant to this chapter . . .”)), but it *must* review and approve any proposed  
11 nonexempt agency rule before such a rule is finalized. A.R.S. § 41-1052(A) provides that  
12 “[b]efore filing a final rule subject to this section with the secretary of state, an agency shall  
13 prepare, transmit to the council . . . and obtain the council’s approval of the rule and its  
14 preamble and economic, small business and consumer impact statement . . . .” GRRC reviews  
15 the materials submitted by the agency and then either “approve[s] or return[s], in whole or in  
16 part, the rule, preamble or economic, or small business and consumer impact statement.”  
17 A.R.S. § 41-1052(C). GRRC cannot approve a rule unless it meets a myriad of requirements  
18 set out in A.R.S. § 41-1052(D). If GRRC does not approve a rule, it returns the rule to the  
19 agency with either minor or substantial revisions. [Debra K. Davenport, *A Performance Audit*  
20 *and Sunset Review of the Governor’s Regulatory Review Council* (Feb. 21, 2006),  
21 <https://www.azauditor.gov/sites/default/files/06-01.pdf>, p. 4] The agency must then make  
22 GRRC’s revisions and resubmit the revised rule to the Council. A.R.S. § 41-1052(C). As  
23 explained by GRRC on its own website, the Council is thus the “clearinghouse for the majority  
24 of state agency rules.” [*Frequently Asked Questions*, Governor’s Regulatory Review Council,  
25 <https://grrc.az.gov/faq>]

1 Not only does GRRC have final authority to approve any new agency rule, but it  
2 exercises ongoing authority to review current agency rules. “At least once every five years,  
3 each agency shall review all of its rules, including rules made pursuant to an exemption from  
4 this chapter or any part of this chapter, to determine whether any rule should be amended or  
5 repealed.” A.R.S. § 41-1056(A). Agencies prepare and submit to the Council a Five Year  
6 Report that analyzes eleven specific statutory criteria.

7 The Council reviews the report and either approves or returns it, in whole or in part.  
8 A.R.S. § 41-1056(C). “If the council returns an agency’s report, in whole or in part, the  
9 council shall inform the agency of the manner in which its report is inadequate and, in  
10 consultation with the agency, shall schedule submission of a revised report.” *Id.* In returning  
11 an agency report, GRRC has the authority to require an agency “to propose an amendment or  
12 repeal of the rule . . . if the council determines . . . that the rule is materially flawed” under the  
13 report. A.R.S. § 41-1056(E). A rule may be flawed if GRRC determines that the rule is,  
14 among other things: (1) not authorized by statute; (2) inconsistent with other statutes, rules or  
15 agency enforcement policies and the inconsistency results in a significant burden on the  
16 regulated public; (3) more costly than beneficial; or (4) not clear, concise and understandable.  
17 *Id.* If GRRC determines a rule to be materially flawed, it must be repealed or amended within  
18 six months. *Id.*

19 But GRRC’s far-reaching authority over agencies does not end there. In addition to  
20 reviewing agency rules every five years, the Council may review an agency rule *at any point* if  
21 four members of the Council request such a review. A.R.S. § 41-1056(D). GRRC also has the  
22 ability to consider objections lodged by any individual or entity against any rule promulgated  
23 by any agency if the agency first rejects the protest to the rule. A.R.S. § 41-1056.01. The  
24 person or entity challenging the rule may appeal the agency decision denying the protest and  
25 GRRC may either affirm the agency decision, or “require an agency to promptly initiate a rule  
26 making or to amend or repeal the rule or the rule package” after doing its own review of the

1 rule. A.R.S. § 41-1056.01(F). In other words, GRRC has the ability to exert significant  
2 control over an agency's rulemaking.

3 Indeed, the Council's broad oversight of agency rules affects virtually every agency in  
4 the State. In a Performance Audit and Sunset Review authored in February 2006 and  
5 commissioned by then-Governor Janet Napolitano, GRRC reported that it reviewed no less  
6 than 1,183 individual rules in 2004 and 1,333 rules in 2005, the only two years for which such  
7 data has been found. [Debra K. Davenport, *A Performance Audit and Sunset Review of the*  
8 *Governor's Regulatory Review Council* (Feb. 21, 2006),  
9 <https://www.azauditor.gov/sites/default/files/06-01.pdf>, p. iii] And an examination of the  
10 Council's actions in the last two months alone demonstrates that GRRC has reviewed new and  
11 current rules promulgated by no less than 11 different state agencies, entities and boards: the  
12 Department of Administration, the Department of Transportation, the Department of Housing,  
13 the Department of Health Services, the Department of Agriculture, the Department of  
14 Economic Security, the Department of Environmental Quality, the Land Department,  
15 AHCCCS, the Greater Arizona Development Authority, and the Arizona State Retirement  
16 System. [Governor's Regulatory Review Council, Notice of Action Taken at the May 1, 2018  
17 Meeting (attached as Exhibit 1); Governor's Regulatory Review Council, Notice of Action  
18 Taken at the June 5, 2018 Meeting (attached as Exhibit 2)]

19 There is simply no question that GRRC, through its extensive and virtually unchecked  
20 rulemaking authority, involves itself intimately in all aspects of an agency's rules and, by  
21 extension, in an agency's operations.

22 **B. The People of Arizona Demanded the Commission's Independence.**

23 In stark contrast with state agencies that are currently subject to GRRC's final  
24 rulemaking authority, the Commission was carefully designed to insulate the Commission  
25 from manipulation by elected officials and their political allies. The Act is replete with  
26 evidence of this intent. It had to be that way. The Commission has the great responsibility of

1 administering a regime aimed at “improv[ing] the integrity of Arizona state government . . .  
2 encourag[ing] citizen participation in the political process, and . . . promot[ing] freedom of  
3 speech.” A.R.S. § 16-940. In service of that responsibility, it is empowered to levy civil  
4 penalties up to and including removal from office. A.R.S. § 16-942. To subject the  
5 Commission to influence – direct or indirect – by elected officials who “are always potential  
6 targets of such enforcement efforts,” *Clean Elections Inst., Inc. v. Brewer*, 209 Ariz. 241, 247  
7 (2004), would be to jeopardize the impartial and effective administration of the law and in turn,  
8 to diminish voters’ trust in the political process.

9 At the most basic level, the establishment of a new regulatory body to enforce the Act,  
10 rather than depending on pre-existing officers or agencies, was intentional and a step towards  
11 independent enforcement. Surely the Secretary of State, in conjunction with the Attorney  
12 General, would have the administrative capacity and expertise necessary to enforce the Act.  
13 But those offices are subject to regulation by the Commission in their capacities as candidates  
14 for office, so the Act’s authors thought it better to establish a Commission composed of non-  
15 elected officials.

16 Further, the Act gives the Commission functional independence from those it regulates  
17 in several ways. The Act establishes several procedural safeguards around the appointment  
18 and removal of Commissioners. Commissioners may only be removed from office for cause  
19 and even then, only “after written notice and opportunity for a response” and upon concurrence  
20 of both the Governor and the Senate. A.R.S. § 16-955(E). No more than two commissioners  
21 may be members of the same political party, and appointments are made on an alternating basis  
22 between officials of different parties, to ensure that no one party is able to “capture” the  
23 Commission. A.R.S. § 16-955(A), (D). Commissioners are even required to refrain from  
24 various political activities, including running for office, serving as the chair or treasurer of a  
25 political committee, or working as a lobbyist, and that prohibition extends for three years after  
26



1 their tenure on the Commission. A.R.S. § 16-955(I). By contrast, GRRC possesses none of  
2 these features because it is meant to be a more politically-driven and policy-oriented body.

3 Recognizing the potent leverage inherent in the power of the purse, the Act’s authors  
4 also protected the Commission’s financial independence from the political branches. The  
5 Commission’s activities are supported exclusively by a Clean Elections Fund that is not subject  
6 to legislative appropriation, A.R.S. § 16-954, and the Commission “independently decides how  
7 to spend the monies in the Fund and how much to spend on particular activities.” *Clean*  
8 *Elections Inst., Inc.*, 209 Ariz. at 246.

9 On top of all these structural features, the authors of the Act found it prudent to  
10 specifically insulate the Commission from political influence over its rulemaking authority.  
11 Thus, the Act *entirely* exempts the Commission from the Arizona Administrative Procedures  
12 Act’s provisions related to rulemaking, including review and approval of the Commission’s  
13 rules by GRRC. A.R.S. § 16-954(C). As detailed above, removing that exemption as HCR  
14 2007 attempts to do would empower GRRC to alter or block rules necessary to the impartial  
15 and effective administration of the Act, and would create powerful temptations for political  
16 actors to influence GRRC into exercising that new power. This would be an incredibly  
17 significant change to the system created by the Act. Voters must be permitted to assess and  
18 decide upon that change on its own merits, and uncoupled from any other proposed change to  
19 the Act.

20 **C. GRRC Has a Documented History of Anti-Commission Activity.**

21 This Court need not speculate on what the consequences of subordinating the  
22 Commission’s rulemaking authority to GRRC would be; GRRC has a well-documented and  
23 recent history of singling out the Commission for unfair treatment based on partisan  
24 motivations. In October 2015, the Commission submitted to GRRC its periodic Five Year  
25 Report (“Report”) pursuant to A.R.S. § 41-1056(A). [Letter from Thomas M. Collins, Exec.  
26 Director, Clean Elections Commission, to Bret H. Parke, Chair, GRRC (available at

1 [https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II\\_0.pdf](https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II_0.pdf), PDF 9)]

2 A staff attorney at GRRC reviewed the report under the 11 criteria set out in A.R.S. § 41-  
3 1056(A) and concluded that “[t]he report meets the requirements of A.R.S. § 41-1056 . . . .

4 This analyst recommends the report be approved.” [Letter from Chris Kleminich, Staff  
5 Attorney, GRRC, to Members of the Governor’s Regulatory Review Council, p. 5 (available at

6 [https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II\\_0.pdf](https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II_0.pdf), PDF 6)]

7 An economic analyst at GRRC also evaluated the report under A.R.S. § 41-1056(A) and  
8 concluded that “the report complies with A.R.S. § 41-1056 and recommends approval.”

9 [Letter from GRRC Economist to Members of GRRC, p. 2 (available at  
10 [https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II\\_0.pdf](https://grrc.az.gov/sites/default/files/Jan%202016%20Materials%20Part%20II_0.pdf), PDF 8)]

11 Despite the universal recommendations of GRRC staff that the Report be approved  
12 almost two and half years ago, GRRC has yet to approve it. In the first GRRC meeting after  
13 the Report was evaluated and recommended for approval in January 2016, the Council refused  
14 to approve it based on objections raised by State Elections Director Eric Spencer. Specifically,  
15 Mr. Spencer requested that GRRC return the Report, declare specific rules unanimously  
16 adopted by the Commission materially flawed, and order the Commission to repeal them, an  
17 action that GRRC had never taken before. [See Letter from Thomas M. Collins, Exec.  
18 Director, Clean Elections Commission, to Nicole Ong, Chair, GRRC and Chris Klemmich,  
19 Staff Attorney (available at ([https://storageccecc.blob.core.usgovcloudapi.net/public/docs/50-  
20 Jan--21-2016--Commissions-Letter-to-GRRC.pdf](https://storageccecc.blob.core.usgovcloudapi.net/public/docs/50-Jan--21-2016--Commissions-Letter-to-GRRC.pdf), PDF 1); Governor’s Regulatory Review  
21 Council, Minutes of the January 5, 2016 Council Meeting, p. 7 (attached as Exhibit 3)] The  
22 Commission’s Executive Director, in a written response to Mr. Spencer’s objections submitted  
23 to GRRC, noted that Mr. Spencer’s objections were baseless and asked the Council to exceed  
24 its statutory authority as the only issue regarding the Report was whether any rule was  
25 materially flawed under A.R.S. § 41-1056(E) based on the 11 factors set out in A.R.S. § 41-  
26 1056(A). [See Letter from Thomas M. Collins, Exec. Director, Clean Elections Commission,

1 to Nicole Ong, Chair, Governor’s Regulatory Review Council and Chris Klemmich, Staff  
2 Attorney, p. 1-2 (available at [https://storageecce.blob.core.usgovcloudapi.net/public/docs/50-  
3 Jan--21-2016--Commissions-Letter-to-GRRC.pdf](https://storageecce.blob.core.usgovcloudapi.net/public/docs/50-Jan--21-2016--Commissions-Letter-to-GRRC.pdf))]

4 GRRC failed to respond to the arguments raised by the Commission and instead  
5 unanimously adopted the Secretary of State’s position with virtually no discussion. [See  
6 Governor’s Regulatory Review Council, Minutes of the February 2, 2016 Council Meeting  
7 (attached as Exhibit 4)] The Report was thus returned to the Commission without any  
8 explanation under A.R.S. § 41-1056(C) of why the Report was inadequate and GRRC ordered  
9 the Commission to repeal the purportedly objectionable rules despite the fact that there was no  
10 finding that they were materially flawed. [*Id.* at p. 3; *see also* Governor’s Regulatory Review  
11 Council, Minutes of the May 5, 2016 Council Meeting (attached as Exhibit 5)] When the  
12 Commission pointed out that GRRC had not followed A.R.S. § 41-1056(C) and did not find  
13 any part of any rule to be materially flawed before ordering a repeal of the rules, GRRC  
14 dismissed the objection without any consideration of the merits of the argument. [*Id.*]

15 Even though GRRC did not follow the statutorily-prescribed procedure and processes  
16 for evaluating Five Year Reports, the Commission attempted to modify the rules that the  
17 Secretary of State objected to so the Report could be approved. [Governor’s Regulatory  
18 Review Council, Minutes of the July 26, 2016 Study Session (attached as Exhibit 6)] Those  
19 changes still did not mollify GRRC and the entire Report remains unapproved. To date, the  
20 Report from the Commission is the *only* Five Year Report that has not been approved by  
21 GRRC. [Governor’s Regulatory Review Council, Minutes of the August 2, 2016 Council  
22 Meeting, p. 4 (attached as Exhibit 7)]

23 **D. A Dramatic Change in the Commission’s Rulemaking Authority Is Distinct**  
24 **in Every Possible Way from Dictating a Single Policy Change.**

25 There can be no serious question that HCR 2007’s attempt to subordinate the  
26 Commission’s rulemaking authority to GRRC would represent a fundamental structural change

1 to the Commission and its operations. The abolition of the Commission’s independence is no  
2 small thing, and quite literally has *nothing* to do with the more innocuous amendment proposed  
3 elsewhere in HCR 2007. And to argue that the two provisions are “logically interrelated” is to  
4 countenance the absurd.

5 If the people of Arizona wish to upend how the Commission has operated for two  
6 decades, that is their prerogative in exercise of their inherent legislative power. But the  
7 Constitution requires that if such a change is proposed by the Legislature, it must be presented  
8 to the people for their approval or rejection in an enactment that complies with the single-  
9 subject rule. HCR 2007 fails that constitutional test, and must be struck down as a  
10 consequence.

11 **IV. Conclusion.**

12 *Amici* respectfully request that the Court declare that HCR 2007 violates the single-  
13 subject rule, and enjoin its placement on the ballot in November.

14  
15 Respectfully submitted this 27th day of June, 2018.

16 **COPPERSMITH BROCKELMAN PLC**

17 By /s/ Roopali H. Desai

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26 \_\_\_\_\_