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8 **ARIZONA SUPERIOR COURT**
9 **MARICOPA COUNTY**

10 In the Matter of:

11 RULE 28, IRC NOMINATION
12 PROCEDURES

Supreme Court No. R-20-0035

Comment on Revised Petition to
Amend the Procedures for
Nominations for the Independent
Redistricting Commission

15 Pursuant to Ariz. R. Sup. Ct. 28(e), Arizona Advocacy Fund, Mi Familia Vota,
16 Living United for Change in Arizona and Chispa Arizona, which are an Arizona
17 non-profit corporations devoted to defending and deepening Arizona’s commitment
18 to democracy and promoting the values of Arizona’s working families, submit the
19 following comments on the Commission on Appellate Court Appointments’
20 (“CACA”) April 2, 2020 revised emergency petition to amend Rules 128 through
21 134 of the Arizona Rules of Supreme Court. Specifically, and for the reasons set
22

1 forth below, the above named parties request that the emergency amendment to Rule
2 131, formerly Rule 132, be rescinded.

3 INTRODUCTION

5 “Publicity is justly commended as a remedy for social and industrial diseases.
6 Sunlight is said to be the best of disinfectants; electric light the most efficient
7 policeman.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other*
8 *People’s Money* 62 (National Home Library Foundation ed. 1933)). Such publicity
9 is particularly important in the context of elections. “Public disclosure also promotes
10 transparency and accountability in the electoral process to an extent other measures
11 cannot.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 199 (2010).

13 The importance of publicity in the political process was reflected in the
14 enacting of Arizona’s Constitution, which include the requirement that: “The
15 legislature, at its first session, shall enact a law providing for a general publicity,
16 before and after election, of all campaign contributions to, and expenditures of
17 campaign committees and candidates for public office.” Ariz. Const. art. VII, § 16.
18 Arizona voters expressed concern of corruption that “[u]ndermines public
19 confidence in the integrity of public officials,” in passing the Citizens Clean
20 Elections Act in 1998. A.R.S. § 16-940(B)(5). Similarly, in 2000, when the voters
21 established the Independent Redistricting Commission, they required that the
22 commission “shall conduct business in meetings open to the public, with 48 or more
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1 hours public notice provided.” Ariz. Const. art. IV, Pt. 2 § 1(12). And required the
2 Commission to “advertise a draft map of congressional districts and a draft map of
3 legislative and congressional districts to the public for comment, which comment
5 shall be taken for at least thirty days.” Ariz. Const. art. IV, Pt. 2 § 1(16).

6 Each of these express the desire of Arizonans to move the *process* behind our
7 elections out of the shadows. In the case of general publicity of campaign funding,
8 they provided information to the public at large to evaluate the presence of undue
9 influence from campaign contributors. With the Citizens Clean Elections Act, they
10 provided a system that allows elections to be funded without candidates accepting
11 large contributions from private interest over which they will ultimately regulate.
12 With the IRC, they moved redistricting out of the shadows of legislative deal making
13 and partisan influence that would lead to districts that were not focused on
14 geographically compact and competitive districts representing communities of
15 interest and complying with the Voting Rights Act. Although each employed
16 substantive legal requirements to accomplish their goals of clean elections and fair
17 districts, they function primarily by reworking and opening the underlying process.

19 New Supreme Court Rule 131 runs counter to the values described above in
20 three ways. First, it blocks public access to IRC applicants by creating a confidential
21 section of the application form. Second, it allows concealing literally any
22 information a third party designates confidential. Finally, it exempts CACA
23

1 members' "personal" notes and "procedural" emails from disclosure. These
2 amendments should be reconsidered and rejected.

3 COMMENTS

5 **A. Rule 131(d) Restricting Public Review of IRC Applicants**

6 Rule 131(d) now provides that:

7 The contents of all applications that relate to the applicant
8 are public information and shall be made available to the
9 public on the Commission's website. All information in
10 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.

11 This is a dramatic change from its analog in the previous version of the rules found
12 at Rule 132(c).

13 The contents of all applications that relate to the applicant
14 are public information and shall be made available to the
15 public on the Commission's website. The names and
16 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.

17 The new rule replaces the extremely limited exception for contact information of
18 persons who are listed as references with a virtually limitless exemption for all
19 information contained in the otherwise undefined "confidential section."

20
21 Arizonans entrust the members of the IRC with great responsibility. The
22 Commission's defining of legislative and congressional districts profoundly
23 influences every election for the following decade. The process of selecting these

1 individuals must be fully exposed to the disinfectant sunlight of public scrutiny. The
2 CACA members in making their nominations and elected officials who ultimately
3 select IRC members must make their nominations and selections with full
5 knowledge that the public is watching them. It must remain impossible to overlook
6 evidence of bias or vulnerability to improper influence in the selection process. By
7 creating an entire section of the application that is just between the applicant and the
8 officials this need is not satisfied.

9
10 Furthermore, in a challenge to redistricting under Section 2 of the VRA, courts
11 consider the totality of the circumstances around drawing the districts. Factors
12 include procedures that enhance the opportunities for discriminations and a
13 jurisdiction's responsiveness to potential discrimination as provided by Senate
14 Judiciary Committee's Report accompanying 1982 amendments to the Voting Rights
15 Act. *See, e.g., Barnett v. Chicago*, 969 F. Supp. 1359 (N.D. Ill. 1997); *see also,*
16 *Fairley v. Hattiesburg*, 584 F.3d 660 (5th Cir. 2009); *Barnett v. Daley*, 32 F.3d 1196
17 (7th Cir. 1994). Thus, Justice Brandeis's invocation of the electric light as the most
18 efficient policeman is implicated here as well. The public, including watchdog
19 groups seeking to protect our democracy through private enforcing of the VRA, must
20 have access to the totality of circumstances that resulted in the creation of legislative
21 and congressional districts. That includes the nomination and selection process of
22 IRC members.
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1 **B. Rule 131(e)(1) Restricting Public Review of Anything Designated**
2 **Confidential by a Third Party**

3 Rule 131(e)(1) now provides

5 The following information shall be confidential
throughout the nomination process

6 Written information provided to the Commission by a
7 third party regarding an applicant, including the third
8 party's identity, which the third party designates in writing
as confidential information;

9 Such a broad exemption to disclosure is breathtaking. It contravenes the
10 general principals of public records law expressed in both state and federal
11 jurisprudence. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352 (1976) (noting
12 that "limited exemptions do not obscure the basic policy that disclosure, not secrecy,
13 is the dominant objective of the Act"); *Cox Arizona Publications, Inc. v. Collins*,
14 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993) (rejecting a blanket exemption "that
15 court contravenes the strong policy favoring open disclosure and access, as
16 articulated in Arizona statutes and case law").

17
18 Specifically, reliance on the mere designation by a third-party that material is
19 confidential is ripe for abuse. For example, in order to hide their activities from
20 watchdog groups, private corporation have sought to classify documents provided
21 to public agencies as confidential under a FOIA Exemption, but courts do not accept
22 the bare assertion of confidentiality or competitive disadvantage as sufficient to
23 shield their conduct from scrutiny. *Torres Consulting & Law Group, LLC v. Nat'l*

1 *Aeronautics & Space Admin.*, 666 Fed. Appx. 643, 645 (9th Cir. 2016). Those
2 seeking to influence the redistricting process would have no less motive to cry
3 “Confidential” in order to hide their actions from public view. This exemption
5 creates an exception that swallows the rule.

6 **C. Rule 131(e)(2) Restricting Public Review of Notes**

7 Rule 131(e)(2) now provides

8 The following information shall be confidential
9 throughout the nomination process

10 All individual Commissioner’s notes that are generated for
11 personal use;

12 While the previous section addresses an exemption from disclosure that can easily
13 be manipulated for mischief, this exemption presents a quandary as to when it could
14 ever be necessary. What notes will Commissioner’s generate that are for “personal
15 use”? Arizona law already establishes that “only those documents having a
16 ‘substantial nexus’ with a government agency’s activities qualify as public records.”
17 *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 10, 156 P.3d 418, 421 (2007). Thus, a
18 Commissioner’s grocery list written out during a candidate interview is free from
19 the public eye. Adopting such an exemption without any purpose creates a serious
20 danger that it will be interpreted overly broadly.

21 Furthermore, notes made during a selection process give insight into the
22 selector’s motives. Consider the recent United States Supreme Court case *Foster v.*
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1 *Chatman*, in which the prosecutors’ copies of the jury venire list included the letter
2 “B” next to each black prospective juror's name, and other handwritten makes
3 commented extensively on the juror’s race and making it clear prosecutors used this
5 as a criteria to reject qualified jurors. 136 S. Ct. 1737, 1744 (2016). Such informal
6 notations have a bearing on ensuring this process does not violate the VRA. The
7 emergency rule runs a serious risk of secreting such important notations away from
8 public scrutiny.

9 **D. Rule 131(e)(3) Restricting Public Review of Process Email**

10 Rule 131(e)(3) now provides

11 The following information shall be confidential
12 throughout the nomination process

13 All procedural emails sent between commissioners.

14 As described in the Introduction, independent redistricting adopted by Arizona
15 voters primarily changed the process by which district lines were drawn. The
16 process by which commissioners are selected is meticulously outlined in Article VI
17 of the Arizona Constitution as amended by the redistricting initiative in 2000. The
18 process by which maps are to be drawn, down to the point at which partisan
19 registration may be even reviewed, is provided in the Constitution itself. An
20 exemption for *procedural* communications is entirely out of step with Arizona’s
21 independent redistricting system.
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1 Furthermore, it is difficult to imagine any procedural email that would be so
2 minor that it should be shielded from the public view. The maintenance of an
3 unbiased setting free from the potential of undue influence requires that the public
4 have access of the totality of circumstances that are influencing the process—
5 including the nomination and selection of IRC members.
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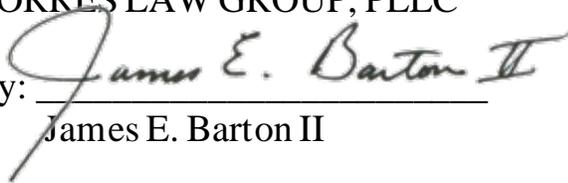
7 **CONCLUSION**

8 For the foregoing reasons, the Arizona Supreme Court should decline to adopt
9 permanently the emergency amendments of Rule 131.
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11 DATED this 30th day of June 2020.

12 Respectfully submitted,

13 TORRES LAW GROUP, PLLC

14 By: 

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