

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

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

PERSONAL INFORMATION

1. Full Name:

Benjamin David Kreutzberg

2. Have you ever used or been known by any other name? **Yes.** If so, state name:

I often shorten my first name, Benjamin, to "Ben."

3. Office Address:

**Office of the Yavapai County Attorney
255 E. Gurley St.
Prescott, AZ 86301**

4. How long have you lived in Arizona? What is your home zip code?

I was born in Arizona and have lived in Arizona my entire life except when I attended college in Colorado from 2003 to 2007. My home zip code is 86301.

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

I have resided in Yavapai County since 2010.

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

6. List your present and any former political party registrations and approximate dates of each:

I have been a registered Republican since I became eligible to vote in 2003.

(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: **Caucasian (primarily German)**

EDUCATIONAL BACKGROUND

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

**Sandra Day O'Connor College of Law at Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(I attended the Tempe campus)**

**Dates Attended: Fall 2007 through Spring 2010
Degree Earned: Juris Doctor**

**Colorado School of Mines
1500 Illinois St.
Golden, CO 80401**

**Dates Attended: Fall 2003 through Spring 2007
Degree Earned: Bachelor of Science**

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

Sandra Day O'Connor College of Law at Arizona State University: The Juris Doctor program includes courses on a variety of substantive legal areas and legal procedures. I was also a member of the school's chapter of the Federalist Society and participated in moot court.

Colorado School of Mines: I studied Chemical Engineering. I also participated in the Fencing Club and was the Vice President of the Shooting Club.

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

Sandra Day O'Connor College of Law at Arizona State University:

Academic Honors: I graduated magna cum laude with a class rank of 8 of 144. I received the award for highest grade in Constitutional Law I, Arizona Constitutional Law and Federal Courts. I qualified for and joined the Order of the Coif.

Scholarships: At various times while in law school, I received the Charles E. Jones Merit Scholarship and the College of Law Merit Scholarship. I was also a Pedrick Scholar most or all semesters.

Other Activities: I was the Arizona Issue editor of the Arizona State Law Journal for the 2009–2010 year, and a Staff Writer for the 2008–2009 year. I also completed a Judicial Externship with the Honorable Daniel A. Barker of the Arizona Court of Appeals, Division I in 2008.

Colorado School of Mines:

Academic Honors: I graduated with High Scholastic Honors with a grade point average of 3.948. I was on the Dean's List most or all semesters.

Scholarships: I received the President's Scholarship throughout my undergraduate tenure.

Other Activities: I am a member of the Tau Beta Pi engineering honors society. While in school, I participated in meetings and activities of that society.

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.

Arizona Courts: 2010

United States District Court for the District of Arizona: 2010

United States Court of Appeals for the Ninth Circuit: 2011

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.
Not applicable
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No**. If so, explain any circumstances that may have hindered your performance.
Not applicable
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/LOCATION	DATES
Yavapai County Attorney's Office Prescott, AZ Position: Deputy County Attorney	July 2012-present
Murphy, Schmitt, Hathaway & Wilson, PLLC Prescott, AZ Position: Associate Attorney and Law Clerk	September 2010- June 2012
Coconino County Attorney's Office Flagstaff, AZ Position: Law Clerk	Summer 2010
U-Haul International Phoenix, AZ Position: Legal Intern	Summer 2009
Hassett Law Firm P.L.C. Phoenix, AZ Position: Project Law Clerk	Summer 2008
Biltmore Legal Consultants Phoenix, AZ Position: Data Entry and Filing Clerk for Fennemore Craig, P.C.	Summer 2007

I attended law school from the Fall of 2007 to the Summer of 2010 and did not work during school semesters.

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.

Please see the list of attorneys at the Yavapai County Attorney's Office included as Attachment A.

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.

I have been a Deputy Yavapai County Attorney since 2012. During that time, I have been assigned to the Civil Division. In that position, I have represented Yavapai County in litigation and extensively advised various county officers, officials and employees. My assignments have included the Development Services Department, the Finance Department, Fire Districts, the Facilities Department, the Information Technology Services Department, the Public Fiduciary, School Districts and the Sheriff.

By statute, the Yavapai County Attorney's Office also represents the County's mental health evaluation agency in civil commitment cases. I have personally handled the majority of such cases in Yavapai County since 2012.

Mental health cases go from petition to hearing very quickly. That short timeframe requires quick legal reasoning and problem solving, sometimes in a trial-like setting. The majority of these cases eventually reach contested evidentiary hearings. I have also developed a good rapport with the public defenders who represent most of the proposed patients.

In addition to my normal assignments, I have represented various government entities in litigation with Yavapai County Attorney Sheila Polk. Those special projects have included litigation surrounding campaign finance enforcement during the 2010 Arizona Attorney General election and litigation about the Arizona Medical Marijuana Act. I argued two cases before the Supreme Court of Arizona that arose from those special projects.

I also frequently assist the prosecutors in the Yavapai County Attorney's Office when criminal cases intersect with my areas of expertise. For example, I have often contributed to discussions about determinations of defendants' competency, and their potential restoration to competency, in criminal cases.

I estimate that fifty percent of my practice is advisory, and fifty percent is litigation. Of the litigation, approximately fifty percent is mental health civil commitment cases. Approximately forty-five percent is other civil litigation. Approximately five percent is criminal litigation, where I have represented both the State of Arizona and other entities involved in the criminal process.

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

In private practice, I represented both plaintiffs and defendants in personal injury matters and other civil litigation.

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.

I have no such certifications.

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

In my advisory practice, I routinely draft and review contracts and advise the County's departments on the full spectrum of legal matters. The nature of that practice is profoundly broad. In a single day, for example, I could negotiate revisions to a contract, advise a department on a personnel matter, advise a department about recorded real estate documents and participate in litigation.

In my litigation practice, I have authored numerous motions and briefs, including in appellate courts.

I drafted revisions to Arizona's campaign finance enforcement laws following the litigation regarding the 2010 Arizona Attorney General election (see Question 26.A). In 2018, the legislature passed SB 1249 to amend A.R.S. § 16-938 substantially as I had proposed.

I have drafted and worked on changes to Yavapai County's Planning and Zoning Ordinance. I have also drafted policies and procedures.

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

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

Yavapai County Merit System Commission: 5 Cases

Yavapai County Land Use Hearing Officer: 1 Case

**Yavapai County Board of Adjustment: 1 Case
Arizona Office of Administrative Hearings: 1 Case**

b. The approximate number of these matters in which you appeared as:

Sole Counsel: 6

Chief Counsel: 2

Associate Counsel: 0

21. Have you handled any matters that have been arbitrated or mediated? **No.**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **Not applicable**

Chief Counsel: **Not applicable**

Associate Counsel: **Not applicable**

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.

A. Antigone Books L.L.C. et al. v. Tom Horne/Mark Brnovich et al., U.S. District Court case no. 2:14-cv-02100-PHX-SRB

(1) The date or period of the proceedings

September 2014 to July 2015

(2) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented the plaintiffs:

**Joshua S. Akbar
Dentons US LLP
2398 Camelback Road
Phoenix, AZ 85016-9007
602-508-3947
joshua.akbar@dentons.com**

Michael A. Bamberger
Richard M. Zuckerman
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020
212-768-6700
michael.bamberger@dentons.com
richard.zuckerman@dentons.com

Daniel J. Pochoda
Victoria Lopez
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85011-0148
602-650-1854
dpochoda@acluaz.org
vlopez@acluaz.org

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

The primary defendant was the Arizona Attorney General, who was initially Thomas Horne and was later Mark Brnovich. The following counsel represented the Attorney General (David Weinzweig subsequently became a judge of the Arizona Court of Appeals, Division I):

David Daniel Weinzweig
Office of the Attorney General
1275 W Washington St.
Phoenix, AZ 85007-2997
602-542-7989
david.weinzweig@azag.gov

Robert Lawrence Ellman
Office of the Attorney General
1275 W Washington St.
Phoenix, AZ 85007-2997
602-542-8696
robert.ellman@azag.gov

Stephanie Susan Elliott
Office of the Attorney General
15 S 15th Ave.
Phoenix, AZ 85007
602-542-8555
Stephanie.Elliott@azag.gov

All Arizona county attorneys were also named defendants. The individual attorneys who appeared are listed in Attachment B.

(3) Summary of the substance of the case

This case was a constitutional challenge to Arizona’s “revenge pornography” statute, A.R.S. § 13-1425. The plaintiffs alleged that the statute discriminated on the basis of speech content, was not tailored to a compelling or important government purposes, prohibited non-obscene speech and was overbroad. The plaintiffs and the Attorney General eventually stipulated that the statute was unenforceable in its then-current form.

(4) Statement of the significance of the case

The county attorneys were largely nominal parties to this case, but they were named as the prosecutors who would enforce the statute. I negotiated a stipulation with the plaintiffs whereby the Yavapai County Attorney’s nominal party status was formalized. The Yavapai County Attorney was not required to substantively participate in the litigation regarding the statute’s constitutionality and was bound by the Attorney General’s substantive resolution of the case. The stipulation also limited attorneys’ fee exposure, and no fees were ultimately assessed against the Yavapai County Attorney.

Most or all of the other county attorneys entered into similar stipulations following our lead. The process of formalizing the county attorneys’ nominal party status relieved multiple county attorneys’ offices throughout the state of substantial litigation burdens.

B. State of Arizona v. [name redacted, referred to as Patient M], Yavapai County Superior Court case no. P1300CV201201165

(1) The date or period of the proceedings

The main case began in October 2012 and was settled in May 2013. However, periodic review processes continue to the present.

- (2) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented Patient M:

**Andrew Falick
Deputy Yavapai County Public Defender
595 White Spar Road
Prescott, AZ 86303
928-771-3588
Andrew.falick@yavapai.us**

At the time of the main case, the following counsel represented the Arizona State Hospital:

**Gregory Honig
Assistant Attorney General
Arizona Attorney General's Office
1275 W. Washington
Phoenix, AZ 85007
Gregory.Honig@azag.gov**

- (3) Summary of the substance of the case

I filed this case under Arizona's sexually violent person statutes, A.R.S. §§ 36-3701 through 36-3717. Patient M had previously been convicted of multiple sexually violent offenses. The State was also required to prove beyond a reasonable doubt that Patient M was likely to engage in acts of sexual violence to prove that he was a sexually violent person.

The parties resolved the case by a settlement in which Patient M admitted that he was a sexually violent person but was placed in the Arizona State Hospital's Least Restrictive Alternative program.

- (4) Statement of the significance of the case

This case presented complicated issues of stale records, medical opinion and difficult burdens of proof. The parties were able to work together to resolve it to secure appropriate treatment and protect the community.

C. Sherman v. Yavapai County Sheriff, Yavapai County Employees' Merit System Commission

- (1) The date or period of the proceedings

August 2015 to October 2015

- (2) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented Appellant Sherman:

Tosca Henry
Ledbetter Law Firm, PLC
1003 N. Main Street, Cottonwood, AZ 86326
928-649-8777
tosca@ledbetterlawaz.com

- (3) Summary of the substance of the case

This case was an appeal of the termination of a Yavapai County Sheriff's Office employee. The employee was accused of dishonesty following the investigation of a jail escape. Shortly before the hearing was scheduled to begin, opposing counsel and I negotiated a settlement.

- (4) Statement of the significance of the case

The facts and circumstances of this case are not groundbreaking. But it is indicative of many other similar cases that I have settled throughout my career. I worked professionally with opposing counsel to negotiate a resolution that accomplished both parties' goals.

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: **3**
State Courts of Record: **200**
Municipal/Justice Courts: **4**

The approximate percentage of those cases which have been:

Civil: **95%**
Criminal: **5%**

The approximate number of those cases in which you were:

Sole Counsel:	180
Chief Counsel:	15
Associate Counsel:	10

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:	5%
You argued a motion described above	2%
You made a contested court appearance (other than as set forth in the above response)	75%
You negotiated a settlement:	10%
The court rendered judgment after trial:	0%**
A jury rendered a verdict:	0.5%

****A large fraction of these cases were mental health civil commitment matters, guardianships and similar matters that are decided by judge. While they are not formal trials, they are trial-like in many ways.**

The only cases I am counting as formal trials are one civil bench trial that settled after the presentation of evidence and one criminal felony jury trial that resulted in a jury verdict.

The number of cases you have taken to trial:

Limited jurisdiction court	0
Superior court	2**
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:	9
Criminal:	1
Other:	4 (Appellate special action)

The approximate number of matters in which you appeared:

As counsel of record on the brief: **12**

Personally in oral argument: **4**

25. Have you served as a judicial law clerk or staff attorney to a court? **No**. If so, identify the court, judge, and the dates of service and describe your role.

Not applicable, but I did serve as a Judicial Extern to the Honorable Daniel A. Barker of the Arizona Court of Appeals, Division I, in the fall of 2008.

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.

A. *Horne et al. v. Polk*

(1) The date or period of the proceedings

November 2013 to January 2018

(2) The name of the court or agency and the name of the judge or officer before whom the case was heard

The Honorable Tammy L. Eigenheer, Administrative Law Judge, Arizona Office of Administrative Hearings, case no. 14F-0101-AAG

The Honorable Crane McClennen (initial appeal) and Patricia A. Starr (later attorneys' fee litigation), Judges, Maricopa County Superior Court, case no. LC2014-000255-001 DT

The Honorable Jon W. Thompson, Randall M. Howe and Lawrence F. Winthrop, Judges, Arizona Court of Appeals Division I, case no. 1 CA-CV 14-0837

The Honorable Scott Bales, Chief Justice, the Honorable John Pelander, Vice Chief Justice, the Honorable Robert M. Brutinel and Clint Bolick, Justices, the Honorable Peter J. Eckerstrom, Chief Judge, the Honorable Joseph W. Howard and Timothy M. Wright, Judges, Supreme Court of Arizona, case no. CV-16-0052-PR, reported at 242 Ariz. 226

- (3) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented Plaintiffs/Appellants Thomas C. Horne and his related campaign at various times through the process:

**Michael D. Kimerer
Kimerer and Derrick, P.C.
1313 E. Osborn, Suite 100
Phoenix, AZ 85014
602-279-5900
MDK@kimerer.com**

**M.E. "Buddy" Rake, Jr.
Daniel T. Benchoff
Rake Law Group
2701 E. Camelback Road, Suite 160
Phoenix, AZ 85016
602-264-9081
brake@aztriallaw.com
dbenchoff@aztriallaw.com**

**Dennis I. Wilenchik
Wilenchick & Bartness, P.C.
2810 N. Third Street
Phoenix, AZ 85004
602-606-2810
admin@wb-law.com**

The following counsel represented Plaintiff/Appellant Kathleen Winn and her related political committee at various times through the process (both lawyers have subsequently changed associations and possibly contact information):

Timothy A. La Sota
Tim LaSota, PLC
2198 E. Camelback Rd., Suite 305
Phoenix, AZ 85016
602-255-0103
tim@timlasota.com

Larry L. Debus
Debus, Kazan & Westerhausen, Ltd.
335 E. Palm Lane
Phoenix, AZ 85004
602-257-8900
lld@dkwlawyers.com

The Arizona Solicitor General's Office submitted an amicus curiae brief by the following counsel (John R. Lopez subsequently became a justice of the Supreme Court of Arizona and Jennifer M. Perkins subsequently became a judge of the Arizona Court of Appeals, Division I):

John R. Lopez, IV
Dominic E. Draye
Jennifer M. Perkins
Arizona Attorney General's Office
1275 W. Washington St.
Phoenix, AZ 85007
602-542-8255
John.lopez@azag.gov
Dominic.draye@azag.gov

The Institute for Justice submitted three amicus curiae briefs by the following counsel:

Paul V. Avelar (023078)
Timothy D. Keller (019844)
Keith E. Diggs (032692)
Institute for Justice
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
480-557-8300
pavelar@ij.org
tkeller@ij.org
kdiggs@ij.org

Finally, at the Office of Administrative Hearings and appeal to the Maricopa County Superior Court, but not the later appeals, Deputy Yavapai County Attorney Jack H. Fields appeared with me:

Jack H. Fields
Assistant County Administrator
1015 Fair St.
Prescott, AZ 86305
928-771-3200
Jack.fields@yavapai.us

(4) Summary of the substance of the case

Quoting *Horne v. Polk*, 242 Ariz. 226, 228–29, ¶¶ 2–3 (2017):

On June 27, 2013, acting pursuant to A.R.S. § 16-924(A) (2011) *repealed by* 2016 Ariz. Sess. Laws, ch. 79, § 10 (2d Reg. Sess.), Arizona Secretary of State Ken Bennett determined that there was reasonable cause to believe that Attorney General Thomas Horne, Kathleen Winn, who served as Community Outreach Director of the Attorney General's Office, and two campaign committees (collectively “Appellants”) had violated Arizona campaign finance laws, specifically A.R.S. §§ 16-901(14), -905, -913, -915, -917, and -919. The Secretary accordingly notified Solicitor General Robert L. Ellman, who appointed Sheila Polk as Special Arizona Attorney General because the Attorney General and one of his staffers were subjects of the notice, and “an appearance of impropriety would arise if the Arizona Attorney General's Office investigated the alleged campaign finance violation.”

Following investigation, pursuant to A.R.S. § 16-924(A), Polk issued a twenty-five-page order finding that Appellants had violated Arizona campaign finance statutes by illegally coordinating campaign expenditures, exceeding contribution limits, and collecting illegal contributions. Polk directed Appellants to amend their campaign finance reports and ordered Horne and his campaign to refund contributions totaling approximately \$397,000. The order stated that if the Appellants failed to take the specified actions within twenty days, “this Office will issue an Order Assessing a Civil Penalty pursuant to A.R.S. § 16-924(B). The violation of the contribution limit carries a civil penalty of three times the amount of money of the violation. A.R.S. § 16-905(J).”

Horne and Winn subsequently challenged that order through an administrative hearing, appealed the result to the Maricopa County Superior Court and Arizona Court of Appeals, Division I, and finally

petitioned the Supreme Court of Arizona for Review. The supreme court eventually ruled in favor of Horne and Winn:

Although Appellants do not allege actual bias, the circumstances here deprived them of due process. Apparently unique in the context of Arizona administrative law, Arizona's campaign finance statute, when joined with the APA, place a single official in the position of making both an initial and final determination of legal violation, with no opportunity for de novo review by the trial court. A quasi-judicial proceeding "must be attended, not only with every element of fairness but with the very appearance of complete fairness." Specifically, we hold that when Polk also assumed an advocacy role during the ALJ proceedings, the due process guarantee prohibited her from then serving as the final adjudicator.

Id. at 234, ¶ 28 (citation omitted). A different administrative decision maker later found insufficient evidence of coordinated expenditures.

(5) Statement of the significance of the case

This case touched on diverse areas of law including administrative law, election law and constitutional law. It clarified an area of law that Arizona's courts had not fully assessed. It was also a valuable opportunity for me to be involved at the highest levels of Arizona's appellate system and to handle a case of profound statewide importance. Further, it gave me valuable experience preparing and litigating in a trial-like setting at the Arizona Office of Administrative Hearings.

Following the case, the Arizona legislature amended the relevant statutes to address some of the issues raised (see question 19).

B. *State v. Jones*

(1) The date or period of the proceedings

The Yavapai County Attorney's Office began the prosecution in 2014. The Arizona Attorney General handled the first appeal to the Arizona Court of Appeals, Division I, from 2016 to 2018. The case returned to the Yavapai County Attorney's Office for the proceedings before the Supreme Court of Arizona in October 2018, which lasted through the court's decision in May 2019.

I was not counsel of record during the trial court prosecution, although I did assist in the State's response to a special action to the Arizona Court of Appeals, Division I, of which the court declined jurisdiction, and a petition for review of that declination to the Supreme Court of Arizona, which the court declined. I became co-counsel of record after the case was again

before the Supreme Court on a petition for review following conviction and appeal when the case returned to the Yavapai County Attorney's Office in October 2018. (I describe only that phase of the litigation in detail in response to this question).

- (2) The name of the court or agency and the name of the judge or officer before whom the case was heard

The Honorable Scott Bales, Chief Justice, the Honorable Robert M. Brutinel, Vice Chief Justice, the Honorable John Pelander, Clint Bolick, Ann A. Scott Timmer, Andrew Gould, John R. Lopez, Justices, Supreme Court of Arizona, case no. CR-18-0370-PR, reported at 440 P.3d 1139

- (3) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented Defendant/Appellant Jones:

**Robert A. Mandel
Taylor C. Young
MANDEL YOUNG PLC
2390 East Camelback Road, Suite 318
Phoenix, AZ 85016-4400
602-374-4591
rob@mandelyoung.com
taylor@mandelyoung.com**

**Lee Stein
Anna H. Finn
MITCHELL STEIN CAREY CHAPMAN, PC
One Renaissance Square
2 North Central Avenue, Suite 1450
Phoenix, AZ 85004
602-358-0290
lee@mscclaw.com
anna@mscclaw.com**

The following counsel represented Amicus Curiae Wil Humble:

**Gary Michael Smith
SMITH SAKS, PLC
2390 Ea. Camelback Rd.
Suite 318
Phoenix, AZ 85016
602-888-9969
smith@smithsaks.com**

The following counsel represented Amici Curiae Qualifying Patients and Caregivers:

**Jared G. Keenan
Kathleen E. Brody
American Civil Liberties Union Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
602-650-1854
jkeenanacluaz.org
kbrodyacluaz.org**

**Emma Andersson
American Civil Liberties Union
125 Broad St., 17th Floor
New York, NY 10004
eanderssonaclu.org**

The following counsel represented Amicus Curiae Arizona Attorneys for Criminal Justice:

**Sarah L. Mayhew
33 N. Stone Ave., 21st Floor
Tucson, AZ 85701
520-724-6800
Sarah.mayhew@pima.gov**

The following counsel represented Amicus Curiae National Organization for the Reform of Marijuana Laws:

**Thomas W. Dean
13201 N. 35th Ave., Suite B-10
Phoenix, AZ 85029
602-635-4990
attydean@gmail.com**

The following counsel represented Amicus Curiae MPX Bioceutical Corporation:

**John H. Pelzer
Greenspoon Marder LLP
200 E. Broward Boulevard, Suite 1800
Fort Lauderdale, FL 33301
954-527-2469
John.pelzer@gmlaw.com**

Sharon A. Urias
Greenspoon Marder LLP
8585 E. Hartford Drive, Suite 700
Scottsdale, AZ 85255
480-306-5458
Sharon.urias@gmlaw.com

The following counsel represented Amicus Curiae Kevin Singer:

Kathi Mann Sandweiss
Lawrence E. Wilk
Thomas S. Moring
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
602-248-1000
kms@jaburgwilk.com
lew@jaburgwilk.com
tsm@jaburgwilk.com

The following counsel represented Amicus Curiae Arizona Dispensaries Association:

Eric M. Fraser
Osborn Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012
602-640-9000
efraser@omlaw.com

The following counsel represented Amici Curiae Physicians:

Gaye L. Gould
Janet E. Jackim
Philip R. Rudd
Sacks Tierney P.A.
4250 N. Drinkwater Blvd., Fourth Floor
Scottsdale, AZ 85251
480-425-2600
Gaye.gould@sackstierney.com
Janet.jackim@sackstierney.com
Philip.rudd@sackstierney.com

The following counsel represented Amici Curiae Jennifer Welton and Alex Lane:

**Alex Lane
Lane, Hupp, Crowley, PLC
111 E. Monroe St., Suite 1216
Phoenix, AZ 85003
480-776-5757
alex@lhcplc.com**

The following counsel represented Amicus Curiae Arizona Prosecuting Attorneys' Advisory Council:

**Elizabeth B. Ortiz
1951 W. Camelback Rd., Suite 202
Phoenix, AZ 85015
602-542-7222
Elizabeth.ortiz@apaacaz.com**

Finally, Chief Deputy Yavapai County Attorney Dennis M. McGrane was counsel with me on the briefs:

**Dennis M. McGrane
Chief Deputy Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
928-771-3344
Dennis.mcgrane@yavapai.us**

(4) Summary of the substance of the case

Jones was convicted of possessing the drug cannabis. He had received a card issued pursuant to the Arizona Medical Marijuana Act ("AMMA") and argued that the AMMA's protections included cannabis. The State also argued at some phases of the case that the AMMA was preempted by federal law. The trial court and court of appeals found that cannabis was outside the scope of the AMMA's protections.

The Supreme Court of Arizona reversed, holding that the AMMA's protections include cannabis.

- (5) Statement of the significance of the case

This case clarified the scope of the AMMA. It was of profound statewide importance and will impact law enforcement, prosecutors, qualifying patients and dispensaries statewide.

For me, the case provided extremely valuable experience arguing before the State's highest court.

C. Glenn v. Yavapai County Sheriff

- (1) The date or period of the proceedings

March 2016 to October 2016

- (2) The name of the court or agency and the name of the judge or officer before whom the case was heard

This case was heard by the Yavapai County Employees' Merit System Commission. The commission members were Janis Ann Sterling (Chair), Richard Hartom, Gene Carrigan, Norman Perry and Dean Trebesch.

- (3) The names, e-mail address, and telephone numbers of all counsel involved and the party each represented

The following counsel represented Appellant Glenn:

**Tosca Henry
Ledbetter Law Firm, PLC
1003 N. Main Street, Cottonwood, AZ 86326
928-649-8777
tosca@ledbetterlawaz.com**

- (4) Summary of the substance of the case

This case involved allegations that a Detention Sergeant had failed to correct the misidentification of an inmate and had been dishonest during the subsequent investigation. The Commission upheld the Yavapai County Sheriff's decision to terminate his employment.

- (5) Statement of the significance of the case

This case is indicative of much of my practice. It involved advising the Yavapai County Sheriff's Office during the early portions of the investigation as well as defending the subsequent appeal.

The proceeding itself was a two-day contested evidentiary hearing with approximately eight witnesses and extensive video evidence.

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.).

Not applicable

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.

Not applicable

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

I have trained attorneys and administrative professionals in the Yavapai County Attorney's Office on topics including public records, mental health and prosecutorial misconduct. I also train law enforcement officers on case law in Yavapai County's Crisis Intervention Team training.

I am an active participant in the group of civil deputy county attorneys throughout Arizona. The group meets quarterly. We discuss issues that are common to all counties and potential legislation.

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.

My undergraduate degree is in Chemical Engineering. During the summer of 2005, I was a Nuclear Materials Technology Intern at Los Alamos National Laboratory.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.*** If so, give details, including the name of the enterprise, the nature of the business, the

title or other description of your position, the nature of your duties and the term of your service.

***See question 54. I am an officer and director of a nonprofit corporation that conducts shooting competitions. I do not consider it a business enterprise, but include it here for completeness.**

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **No.** If not, explain your decision.

My duties are not inconsistent with continued public service as a judge. They also do not require anything like a full-time commitment.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain. **Not applicable**
33. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain. **Not applicable**
34. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain. **Not applicable**
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.** If so, explain. **Not applicable**
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No.** If so, identify the nature of the case, your role, the court, and the ultimate disposition. **Not applicable**
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.** If so, explain. **Not applicable**
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **Yes.** If so, explain. **I own stocks in specific corporations. I would adhere to all relevant requirements regarding those corporations if appointed.**

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.** If so, provide details. **Not applicable**
40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**
- If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition. **Not applicable**
41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable**
42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **None**
43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **None**
44. List and describe any sanctions imposed upon you by any court. **None**
45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No.** If so, in each case, state in detail the circumstances and the outcome. **Not applicable**
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.** If your answer is "Yes," explain in detail. **Not applicable**

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.** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action. **Not applicable**
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.** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test. **Not applicable**
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.** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties. **Not applicable**

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes.** If so, list with the citations and dates.

Benjamin D. Kreutzberg, Note, Introduction and Statistical Analysis: A Discussion of the Arizona Supreme Court's 2008–2009 Decisions, 42 ARIZ. ST. L.J. 517 (2010).

Benjamin D. Kreutzberg, Richard L. Ames, Kenneth M. Hansel, *Evaporation and NARS: Nitric Acid Mass-Balance Summary: 2000-2005*, Los Alamos National Laboratory # LA-14248 (2005).

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain. **Not applicable**
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 taught internal Yavapai County Attorney's Office training sessions on Public Records, Mental Health and prosecutorial misconduct. In

addition, in the Spring semester of 2012, I was a guest lecturer for Professor F. Andrew Hessick's Federal Courts course at the Sandra Day O'Connor College of Law at Arizona State University. The topic of that class session was the political question doctrine.

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

**Yavapai County Bar Association, 2010-2012
Arizona Civil Deputy County Attorneys Group, 2012-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 (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

I volunteered to present a mock trial to a class at Granite Mountain School in 2012.

I volunteered in 2011 and 2012 to provide pro bono legal services at Yavapai County Law Day.

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

In the spring of 2020, I ran for and was elected to the Board of Directors of Yavapai Recreation League, Inc. dba Prescott Action Shooters ("YRL"). Upon my election to the Board, my fellow Board members elected me to be Secretary.

YRL is a nonprofit corporation that owns a private shooting range outside of Prescott and conducts several competitive shooting matches every month. It has approximately 430 members. My duties as Secretary include maintaining the corporate records, publishing agendas and minutes and making filings with the Arizona Corporation Commission. My duties as a director include crafting the corporation's policies and future direction.

The current COVID-19 pandemic has presented some particular challenges for YRL. The Board has adopted mitigation measures and held most of its meetings electronically.

I was the manager for the Prescott United Methodist Church Softball Team for the 2011, 2012 and 2013 seasons.

I was a member of the Paradise Valley United Methodist Church Worship, Music, and Fine Arts Committee from 2008 to 2010, and Chairman from 2009 to 2010. As part of my duties, I was also a member of the Associate Music Minister Selection Committee in 2009.

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

In 2015, I received the Yavapai County Attorney's Appellate Prosecutor of the Year Award. I was also nominated for the Arizona Prosecuting Attorneys' Advisory Council ("APAAC") Appellate Prosecutor of the Year Award at the same time.

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

I applied for another vacancy on the Arizona Court of Appeals, Division I in the fall of 2019.

Have you ever been removed or resigned from office before your term expired?
Not applicable. If so, explain. **Not applicable**

Have you voted in all general elections held during the last 10 years? **Yes.** If not, explain. **Not applicable**

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

I am an avid competitive shooter. Among other classifications, I hold the classifications of Master in the pistol caliber carbine division of the United States Practical Shooting Association and the classification of Expert in the stock service pistol division of the International Defensive Pistol Association. As described in question 54, I am also an officer and director in our local nonprofit corporation that conducts shooting competitions.

I am also passionately interested in military history and technology and hold a private pilot's certificate.

HEALTH

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

ADDITIONAL INFORMATION

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

As someone who was born in Arizona and has spent most of my life here, I have experienced and understand the diversity of this State. Although I am a Caucasian male, I recognize and respect the differences that every individual possesses. I strive to view people as individuals rather than as members of groups.

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

I have consistently sought opportunities for appellate practice in my office. As a result, I have handled a wide variety of appellate matters and have developed considerable experience as an appellate practitioner.

In addition, my practice as a Civil Deputy County Attorney is quite broad. I have frequently interpreted statutes about which there is little to no case law, in a variety of circumstances. Yavapai County conducts the full spectrum of governmental activities. Because Yavapai County is relatively small, I have provided legal advice throughout that spectrum. The diversity of my practice has provided precisely the type of experience that would be valuable to me as an appellate judge. There are only six Civil Deputy County Attorneys at the Yavapai County Attorney's Office, and we all enjoy the collaborative environment that the nature of our practice encourages.

In some ways, my advisory practice is more analogous to judging than my litigation practice because legal advice is neutral, while litigation arguments further litigation positions.

My extensive experience in mental health law would be extremely valuable to the court. I have provided technical advice on several legislative proposals regarding Arizona's mental health processes. I have also participated in multiple working groups to improve mental health processes in Yavapai County and statewide.

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.** If not, explain. **Not applicable**

62. Attach a brief statement explaining why you are seeking this position. **Please 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. **Please see Attachments D and E.**
64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website. **Not applicable**
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. **Not applicable**

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

Attachment A

Attachment A
List of attorneys at the Yavapai County Attorney's Office
(Question 15)

The following attorneys are currently employed at the Yavapai County Attorney's Office (in alphabetical order):

Asay, Glen
Biedermann, Joy
Bigbee, James
Black, Matthew
Brennan, Martin
Citrenbaum, Lewis
Clark, Steven
Cordrey, Michael
Eazer, Susan
Fisher, Joshua
Hale, Jonathan
Hughes, Bill
Harris, Casi
Jezairian, Kristina
Kennedy, Carol
Ketchum, Julia
Kreutzberg, Benjamin
Landis, James (inactive but performs non-attorney functions)
Lowe, John
McGill, Michael
McGrane, Dennis (Chief Deputy County Attorney)
Michalsky, Christopher
Morrison, Michael
Owens, Dana
Parker, Larissa
Polk, Sheila (County Attorney)
Rodriguez, George
Sabo, Jessica
Sankey, Stephanie
Savage, Danalyn
Sisneros, Stephen
Stoxen, Thomas
Sutton, Rebecca
Toth, Alex
Whitmer, Henry
Wolfinger, Ethan
Wortman, Patti
Young, Steven

The following attorneys not currently employed at the Yavapai County Attorney's Office, but have been since 2015 (in alphabetical order):

**Ahler, Paul
Arellano Edwards, Ross
Buckmaster, Roy
Daniels, Michael
Drew, Amy
Fields, Jack
Giltner (formerly Spitner), Cynthia
Hastings, Charles
Johnson, Robert
Kunisch, William
Long, Jarrod
Nelson, William
Nye, Dexton
Pitrat, Tyler
Pousson, Janee
Roll, Christopher
Schiff, Kevin
Wateland (formerly Gabaldon), LaTanya
Wheeler, Tanaaz**

Attachment B

Attachment B

Counsel for county attorney defendants in *Antigone Books L.L.C. et al. v. Tom Horne/Mark Brnovich et al.*, U.S. District Court case no. 2:14-cv-02100-PHX-SRB (Question 22.A.2)

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Courtney Rachel Glynn
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Charlene Ann Laplante
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Attachment C

Attachment C

Why I am seeking this position (Question 62)

Lawyers have different paths to law school. Many are impressed by lawyers they meet, are interested in the mechanics of the practice of law or enjoy legal analysis. My path combined all those facets, as I had the fortune (or misfortune) to have two lawyers for parents. But where my parents specialized their practices, I always sought to diversify mine. I have a passion for the law itself and for applying it to the realities of life.

In law school, I found the intellectual challenge of absorbing the law and understanding legal reasoning to be extremely fulfilling. At that time, I had the opportunity to complete a judicial externship for the Honorable Daniel A. Barker of the Arizona Court of Appeals, Division I. The court allowed externs to participate in the conference process, which gave me the chance to see how appellate judges decide cases and discuss the law.

Since I graduated, I have similarly sought opportunities to analyze and apply the law. The most compelling of such opportunities have been appeals, which I have actively sought. I relish every opportunity to write a brief or argue before appellate courts. When I am doing that work, I find the mental exercise to be challenging yet profoundly interesting.

Appeals primarily involve questions of law. The opportunity to make deciding such questions a full-time vocation inspires my deepest hopes as to what a fulfilling career would be. I would also be able to make a positive difference in the legal landscape of Arizona. The chance to do so with an exceptional group of jurists makes this position my ideal job. For all these reasons, I have wanted to become an appellate judge for many years.

Attachment D

Attachment D
Writing Sample # 1 (Question 63)

This writing sample is a short supplemental brief filed before the Supreme Court of Arizona in *Horne et al v. Polk*, 242 Ariz. 226 (2017). By this stage of the case, the parties had extensively briefed the core questions. This supplemental brief concisely distinguished specific case law and argued that the procedure was constitutionally sound.

I. INTRODUCTION

The core issue in this case is whether Arizona's statutory procedures for administrative proceedings, contained in A.R.S. §§ 41-1092 through 41-1092.12, are constitutional. The parties and amici have extensively argued and cited Arizona, federal and out of state cases in support of their positions. This Supplemental Brief focuses instead on the overarching issues that are relevant to this Court's consideration of the constitutionality of the administrative process.

II. ARGUMENT

A. The agency followed the statutory administrative procedures.

The administrative adjudication in this case was governed by A.R.S. §§ 41-1092 through 41-1092.12, which apply to most administrative proceedings in Arizona. It is undisputed that the agency and the agency head followed the statutory procedures. Appellants' challenge, therefore, is to the constitutionality of that broadly-applicable statutory scheme.

Arizona's administrative statutes allow the agency head to make the final administrative decision. A.R.S. § 41-1092.08(F). Nothing in the statutory scheme requires the agency head to exclude herself from the ALJ hearing process or implement some form of internal separation among agency employees.

Moreover, nothing in the statutory scheme would suggest to Appellants that the ALJ's decision was any sort of final decision. It was clear to all parties that the

agency, through the agency head, was the entity that was to make the final administrative decision. The ALJ's role was always to facilitate that process, not to serve as the final decision maker. The hearing before the ALJ was not legally equivalent to a hearing before an entity that makes a final decision.

That distinction makes Arizona's administrative process different from those reported in many out of state cases, but the differences do not render the Arizona process unconstitutional. The distinctions do mean that much of the out of state case law is inapplicable, so this Court should assess the process with the distinctions in mind as it considers the constitutionality of the Arizona process.

At its core, due process requires notice and an opportunity to be meaningfully heard. *E.g. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). As described throughout the briefing, the process in this case was fundamentally fair and provided notice and an opportunity to be meaningfully heard. It was thus consistent with due process requirements.

B. The agency head was not required to exclude herself during the administrative process.

It is undisputed that the agency head was not excluded or "walled off" during the administrative process in this case. But it is also undisputed that the agency head did not personally appear before the ALJ and was not present at the hearing. That distinction is important to this Court's consideration of due process issues. Even if due process requires some separation of roles, the separation in this

case was sufficient.

Some out of state cases are particularly concerned with the *appearance* of unfairness. *E.g. Nightlife Partners, Ltd. v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234, 246, 108 Cal. App. 4th 81, 94, (2003); *Appeal of Trotzer*, 143 N.H. 64, 68, 719 A.2d 584, 587 (1998). The agency head's non-presence at the ALJ hearing significantly mitigates any appearance of unfairness.

Further, in *Botsko v. Davenport Civ. Rights Comm'n*, 774 N.W.2d 841 (Iowa 2009), the Supreme Court of Iowa acknowledged the significance of an agency head's personal presence at administrative hearings. *Id.* at 849, 853. The court first recognized that "the mere fact that an agency adjudicator has a supervisory role over agency actors involved in the investigatory or prosecutorial functions of the agency does not establish a procedural due process claim." *Id.* at 849 (citation omitted). Later, the court found that the agency director was engaged in advocacy, and that there was a due process violation, when the director "[sat] at counsel table with a complainant, confer[red] with that counsel at the close of the testimony of witnesses, and [did] not object when the hearing officer suggest[ed] that she, along with counsel for the complainant, [bore] the burden of proof." *Id.* at 853.

Even if this Court were to find that some combinations of advocacy and adjudication in the Arizona administrative statutes are unconstitutional, *Botsko* suggests a bright-line rule: Consistent with due process, an agency head may

supervise her agency and need not be excluded or “walled off” so long as she does not appear at the ALJ hearing. If the Court were to find that some separation is constitutionally required in Arizona’s statutory scheme, such a bright-line rule is necessary so that agencies can set clear boundaries and avoid uncertainties. If this Court were instead to find that the nuanced details regarding the agency head’s precise amount of participation determine the constitutionality of the process, administrative agencies and courts would be mired in litigation regarding how “high” the “wall” would need to be and what “breaches” would cause due process violations. That focus on the process would impair the true purpose of administrative hearings, which is to expediently reach the merits of a controversy.

Moreover, totally excluding the agency head from the hearing process would be impractical and unhelpful. A county attorney necessarily supervises her deputies, and is ethically responsible for their actions under some circumstances. Ariz. R. Sup. Ct. 42, ER 5.1. If the agency head were required to exclude herself from the administrative process, she would not be able to exercise any operational control over the progress of cases or the policy-setting goals to be accomplished through them. That result would transform the agency head from the leader of the agency into a specialist hearing review officer who could not use her own expertise while running the agency. Such a result would defeat the purpose of having administrative processes.

Fundamentally, an agency head has special knowledge, experience and responsibilities that make her exclusion particularly inappropriate. *Cf. Withrow v. Larkin*, 421 U.S. 35, 51–52 (1975) (noting and apparently approving the federal Administrative Procedure Act “which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly exempts from this prohibition ‘the agency or a member or members of the body comprising the agency.’”). A holding that due process requires an agency head to abrogate her supervisory responsibilities during the administrative process would be untenable and is not constitutionally required.

III. CONCLUSION

As presented throughout the briefing, the process in this case has been consistent with Arizona law. Arizona law provides sufficient due process, and is thus constitutional. Accordingly, this Court should affirm the lower courts’ decisions.

RESPECTFULLY SUBMITTED this 13th day of January, 2017.

Sheila Polk
YAVAPAI COUNTY ATTORNEY

By: 
Benjamin D. Kreutzberg
Deputy Yavapai County Attorney
Attorney for Appellee

Attachment E

Attachment E
Writing Sample # 2 (Question 63)

This writing sample is an excerpt from a supplemental brief that I wrote before the Supreme Court of Arizona in *State v. Jones*, 440 P.3d 1139 (2019). Section II concisely argues the State’s position that the Arizona Medical Marijuana Act (“AMMA”) did not protect the drug cannabis. It makes that argument using a variety of statutory construction techniques.

II. Cannabis is not protected by the AMMA.

In accord with this Court's order dated January 8, 2019, the State will not restate the arguments presented in the Response to the Petition for Review in detail. But fundamentally, the AMMA only protects the possession of an "allowable amount" of marijuana. A.R.S. § 36-2811(B)(1). The "allowable amount" of marijuana only includes "usable marijuana." A.R.S. § 36-2801(1)(a)(i). Cannabis does not fit the definition of "usable marijuana," which only includes "the dried flowers of the marijuana plant, and any mixture or preparation thereof." A.R.S. § 36-2801(15). Accordingly, cannabis is not protected because it is not "usable marijuana" and thus cannot be an "allowable amount" of marijuana.

Further, because the "allowable amount of marijuana" is "two-and-one-half ounces of usable marijuana," A.R.S. § 36-2801(1)(a), the AMMA's drafters could not have intended to authorize the possession of cannabis, which is much more potent than "standard" marijuana. Had they intended to do so, they surely would

have included a lower “allowable amount of cannabis” to ensure some modicum of potency equivalence between cannabis and “standard” marijuana.

Reading the AMMA to exclude cannabis would also be consistent with rulings of other states’ courts with analogous medical marijuana acts. *State v. Carruthers*, 837 N.W.2d 16, 21, 31 (Mich. App. 2013) (holding that brownies containing a THC extract were not “usable marihuana” and thus not protected because “usable marihuana” only included “the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof” (citations and internal quotations omitted)); *State v. Pirello*, 282 P.3d 662, 664–65 (Mont. 2012) (holding that hashish was unprotected because it was not “useable marijuana” because it was “mechanically processed or extracted”).⁴ This court has previously recognized that Michigan’s medical marijuana act is “substantially identical to the AMMA.” *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 124, ¶ 22 (2015).

In addition, even if the AMMA protected “marijuana” that is not “usable marijuana,” it would still not protect cannabis. As the court of appeals correctly found, the AMMA’s drafter’s choice not to specifically include the narcotic drug cannabis in the AMMA’s definition of “marijuana” means that the people cannot

⁴ Following *Carruthers* and *Pirello*, Michigan and Montana amended their medical marijuana acts to specifically include resins. H.B. 4210, 98th Leg., 2016 Reg. Sess. (Mich. 2016); S.B. 333, 65th Reg. Sess. (Mont. 2017). *See also* Mich. Comp. Laws. § 333.26423(n); Mont. Code § 50-46-302(10).

have intended to include it. Cannabis has long been recognized as a separate substance from “standard” marijuana:

According to our supreme court, hashish is “‘the resin extracted’ from the marijuana plant,” criminalized as cannabis, a narcotic drug, and distinct from marijuana. *Bollander*, 110 Ariz. at 87. “[T]he legislature has recognized hashish and marijuana as two distinct forms of cannabis . . . but marijuana alone has been singled out for separate treatment under our statutes.” *Id.* We have held that our legislature's differing treatment of hashish and marijuana is to be attributed to the great potency of the former, rendering it “susceptible to serious and extensive abuse.” *State v. Floyd*, 120 Ariz. 358, 360 [] (App. 1978).

AMMA is silent as to hashish. Prior understanding of the pertinent words strongly indicates that AMMA in no way immunizes the possession or use of hashish.

State v. Jones, 245 Ariz. 46, 49, ¶¶ 10–11 (App. 2018).

Fundamentally, when the people adopted the AMMA, they knew about that prior understanding of the term “cannabis” and chose not to include it in the AMMA’s protections. *See, e.g. State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990) (“We presume that the legislature knows the existing laws when it enacts or modifies a statute.” (citation omitted)). *See also League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559, ¶ 9 (2006) (holding that the “‘legislative power of the people is as great as that of the legislature’” (citation omitted)).

The AMMA defines “marijuana” as “all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant.” A.R.S. § 36-2801(8). That non-specific definition does not mean that every conceivable chemical

compound extracted from the plant is protected by the AMMA. Such chemicals are not “parts” of the plant, but entirely different substances. A finding that the AMMA protects the narcotic drug cannabis would be akin to a finding that explosives produced from fertilizer are protected by laws allowing the sale of farm products. The AMMA does not sweep so broadly and cannot lead to such absurd results.