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Arizona State Senate

October 1, 2024

Thomas M Collins
Executive Director
Citizens Clean Elections Commission
1110 W. Washington St., Suite 250
Phoenix, Arizona 85007

Re: One-Percent Debate Exclusion

Dear Mr. Collins,

I am in receipt of your September 12, 2024 letter responding to the concerns I raised about the new rule (the "1% Debate Exclusion") adopted by the Arizona Citizens Clean Elections Commission (the "Commission") without notice or the opportunity for public comment required under the Arizona Administrative Procedures Act (the "APA"), A.R.S. §§ 41-1001, *et seq*. The 1% Debate Exclusion, which you try to re-style as a "discretionary decision," excludes candidates from participating in public debates, even when they are from parties recognized under Arizona law and will appear on the general election ballot.

You are sorely mistaken if you expected the serious concerns raised in my letter to be assuaged by a lengthy letter filled with fluff about why you *think* it's a good idea to remove candidates from state-recognized parties from public debates. While these policy arguments may be convincing to you, it is really beside the point. I shouldn't need to remind you that the Commission, as part of the executive branch, implements legislative policy—it does not set it.

When you finally mentioned my concerns (four pages into the letter), it was nothing more than a "because-I-said-so" response completely devoid of legal merit. The crux of your argument is that the Commission "made a discretionary decision" about who gets to participate in the general election debates. But Arizona law only gives the Commission discretion to determine the ***manner*** in which debates are conducted. It does not, as your letter contends, give the Commission unfettered discretion to pick and choose which ***candidates*** get to participate. Arizona law is clear. The Commission is required to "[s]ponsor debates ***among candidates***." A.R.S. § 16-956(A)(2) (emphasis added).

To get around the plain language of Arizona law, you make an astonishing argument. You claim that a candidate for federal office, who will be on Arizona's general election ballot, is not really a "candidate" if the person did not register a campaign committee with the Federal Elections Commission. This makes no sense, and it misunderstands the law.

Federal candidates are only required to register a campaign committee with the Federal Elections Commission if they (or someone on their behalf) expends or receives more than $5000 in contributions. So, not having a federally registered campaign committee could only tell you, at most, that the candidate has expended or received less than $5000 or is not in compliance with federal law.

But neither of these conditions are a requirement for being a candidate under *Arizona* law. Arizona law specifically defines what it means to be a "candidate." A "candidate" is "an individual who receives contributions or makes expenditures or who gives consent to another person to receive contributions or make expenditures on behalf of that individual in connection with the candidate's nomination, election or retention for any public office." A.R.S. § 16-901(A)(7). Thus, unlike federal law, a person doesn't need to expend or receive $5000 to be a candidate. Under Arizona law, a person can be a candidate for a public office as long as they expend or receive a single cent. You have cited nothing to suggest that the Green Party candidate doesn't meet Arizona's low standard.

Undaunted, you make two additional and equally frivolous arguments.

First, you argue that the R2-20-107(C) only lists who ***can't*** participate in debates; it doesn't specify who ***must*** participate in debates. But who must be allowed to participate and who must not be allowed to participate are two sides of the same coin. Further, the ***rule*** didn't have to specify who must participate in debates; the ***statute*** already does this. Again, the Commission is required to "[s]ponsor debates among ***candidates***." A.R.S. § 16-956(A)(2) (emphasis added).

Second, you claim that the Commission's new rule—which creates a debate exclusion for candidates who do not garner 1% of the total primary votes—is not really a rule; it's just a "discretionary decision." But the Commission has already recognized that it must pass a rule before it can exclude candidates from debates. It passed, by rule, very narrow exceptions when candidates may not participate in debates. R2-20-107(C). What would be the point of this rule if the Commission had unfettered discretion to pick who could participate in debates anyway?

The Commission cannot evade the requirements of the APA by simply calling the 1% Debate Exclusion a "discretionary decision." Arizona specifically defines what is a rule that must comply with the protections set forth under the APA. The APA defines a "rule" expansively to encompass any "agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." A.R.S. § 41-1001(21). As courts have observed in construing similar provisions in the federal Administrative Procedure Act, even unwritten or informal agency practices may constitute "rules" when they function as mandatory dictates that exert a substantive effect on legal rights or obligations. *See, e.g., Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 631 (5th Cir. 2001) (holding that agency's alteration of existing unwritten practice was a new "rule" subject to federal APA requirements); *Electronic Privacy Information Ctr. v. U.S. Dept of Homeland Security*, 653 F.3d

1, 6-7 (D.C. Cir. 2011) (TSA policy providing for use of body scanning machines at airports was binding and "substantially affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking"); *Western Coal Traffic League v. United States*, 694 F.2d 378, 392 & n.61 (5th Cir. 1982) (noting that "the status of guidelines as 'rules' is determined by their binding character," and adding that "[t]he fact that the Commission used the term 'guidelines' is not controlling: it is the impact and not the phrasing that matters. Indeed, agencies often adopt policies having the status of rules without codifying them in regulations, guidelines or in other formal formats").

The Commission's new 1% Debate Exclusion fits precisely within Arizona's definition of a "rule." First, it is undoubtedly a directive of general applicability. The exclusion applies not to just one individual, but it applies generally to "any candidate who receives less than 1% of the total votes cast in the primary for the relevant office." *See, e.g.*, *Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Retirement Sys.*, 237 Ariz. 246, 250 (App. 2015) (holding that agency's policy for determining when a retirement incentive results in an "actuarial unfunded liability" within the meaning of authorizing statute was a "rule" in part because the agency "applied the Policy consistently to all System employers since its adoption").

Second, the 1% Debate Exclusion is the promulgation of a new, discrete policy. Again, as set forth above, Arizona law gives the Commission discretion on ***how*** to conduct debates, but not on ***who*** participates. *See* A.R.S. § 16-956(A)(2) ("[s]ponsor debates ***among candidates***") (emphasis added). At the very least, it should be indisputable that Arizona law does not expressly give the Commission the authority to selection ***who*** participates in debates. As such, the Commission did not merely honor a specific, self-executing statutory directive when it developed the 1% Debate Exclusion.

Instead, as the lengthy explanation about the reasons for the 1% Debate Exclusion in your letter demonstrates, the Commission undertook an independent policy determination that effectuates direct and significant consequences for candidates for public office. *See, e.g.*, *Ariz. State Univ.*, 237 Ariz. at 251 (agency's policy defining what constitutes an "actuarial unfunded liability" was a rule, noting that the statute "does not set forth the calculations to be made and leaves much to the [agency's] discretion" (citation omitted)); *Sw. Ambulance, Inc. v. Ariz. Dept. of Health Servs.*, 183 Ariz. 258, 261 (App. 1995) (finding that schedules of charges governing ambulance companies were "rules," noting that they comprehensively "specif[ied] such things as how a fraction of an hour is to be charged, how mileage is to be charged . . . and other items which are generally applicable to all ambulance companies statewide"); *Carondelet Health Servs. v. Ariz. Health Care Cost Containment Sys.*, 182 Ariz. 221, 227 (App. 1994) (agency's new methodology for computing hospital rates was a "rule" because it "employs rules of general application that determine the reimbursement levels for every hospital in Arizona. Moreover, it is a policy statement or clarification of how [adjusted billing costs] factors will be adjusted based on AHCCCS' interpretation of the session law").

Because Arizona requires the Commission to "sponsor debates among candidates" and the Green party candidate certainly meets Arizona's liberal definition of "candidate," the only conceivable way the Commission could exclude a Green Party candidate from participating would

be through a duly passed rule that complies with Arizona's APA. This, however, the Commission has not done.

I call on the Commission to comply with the APA and submit the 1% Debate Exclusion to the normal and open process for promulgating rules. If this rule is as good of an idea as you think it is, the Commission should have nothing to fear from an open and public process. Further, until such a rule is promulgated in compliance with Arizona law, all candidates should be invited to public debates unless expressly excluded under R2-20-107(C). Failing to do so invites litigation, calls into question the independence of the Commission, and deprives Arizona citizens of the protections afforded under the APA.

Respectfully,

Jake Hoffman
Arizona State Senator
Chairman, Senate Committee on Government