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**State of Arizona  
Citizens Clean Elections Commission**

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Via Email

September 12, 2024

The Honorable Jake Hoffman  
Senator  
Arizona State Senate  
1700 W. Washington St.  
Phoenix, AZ 85007

Dear Senator Hoffman:

On behalf of the Arizona Citizens Clean Elections Commission (“Commission”), we appreciate the opportunity to fully address here the letter dated September 5, 2024 authored by you on behalf of the Arizona Senate Government Committee (the “Committee”).

**Summary of Response**

- The Commission is empowered to sponsor debates among candidates and has been granted broad discretion to do so. Because this requires substantial time, expertise and effort, the Commission has contracted with a local advertising and marketing firm and the Arizona Media Association (“AMA”) to produce broadcast debates for select statewide and congressional offices.
- In order to ensure that these debates are widely available and watched by the voting public, Commission staff agreed to delegate editorial decision making to its broadcasting partner, the AMA. This includes determination of a showing of a minimal amount of support for a candidate to appear on stage in broadcast debates. Media partners throughout the country often set minimum requirements for candidates to participate.
- AMA's minimal standards ensure voters get as much information as possible in a limited time. The Commission signed off on those requirements, recognizing debate sponsors often set minimum thresholds using metrics that include polling or fundraising. This editorial decision recognizes viewer and broadcaster interests, as well as important logistical and preparation considerations.
- **To directly address the letter’s claim:** This editorial policy is not a rule under the Arizona Procedures Act. Nor is it contrary to Ariz. Admin. Code § R2-20-107. Indeed, Mr. Quintana is not, evidently, qualified as a “candidate” under the applicable law.

- The AMA-created metrics, with the concurrence of the Commission, are entirely consistent with long-established precedent governing invitations to debates. Moreover, early indications of broadcast interest show the decision will ensure more voters have an opportunity to watch a U.S. Senate debate.
- Existing indications are that ninety percent of Arizona local news broadcasters, as well as national broadcast commitments by CSPAN and ABC News, will be broadcasting the Commission’s upcoming U.S. Senate race debate mean voters will have ample opportunity to view a broadcast of that debate.
- Finally, Mr. Quintana has been aware that he was not going to be invited for three weeks and has taken no meaningful action, administratively or otherwise, on any purported claim.

**The Commission’s Role in Sponsoring Candidate Debates**

As the Committee is aware, the Commission works diligently to fulfill its statutory responsibilities, including providing effective voter education regarding statewide elections. These efforts promote voter engagement and participation as well as public confidence in the Arizona political and electoral process. The Arizona statutes require that the Commission sponsor candidate debates as a component of its voter education efforts. *See* A.R.S. § 16-956(A)(2) (subsection of section entitled “Voter education and enforcement duties” stating: “[t]he commission shall . . . Sponsor debates among candidates, in such manner as determined by the commission.”)

The Commission’s voter education efforts are developed annually in consultation with election officials and stakeholders, and focus on educating voters about the logistics of voting as well as providing voters with candidate information through the debate process. In prior years, the Commission had enjoyed a close working relationship with Arizona State University’s Public Broadcasting Service (“PBS”) affiliate, KAET, which served as the production and broadcast partner for the Commission’s debates.

To extend the reach of the Commission-sponsored debates for the U.S. Senate and House of Representatives elections and the Arizona Corporation Commission elections that would precede the 2024 general election (the “2024 Debates”), the Commission opened the debate production and broadcast responsibilities to competition. Through that process, the Commission entered into a debate production and distribution contract with RIESTER Advertising Agency in partnership with the Arizona Media Association (a 501-c(6) non-profit corporation that is the official trade association for Arizona’s local radio, TV, print and digital news industry).

**The Threats to Voter Education Posed by Sharing Debate Time with Candidates Who Have Low Voter Interest Motivated the Commission, in Consultation with its Contracted Production/Broadcast Consultant, to Limit Invitations to 2024 Debates.**

The Commission’s objective under its current debate production/broadcast contract is to ensure the 2024 Debates are available to all voters in every corner of Arizona. The Commission has learned through its contracted debate production and broadcast partnership that because media outlets that broadcast the debates are foregoing substantial revenue opportunities by agreeing to broadcast a debate, ensuring broadcast commitments requires that the broadcasters have confidence that the debates will be well-produced, attractive to their viewers, and will be structured to ensure positive viewer engagement throughout the debate.

The Commission’s contracted debate production consultants have made it clear to the Commission’s staff that Arizona broadcasters have expressed reservation about committing to broadcast general election debates featuring candidates who have demonstrated very little public

support during the primary election cycle. As the Committee will appreciate, attempting to structure a general election debate involving candidates requires some degree of equal division of debate presentation time. When the time in a debate will be divided with candidates who have received very little voter support prior to the general election debates, the Commission's contracted debate partners estimate many Arizona broadcasters will opt out of broadcasting the debate altogether because the debate will no longer appropriately dedicate its limited time to the candidates that have shown viable candidacy. This undermines the voter education responsibilities of the Commission.

Furthermore, even where the debate is broadcast, including and dividing time amongst candidates who can demonstrate little prior voter support or interest realistically threatens to discourage viewers from tuning in, and, if they do tune in, it threatens to discourage long-term engagement by prospective voter viewers who will find much of the debate broadcast focused on candidates in whose views they are not interested, and will be frustrated by dilution of the time devoted to elaborating on the positions and characteristics of the likely principle vote-getters for the upcoming general election. Failing to attract voter viewership in the first place, and running voter viewers off early in the debates both seriously frustrate the Commission's attempts to fulfill its statutory voter education obligations. Collaterally, this failure will also mean wasted spending of substantial public funds that are used to produce and encourage broadcast of the debates.

For the 2024 Debates, persons identified as Green Party affiliates running for the open U.S. Senate and Arizona Corporation Commission seats earned sufficient votes in primary elections to be included on the 2024 Arizona general election ballots. However, none of these persons obtained even 1% of the total primary votes cast for the offices they are seeking. For example, Mr. Eduardo Quintana, who will appear as a designated Green Party U.S. Senate candidate on the general election ballots obtained only 282 votes in the U.S. Senate primaries, or only around .02% of the total primary votes cast. This was far short of the well over 12,000 votes he would require to even hit the 1% threshold.

The Commission staff also recognized through prior experience and consultation with the contracted experts that including such persons in the 2024 Debates posed: (1) serious challenges to the physical set-up of high-candidate-count debates like the Corporation Commission debates which would now require 8 candidates be accommodated instead of 6; (2) logistical problems for debate moderators who would have to limit and structure debate questions to accommodate the extra time demands of dividing debate answer time among additional participants; and (3) logistical challenges for the major primary vote-getters and their campaign staff who would now have to plan for potentially much smaller time allotments for candidate answers and for additional rebuttal to the additional candidates' potential positions. These challenges could seriously hamper or dilute debate production or quality, and possibly discourage participation in the 2024 Debates by "nonparticipating" candidates who are not legally bound to appear by A.R.S. § 16-956(A)(2) (such as the U.S. Senate candidates).

Based on the input received from, and consultation by Commission staff with the Commission's contracted production/broadcast consultants, the Commission made a discretionary decision to not invite to the 2024 General Election Debates any persons who received less than 1% of the total votes cast in the primary for the relevant office(s). This decision did not base debate invitations on any particular party affiliation or position, but was neutral and based only on the categories of concerns for not undermining maximum, statewide broadcast of well-produced debates that were attractive in advance to potential voters and most likely to hold voter interest and engagement throughout the debate broadcast. In other words, the discretionary decision was informed by facts and realistic concerns and predictions, and aimed exclusively at maximizing the value of the 2024 Debates to the education of Arizona voters. It accomplishes, facilitates and

promotes the voter education commanded of the Commission by the Citizens Clean Elections Act, and helps ensure the Commission will not fail to honor those statutory duties.

**The Commission Has Not Adopted a New Rule Requiring Compliance with  
APA Notice and Public Comment Requirements**

Your September 5, 2024 letter indicates a recent media report suggested that the Commission adopted a new “rule” requiring that candidates receive at least 1% of total ballots cast in a primary to qualify for a Commission-sponsored general election debates in statewide and federal races. The report mischaracterizes a discretionary decision by the Commission, based on input from its contracted debate production and broadcast consultants, to not include the candidates who had received less than 1% of votes cast in their primaries in the 2024 Commission-sponsored debates. It is both factually inaccurate and inconsistent with the APA requirements to characterize this decision as adoption of a new “rule” for purposes of the APA.

First, the APA defines a rule as “an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. “Rules” include provisions like those prescribing fees, or that amend or repeal a prior rule, but do not include intra-agency memoranda that are not delegation agreements. A.R.S. § 41-1001(21). The decision to set threshold criteria for persons invited to participate in this year’s debates was based on a rational judgement, informed by fact and Commission staff experience, about how to best promote voter education. It did not set an agency practice requirement, like those contemplated under the APA instruction that, “[e]ach agency shall make rules of practice setting forth the nature and requirements of all formal procedures available to the public.” A.R.S. § 41-1003. As the threshold issue was not a rule put forth by the Commission, but a discretionary decision about how to execute the Commission’s statutory voter education mandate and authority under the unique circumstances of this year’s general election, there was no need to undertake the rulemaking process.

Regarding your suggestion that the Commission needed to amend its rules to exercise its discretion in this manner, the instant issue is not actually contemplated by the Commission’s enabling statutes or its existing rules. Ariz. Admin. Code § R2-20-107 says that write-in candidates “will not” be invited to participate in general election debates. The rule does not say that the Commission *must* invite everyone else who may appear on the general election ballot. So, the discretionary decision about who to invite to the 2024 Debates did not transgress an existing administrative rule. It does not qualify as a “rule” under that provision of A.R.S. § 41-1001(21) that define agency practice requirements that amend or repeal a pre-existing rule to also be a “rule” subject to APA rule-making.

Moreover, the Commission rules and statutes refer to attendance and participation in Commission debates by “candidates”. See A.R.S. § 16-956(A)(2); Ariz. Admin. Code § R2-20-107. Uniquely, for purposes of the Commission’s rules, the term “candidate” is defined under Ariz, Admin. Code R2-20-101(4). That rule provides:

‘Candidate’ means a natural person who receives or gives consent for receipt of a contribution for the person’s nomination for or election to any office in this state, and includes the person’s campaign committee, the political committee designated and authorized by the person, or any agents or personnel of the person. When not otherwise specified by statute or these rules, ‘Candidate’ includes a Candidate for Statewide Office or a Legislative Candidate.

Please note that for purposes of the individual who will appear along with winners of the Republican and Democrat parties on the 2024 general election ballot for U.S. Senate, Mr. Eduardo Quintana, it appears that Mr. Quintana has no campaign committee registered with the Federal

Elections Commission as required by federal law for candidates to raise campaign funding. Also, while there is a website devoted to his candidacy at <https://www.eduardoquintana4senate.com>, the “donate” link is not a live link. (last checked Sept. 12, 2024). This appears quite distinct from the Libertarian nominee whose participation in a 2022 Commission-sponsored debate the Committee cites. The Commission understands that nominee had a formal, FEC-registered campaign committee that was set up to engage in campaign fundraising.

There was thus no record at the time the Commission made its decision about who to invite to the U.S. Senate debate that Mr. Quintana was either receiving contributions or making expenditures in connection with his efforts at election to public office. It did not appear he qualified as a “candidate” for purposes of the Commission debate rule, and, in that case, there would be no Commission rule that could entitle him without question to participate in Commission general election debates or require the Commission to invite him and allow his participation.

The discretionary decision to limit debate invitations to candidates obtaining over 1% of the primary votes did not conflict with any existing rule requirements, and it constituted a single election discretionary decision about how to apply the Commission’s discretion and accomplish its voter education mandate under the unique circumstances of the impending election. It did not constitute a “rule” subject to the APA. The foregoing confirms why the Committee’s concerns with the Commission having violated either the Citizens Clean Elections Act or the APA are unfounded.

### **The Commission’s Decision Was Well Within its Implied Statutory Authority Under Well-Established Elections Law.**

Because the Commission’s decision did not conflict with or violate any statute, it is appropriate to look at the broad authority the Arizona statutes grant the Commission to sponsor “debates among candidates, in such manner as determined by the commission.” When examining such authority, it is appropriate to consult the rulings of courts in other federal and state jurisdictions who have addressed the same or similar situations.

Courts across the country have held that candidate debate staging entities have discretion to exclude candidates based on reasonable, objective criteria such as minimal public support for such candidates and low fundraising data. The U.S. Supreme Court has held that debates are nonpublic forums. As such, a criteria decision made by a government debate-sponsoring agency will be upheld unless it constitutes unreasonable viewpoint discrimination. Threshold criteria such as minimum independent polling results or minimum individual fundraising thresholds have consistently been upheld as reasonable, objective metrics of a candidate’s viability. And testing that viability to determine who will be invited to participate in a debate has been considered a valid and necessary exercise of discretion to support the policy objective of effective voter education.

In *Chandler v. Georgia Public Telecommunications Commission*, a Libertarian candidate for governor and a Libertarian candidate for lieutenant governor were excluded from public broadcast debates featuring the Democratic and Republican candidates. 917 F.2d 486, 488 (11th Cir. 1990). The Libertarian candidates “were [instead] offered thirty minutes of air time on the GPTC stations to present their views.” *Id.* at n.1. The Eleventh Circuit held that the public television station’s decisions on how they regulate content to serve the public interest was “not viewpoint restrictive and [did] not violate the First Amendment.” *Id.* at 489. “GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia.” *Id.* “A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers.” *Id.* “We are not willing to establish a precedent that would

require public television stations to forego the broadcast of controversial views touching upon important public issues—environment, ecology, animal rights, ozone depletion—lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television.” *Id.* at 489–90.

Resolving a circuit split in favor of the *Chandler* decision, the U.S. Supreme Court held in *Arkansas Education Television Commission v. Forbes* that selective state-sponsored debates are nonpublic forums and the government can therefore restrict speech if the restrictions are reasonable and viewpoint neutral. 523 U.S. 666, 678 (1998). There, the debate sponsor, Arkansas Education Television Commission (“AETC”) excluded an Independent congressional candidate from a debate having made a “bona fide journalistic judgement that [its] viewers would best be served by limiting the debate.” *Id.* at 671. The court noted that “in many cases it is not feasible for the broadcaster to allow unlimited access to a candidate debate.” *Id.* at 676. Holding that these debates were a public forum and that all ballot-qualified candidates had a presumptive right of access “would result in less speech, not more” because it “would place a severe burden upon public broadcasters who air candidates’ views.” *Id.* at 680–81. The *Forbes* court cited the 1996 congressional elections where it “was common for 6 to 11 candidates to qualify for the ballot for a particular seat,” it would be reasonable to “decide that the inclusion of all ballot-qualified candidates would actually undermine the educational value and quality of debates.” *Id.* at 681 (internal quotation marks omitted). “Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all. A broadcaster might decide “ ‘the safe course is to avoid controversy, ...and by so doing diminish the free flow of information and ideas.” *Id.* at 681 (internal quotation marks omitted). “These concerns are more than speculative” and “[a] First Amendment jurisprudence yielding these results does not promote speech but represses it.” *Id.* at 681–82 (noting that a debate was in fact canceled as a direct result of the lower court’s decision in this case). Ultimately, the court held that while a candidate cannot be excluded because of their viewpoint, they can be excluded for lacking objective voter support and interest. *Id.* at 683.

Following *Forbes*, other courts have consistently upheld debate eligibility criteria such as a minimum level of polling support, name recognition, and fundraising since those metrics help objectively measure a candidate’s seriousness. See *Palmer v. Fox Broad. Corp.*, No. 02-0108, 2002 WL 31027440, at \*3-4 (E.D. La. 2002) (holding that whether a broadcaster was a private or state actor, it was nevertheless reasonable and not viewpoint discrimination for the executive producer to consider factors to determine eligibility for a mayoral debate including studio accommodating capacity, results of polling, and whether the candidate raised \$50,000 in contributions); *Johnson v. Suffolk Univ.*, No. 02-12603, 2002 WL 31426734, at \*2 (D. Mass. Oct. 28, 2002) (holding that a private newspaper’s determination to use 15% polling as threshold criteria for gubernatorial debate held at public university was reasonable and viewpoint-neutral); *Ala. Libertarian Party v. Ala. Pub. Television*, 227 F. Supp.2d 1213, 1216-19 (M.D. Al. 2002) (holding that public television’s 5% polling threshold criteria for gubernatorial debate was reasonable and view-point neutral and aimed at ensuring meaningful debate); *Libertarian Nat. Comm. Inc. v. Holiday*, No. CIV. 14-63-GFVT, 2014 WL 5111583, at \*2, \*9 (E.D. Ky. Oct. 11, 2014) (holding that debate stagers did not “pick and choose candidates based on their viewpoint” by requiring qualified candidates for federal office to meet an additional threshold including, inter alia, raising \$10,000 in contributions or receiving 5% polling support); *Ayyadurai v. Univ. of Massachusetts*, No. CV 18-11929-RGS, 2018 WL 5253210, at \*2-3 (D. Mass. Oct. 22, 2018) (holding that it was reasonable and not viewpoint discrimination to require a qualified candidate for federal office to meet additional threshold criteria including, inter alia, raising \$50,000 in individual contributions

and receiving 10% independent polling support); *Level the Playing Field v. Fed. Election Comm'n*, 961 F.3d 462, 468 (D.C. Cir. 2020) (holding that a 15% polling threshold was a reasonable and objective criteria for determining federal candidate debate eligibility).

Based on the foregoing, the Commission believes it has reasonably exercised its delegated discretion to limit who may participate in a particular debate based on threshold criteria determinations it deems necessary given the input it received from its contracted production/broadcast consultants. The Commission further contends that the Arizona statutes did not intend to compel it to admit any person appearing on the ballot who wished to present their views. This is particularly true in light of the obvious pragmatic limitations recognized in *Forbes*, as well as the federal courts' consistent deference to the imperative of creating debates that attract sufficient public interest, foster the primary objective of educating the electorate, and that avoid creating a "cacophony of ideas" that actually impede voter education or dissuade viewership.

As the types of and grounds for exclusion in a particular election cycle may depend on the particulars of the candidate circumstances in that cycle, it would be much harder for the Commission to accurately predict and exercise its discretion through a permanent exclusion/invitation rule governing all other circumstances. Therefore, the Commission believes its statutory discretion must, of necessity, be exercised on an *ad hoc* basis considering the particularized circumstances of a given election.

Thus, given the broad discretion suggested by the Commission's authorizing statute concerning the "manner" in which debates shall be conducted, and given that courts have consistently given such government debate sponsors wide discretion to exclude candidates based on their base of electoral support or fundraising criteria to promote the policy of effective voter education, the Commission believes it has discretion to exclude certain candidates from certain debates based on lack of wide voter support or lack of fundraising. Here, the decision to not invite persons who received fewer than 1% of the total primary votes was reasonable and supported by input the Commission's contracted consultants obtained from potential broadcasters indicating the lack of support among some broadcasters for debates that would include such low vote-getters.

Finally, the rationality and success of the Commission's exercise of discretion is proven by its success in securing broadcast commitments from Arizona broadcast outlets. Since the Commission made its decision to not invite persons who received less than 1% of all primary votes cast, the Commission has secured commitments by 90% of Arizona local news broadcasters as well as national broadcast commitments by CSPAN and ABC News, to broadcast the Commission's U.S. Senate debate. There is substantial value associated with these commitments, especially because it represents the commitments of air time that would otherwise cost a private content distributor or advertiser some \$520,800.00, and it will allow as broad a reach as possible to spread the ideas and introduce Arizona voters through a debate format to the ideas of the front-runner candidates in the major statewide federal and state general election contests for 2024. The Commission has met its statutory obligations.

**The Committee May Also Consider the Lack of Affirmative Efforts to Obtain a Debate Invitation by the Uninvited Persons.**

The Commission also respectfully submits that the Committee might consider the fact that the persons who will appear on Arizona ballots for statewide elections this fall, but who received less than 1% of the primary votes, have been constructively aware since August 22, 2024 that the Commission had not invited them to participate in its debates. While the Commission disagrees that there would be any basis for a claim of violation of the law governing Commission debates, any such persons who believed that this was a violation of the Commission's enabling statutes, its rules, or the APA has had a right to resort to the courts to seek a declaration and any other

appropriate relief for such an alleged violation. None did. So, the Commission staff and its production and broadcast partners have moved forward producing and preparing for debates without such participants. And so have the other candidates, their campaigns, and any selected moderators. In other words, the Commission and many others have moved forward in reliance on the legal propriety of the Commission's discretionary decision. They would now be prejudiced by any change in that position, and such changes have become impracticable by the passage of time and commitment of resources toward the debate format the Commission and its producer decided on.

### **Conclusion**

On behalf of the Commission, I thank the Committee for this opportunity to transparently explain the facts, legal rationale and reasoned judgment that led the Commission to limit general election debate invitations to those persons receiving less than 1% of the total primary votes cast for their respective elected positions. The Commission understands and respects that the members of the Committee share the Commission's commitment to ensuring that the voters of Arizona enjoy that many salutary educational effects of well-produced and widely broadcasted candidate debates for statewide elected offices. The Commission is pleased to confirm that the voters of Arizona will enjoy more broadly available access to key debates this fall than has ever been provided for them before. And, the Commission hopes to continue that process improvement with the Committee's help and supportive oversight in the future.

Sincerely

A handwritten signature in black ink, appearing to read "Thomas M. Collins". The signature is fluid and cursive, with the first name "Thomas" being the most prominent part.

Thomas M. Collins