

2014 AG Opinions

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL January 2, 2015	No. I14-009 (R14-019) Re: Antique Firearms
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To: Hon. Lydia Hernandez
Arizona House of Representatives

Questions Presented

You requested an opinion on the following question: Does Arizona law subject a person to criminal prosecution for firing an “antique firearm” as that term is defined under federal law?

Summary Answer

Yes. Arizona criminal statutes do not distinguish between an “antique firearm” as defined in 18 U.S.C. § 921(a)(3) and other types of firearms. Under Arizona law, it is a crime to fire an antique firearm under circumstances in which firing any other type of firearm would be a crime.

Analysis

Arizona statutes do not define or use the term “antique firearm.” Arizona’s criminal code defines a “firearm” as “any loaded or unloaded handgun, pistol, revolver, rifle, shotgun or other

weapon” that will expel, is designed to expel, or can readily be converted to expel a projectile by the action of expanding gases or an explosive. A.R.S. §§ 13-105(19); 13-3101(A)(4). These statutory definitions specifically exclude “a firearm in permanently inoperable condition,” but they do not exclude an operable antique firearm. *Id.*

The federal criminal code, however, does define an “antique firearm” and excludes it from the definition of a firearm for purposes of criminal liability under 18 U.S.C. § 922. *See* 18 U.S.C. § 921(a)(3) (“The term ‘firearm’ ... does not include an antique firearm.”). Under 18 U.S.C. § 921(a)(16), the term “antique firearm” means the following:

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica--

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Arizona Revised Statutes section 13-1211 makes it a class 2 felony to knowingly discharge a firearm at a residential structure and a class 3 felony to discharge a firearm at a nonresidential structure. Section 13-1211 draws no distinction between antique firearms and other firearms. Similarly, Arizona Revised Statutes section 13-3107 classifies the criminally

negligent discharge of firearms within or into the limits of a municipality as a class 6 felony. *See* A.R.S. § 13-3107(A). Again, the statute draws no distinction between antique firearms and other firearms. Finally, the Legislature defined a “violent or aggravated felony” for sentencing purposes to include “[d]ischarging a firearm at a residential structure if the structure is occupied” without creating any exception for antique firearms. A.R.S. 13-706(F)(2)(g).

Under all of these Arizona laws, the discharge of an antique firearm (as defined under federal law) has the same criminal consequences as the discharge of any other firearm.¹

Conclusion

Firing an antique firearm subjects a person to criminal prosecution in Arizona to the same extent that firing any other type of firearm subjects that person to criminal prosecution.

Thomas C. Horne
Attorney General

¹ In 2013, Arizona lawmakers introduced HB 2234, which would have (1) amended the definition of a firearm under A.R.S. § 13-105(19) by, among other things, excluding weapons manufactured on or before January 1, 1899, and (2) deleted the definition of a firearm in A.R.S. § 13-3101(4). The amendment of A.R.S. § 13-105(19), had it been enacted into law, would have created a state statutory analog to the federal definition of an antique firearm under 18 U.S.C. § 921(a)(16)(A).

In 2014, Arizona lawmakers introduced SB 1064, which contained the same two provisions. Like HB 2234, SB 1064 was never enacted.



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL December 30, 2014	No. I14-008 (R14-018) Re: Instant Wagering
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To: William J. Walsh
Director, Arizona Department of Racing

Questions Presented

You requested an opinion on the following question pertaining to “Instant Racing,” a form of gambling involving historic horseracing:

Does the Arizona Racing Commission (“ARC”) or the Arizona Department of Racing (“ADOR”) have authority under Arizona Revised Statutes (“A.R.S.”) §§ 5-101 to -116 to adopt rules authorizing Instant Racing as a form of pari-mutuel wagering?

Summary Answer

No. Pari-mutuel wagering in the form of Instant Racing is a prohibited form of gambling under Arizona law.

Gambling is illegal under the Arizona Criminal Code, but the Code contains an exemption for regulated gambling. A.R.S. § 13-3302(A)(3). Under Title 5, chapter 1 of the

Arizona Revised Statutes, one form of lawful regulated gambling is pari-mutual wagering on the results of horse and dog races held at a racing meeting in Arizona or televised to a racetrack enclosure by simulcasting. Although the ARC and the ADOR have statutory authority to adopt rules governing the conduct of these activities, “Instant Racing” is neither a race held at a racing meeting in Arizona nor a race televised to a racetrack enclosure by simulcasting. Consequently, without a legislative change, the ARC and the ADOR lack the authority to adopt rules that would permit Instant Racing.

Background

“Instant Racing” is a patented wagering system consisting of self-service gaming machines connected to a central server. Racetech, LLC, an Arkansas limited liability company, holds the patent.¹ Instant Racing involves wagering on historical horse races that have occurred at racing venues throughout the United States. The patrons bet with each other, and the racetrack has no interest in the race’s outcome, but takes a prescribed percentage of the total pool of wagers.

Instant Racing terminals resemble casino slot machines. Bettors insert money (or the equivalent credit) into the terminal to make a wager. The terminal then displays information regarding a historic race while concealing the race’s location and date, as well as the horses and jockeys involved. The terminal provides bettors with past performance information on the race’s participants (frequently referred to as the “Daily Racing Form”), and bettors may then handicap the race and place bets in a variety of categories. After placing a wager, a bettor has the option of viewing the entire race or only the stretch run on a video screen.

¹ The description of “Instant Racing” in this opinion is based on Racetech, LLC, marketing materials and judicial opinions from various states. *See, e.g., MEC v. Or. Racing Comm’n*, 233 Or. App. 9, 16, 225 P.3d 41, 65 (App. 2009).

Analysis

The question is whether the ADOR and the ARC may promulgate rules authorizing and regulating Instant Racing. An administrative agency's enabling legislation provides both the source of and the limits on its rulemaking power. *Kennecott Copper Corp. v. Indus. Comm'n of Ariz.*, 115 Ariz. 184, 186, 564 P.2d 407, 409 (App. 1977) ("To otherwise operate would be an administrative usurpation of the constitutional authority of the legislature."); *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994) (same). Consequently, "[t]here is no authority or power to create a rule or regulation out of harmony with the statutory grant." *Adams v. Indus. Comm'n*, 26 Ariz. App. 289, 290, 547 P.2d 1089, 1090 (1976), *rev'd on other grounds*, 113 Ariz. 294, 296, 552 P.2d 764, 766 (1976).

The Arizona Legislature establishes policy and enacts standards to guide agencies. *Haggard v. Indus. Comm'n*, 71 Ariz. 91, 101, 223 P.2d 915, 922 (1950); *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 206, 484 P.2d 619, 626 (1971). A statute that grants unlimited regulatory authority to an administrative agency, without any restraints or standards to direct the agency's action, offends the Arizona Constitution as an unlawful delegation of the Legislature's power. *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953) (stating that an overly general grant would allow an agency "to wander with no guide nor criterion, with no channel through which its powers may flow"). Because an agency's authority to regulate is necessarily confined to the statutory grant, the extent of the ARC's and the ADOR's authority to regulate horseracing is limited in turn to the forms of horseracing that Arizona statutes authorize.

The controlling legislation requires the ARC to "[p]repare and adopt complete rules to govern the racing meetings as may be required . . . to protect and promote public health, safety and the proper conduct of racing and pari-mutuel wagering and any other matter pertaining to the

proper conduct of racing within this state.” A.R.S. § 5-104(A)(2). Subsection 5-104(U) provides that the ADOR “may adopt rules . . . to carry out the purposes of this article, ensure the safety and integrity of racing in this state and protect the public interest.” Both provisions create the source of rulemaking power, but not in the same way. Whereas the latter provision expressly limits the grant of authority to rules that “carry out the purposes of this article” and thus incorporates legislative policy decisions expressed in the entire statutory scheme, the former lacks this express limitation. Nevertheless, pursuant to the authorities cited above, rules enacted pursuant to A.R.S. § 5-104(A)(2) may not be “out of harmony” with the remainder of Title 5, Article 1.

The remaining question is therefore whether ARC or ADOR rules that permit wagering on historic races would conflict with the existing statutory scheme governing pari-mutuel wagering, thereby precluding such rules. Title 5, Article 1 does not expressly permit pari-mutuel wagering on historic races and, by implication, therefore prohibits rules that would permit such activity. Wagering on the results of a horserace except as expressly authorized in Title 5, Article 1 is a crime.² A.R.S. § 5-112(J). Authority for wagering on historic races must therefore appear in Arizona law; the Legislature need not have expressly prohibited the activity because A.R.S. § 5-112(J) prohibits all activity that is not expressly authorized. There is no provision within Title 5, Article 1 that expressly refers to wagering on historic races. Accordingly, Arizona law prohibits wagering on historic races unless it fits within any broader existing provisions. As explained below, it does not. The ADOR and the ARC therefore may not adopt rules permitting and regulating the activity absent a legislative amendment.

² Section 5-112(J) also cross-references Title 13, Chapter 33 (Arizona’s criminal gambling code), which exempts “regulated gambling” pursuant to A.R.S. § 13-3302(A)(3). “[R]egulated gambling” includes horseracing as authorized by state law. *See id.*; A.R.S. § 13-3301(6)(b).

Section 5-112(A) authorizes gambling on horseracing as follows:

[A]ny person within the enclosure of a racing meeting held pursuant to this article may wager on the results of a race held at the meeting *or televised to the racetrack enclosure by simulcasting* pursuant to this section by contributing money to a pari-mutuel pool operated by the permittee as provided by this article.

(Emphasis added.) A historic race cannot be “a race held at the meeting,” so it must fall within the parameters of a race “televised to the racetrack enclosure by simulcasting” to be the subject of authorized pari-mutuel gambling. *Id.* Pursuant to A.R.S. § 5-101(26), “[s]imulcast’ means the telecast shown within this state *of live audio and visual signals* of horse . . . races conducted at an out-of-state track or the telecast shown outside this state *of live audio and visual signals* of horse . . . races originating within this state for the purpose of pari-mutuel wagering.” (Emphasis added.) A rebroadcast of a historic race is not a “live audio and visual signal of horse races.”

The term “live” controls the analysis. In the context of horserace simulcasting around the United States, audio and visual *signals* are necessarily “live” in that they are actively and presently transmitted from one location to another. There can be no “old” simulcast signals that were previously transmitted but not yet received at the track. The adjective “live” cannot reasonably be construed as referring to the quality of the “audio and visual *signal*,” but must necessarily refer to the fact that the audio and visual signals are of a live horserace. An analogous circumstance is when a news broadcast states that it is “live.” No one would construe that to mean that the *transmission* of the broadcast is via a live *signal*, but that the events depicted are not occurring simultaneously within the limits of technology at the scene and on one’s viewing screen. *See Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W. 3d 726, 740 (Ky. 2014)(stating that “[a]t least since the advent of motion pictures and television, no competent person reasonably versed in the English language can fail to

comprehend the meaning of the term “live” We are all familiar with its common use in phrases such as ‘live testimony,’ ‘live performances,’ ‘live broadcasts,’ and ‘live music.’ The ordinary speaker of English will not confuse those concepts with ‘recordings of live testimony,’ ‘recordings of live performances,’ and so on”). Notably, *Dictionary.com* defines “simulcast” as “a closed-circuit television broadcast of an event, as a horse race, *while it is taking place.*” (<http://dictionary.reference.com/browse/simulcast?s=t>) (last accessed 10/31/2014) (emphasis supplied); *see also* Neb. Att’y Gen. Op. No. 10009 (Mar. 29, 2010) at 9 (citing this definition). Because the rebroadcast or replaying of a historic race does not fall within the definition of “simulcast” in A.R.S. § 5-112(J), wagering on a historic race is prohibited. In addition, because wagering on historic races is not permitted in Title 5, Article 1, it is not “regulated gambling” pursuant to A.R.S. §§ 13-3302(A)(3) and -3301(6)(b) and is therefore illegal. While A.R.S. § 5-112(A) states that “[a]ll forms of pari-mutuel wagering shall be allowed on [horseraces], whether or not televised by simulcasting,” this provision cannot be construed to expand authorized gambling beyond its express limits in A.R.S. § 5-112(A) without rendering the latter provision irrelevant or immaterial. “It is a rule of construction that statutes In pari materia must be read and construed together and that all parts of the law on the same subject must be given effect, if possible.” *Ariz. Gunnite Builders, Inc. v. Cont’l Cas. Co.*, 105 Ariz. 99, 101, 459 P.2d 724, 726 (1969).

A number of courts and state legislatures outside Arizona have addressed this issue and have expressly or impliedly reached the same conclusion. *See, e.g.*, HB 1162, 82nd Gen. Assemb., Reg. Sess. (Ark. 1999) (creating a new section of law for historic racing when it had a definition of “simulcast” very similar to Arizona’s); HB 220, 62nd Leg., 1st Sess. (Idaho 2013) (same); *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W. 3d 726, 740

(Ky. 2014) (holding that state law permitted wagering on historic races, but concluding that because the state could only tax live races or simulcasts—which has a definition very similar to that of Arizona—that the state could not tax historic races, which fit neither category); *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 977, 853 N.W.2d 494, 499 (Neb. 2014) (discussing wagering on historic races and impliedly concluding that it did not fit within Nebraska’s definition of “simulcast.”); Neb. Att’y Gen. Op. No. 10009 (Mar. 29, 2010) (same); *MEC v. Or. Racing Comm’n*, 233 Or. App. 9, 13, 225 P.3d 41, 64 (App. 2009) (holding that existing law prohibited historic racing despite a definition of “simulcast” very similar to Arizona’s); HB 2613, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (creating a new section of law for historic races); *Wyo. Downs Rodeo Events, LLC v. State*, 134 P.3d 1223, 1227 (Wyo. 2006) (holding that wagering on historic races did not fit Wyoming’s definition of “simulcast”). These interpretations of similar statutory provisions support the determination that Arizona law does not permit betting on historic races.

Conclusion

Gambling is illegal in Arizona except as expressly authorized. While horseracing is the subject of lawful “regulated gambling,” the statutes governing horseracing do not authorize gambling on historic races and expressly prohibit any gambling that is not specifically authorized. Because the Department of Racing and the Arizona Racing Commission cannot adopt rules that conflict with the statutes that govern their conduct, they cannot authorize gambling on historic races by rule.

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL October 3, 2014	No. I14-007 (R14-013) Re: Inmate's Parole Eligibility
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To: Brian L. Livingston
Chairman
Arizona Board of Executive Clemency

Questions Presented

You requested an opinion seeking clarification of the legal obligations of the Arizona Board of Executive Clemency ("Board") concerning parole release hearings for parole eligible inmates. Specifically, you asked the following questions:

1. When an inmate who is deemed eligible for general parole, parole to his/her next consecutive sentence, absolute discharge, or home arrest, decides not to appear before the Board ("waives an appearance or refuses to appear") at his/her scheduled parole hearing, is the Board still required to conduct the scheduled hearing and determine whether to grant parole to the inmate?
2. If an inmate who is deemed eligible for general parole, parole to his/her next consecutive sentence, absolute discharge, or home arrest, refuses to appear at his/her regularly scheduled parole hearing, and the Board takes no action on the scheduled hearing date, is

the Board required to accommodate the inmate's subsequent request for a new parole hearing earlier than would be normally scheduled?

3. Can an inmate "waive a parole hearing" when the inmate has been certified as eligible for parole by the Department of Corrections? If so, does such a waiver release the Board from determining whether to grant parole to the inmate?

Summary Answer

1. Yes. When an inmate is certified as eligible for parole, absolute discharge, or home arrest, the Board or a hearing officer is required to conduct a parole hearing to approve or reject the inmate's application for parole, even if the inmate waives his/her appearance or refuses to appear at his/her parole hearing.
2. Yes. If an inmate refuses to appear at his/her regularly scheduled parole hearing, and the Board takes no action on the scheduled hearing date, the Board is required to accommodate the inmate's subsequent request for a new parole hearing.
3. Yes. An inmate who has been certified as eligible for parole can waive his parole hearing. An inmate's valid waiver, however, does not release the Board from making a decision on whether to grant parole to the inmate.

Background

"[T]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). A State may nevertheless create a liberty interest in parole through its statutory scheme governing the parole decision-making process. *Id.* at 12. In *Greenholtz*, for example, the Supreme Court concluded that the "expectancy of release provided" in the Nebraska statute at issue was "entitled to some measure of constitutional protection" and

examined the statutory procedures “to determine whether they provide the process that is due.” 442 U.S. at 12; *see also Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (holding that the state parole statute created a due process liberty interest in parole release by stating that the board “shall” release the prisoner, subject to certain restrictions). The Court ultimately held that the Nebraska statute “affords the process that is due” because it provides the inmate with “an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole[.]” *Greenholtz*, 442 U.S. at 16.

The Arizona statute governing parole provides as follows:

If a prisoner is certified as eligible for parole pursuant to § 41–1604.09 the board of executive clemency shall authorize the release of the applicant on parole if the applicant has reached the applicant’s earliest parole eligibility date pursuant to §41–1604.09, subsection D and it appears to the board, in its sole discretion, that there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state.

A.R.S. § 31–412(A). In *Stewart v. Arizona Board of Pardons and Paroles*, 156 Ariz. 538, 753 P.2d 1194 (App. 1988), the Arizona Court of Appeals concluded that this statute “creates a protected liberty interest in parole release.” 156 Ariz. at 542–43, 753 P.2d at 1198–99 (citing *Greenholtz*, 442 U.S. at 12). Accordingly, the Board must afford Arizona inmates who become eligible for parole “an opportunity to be heard” and, “when parole is denied,” must inform an inmate “in what respects he falls short of qualifying for parole.” *Greenholtz*, 442 U.S. at 16.

The Director of the Arizona Department of Corrections is responsible for developing and maintaining “a parole eligibility classification system” for inmates. A.R.S. § 41–1604.09(A). Inmates who are certified as eligible for parole pursuant to the classification system “shall be given an opportunity to apply for release on parole.” A.R.S. § 31–411(A). Although the statute contemplates an application by the inmate, a parole application may be submitted by someone

other than the eligible inmate. *See* Ariz. Op. Atty. Gen. No. I77-213, 1977 WL 22139 (Nov. 15, 1977).

The inmate is entitled to “an opportunity to be heard” on the parole application “either before a hearing officer designated by the board or the board itself, at the discretion of the board.” A.R.S. § 31-411(B). The Board is vested with “exclusive power to pass upon” parole applications and must “either approve, with or without conditions, or reject the prisoner’s application for parole.” A.R.S. §§ 31-402(A), -411(C). In determining whether to grant parole, the Board must consider whether “there is a substantial probability that the applicant will remain at liberty without violating the law and that the release is in the best interests of the state.” A.R.S. § 31-412(A).

When parole is denied, the Board provides the Director with “a written statement specifying the individualized reasons for the denial of parole,” and the inmate has the opportunity to review the Board’s statement. A.R.S. § 31-411(G). If the Board denies an inmate’s parole application and the inmate remains eligible for parole under the classification system, the Director must recertify the inmate pursuant to A.R.S. § 41-1604.09(G). Under this provision, recertification occurs between one and four months after the hearing at which parole was denied. A.R.S. § 41-1604.09(G). However, the Board may prescribe that the inmate “shall not be recertified for a period of up to one year after the hearing.” *Id.*

Analysis

- 1. When an Inmate Waives an Appearance or Refuses to Appear at His/Her Parole Hearing, the Board or a Hearing Officer Must Nonetheless Conduct the Scheduled Hearing and Determine Whether to Grant Parole to the Inmate.**

The first question presented is whether the controlling case law and applicable statutory provisions require the Board to conduct a parole hearing and determine whether to grant parole

to an eligible inmate when the inmate “waives an appearance or refuses to appear” at his/her scheduled parole hearing. This inquiry implicates the first due process requirement under *Greenholtz*, which requires the State to provide a parole-eligible inmate with an “opportunity to be heard.” 442 U.S. at 16.

The statute contains several interrelated provisions. Subsection 31–411(B) provides that a parole-eligible inmate “*shall* be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board.” (Emphasis added.) Subsection (C) states that “[a] prisoner who is eligible for parole or absolute discharge from imprisonment shall not be denied parole or absolute discharge from imprisonment without an opportunity to be heard before the board unless another form of release has been granted.” A.R.S. § 31–411(C). The Board’s Executive Director must “employ hearing officers as deemed necessary within the limits of legislative appropriation.” A.R.S. § 31–402(G). Under A.R.S. § 31–402(G), “hearing officers shall conduct probable cause hearings on parole, work furlough and home arrest revocations or rescissions.” *Id.* Hearings are “open to the public” and conducted “in an informal manner without adherence to the rules of evidence required in a judicial proceeding.” Ariz. Admin. Code R5–4–102(A), (B).

The primary goal in interpreting a statute is to discern and give effect to legislative intent. *See, e.g., Harris Corp. v. Ariz. Dep’t of Revenue*, 233 Ariz. 377, 381, ¶ 13, 312 P.3d 1143, 1147 (App. 2013). “[T]he plain language of the statute [i]s the most reliable indicator of its meaning.” *State v. Mitchell*, 204 Ariz. 216, 218, ¶ 12, 62 P.3d 616, 618 (App. 2003). Unless the statutory language is ambiguous, its plain meaning governs. *Harris Corp.*, 233 Ariz. at 381, ¶ 13, 312 P.3d at 1147.

Here, the plain language of A.R.S. § 31–411(B) and (C) and A.R.S. § 31–402(G) requires either the Board or a hearing officer to conduct hearings for inmates who become eligible for parole or absolute discharge. These statutes state that the inmate “shall” be given the “opportunity to be heard,” and that hearing officers “shall” conduct such hearings. “The use of the word ‘shall’ in a statute usually indicates the [L]egislature intended a mandatory provision.” *Joshua J. v. Ariz. Dep’t of Econ. Sec.*, 230 Ariz. 417, 421, ¶ 11, 286 P.3d 166, 170 (App. 2012); *see also Ins. Co. of N. Am. v. Superior Court (Villagrana)*, 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990) (“The use of the word ‘shall’ indicates a mandatory intent by the [L]egislature.”). The statute governing home arrest likewise contemplates such a hearing. *See* A.R.S. § 41–1604.13(E) (“Before holding a hearing on home arrest, the board on request shall notify and afford an opportunity to be heard to the presiding judge of the superior court in the county in which the inmate requesting home arrest was sentenced, the prosecuting attorney and the director of the arresting law enforcement agency.”).

Although the Board might be able to satisfy the case-driven “opportunity to be heard” requirement through some means other than a hearing, the provisions of A.R.S. §§ 31–402(G) and 31–411(B) and (C), read together, direct the Board to conduct parole hearings or designate a hearing officer to do so. *See State v. Cid*, 181 Ariz. 496, 499–500, 892 P.2d 216, 219–20 (App. 1995) (“A complementary rule of statutory construction holds that, whenever possible, statutes which are in *pari materia* are read together and harmonized to avoid rendering any clause, sentence or word ‘superfluous, void, contradictory or insignificant.’”) (internal citations and quotation marks omitted). The Board must therefore conduct a parole hearing for an inmate even if the inmate waives his/her appearance or refuses to appear for his/her parole hearing.

The Board may consider the inmate's waiver of a hearing in determining whether "there is a substantial probability that the [inmate] will remain at liberty without violating the law and that the release is in the best interests of the state" under A.R.S. § 31-412(A). See *In re Shaputis*, 265 P.3d 253, 266 (Cal. 2011) ("An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public safety that a grant of parole would entail. In such a case, the Board must take the record as it finds it."); *Matter of Christianson v. Rodriguez*, 575 N.Y.S.2d 593, 593 (N.Y. App. Div. 1991) ("By persistently refusing to appear before the Board of Parole for both of his parole release hearings, petitioner has not only effectively waived his right to be present at said hearings, but he has forfeited his right to challenge the determination on the ground that the hearings were conducted in his absence.") (citations omitted).

In sum, because the Arizona statutes governing parole establish a "protected liberty interest in parole release," *Stewart*, 156 Ariz. at 542, 753 P.2d at 1198, a parole release hearing satisfies due process by providing an eligible inmate with an "opportunity to be heard" in the parole decision-making process, *Greenholtz*, 442 U.S. at 16. Although an inmate may waive his/her right to appear at the hearing or refuse to appear, Arizona law requires the Board or a hearing officer to conduct a parole hearing when an inmate becomes certified as eligible for parole.

2. If an Inmate Refuses to Appear at His/Her Parole Hearing, and the Board Takes No Action on the Scheduled Hearing Date, the Board is Required to Accommodate the Inmate's Subsequent Request for a New Parole Hearing.

The second question concerns the Board's responsibility to conduct a parole hearing upon the request of a parole-eligible inmate who refused to appear for his/her scheduled parole hearing, when the Board took "no action" on the scheduled hearing date. As discussed above,

either the Board or a hearing officer is required to conduct a parole hearing for eligible inmates pursuant to A.R.S. §§ 31-402(G) and 31-411(B) and (C). Moreover, under A.R.S. § 31-411(C), the Board is required to either approve or reject an inmate's application for parole or absolute discharge "[w]ithin thirty days after the date of the hearing officer's recommendations." Accordingly, the Board must conduct a parole hearing under these circumstances and make a determination on the inmate's application for parole.

Once a parole hearing is conducted and a parole determination is made, however, an inmate is not entitled "to bring successive applications for relief to the point that it becomes an unreasonable burden upon the parole board and indirectly upon the other prisoners whose applications the Board must consider." *Foggy v. Eymann*, 110 Ariz. 185, 188, 516 P.2d 321, 324 (1973) (holding no due process violation occurred where Board considered inmate's parole application and denied request for hearing on his application for commutation of sentence submitted less than one month later, reasoning that "the Board had just heard applicant's request for parole and was in a position to know that a hearing . . . would be futile"). At that point, the inmate denied parole is subject to the recertification procedures outlined in A.R.S. § 41-1604.09(G). See A.R.S. § 41-1604.09(G) (providing that parole eligibility classification "shall be reviewed by the director not less than once every six months," that "[a]ny prisoner who was certified as eligible for parole and denied parole and remains eligible . . . shall be recertified by the director not less than one nor more than four months after the hearing at which the prisoner was denied parole," and authorizing the Board to "prescribe that the prisoner shall not be recertified for a period of up to one year after the hearing" denying parole).

3. A Parole-Eligible Inmate Can Waive His/Her Parole Release Hearing, but the Waiver Does Not Relieve the Board of its Duty to Decide Whether to Grant Parole.

The third question presented is whether an inmate's decision to "waive a parole hearing," releases the Board from taking any action or making a decision on the inmate's parole application. In Arizona, inmates have "a right to reject an offer of parole[.]" *Sheppard v. State ex rel. Eyman*, 18 Ariz. App. 108, 110, 500 P.2d 639, 641 (1972), *overruled on other grounds by Thomas v. Ariz. State. Bd. of Pardons & Paroles*, 115 Ariz. 128, 129, 564 P.2d 79, 80 (1977). "Parole becomes effective only when accepted by the prisoner." *Id.* at 109, 500 P.2d at 640. This is consistent with the law in other states. *See State ex rel. Crosby v. White*, 456 P.2d 845, 847 (Mont. 1969) ("A prisoner should know at the time a parole is approved . . . just what conditions are attached to it so that he can choose whether to accept it or not."); *Pierce v. Smith*, 195 P.2d 112, 116 (Wash. 1948) ("One convicted of crime has the right to reject an offer of parole[.]"); *but see Bollinger v. Bd. of Parole & Post-Prison Supervision*, 920 P.2d 1111, 1114 (Or. App. 1996) (noting that although inmate had ability to waive parole under the former statute, newly enacted statute prohibited inmates from refusing an order granting parole).

If parole-eligible inmates have the right to reject parole, they necessarily have the lesser right to waive their parole hearings. Although the statutes do not expressly provide for the waiver of a parole hearing, case law addressing waiver of hearings in the parole revocation context supports this conclusion. *See Greenholtz*, 442 U.S. at 9–10 (recognizing that parole release and parole revocation "are quite different," noting that "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires"); *Borchers v. Ariz. Bd. of Pardons & Paroles*, 174 Ariz. 463, 469, 851 P.2d 88, 94 (App. 1992) ("Unlike a parole revocation hearing, a parole release hearing . . . is not a true adversarial proceeding.").

The Board should take measures to ensure that inmates who desire to waive parole hearings do so knowingly, intelligently, and voluntarily, and to create a record that establishes the validity of the waiver. *See People ex rel. Frazier v. Warden, Rikers Island Corr. Ctr.*, 978 N.Y.S.2d 636, 641 (N.Y. 2013) (“A waiver will be deemed knowing, intelligent, and voluntary when the record demonstrates that the parolee’s rights concerning the hearing and the effect of his waiver were explained to him”); *People ex rel. Moll v. Rodriguez*, 516 N.Y.S.2d 998, 1000 (N.Y. App. Div. 1987) (“The waiver of a preliminary [parole revocation] hearing must be knowing, intelligent and voluntary, and the basis for the hearing officer’s determination of validity must appear in the record.”); *McKenzie v. Pa. Bd. of Probation & Parole*, 963 A.2d 616, 621 (Pa. Commw. Ct. 2009) (“[T]he violation hearing waiver form here reflects [the parolee] voluntarily, knowingly and intelligently waived his right to a violation hearing[.]”) (internal quotation marks omitted); *Ex parte Maceyra*, 690 S.W.2d 572, 577 (Tex. Crim. App. 1983) (holding that “in absence of an affirmative waiver, intelligently and knowingly given, a parolee is entitled to [a] parole revocation hearing”) (citation omitted). Cases from other jurisdictions suggest that express advisories in written waivers signed by the inmate can satisfy the requirement of a knowing, intelligent, and voluntary waiver. *See, e.g., Frazier*, 978 N.Y.S.2d at 641 (reasoning “a writing that clearly and unambiguously demonstrates the parolee’s desire to abandon his right to a preliminary hearing will be deemed valid”); *McKenzie*, 963 A.2d at 620 (noting under state law, “to effectuate a knowing and voluntary waiver in Parole Board cases, all that is required is for the Board to show that it followed its own regulations and provided the necessary information to the offender prior to the offender signing the written waiver form”).

The Board can use its rule-making authority to require signed, written waivers or other comparable requirements designed to establish that an inmate validly waived a parole release

hearing. *See* A.R.S. § 31-401(G) (“The board may adopt rules, not inconsistent with law, as it deems proper for the conduct of its business. The board may from time to time amend or change the rules and publish and distribute the rules as provided by the administrative procedures act.”).

Finally, even if an inmate validly waives his/her right to a parole hearing, such a waiver does not release the Board from determining whether to grant parole to the inmate. Under A.R.S. § 31-411(C), the Board must approve or reject an inmate’s application for parole or absolute discharge from imprisonment. Consequently, although an inmate’s waiver of his/her right to a parole hearing releases the Board from its obligation to conduct the hearing, it does not relieve the Board of its obligation to determine whether to grant parole to the inmate.

Conclusion

The Board must give parole-eligible inmates an “opportunity to be heard” in the parole release decision-making process. Arizona law fulfills this requirement exclusively through parole hearings conducted by the Board or hearing officers. An inmate may waive the right to a parole hearing. Although a valid waiver would relieve the Board of its duty to conduct the hearing, the Board must nonetheless make a decision on the inmate’s parole application pursuant to A.R.S. § 31-411(C).

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>September 25, 2014</p>	<p>No. I14-006 (R14-008)</p> <p>Re: Procedures for disincorporating a municipality as set forth in A.R.S. §§ 9-211 through 9-226</p>
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To: Britt W. Hanson
Chief Civil Deputy County Attorney, Cochise County

Questions Presented

You requested an opinion concerning the following questions regarding disincorporation under Arizona Revised Statutes (“A.R.S.”) §§ 9-211 through 9-226:

1. Do the provisions in A.R.S. §§ 9-212 and 9-215 that require those who petition for and those who vote on the disincorporation of a city or town to be property taxpayers in the municipality violate the Fourteenth Amendment to the United States Constitution’s Equal Protection Clause?
2. Is A.R.S. § 9-215’s requirement that to vote in a disincorporation election, one must have resided in the municipality for the six months preceding the election unconstitutional?
3. What do A.R.S. § 9-212(A)’s provisions requiring that those who sign a disincorporation petition be “bona fide residents” and “electors” mean?

Summary Answers

1. Yes. By precluding nontaxpayers from petitioning for and voting on disincorporation, A.R.S. §§ 9-212 and 9-215 severely burden the right that the Equal Protection Clause confers on these citizens to participate in state elections on an equal basis with other citizens in the jurisdiction. The State must therefore demonstrate that the provisions are narrowly tailored to further a compelling state interest. Because nontaxpayers are just as interested in and just as affected by disincorporation as taxpayers, the State cannot establish that it has a compelling interest that justifies treating the two groups differently. Section 9-212's provisions that limit disincorporation petitioners and electors to property taxpayers and A.R.S. § 9-215's provision that limits disincorporation electors to property taxpayers therefore violate the Equal Protection Clause. This determination does not completely vitiate A.R.S. §§ 9-212 and 9-215, however, because their unconstitutional provisions are severable from their constitutional ones.
2. Yes. Section 9-215 establishes the qualifications for voting in a disincorporation election. Its requirement that electors have lived in the municipality for the six months preceding the election is unconstitutional because it violates the right to participate in state elections on an equal basis with other citizens in the jurisdiction as well as the right to travel. When this unconstitutional provision and the unconstitutional provision limiting disincorporation electors to property taxpayers are severed, A.R.S. § 9-215 requires that electors "possess the qualifications of electors for county officers." Section 16-101(B) establishes the requirements for being a "resident" and A.R.S. § 16-121(A) establishes the requirements for being a "qualified elector" for purposes of county officer elections.

3. (a) There is no definition of the term “bona fide residents” in A.R.S. §§ 9-211 through 9-226, and no other Arizona statute defines the term. But A.R.S. § 16-101(B) defines the term “resident” for voter registration purposes as a person who has an actual physical presence in Arizona (or for purposes of a political subdivision, an actual physical presence in the political subdivision), combined with an intent to remain. Because A.R.S. § 16-101(B) deals with the same general subject matter as A.R.S. § 9-212(A), the two should be construed together and the term “bona fide resident” in A.R.S. § 9-212(A) should be given the same meaning as the term “resident” in A.R.S. § 16-101(B).
- (b) There is no definition of the term “electors” in A.R.S. §§ 9-211 through 9-226 that would apply to petition signers under A.R.S. § 9-212(A). But A.R.S. § 16-121(A) provides that a “qualified elector for any purpose for which such qualification is required by law” is one who is at least eighteen years old on or before the election date, is qualified to register to vote under A.R.S. § 16-101, and is properly registered to vote. Since both statutes deal with electors, the two should be construed together and the term “elector” in A.R.S. § 9-212(A) should be given the same meaning as the term “qualified elector” in A.R.S. § 16-121(A).

Background

Sections 9-211 through 9-226 establish a procedure that enables a city or town to choose to be disincorporated by the county board of supervisors and to then be reincorporated under a board of trustees form of government.¹ See A.R.S. § 9-211. The statutes initially require that a petition requesting disincorporation that is signed by “one half or more of the property taxpayers

¹ There are two distinct sets of disincorporation statutes: A.R.S. § 9-102 and A.R.S. §§ 9-211 through 9-226. Section 9-102 applies to the complete termination of a municipal corporation without further reincorporation, and A.R.S. §§ 9-211 through 9-226 apply to disincorporation followed by reincorporation. Ariz. Att’y Gen. Op. I62-64-L.

who are bona fide residents and electors appearing on the last assessment roll of an incorporated city or town” be presented to the board of supervisors. A.R.S. § 9-212(A). After receiving the petition, the board of supervisors publishes a notice calling for an election concerning the disincorporation issue by the “qualified electors of the corporation who are property taxpayers therein.” A.R.S. § 9-212(B). It also appoints “bona fide resident electors” who are property taxpayers to be officers, inspectors, and clerks of the disincorporation election. A.R.S. § 9-213(A). Under A.R.S. § 9-215, electors shall “possess the qualifications of electors for county officers, and shall have resided in the corporation six months next preceding the election, and shall be property taxpayers in the corporation, and their names shall appear upon the assessment or tax rolls of the corporation next preceding the day of election.”

If a majority of votes is cast in favor of disincorporation, the county board of supervisors appoints three qualified electors to serve on the newly incorporated city or town’s board of trustees for staggered terms of one, two, and three years. A.R.S. § 9-217(A). The trustee whose term expires in one year is the board of trustees’ president. *Id.* One year after the city or town is reincorporated, an election to replace the trustee whose term is expiring and to choose the city or town’s elective officers is held. A.R.S. § 9-218(A). The board of trustees has broad general powers to govern the city or town, which include enacting ordinances to protect the public health, safety, and peace and prescribing punishments for violating those ordinances, A.R.S. § 9-219; levying taxes, A.R.S. § 9-220; and regulating voter registration, A.R.S. § 9-225. The board of trustees also appoints to serve at its pleasure a clerk of the board, A.R.S. § 9-222, a marshal, A.R.S. § 9-223, and a treasurer, A.R.S. § 9-224.

Analysis

I. Excluding Nontaxpayers from Petitioning for and Voting on Disincorporation Violates the Equal Protection Clause, but This Determination Does Not Completely Vitiolate A.R.S. §§ 9-212 and 9-215 Because Their Unconstitutional Provisions Are Severable from Their Constitutional Ones.

A. Although There Is No Constitutional Right to Vote on Municipal Corporation Matters, If the Legislature Provides for Elections Concerning Such Matters, the Procedures that It Establishes Must Satisfy Equal Protection Requirements.

Municipal corporations are subdivisions of the State, and the Legislature has broad powers over them. *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 218, 714 P.2d 386, 388 (1986). As long as the Legislature complies with state and federal constitutional requirements, it may take any action that it deems appropriate with respect to municipal corporations. *Id.* This includes creating them, expanding or contracting their boundaries, or abolishing them. *Id.* There is no state or federal constitutional requirement that the Legislature seek the consent of state citizens before taking any action concerning a municipal corporation. *Id.* at 218-19, 714 P.2d at 388-89 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907)); *Skinner v. City of Phoenix*, 54 Ariz. 316, 320, 95 P.2d 424, 425 (1939)). State citizens therefore have no constitutional right to vote on decisions concerning municipal corporations. *See City of Tucson v. Pima Cnty.*, 199 Ariz. 509, 515, 19 P.3d 650, 656 (App. 2001); *Goodyear Farms*, 148 Ariz. at 219, 714 P.2d at 389. Although the Legislature does not have to subject decisions concerning municipal corporations to a vote, if it chooses to do so, it must comply with the Fourteenth Amendment to the United States Constitution's Equal Protection Clause. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969); *Goodyear Farms*, 148 Ariz. at 219, 714 P.2d at 389.

B. Laws that Severely Burden the Constitutional Right to Participate in State Elections on an Equal Basis with Other Citizens in the Jurisdiction Must Satisfy Strict Scrutiny Review by Being Narrowly Tailored to Further a Compelling State Interest.

The Equal Protection Clause's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws" requires States to treat similarly situated persons alike.² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It does not as a general rule create any substantive rights or liberties, but instead establishes "a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). There is, however, an exception in the voting rights area. The United States Constitution does not confer any general right to vote in state elections. *Id.* n.25; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.74, 35 n.78 (1973). But its Equal Protection Clause does confer the substantive right to participate in state elections on an equal basis with other citizens in the jurisdiction. *Harris*, 448 U.S. at 322 n.25; *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Although this right to vote on an equal basis with other citizens "is of the most fundamental significance under our constitutional structure," the Supreme Court has recognized that it is not an absolute right. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Because the United States Constitution also gives States the power to prescribe the time, place, and manner of holding elections for United States senators and representatives, U.S. Const. art. I, § 4, cl. 1, the Court has acknowledged that States have the authority to regulate their own elections, *Burdick*, 504 U.S. at 433. It has also recognized that state election laws, whether they govern "the

² The Arizona Supreme Court has construed the Arizona Constitution's Equal Privileges and Immunities Clause as having essentially the same effect as the United States Constitution's Equal Protection Clause. *Coleman v. City of Mesa*, 230 Ariz. 352, 361, 284 P.3d 863, 872 (2012). Arizona's clause provides as follows: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. art. 2, § 13.

registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself,” will inevitably affect an individual’s right to vote. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). It has further recognized that subjecting every state law that imposes any burden on the right to vote to the strict scrutiny standard of review, which requires that laws be narrowly tailored to further a compelling state interest, “would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* It has therefore rejected applying strict scrutiny to every law that burdens the right to vote and has instead adopted “a more flexible standard.” *Id.* at 434; *see also Chavez v. Brewer*, 222 Ariz. 309, 320, 214 P.3d 397, 408 (App. 2009) (acknowledging the flexible standard); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 211 Ariz. 337, 345-48, 121 P.3d 843, 851-54 (App. 2005) (applying the flexible standard).

Under this standard, a court considering a challenge to a state election law must weigh “the character and magnitude” of the injury that the law imposes on the plaintiff’s constitutional rights against “the precise interests” that the State has identified as justifying that burden. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). In doing so, the court must consider the extent to which the State’s interests make it necessary to burden the plaintiff’s rights. *Id.* The level of scrutiny that a court applies under this standard depends upon the extent to which the law burdens the plaintiff’s rights. *Id.*; *Ariz. Minority Coal.*, 211 Ariz. at 346, 121 P.3d at 852. An election law that severely burdens the plaintiff’s constitutional rights will be upheld only if the State demonstrates that it satisfies strict scrutiny because it is narrowly tailored to further a compelling state interest. *Burdick*, 504 U.S. at 433-34; *Ariz. Minority Coal.*, 211 Ariz. at 346, 121 P.3d at 852. An election law that imposes only a reasonable, nondiscriminatory restriction on a plaintiff’s constitutional rights will be upheld if the State demonstrates that the

restriction serves important state regulatory interests. *Burdick*, 504 U.S. at 434; *see also Chavez*, 222 Ariz. at 320, 214 P.3d at 408 (acknowledging this standard).

C. Section 9-212(A)'s Petition Procedure Implicates the Constitutional Right to Participate in State Elections on an Equal Basis with Other Citizens in the Jurisdiction Because It Allows Property Owners to Prevent an Election from Being Held.

Under A.R.S. § 9-212(A), at least half the property taxpayers “who are bona fide residents and electors appearing on the last assessment roll of an incorporated city or town” must present a petition requesting disincorporation to the county board of supervisors before the board can call for a disincorporation election. This raises the threshold question whether A.R.S. § 9-212(A)'s petition procedure implicates the right to participate in an election on an equal basis with other citizens in the jurisdiction. Arizona courts have not addressed this issue with respect to A.R.S. § 9-212(A)'s petition procedure, but in *Goodyear Farms*, the Arizona Supreme Court considered whether A.R.S. § 9-471 violated equal protection principles by providing that only property owners could sign annexation petitions. 148 Ariz. at 218, 714 P.2d at 388. The statute required that a petition requesting annexation be submitted to the interested municipal corporation's governing body and that it be signed by the owners of “not less than one-half in value of the real and personal property” that would be subject to taxation if the annexation was completed. *Id.* The governing body then had complete discretion to decide whether to enact an ordinance annexing the territory in question. *Id.* at 221, 714 P.2d at 391. The plaintiffs contended that A.R.S. § 9-471's petition procedure was analogous to an election and that precluding them from signing a petition because they did not own any property therefore violated their right to vote. *Id.* at 219, 714 P.2d at 389.

In determining that this particular petition procedure was not analogous to an election, the supreme court cited *Gillard v. Estrella Dells I Improvement District*, 25 Ariz. App. 141, 146, 541

P.2d 932, 937 (1975), which concerned a statute that allowed the county board of supervisors to consider a petition signed only by real property owners requesting the creation of a county improvement district. *Goodyear Farms*, 148 Ariz. at 221, 714 P.2d at 391. The statute gave the board complete discretion after receiving such a petition to decide whether to create a district. *Gillard*, 25 Ariz. App. at 143-44, 541 P.2d at 934-35. The court of appeals rejected the argument that the petition procedure was analogous to an election, noting that creating county improvement districts was a legislative function, that the Legislature did not have to require that improvement districts be created by election, and that instead of providing for an election in this statute, it had provided for “petitioning procedures to an executive body performing a delegated legislative duty.” *Id.* at 143, 146-47, 541 P.2d 934, 937-38. The court of appeals therefore concluded that the petition procedure did not implicate the right to vote. *Id.* at 146-48, 541 P.2d at 937-39.

In addition to citing *Gillard* in *Goodyear Farms*, the supreme court cited several cases from other jurisdictions that had upheld annexation schemes similar to Arizona’s after determining that because they did not involve an election and they committed the final decision concerning annexation to a board or commission rather than to the voters, they did not implicate any equal protection voting rights concerns. 148 Ariz. at 221-22, 714 P.2d at 391-92 (citing *Carlyn v. City of Akron*, 726 F.2d 287, 289-90 (6th Cir. 1984); *Berry v. Bourne*, 588 F.2d 422, 424-25 (4th Cir. 1978); *Twp. of Jefferson v. City of W. Carrollton*, 517 F. Supp. 417, 420-21 (S.D. Ohio 1981); *Doenges v. City of Salt Lake City*, 614 P.2d 1237, 1239 (Utah 1980)). The supreme court concluded that Arizona’s annexation scheme did not implicate any equal protection voting rights concerns either. *Goodyear Farms*, 148 Ariz. at 222, 714 P.2d at 392. It

therefore determined that the annexation scheme was not subject to strict scrutiny and upheld it under rational basis review. *Id.* at 222-23, 714 P.2d at 392-93.

In reaching its conclusion, the supreme court distinguished *Curtis v. Board of Supervisors*, 501 P.2d 537 (Cal. 1972). *Goodyear Farms*, 148 Ariz. at 220, 714 P.2d at 390. The statute challenged in *Curtis* allowed the owners of fifty-one percent of the total assessed value of the property within the boundaries of an area that had been proposed for incorporation to file protests that would block an election in which all of the registered voters who had lived within the boundaries for a specified period could vote on incorporation. 501 P.2d at 541. The court held that the statute was subject to strict scrutiny because it burdened the right to vote by giving property owners the power to halt an election, thereby preventing all qualified voters from voting. *Id.* at 545-46. The statute at issue in *Curtis* differs from A.R.S. § 9-212(A), which makes submitting a petition a necessary condition to—rather than a veto of—a disincorporation election and allows only property taxpayers to vote on disincorporation. But the statutes are alike in the significant respect that they both allow property owners to block an election. Courts in other jurisdictions have also held that petition procedures that allow property owners to block an election implicate equal protection voting rights concerns. *See Murray v. Kaple*, 66 F. Supp. 2d 745, 747, 750 (D.S.C. 1999); *City of Seattle v. State*, 694 P.2d 641, 644-47 (Wash. 1985). Because A.R.S. § 9-212(A)'s petition procedure—like the procedure at issue in *Curtis* and unlike the procedure at issue in *Goodyear Farms*—allows property taxpayers to block an election, it implicates equal protection voting rights concerns.

D. Provisions that Preclude Nontaxpayers from Petitioning for or Voting on Disincorporation Are Subject to Strict Scrutiny Review Because They Severely Burden Nontaxpayers' Rights to Participate in State Elections on an Equal Basis with Other Citizens in the Jurisdiction.

The initial inquiry under the *Burdick* standard is the “character and magnitude” of the burden that the provisions of A.R.S. §§ 9-212 and 9-215 precluding nontaxpayers from voting on disincorporation and the provision of A.R.S. § 9-212 precluding nontaxpayers from petitioning for disincorporation impose. *See Burdick*, 504 U.S. at 434 (internal quotation marks omitted). Complete preclusion obviously imposes the severest of burdens on nontaxpayers’ right to vote on an equal basis with other citizens in the jurisdiction. *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I. 1994) (“A complete denial of the right to vote is a restriction of the severest kind.”). These provisions will therefore be upheld under the *Burdick* standard only if they satisfy strict scrutiny. *See Burdick*, 504 U.S. at 433-34; *Ariz. Minority Coal.*, 211 Ariz. at 346, 121 P.3d at 852; *see also Lemons v. Bradbury*, 538 F.3d 1098, 1103-04 (9th Cir. 2008) (stating that the Supreme Court has subjected the voting regulations of geographically defined governmental units that condition voting in unit-wide elections on property ownership to strict scrutiny because such regulations impose severe restrictions on the right to vote).

E. Because Nontaxpayers Are as Interested in and as Affected by Disincorporation and Reincorporation Under A.R.S. §§ 9-211 through 9-226 as Property Taxpayers Are, the State Has No Compelling Interest that Would Justify Precluding Them from Petitioning for or Voting on Disincorporation.

To satisfy strict scrutiny, the provisions of A.R.S. §§ 9-212 and 9-215 that permit only property taxpayers to petition for and vote on disincorporation must be narrowly tailored to further a compelling state interest. *Burdick*, 504 U.S. at 433-34. Governmental entities have sometimes attempted to justify statutory or regulatory classifications based on property ownership by arguing that property owners are more interested in, more affected by, or more

qualified to deal with the statute's or regulation's subject matter than those who own no property are. *See, e.g., Quinn v. Millsap*, 491 U.S. 95, 107 (1989) (stating that the defendants sought to justify a state law that allowed only real property owners to sit on a board charged with reorganizing local government by arguing that real property owners had “first-hand knowledge of the value of good schools, sewer systems and the other problems and amenities of urban life” and had a tangible stake in the long-term future of their areas); *Hill v. Stone*, 421 U.S. 289, 298-99 (1975) (stating that the defendants sought to justify provisions that limited the right to vote in city bond elections to property taxpayers by arguing that the provisions gave “some protection to property owners, who [would] bear the direct burden of retiring the city’s bonded indebtedness” through property taxes); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (stating that the city sought to justify a state law that allowed only property owners to vote in elections to approve the issuance of municipal utility revenue bonds by arguing that property owners had a special pecuniary interest in such bonds because the utility system’s efficiency directly affected property and property values and placed the basic security of property owners’ investments in their property at stake). The Supreme Court has generally rejected such justifications, *see, e.g., Quinn*, 491 U.S. at 108-09; *Hill*, 421 U.S. at 299-01; *Cipriano*, 395 U.S. at 705-06, and has stated that classifications based on property ownership, like those based on wealth or race, “are traditionally disfavored,” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966).

In the elections context, the Court has explained that when a statutory classification limits the right to vote to citizens who are allegedly primarily interested in or primarily affected by the election in question, the governmental entity will not be able to establish that the exclusion is necessary to achieve the articulated compelling state interest unless all those whom the classification excludes are in fact substantially less interested in or less affected by the election.

Kramer, 395 U.S. at 632. The Court has normally held that classifications based on property ownership were not narrowly tailored enough to satisfy this standard. See, e.g., *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 209-11 (1970) (holding that those who owned no property were as interested in and as affected by general obligation bond elections as property owners were because (1) all city residents had a substantial interest in the city's facilities and services and (2) the election would affect those who owned no property as well as property owners even if the bond debt service obligations were completely met by property taxes because rental property owners would pass higher property taxes on to their tenants in the form of higher rent and commercial property owners would pass higher property taxes on to their customers in the form of higher goods and services prices); *Kramer*, 395 U.S. at 623, 630-33 & n.15 (holding that a statute that limited eligibility to vote in school board elections to those who owned or rented taxable real property in the school district or had children enrolled in district schools did not include all of those who were primarily interested in the elections because the fact that property taxes supported the school districts did not mean that only real property owners or renters felt the tax burden and the categories of persons who were allowed to vote excluded "interested and informed residents" who also had "a distinct and direct interest" in decisions concerning local schools); cf. *Quinn*, 491 U.S. at 107-09 (holding in a nonelection context that excluding those who owned no property from membership on a state board charged with reorganizing local government whose work would affect all citizens regardless of property ownership constituted invidious discrimination that did not satisfy rational basis review because "an ability to understand the issues concerning one's community does not depend on ownership of real property" and however reasonable it might be to assume that real property owners are attached to

their communities, a State could not rationally presume that anyone who did not own real property lacked such an attachment).

In the context of elections concerning municipal corporations, courts have noted that all citizens have an interest in the structure of local government, *Curtis*, 501 P.2d at 550; *City of Seattle*, 694 P.2d at 647-48, and that changes to the entire structure of local government interest and affect property owners and those who own no property alike, *Hayward v. Clay*, 573 F.2d 187, 190 (4th Cir. 1978). They have therefore concluded that governmental entities cannot establish that they have any compelling interest in limiting elections on matters such as annexation and incorporation to property owners.³ See *Hayward*, 573 F.2d at 190; *Curtis*, 501 P.2d at 546-50; *Bd. of Lucas Cnty. Comm'rs v. Waterville Twp. Bd. of Trs.*, 870 N.E.2d 791, 800-01 (Ohio App. 2007); *City of Seattle*, 694 P.2d at 647-48.⁴

As the background section of this Opinion discusses, A.R.S. §§ 9-211 through 9-226 establish a procedure that enables a city or town to choose to be disincorporated by the county board of supervisors and to then be reincorporated under a board of trustees form of government. Because this is the type of fundamental change to the structure of local government that interests and affects all citizens, not just property taxpayers, the State has no compelling interest that

³ The Equal Protection Clause does not prohibit treating some voters differently from others with respect to special interest elections. Such elections involve entities (1) that are created for a limited purpose, (2) that do not exercise the full range of normal governmental powers, and (3) that perform functions that have a disproportionately greater effect on the specific class of people who are permitted to vote with respect to them than they do on the class of people who are excluded from voting with respect to them. *Ball v. James*, 451 U.S. 355, 362-71 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 725-35 (1973); *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 100-08 (2d Cir. 1998). Because the disincorporation of a city or town and its reincorporation under a board of trustees form of government involve changes to the basic structure of local government that do not have a disproportionately greater effect on property taxpayers than they do on nontaxpayers, this exception does not apply here.

⁴ *Hayward*, 573 F.2d at 189, *Curtis*, 501 P.2d at 544-46, and *City of Seattle*, 694 P.2d at 646, relied on decisions that the Supreme Court issued before it clarified in *Burdick* that only restrictions that severely burden the right to participate in state elections on an equal basis with other citizens in the jurisdiction trigger strict scrutiny review. But since *Hayward* concerned a provision that required property owners to approve an annexation, 573 F.2d at 188-89, and *Curtis*, 501 P.2d at 541, 545-46, and *City of Seattle*, 694 P.2d at 644, concerned provisions that allowed property owners to block elections, the provisions that all three addressed imposed severe burdens and would also be subject to strict scrutiny under *Burdick*, 504 U.S. at 434.

would justify excluding nontaxpayers from petitioning for or voting on disincorporation. The provisions of A.R.S. §§ 9-212 and 9-215 that do so therefore violate the Equal Protection Clause.

F. The Determination that the Provisions Limiting Petitioning for and Voting on Disincorporation to Property Taxpayers Violate the Equal Protection Clause Does Not Vitiating A.R.S. §§ 9-212 and 9-215 in Their Entirety Because Their Unconstitutional Provisions Are Severable from Their Constitutional Ones.

When a court determines that part of a statute is unconstitutional, it will not declare the entire statute unconstitutional if two requirements are met. The first requirement is that the statute's invalid portion can be excised from its valid portion in a manner that leaves the valid portion effective and enforceable as a complete law standing alone. *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978); *State v. Superior Court*, 106 Ariz. 365, 369, 371, 476 P.2d 666, 670, 672 (1970); *McCune v. City of Phoenix*, 83 Ariz. 98, 106, 317 P.2d 537, 542 (1957). The statute's unconstitutional portions need not be contained in separate sections from its constitutional portions for severance to occur. *State v. Superior Court*, 106 at 369, 371, 476 P.2d at 670, 672; *McCune*, 83 Ariz. at 106, 317 P.2d at 542. If the portions of A.R.S. § 9-212 that allow only property taxpayers to petition for and to vote on disincorporation are deleted, the remainder of the statute would be effective and enforceable standing alone:

A. When one half or more of the ~~property taxpayers who are~~ bona fide residents and electors ~~appearing on the last assessment roll~~ of an incorporated city or town present a petition in writing to the board of supervisors for the disincorporation of the city or town, the board shall receive, and the clerk shall file the petition and record it at length in the record of the proceedings of the board.

B. Thereupon the board shall immediately publish, as provided by [A.R.S.] § 39-204, a notice which shall contain the petition at length, and designate a time and place within the corporation when and where a vote will be taken by the qualified electors of the corporation ~~who are property taxpayers therein~~ upon the question of granting or refusing the petition for disincorporation.

Excising similar language from A.R.S. § 9-215 also leaves it effective and enforceable standing alone:

Electors in order to vote at the election shall possess the qualifications of electors for county officers, and shall have resided in the corporation six months next preceding the election, ~~and shall be property taxpayers in the corporation, and their names shall appear upon the assessment or tax rolls of the corporation next preceding the day of election.~~

These statutes therefore satisfy the first severability requirement.

The second severability requirement is that the Legislature would have enacted the statute without its unconstitutional portion if the Legislature had known that the portion was invalid when it was enacting the statute. *State v. Pandeli*, 215 Ariz. 514, 530, 161 P.3d 557, 573 (2007); *Watson*, 120 Ariz. at 445, 586 P.2d at 1257; *State v. Fowler*, 156 Ariz. 408, 414, 752 P.2d 497, 503 (App. 1987). The Legislature sometimes includes a severability clause that expresses its intent that the constitutional portions of a statute or a statutory scheme remain in effect if a portion of the statute or scheme is determined to be unconstitutional. *See, e.g., Selective Life Ins. Co. v. Equitable Life Assurance Soc'y of the U.S.*, 101 Ariz. 594, 599, 422 P.2d 710, 715 (1967) (stating that courts give effect to severability clauses when possible). While such clauses are helpful in determining legislative intent with respect to severability, they are not a prerequisite for severability. *Norton v. Superior Court*, 171 Ariz. 155, 158, 829 P.2d 345, 348 (App. 1992) (stating that a severability clause provides “merely useful, not essential, evidence of legislative intent” and noting that Arizona courts have determined that numerous statutes were severable absent such a clause). There is no severability clause in A.R.S. §§ 9-211 through 9-226.

There is no legislative history with respect to the severability of A.R.S. §§ 9-211 through 9-226 either. In the absence of a severability clause or of clear legislative history concerning severability, it is not possible to be certain about the Legislature’s intent regarding severability.

That may be especially true with respect to a statutory scheme like the one at issue here that the Legislature initially enacted over a hundred years ago. But courts nevertheless uphold the constitutional portions of statutes that can be severed from the unconstitutional portions leaving a complete and enforceable law even when there is no severability clause and no legislative history to clearly reveal what those who enacted the statute would have intended concerning severability.

In *Randolph v. Groscost*, 195 Ariz. 423, 427, 989 P.2d 751, 755 (1999), the Arizona Supreme Court noted that when a severability issue concerning a statute that the voters have enacted by initiative arises, the courts have no legislative history to guide them in determining intent with respect to severability and each voter's intent with respect to it might differ from that of other voters. The court stated that it would nevertheless uphold the constitutional portion of statutes enacted by initiative that were complete and enforceable standing alone after their unconstitutional portions were severed unless "doing so would produce a result so irrational or absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other." *Id.*

With respect to statutes that the Legislature has enacted, when there is no severability clause and no legislative history concerning severability, courts examine the statute's language as being "the most reliable evidence" of legislative intent. *State v. Prentiss*, 163 Ariz. 81, 86, 786 P.2d 932, 937 (1989), *as modified on reconsideration* (1990); *State v. Ramsey*, 171 Ariz. 409, 414, 831 P.2d 408, 413 (App. 1992). In doing so, courts consider the statute's essential purpose. *See, e.g., Prentiss*, 163 Ariz. at 86, 786 P.2d at 937; *State v. Superior Court*, 106 at 371, 476 P.2d at 672; *State v. Dykes*, 163 Ariz. 581, 585, 789 P.2d 1082, 1086 (App. 1990). They will uphold the constitutional portion of a statute that is complete and enforceable standing

alone after its unconstitutional portion has been severed unless (1) the statute's valid and invalid portions are so intimately connected with each other that they raise the presumption that the Legislature would not have enacted one without the other or (2) the invalid portion of the statute was what induced the Legislature to enact the statute. *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 344, 982 P.2d 815, 819 (1999); *Watson*, 120 Ariz. at 445, 586 P.2d at 1257; *Eastin v. Broomfield*, 116 Ariz. 576, 586, 570 P.2d 744, 754 (1977).

In *Clay v. Town of Gilbert*, 160 Ariz. 335, 337, 773 P.2d 233, 235 (App. 1989), *review denied* (1989), qualified electors of the town of Gilbert challenged the results of a special election in which the majority of voters had voted in favor of the town acquiring an electricity distribution system. The challengers contended that the election was invalid because although A.R.S. § 9-514 provided that only qualified electors "who are taxpayers of the municipal corporation" could vote on whether the town could acquire public utility property, the town had allowed nontaxpayers to vote on the acquisition issue. *Id.* at 341, 773 P.2d at 239. The court of appeals affirmed the trial court's determination that limiting such an election to taxpayers would have violated equal protection principles because nontaxpayers would be just as interested in and as affected by the town's acquisition and operation of an electricity distribution system as taxpayers would be. *Id.*

The challengers argued that the trial court nevertheless had no authority to sever the words "who are taxpayers" from the statute because doing so "would totally change the focus of the remaining portion of the statute." *Id.* (internal quotation marks omitted). The court of appeals rejected this argument and instead agreed with the trial court that the words were severable because the Legislature had enacted A.R.S. § 9-514 to enable citizens who had an interest in whether the town would engage in the business of operating a public utility to have a

say on the issue. *Id.* at 342, 773 P.2d at 240. It apparently based its determination concerning the statute's purpose on the statute's language because it did not state that there was any legislative history that supported its determination. *See id.* Based on its determination of the statute's purpose, it held that excising the words "who are taxpayers" from the statute did not contravene legislative intent and that the election did not have to be invalidated because nontaxpayers had voted in it. *Id.*

A similar analysis applies here. As the background section of this Opinion discusses, A.R.S. §§ 9-211 through 9-226 establish a procedure that enables a city or town to choose to be disincorporated by the county board of supervisors and to then be reincorporated under a board of trustees form of government. This statutory scheme originated before statehood and has been retained in essentially the same form until the present. *See* Historical and Statutory Notes following A.R.S. §§ 9-211 through 9-226, which identify the sections of the 1901, 1913, 1928, and 1939 Codes at which these provisions previously appeared. The statutory scheme reflects the view—which was apparently widely held across the country until the Supreme Court began to declare it unconstitutional—that only real property owners should be permitted to vote on measures that might affect their property taxes. *See, e.g.,* the cases that subsection I(E) of this Opinion discusses.

But applying the previously discussed test that Arizona courts apply to determine severability in the absence of a severability clause or of clear legislative history, nothing in the statutory scheme indicates (1) that the provisions of the statutory scheme that allow only taxpayers to petition for and vote on disincorporation are so intimately connected with the scheme's valid provisions that they raise a presumption that the Legislature would not have enacted one without the other or (2) that the Legislature was induced to enact the statutory

scheme or to create the board of trustees form of government to benefit property taxpayers. That being the case, the statutory scheme indicates that the Legislature enacted A.R.S. §§ 9-211 through 9-226 to allow the residents of cities and towns to be able to choose whether to disincorporate and to reincorporate under the board of trustees form of government and that it would still have wanted them to be able to make that choice if it had known that it had to allow nontaxpayers to participate in the decision. The portions of the statutory scheme that remain after the provisions that allow only taxpayers to petition for and vote on disincorporation are severed should therefore be upheld. *See also Bd. of Lucas Cnty. Comm'rs*, 870 N.E.2d at 803 (holding that although it might seem that the Legislature had intended that only electors who owned township land outside the boundaries of the incorporated portion of the township should be permitted to petition to erect a new township, the language imposing that restriction could be severed because the statute's "actual paramount purpose and intent" was "to allow only those electors residing in the unincorporated parts of the township to determine the form of their government without the influence of any incorporated villages or municipalities lying within that township").⁵

⁵ Section 9-213(A) requires that to be appointed disincorporation election officers, inspectors, and clerks, citizens must be electors and property taxpayers. While this provision does not need to satisfy strict scrutiny because it does not burden the right to vote, the State would not be able to establish that the property taxpayer requirement should be upheld under an equal protection analysis because it serves important state interests. *See Burdick*, 504 U.S. at 434. This provision can be severed because it meets the severability requirements that subsection I(F) of this Opinion discusses:

A. The board shall thereupon, by written order entered at length of record, appoint from the bona fide resident electors of the corporation, ~~who shall be property taxpayers therein,~~ officers, inspectors and clerks of election, to take the vote on the question of granting or rejecting the petition.

II. The Portion of A.R.S. § 9-215 that Requires Electors to Have Resided in the Municipality for the Six Months Preceding an Election Violates the Right to Participate in State Elections on an Equal Basis with Other Citizens in the Jurisdiction as Well as the Right to Travel, but This Determination Does Not Vitate the Entire Statute Because Its Unconstitutional Portion Is Severable from Its Constitutional One.

A. The Portion of A.R.S. § 9-215 that Requires Electors to Have Resided in the Municipality for the Six Months Preceding an Election Is Unconstitutional.

Section 9-215 establishes the qualifications for voting in the disincorporation election. After its unconstitutional provisions limiting electors to property taxpayers are severed as subsection I(F) of this Opinion discusses, it provides that to vote in a disincorporation election, electors must “possess the qualifications of electors for county officers” and must “have resided in the corporation six months next preceding the election.”

The requirement that electors have resided in the municipality for the six months preceding the election is unconstitutional. In *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972), the Supreme Court noted that States could constitutionally require that voters be bona fide residents of their relevant political subdivisions because that requirement “may be necessary to preserve the basic conception of a political community.” The Court distinguished bona fide residence requirements from durational residence requirements, however, noting that requirements that citizens have lived in the relevant political subdivision for a lengthy period to be eligible to vote severely burden not only the fundamental right to participate in state elections on an equal basis with other citizens in the jurisdiction but also the fundamental right to travel.⁶ *Id.* at 344. It therefore stated that such restrictions must be examined separately from bona fide residence requirements to determine whether they satisfy strict scrutiny. *Id.* at 336-43.

⁶ The Supreme Court has consistently recognized that the right to travel is a fundamental right, but has debated its precise textual source in the United States Constitution. *Jones v. Helms*, 452 U.S. 412, 417-19 (1981). When a statutory classification “impermissibly interferes with the exercise of a fundamental right,” it must satisfy strict scrutiny review under equal protection analysis. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

The Court rejected the argument that lengthy residence requirements were necessary to prevent nonresidents from fraudulently voting, noting that voter registration requirements and criminal penalties would better serve that purpose. *Id.* at 345-48, 353-54. The Court also rejected the argument that lengthy residence requirements were necessary to further the goal of having knowledgeable voters, noting that campaign and voter education activities in the month immediately preceding an election ensure that voters are informed about the candidates and issues. *Id.* at 354-60. The Court held that Tennessee's requirements that citizens have resided in the State for one year and in the county for three months before they could register to vote were not necessary to further any compelling state interest. *Id.* at 360. In doing so, it noted that while "[f]ixing a constitutionally acceptable period" was "a matter of degree," a thirty-day residency requirement appeared to be sufficient to allow a State "to complete whatever administrative tasks are necessary to prevent fraud." *Id.* at 348. Lower courts have subsequently held that six-month residency requirements are unconstitutional under *Dunn*. See, e.g., *Nicholls v. Schaffer*, 344 F. Supp. 238, 243 (D. Conn. 1972); *Mathews v. State Election Bd.*, 582 P.2d 1318, 1321 (Okla. 1978). The portion of A.R.S. § 9-215 that requires electors to have resided in the municipality for the six months preceding the election is therefore unconstitutional.

B. The Determination that a Portion of A.R.S. § 9-215 Is Unconstitutional Does Not Vitate the Entire Statute Because Its Unconstitutional Portion Is Severable from Its Constitutional Portion.

As subsection I(F) of this Opinion discusses, a determination that a portion of a statute is unconstitutional does not require that the entire statute be invalidated if two requirements are met. The first requirement is that the unconstitutional portion is severable from the constitutional portion. *Watson*, 120 Ariz. at 445, 586 P.2d at 1257. Severing the six-month

residency requirement along with the previously discussed property taxpayer requirement from A.R.S. § 9-215 leaves a statute that is effective and enforceable standing alone:

~~Electors in order to vote at the election shall possess the qualifications of electors for county officers, and shall have resided in the corporation six months next preceding the election, and shall be property taxpayers in the corporation, and their names shall appear upon the assessment or tax rolls of the corporation next preceding the day of election.~~

The second severability requirement is that the Legislature would have enacted the statute without its unconstitutional portion if the Legislature had known that the portion was invalid when it was enacting the statute. *Watson*, 120 Ariz. at 445, 586 P.2d at 1257. As discussed in subsection I(F) of this Opinion, where there is no severability clause or clear legislative history concerning severability, it is not possible to be certain about the Legislature's intent regarding severability. That may be especially true with respect to a statutory scheme like the one at issue here that the Legislature initially enacted over a hundred years ago. But courts will nevertheless uphold the constitutional portion of a statute that is complete and enforceable standing alone after its unconstitutional portion has been severed even without a severability clause or clear legislative history concerning severability unless (1) the statute's valid and invalid portions are so intimately connected with each other that they raise the presumption that the Legislature would not have enacted one without the other or (2) the invalid portion of the statute was what induced the Legislature to enact the statute. *Brown*, 194 Ariz. at 344, 982 P.2d at 819; *Watson*, 120 Ariz. at 445, 586 P.2d at 1257; *Eastin*, 116 Ariz. at 586, 570 P.2d at 754.

Applying that test here, nothing in the statutory scheme indicates (1) that the provision of the statutory scheme that allows only those who have resided in the municipality for the six months before the election to vote on disincorporation is so intimately connected with the scheme's valid provisions that it raises a presumption that the Legislature would not have

enacted one without the other or (2) that the Legislature was induced to enact the statutory scheme or to create the board of trustees form of government to benefit those who had resided in the municipality for the six months before the election. That being the case, the statutory scheme indicates that the Legislature enacted A.R.S. §§ 9-211 through 9-226 to allow the residents of cities and towns to be able to choose whether to disincorporate and to reincorporate under the board of trustees form of government and that it would still have wanted them to be able to make that choice if it had known that it had to allow those who had resided in the municipality for less than six months before the election to participate in the decision. The portions of the statutory scheme that remain after the provision that allows only those who have resided in the municipality for the six months before the election to vote on disincorporation is severed should therefore be upheld.

C. To Vote in a Disincorporation Election Under A.R.S. § 9-215, One Must Satisfy A.R.S. § 16-101(B)'s Requirements for Being a "Resident" and A.R.S. § 16-121(A)'s Requirements for Being a "Qualified Elector."

Once A.R.S. § 9-215's unconstitutional property taxpayer and six-month residency requirements are excised, it provides that "[e]lectors in order to vote at the election shall possess the qualifications of electors for county officers." County officers are elected in a general election held "[o]n the first Tuesday after the first Monday in November of every even-numbered year" for the election of, among others, county officers "whose terms expire at the end of the year in which the election is being held or in the following year." A.R.S. § 16-211. The qualifications to vote in that election are established by A.R.S. § 16-121(A), which provides that a "qualified elector for any purpose for which such qualification is required by law" is one who

is at least eighteen years old on or before the election date, is qualified to register to vote under A.R.S. § 16-101, and is properly registered to vote.⁷

To be qualified to register to vote under A.R.S. § 16-101(A), one must be a United States citizen, be at least eighteen years old on or before the date of the next regular election following registration, have been an Arizona resident for the twenty-nine days preceding the election (except as A.R.S. § 16-126 provides with respect to voting in a presidential election after one has left the state), be able to write or make one's mark unless a physical disability prevents one from doing so, not have been convicted of treason or a felony (unless one's civil rights have been restored), and not have been adjudicated an incapacitated person. Section 16-101(B) defines "resident" as a person who has an actual physical presence in Arizona (or for purposes of a political subdivision, an actual physical presence in the political subdivision), combined with an intent to remain. It further provides that a person can have only one residence for purposes of A.R.S. title 16.⁸

Under A.R.S. § 16-120, an elector must have "been registered to vote as a resident within the boundaries or the proposed boundaries of the election district for which the election is being conducted" and the county recorder or his designee must have received the registration before midnight of the twenty-ninth day preceding the election.

Since the constitutional portion of A.R.S. § 9-215 requires that to vote in a disincorporation election, electors must "possess the qualifications of electors for county officers," one who satisfies the preceding requirements for voting in county officer elections will also satisfy A.R.S. § 9-215's requirements for voting in a disincorporation election.

⁷ Section 16-121(A) defines qualified electors for any purpose "except as provided in A.R.S. § 16-126[,]" which governs the qualifications necessary to vote in a presidential election after moving from Arizona.

⁸ If a person's qualifications to vote are challenged on residency grounds under A.R.S. § 16-552(D) or A.R.S. § 16-591, A.R.S. § 16-593 provides the rules that govern the election board's determination of the person's residence.

III. To Satisfy A.R.S. § 9-212(A)'s Requirements that One Must Be a Bona Fide Resident and an Elector to Sign a Disincorporation Petition, One Must Satisfy A.R.S. § 16-101(B)'s Requirements for Being a "Resident" and A.R.S. § 16-121(A)'s Requirements for Being a "Qualified Elector."

Section 9-212(A) requires that those who sign disincorporation petitions be "bona fide residents" and "electors." Neither A.R.S. §§ 9-211 through 9-226 nor any other Arizona statutes define the term "bona fide resident." The term "bona fide" means "[m]ade in good faith," "without fraud or deceit," "sincere," or "genuine." *Black's Law Dictionary* 186 (8th ed. 2004). Although no statute defines the term "bona fide resident," A.R.S. § 16-101(B) defines "resident" for voter registration purposes as a person who has an actual physical presence in Arizona (or for purposes of a political subdivision, an actual physical presence in the political subdivision), combined with an intent to remain.

Statutes that deal with the same subject matter are deemed to be in pari materia and should be construed together as though they constitute a single law. *Reeves v. Barlow*, 227 Ariz. 38, 41-42, 251 P.3d 417, 420-21 (App. 2011) (looking to a different statute dealing with the same subject matter to help define a statutory term); *Heatec, Inc. v. R.W. Beckett Corp.*, 219 Ariz. 293, 295-96, 197 P.3d 754, 756-57 (App. 2008) (same). This is true even though the statutes were enacted at different times, do not refer to each other, and are located in different chapters of the Arizona Revised Statutes. *State v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970). Construing the term "bona fide resident" in A.R.S. § 9-212(A) to have the same definition as the term "resident" in A.R.S. § 16-101(B) is particularly appropriate because in the context of other statutory schemes, Arizona courts have defined the term "bona fide resident" as "a person who is in Arizona to reside permanently, and who, at least for the time being, entertains no idea of having or seeking a permanent home elsewhere," *St. Joseph's Hosp. & Med. Ctr. v. Maricopa Cnty.*, 142 Ariz. 94, 99, 688 P.2d 986, 991 (1984) (quoting *Sneed v.*

Sneed, 14 Ariz. 17, 21, 123 P. 312, 314 (1912)). That definition is consistent with A.R.S. § 16-101(B)'s definition of "resident."

The same analysis applies with respect to the meaning of "electors" in A.R.S. § 9-212(A). Although A.R.S. § 9-215 establishes the qualifications for electors who can vote in the disincorporation election *after* the disincorporation petition has been filed, there is no definition of the term "elector" in A.R.S. §§ 9-211 through 9-226 that would apply to petition signers. Section 16-121(A) provides that a "qualified elector for any purpose for which such qualification is required by law" is one who is at least eighteen years old on or before the election date, is qualified to register to vote under A.R.S. § 16-101, and is properly registered to vote. Since both statutes deal with electors, the two should be construed together and the term "elector" in A.R.S. § 9-212(A) should have the same meaning as the term "qualified elector" in A.R.S. § 16-121(A). To sign a disincorporation petition under A.R.S. § 9-212(A), a person would therefore have to meet the requirements for being a qualified elector under A.R.S. § 16-121(A) that subsection II(C) of this Opinion discusses.

Conclusion

The provisions in A.R.S. §§ 9-212 and 9-215 that allow only property taxpayers to petition for and to vote on disincorporation violate the Equal Protection Clause. This determination does not vitiate these statutes in their entirety because their unconstitutional provisions are severable from their constitutional ones.

Section 9-215 establishes the qualifications for voting in the disincorporation election. Its requirements that electors be property taxpayers and have lived in the municipality for the six months preceding the election are unconstitutional. When these unconstitutional provisions are severed, A.R.S. § 9-215 requires that electors "possess the qualifications of electors for county

officers.” Section 16-101(B) establishes the requirements for being a “resident” and A.R.S. § 16-121(A) establishes the requirements for being a “qualified elector” for purposes of county officer elections.

There are no definitions of the term “bona fide residents” in A.R.S. §§ 9-211 through 9-226, and no other Arizona statute defines the term. But A.R.S. § 16-101(B) defines “resident” for voter registration purposes as a person who has an actual physical presence in Arizona (or for purposes of a political subdivision, an actual physical presence in the political subdivision), combined with an intent to remain. The two statutes should be construed together, and the term “bona fide resident in A.R.S. § 9-212(A) should be given the same meaning as the term “resident” in A.R.S. § 16-101(B).

There is no definition of the term “electors” in A.R.S. §§ 9-211 through 9-226 that would apply to petition signers under A.R.S. § 9-212(A). But A.R.S. § 16-121(A) provides that a “qualified elector for any purpose for which such qualification is required by law” is one who is at least eighteen years old on or before the election date, is qualified to register to vote under A.R.S. § 16-101, and is properly registered to vote. The two statutes should be construed together and the term “elector” in A.R.S. § 9-212(A) should be given the same meaning as the term “qualified elector” in A.R.S. § 16-121(A).

Thomas C. Horne
Attorney General

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL August 27, 2014	No. I14-005 (R14-007) Re: Whether an employee “participates” in PSPRS when an employee who returns to work in a PSPRS designated position continues to receive the employee’s pension benefit and the Department makes a contribution to PSPRS on behalf of the employee
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To: Larry D. Voyles
Arizona Game and Fish Department Director

Questions Presented

You have asked whether an Arizona Game and Fish Department (“GAF”) employee who is receiving a retirement benefit from the Arizona Public Safety Personnel Retirement System (“PSPRS”) thereby “participates” in the PSPRS under Arizona Revised Statutes (“A.R.S.”) § 38-727(A)(1)(c) and is exempt from membership in the Arizona State Retirement System (“ASRS”).

Summary Answer

Under the statutes governing the PSPRS and the Arizona State Retirement System, a retired PSPRS member who returns to work with an employer participating in the ASRS and who receives PSPRS pension payments during such employment is not exempt from membership in ASRS if the PSPRS retiree otherwise satisfies the ASRS membership requirements during such period of reemployment.

Analysis

GAF has hired an employee who retired from a law enforcement position with the City of Glendale and is receiving a PSPRS pension benefit while working for GAF as permitted by A.R.S. § 38-849(H). The GAF hired the retired PSPRS member as a law enforcement specialist, which is a PSPRS-designated position in which the occupant ordinarily would meet all of the qualifications of being an active member of the PSPRS within the scope of the definition of a PSPRS “member” in A.R.S. § 38-842(31).

The reemployment of a retired member of the PSPRS is governed by A.R.S. § 38-849(H), which states as follows:

At any time following retirement, if the retired member becomes employed by an employer, other than the employer from which the member retired, in a position ordinarily filled by an employee of an eligible group, employee contributions shall not be made on the retired member’s account, and any service shall not be credited during the period of reemployment. The employer shall pay the alternate contribution rate pursuant to section 38-843.05.

Pursuant to A.R.S. § 38-849(H), while working for GAF, the PSPRS retiree will not receive PSPRS service credit nor will contributions be remitted to PSPRS on his behalf, but GAF will make the alternate contribution that A.R.S. § 38-843.05 requires.

The Legislature has mandated membership in the ASRS for all public officers and employees who meet three statutory membership requirements. First, an employee must be employed by the State of Arizona or a political subdivision of Arizona that is participating in the ASRS.

A.R.S. § 38-711(13) and (23)(a). Second, the employee’s position must be covered by the Social Security Section 218 Agreement between the United States and the State of Arizona, extending federal old age and survivors insurance to designated Arizona public officers and employees (“Section 218 Agreement”). A.R.S. § 38-727(A)(l).¹ Third, the officers and employees whose

¹ The Legislature enacted 2014 Ariz. Sess. Laws ch. 44 (effective July 24, 2014), eliminating the requirement that an employee’s position must be covered under Arizona’s Social Security Section 218 Agreement in order for an employee in

positions are covered under the Section 218 Agreement must be engaged to work at least twenty weeks in a fiscal year and at least twenty hours per week. A.R.S. § 38-711(23)(b). All public officers and employees who meet these three statutory requirements are subject to mandatory ASRS membership unless one of the exceptions in A.R.S. § 38-727(A)(1) applies.

The subject GAF employee appears to satisfy all three requirements for mandatory ASRS membership. The employee is employed by a participating ASRS employer because GAF is an agency of the State of Arizona. The position of GAF Law Enforcement Specialist is covered by Arizona’s Section 218 Agreement. Finally, assuming that GAF has engaged the PSPRS retiree to work at least twenty weeks in a fiscal year and at least twenty hours per week, the GAF employee meets the ASRS membership requirement and must participate in the ASRS unless the employee is exempt from ASRS participation.

In 2001, the Legislature amended the ASRS statute to exempt from membership in ASRS “any employee or officer who is eligible to participate and who participates in the elected officials’ retirement plan . . . ;^[2]the elected officials’ defined contribution retirement system . . . ;^[3]the public safety personnel retirement system . . . ;^[4]or the corrections officer retirement plan”^[5] 2001 Ariz. Sess. Laws ch. 136, § 7 (codified in 2001 as A.R.S. § 38-727(1)(e) and codified currently as A.R.S. § 38-727(A)(1)(c)). Accordingly, the PSPRS retiree employed by GAF is exempt from

that position to be eligible for ASRS membership. Since July 24, 2014, eligibility for ASRS membership is based on whether A.R.S. § 38-727 excludes a person from ASRS membership.

² A.R.S. §§ 38-801 through -822.

³ A.R.S. §§ 38-831 through -833.

⁴ A.R.S. §§ 38-841 through -860.

⁵ A.R.S. §§ 38-881 through -91

mandatory ASRS membership under A.R.S. § 38-727(A)(1)(c) only if the retiree is *participating* in the PSPRS. The issue is whether the receipt of PSPRS retirement benefits constitutes participation.

The term “participate” is not defined in the ASRS or PSPRS statutes. Accordingly, as provided in A.R.S. § 1-213, the term “shall be construed according to the common and approved use of the language.” “By declining to define a statutory term, the legislature generally intends to give the ordinary meaning to the word.” *Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 408, ¶ 18, 18 P.3d 713, 719, ¶ 18 (App. 2001). “[W]e will give terms ‘their ordinary meanings, unless the legislature has provided a specific definition or the context of the statute indicates a term carries a special meaning.’” *Kessen v. Stewart*, 195 Ariz. 488, 491, ¶ 6, 990 P.2d 689, 692, ¶ 6 (App.1999) (quoting *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 345, 903 P.2d 1101, 1103 (App. 1995)).

“Participate is defined as “to take part, be or become actively involved, or share (in).” *Collins Dictionary*, CollinsDictionary.com, <http://www.collinsdictionary.com/dictionary/english> (last visited Aug. 6, 2014); see also *Merriam-Webster Dictionary*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/participate> (last visited Aug. 6, 2014) (“*a*: to take part <always participates in class discussions> *b*: to have a part or share in something.”). *The American Heritage Dictionary*, defines “participate” as follows: “1. To be active or involved in something; take part: participated in the festivities. 2. To share in something: If only I could participate in your good fortune.” *The American Heritage* ® *Dictionary of the English Language* (5th edition, 2013), <http://www.yourdictionary.com/participate#americanheritage>, (last visited Aug. 21, 2014). [cite] *Black’s Law Dictionary* defines the term “participate” as follows: “to have a share in or to join in with others in an enterprise or an endeavor.” The Law Dictionary.com, <http://thelawdictionary.org/participate/> (last visited Aug. 6, 2014).

These definitions lend little to the analysis because they are subject to contrary applications in the context of whether the receipt of retirement benefits constitutes “participation” in PSPRS. We therefore look to the Agency’s interpretation of the statute. In Arizona, ‘the contemporaneous construction of a statute by those officials charged with its administration is entitled to great weight in arriving at its proper interpretation.’ *Police Pension Bd. v. Warren*, 97 Ariz. 180, 186, 398 P.2d 892, 895 (Ariz. 1965) (quoting *Long v. Dick*, 87 Ariz. 25, 347 P.2d 581 (Ariz. 1959)). In *Eastern Vanguard Forex, Ltd. v. Arizona Corporation Commission*, 206 Ariz. 399, 410, ¶ 35, 79 P.3d 86, 97, ¶ 35 (App. 2003), the court of appeals said the following: “[E]ven though we resolve questions of law involving statutory construction de novo, we give great deference to the agency’s interpretation and application of the statute.” Since the enactment in 2001 of what now is A.R.S. § 38-727(A)(1)(c), the ASRS has interpreted and applied the exemption from ASRS membership of an employee “who is eligible to participate and who participates in” any of the retirement plans listed in the statute as exempting from ASRS only an employee who is making contributions to and earning credited service in another plan.⁶

From the foregoing, we conclude that “participate” should be construed to mean actively contributing and accruing credited service rather than some other passive membership status such as retired, inactive or receiving long-term disability benefits. This conclusion is consistent with the conclusion reached on a similar question involving a retired corrections officer. In Ariz. Att’y Gen. Op. I01-018 (R00-056), the Attorney General opined that pursuant to A.R.S. § 38-727(1)(e) (now A.R.S. § 38-727(A)(1)(c)), a correctional officer who had retired under the Corrections Officer Retirement Plan (“CORP”) and had returned to work in a CORP-designated position was not exempt from mandatory membership in the ASRS. In that opinion, the Attorney General noted that A.R.S. §

⁶ Although this is ASRS’s long standing practice, it is not reflected in a rule or written policy.

38-884(J) (the statute that in 2001 governed the reemployment of a retired member of CORP) prohibited a CORP retiree from contributing to the CORP fund or from accruing credited service while working in a CORP-designated position, and as a consequence, precluded the employee from participating in CORP during such reemployment. Because the retired CORP member who returned to work in a CORP-designated position was not eligible to participate in CORP and was not otherwise exempt from the requirement that State employees participate in the ASRS, the Attorney General concluded that retired CORP members returning to work in CORP-designated positions had to participate in ASRS. Ariz. Att’y Gen. Op. I01-018 at 2.

Effective July 20, 2011, the Arizona Legislature required public employers to remit an Alternative Contribution Rate (“ACR”) to the applicable Arizona retirement system when a retiree returned to work in a public employment position. 2011 Ariz. Sess. Laws ch. 357, §§ 11, 20, 26 & 47 (adding A.R.S. §§ 38-766.02, -810.04, -843.05, and -891.01 within the ASRS, the Arizona Elected Officials’ Retirement Plan, the PSPRS, and the CORP statutes respectively). The Senate Fact Sheet for the legislation indicates that the Legislature established the ACR to mitigate the potential actuarial impact that a retired member who returns to work for an employer may have on ASRS, EORP, PSPRS, and CORP. Ariz. State Senate, *Final Amended Fact Sheet for S.B. 1609*, 50th Leg., 1st Reg. Sess., at 94(a) and (b) (May 10, 2011).

These statutes require participating public employers to remit an ACR in a percentage that the respective public retirement system actuarially determines on behalf of any retiree employed by the participating employer and occupying an employment position that would ordinarily be occupied by an actively contributing member of that retirement system. The ACR statutes, however, do not provide any associated benefit or service credit to the retired member on whose behalf the employer is remitting the ACR. The GAF ACR payment to the PSPRS pursuant to A.R.S. § 38-843.05

therefore does not render its employee who retired from the PSPRS as “participating” in the PSPRS for purposes of A.R.S. § 38-727(A)(1)(c).

Conclusion

A PSPRS retiree who is employed with GAF and who satisfies ASRS membership requirements is not “participating” in the PSPRS for purposes of the ASRS exclusion under A.R.S. § 38-727(A)(1)(c). A PSPRS retiree who is employed with GAF and who satisfies ASRS membership requirements must be enrolled in and contribute to the ASRS.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 30, 2014</p>	<p>No. I14-004 (R14-012)</p> <p>Re: Whether certain statutes apply to electronic cigarettes</p>
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To: The Honorable Steven B. Yarbrough
Arizona State Senate

Questions Presented

You asked for an opinion regarding whether certain Arizona statutes apply to a “vapor product,” more commonly known as an “electronic cigarette.” Specifically, you asked the following:

1. Are electronic cigarettes subject to any of the tobacco luxury taxes set forth in Arizona Revised Statutes (“A.R.S.”) title 42, chapter 3?
2. Do the smoking prohibitions in A.R.S. § 36-601.01 apply to electronic cigarettes?

Summary Answer

1. No. Electronic cigarettes as described in this Opinion are not subject to any of the tobacco luxury taxes set forth in A.R.S. title 42, chapter 3.
2. No. The smoking prohibitions of A.R.S. § 36-601.01 do not apply to electronic cigarettes.

Background

There is no definition of the term “electronic cigarette” under Arizona law. However, as you state, an electronic cigarette is also referred to and statutorily defined as a vapor product. Arizona law includes a criminal prohibition against furnishing electronic cigarettes to minors. *See* A.R.S. § 13-3622. Section 13-3622 defines “vapor product” as “a noncombustible tobacco-derived product containing nicotine that employs a mechanical heating element, battery or circuit, regardless of shape or size, that can be used to heat a liquid nicotine solution contained in cartridges.” A.R.S. § 13-3622(E)(3). Although this definition does not apply to the statutes at the center of your inquiry, it does describe the basic elements of the product commonly referred to as an electronic cigarette.

There are disposable, rechargeable, pen-style, and tank-style versions of electronic cigarettes.¹ The basic components in all versions include a battery and other accompanying electronics, a heating element, and a liquid nicotine solution that is heated to create a vapor (also referred to as an aerosol) that the user inhales. *See* source cited at note 1. The liquid nicotine in electronic cigarettes is “derived” from tobacco. *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir. 2011). In contrast, combustible cigarettes contain actual pieces of tobacco that are ignited and then continue to burn. However, given the infancy of this product market and the current exponential advancement of technology, different versions may already exist or will be created shortly. This Attorney General opinion is limited to an analysis of electronic cigarettes in the forms described above.

¹ Rachel Grana, Neal Benowitz, Stanton A. Glantz, *Background Paper on E-cigarettes (Electronic Nicotine Delivery Systems)*. Center for Tobacco Control Research and Education, University of California, San Francisco, a WHO Collaborating Center on Tobacco Control. Prepared for World Health Organization Tobacco Free Initiative. December 2013. <http://pvw.escholarship.org/uc/item/13p2b72n>.

The use of electronic cigarettes has increased significantly in recent years, prompting States to consider regulatory options that include the implementation of luxury taxes, age restrictions, and limitations on where electronic cigarettes can be used. Some States such as New Jersey and Utah have expanded their “smoke-free” prohibitions to include electronic cigarettes. *See* N.J. Rev. Stat. § 26:3D-56(c) & -57(3); Utah Code Ann. § 26-38-2 and -3. The United States Food and Drug Administration (“FDA”) has proposed that electronic cigarettes be subject to the Federal Food, Drug, and Cosmetic Act (“the FD&C Act”).² This legislative and regulatory activity is taking place as public health concerns have arisen based on the still-uncertain health effects from use of or exposure to electronic cigarettes. The FDA’s current position is that “[w]e do not currently have sufficient data about e-cigarettes to determine what effects they have on the public health.” *See* source cited at note 2. The FDA refers to potential cessation benefits while acknowledging the “existence of toxicants in both the e-cigarette liquid and the exhaled aerosol of some e-cigarettes.” *Id.* Notwithstanding the emergent regulatory developments, the essential characteristics of e-cigarettes currently on the market provide a sufficient basis to render an opinion in response to the two questions that you pose.

Analysis

1. Arizona’s Luxury Tax on Tobacco Products Does Not Apply to Electronic Cigarettes.

The first question is whether electronic cigarettes, as described above, are subject to the tobacco luxury taxes in A.R.S. title 42, chapter 3. Arizona imposes luxury taxes on tobacco products at rates that vary by category of tobacco product. A.R.S. §§ 42-3052(5)-(9), -3251, -3251.01, -3251.02. The categories of tobacco products subject to Arizona’s luxury tax are

² Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, Vol. 79, No. 80, Fed. Reg. 23142, 23157 (proposed April 25, 2014) (to be codified at 21 CFR pts. 1100, 1140, and 1143).

enumerated at A.R.S. § 42-3052(5)-(9). These subsections define “cigar,” “cigarette,” and “tobacco products.” A.R.S. § 42-3001(3), (4), (18). However, the definition of “tobacco products” is merely a reference to the categories of tobacco products listed in A.R.S. § 42-3052(5)-(9).³ The remaining tobacco product categories set forth in A.R.S. § 42-3052(5)-(9) are not defined in the statute, the Arizona Department of Revenue has not promulgated any administrative rules that further describe these categories, and no court has provided a more detailed description of these categories. The answer to your inquiry therefore turns on whether the statutory definitions apply to an electronic cigarette as described above.

Cigarettes and cigars, as defined under Arizona law, are both composed of, among other things, a “roll of tobacco.” A.R.S. § 42-3001(3) (defining “cigar” as “any roll of tobacco”); (4) (defining “cigarette” as “[a]ny roll of tobacco”).⁴ Electronic cigarettes do not contain rolls of tobacco or even pieces of tobacco. Consequently, electronic cigarettes do not come within the existing legislative definitions of the terms “cigar” or “cigarette” for purposes of Arizona’s luxury tax on those products.

This leaves the remaining types of “tobacco products” in title 42, specifically smoking tobacco, snuff, fine cut chewing tobacco, cut and granulated tobacco, shorts and refuse of fine cut chewing tobacco, refuse, scraps, clippings, cuttings and sweepings of tobacco, cavendish, plug, and twist tobacco. A.R.S. § 42-3052(6)-(7). According to Arizona Luxury Tax Ruling LTR 04-2, all tobacco products included in A.R.S. § 42-3052(6)-(7) are composed of either tobacco leaves or pieces of tobacco. Arizona Department of Revenue, *Arizona Luxury Tax Ruling*, LTR 04-2 (2004) (citing *Tobacco Encyclopedia* (Ernst Voges ed., 1984)). Again,

³ This definition also cross-references an article and a statute that have both been repealed.

⁴ The phrase “or any substitute for tobacco” has been stricken from this definition of cigarette, effective July 24, 2014. See 2014 Ariz. Sess. Laws, ch. 160, § 5.

because electronic cigarettes as described above do not contain tobacco leaves or pieces, they do not come within the categories of tobacco products set forth in A.R.S. § 42-3052(6)-(7).

The same result follows when applying dictionary definitions to the terms used to describe the tobacco products in LTR 04-2. See A.R.S. § 1-213 (“Words and phrases shall be construed according to the common and approved use of the language.”); *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990) (stating that absent statutory definitions, courts refer to dictionary definitions to construe a statute’s terms); see also *State v. Mahaney*, 193 Ariz. 566, 568, 975 P.2d 156, 158 (App. 1999) (relying on *Webster’s College Dictionary* for the definition of a word undefined by statute).

Snuff is “powdered tobacco” that is sniffed, chewed, or rubbed on the gums. *Webster’s New World College Dictionary* 1359 (4th ed., 1999). Cavendish is sweetened tobacco pressed into a cake form. *Id.* at 234. Plug is another version of tobacco pressed into cake form or pieces of chewing tobacco. *Id.* at 1108. The other listed tobacco products actually include the word “tobacco,” compelling the conclusion that each of them actually contains tobacco. This provides further support for the conclusion that electronic cigarettes do not come within the tobacco product categories set forth in A.R.S. § 42-3052(6) and (7).

Presently, Minnesota alone applies its tobacco luxury tax statutes to electronic cigarettes. Minnesota Department of Revenue, *Revenue Notice #12-10: Tobacco Products Tax–Taxability–E-Cigarettes* (2012). However, Minnesota’s luxury tax statute defines “tobacco products” to include any products “derived from tobacco.” Minn. Stat. § 297F.01(19). The liquid nicotine in electronic cigarettes is derived from tobacco. *Sottera*, 627 F.3d at 893. Accordingly, Minnesota’s luxury tax definitions embrace electronic cigarettes while Arizona’s do not.

The “derived from tobacco” phrasing was also essential to the FDA’s recent decision to issue proposed rules that subject electronic cigarettes to the FDA’s regulatory authority over “tobacco products.” *See* source cited at note 2. Like the Minnesota statute, the FD&C Act defines “tobacco products” to mean, among other things, any product “derived from tobacco.” 21 USC § 321(rr)(1).⁵ The Arizona statute does not include the “derived from” language or any other terms broad enough to apply to electronic cigarettes. Accordingly, electronic cigarettes are not subject to Arizona’s tobacco luxury taxes set forth in A.R.S. title 42, chapter 3.

2. The Smoking Prohibitions in A.R.S. § 36-601.01 Do Not Apply to Electronic Cigarettes.

The second question is whether the smoking prohibitions in A.R.S. § 36-601.01 (also referred to as “Smoke-Free Arizona”) apply to electronic cigarettes. Proposition 201 added Smoke-Free Arizona to Arizona law on the 2006 General Election ballot, which Arizona voters approved on November 7, 2006. It prohibits “smoking . . . in all public places and places of employment” with a number of express exemptions. A.R.S. § 36-601.01(B). The statute defines the act of “smoking” as “inhaling, exhaling, burning, or carrying or possessing any lighted tobacco product, including cigars, cigarettes, pipe tobacco, and any other lighted tobacco product.” A.R.S. § 36-601.01(A)(11). Smoke-Free Arizona does not define “tobacco product” or “lighted,” no court has provided a more detailed description of these terms as used in this statute, and the Arizona Department of Health Services (“DHS”) has not promulgated a regulation that provides a more detailed description of either term.⁶

⁵ The FDA specifically noted that this does not mean that electronic cigarettes meet the definition of “tobacco product” for federal excise tax purposes because the applicable excise tax statute does not include the “derived from” language. *See* note 2 (citing 26 U.S.C. § 5702(c)).

⁶ The DHS has not promulgated a regulation that defines “lighted.” It has promulgated a regulation that defines “tobacco products and accessories” to include, in part, “[s]moking materials such as cigars, cigarettes, and pipe tobacco.” Ariz. Admin. Code R9-2-101(24)(a). The term “smoking materials,” like the term “tobacco products” in A.R.S. § 42-3001(18), essentially embraces other defined terms that do not include electronic cigarettes.

Given that the word “smoking” is limited to specific behavior with regard to “any lighted tobacco product,” the answer depends on whether an electronic cigarette is “lighted” and, if so, whether it is a “tobacco product.” The applicable dictionary definition of “lighted” is “to set on fire; ignite.” *Webster’s New World College Dictionary* 829. All sources of information on electronic cigarettes indicate that there is no fire or ignition involved in their use. *See* A.R.S. § 13-3622(E)(3) (defining vapor products as having a “heating element” used to “heat” liquid nicotine to create a vapor that is inhaled); source cited in note 1 (providing a diagram addressing the design of an electronic cigarette, which includes a heating element used to vaporize the nicotine solution); *Sottera*, 627 F.3d at 893 (explaining that electronic cigarettes contain a heater known as an “atomizer” that vaporizes the nicotine). Instead, as explained above, electronic cigarettes use a battery as a power source to generate heat in the heating element, and this heat results in the liquid nicotine converting to vapor. In contrast, combustible tobacco products such as cigars, cigarettes, and pipes must all be “lighted” to be used as intended, i.e., to inhale the smoke generated from burning tobacco.

Moreover, Proposition 201’s “Findings and Declaration of Purpose” section states the Proposition’s intent as being to protect people from “the health risks of breathing secondhand tobacco smoke.” *Publicity Pamphlet, Ballot Proposition and Judicial Performance Review*, Arizona (2006); *Heath v. Kiger*, 217 Ariz. 492, 496, 176 P.3d 690, 694 (2008) (acknowledging that courts are able to consider publicity pamphlet information that Arizona’s Secretary of State publishes related to a Proposition). The Proposition materials do not suggest that the Proposition applies to anything other than actions that result in tobacco smoke, the byproduct of burning tobacco. The statutory language, legislative history, and common meaning of statutorily undefined terms all indicate that use of the word “lighted” was intended to apply only to the

burning of a tobacco product, which results in smoke, and not to the use or possession of any product that does not need to be burned, such as an electronic cigarette.

To the contrary, the statute's language and legislative history make clear that Smoke-Free Arizona allows the use of nonlighted tobacco products such as chewing tobacco. For that reason, even if an electronic cigarette was determined to be a tobacco product, its use would nevertheless fall outside Smoke-Free Arizona's prohibitions. However, because of their other qualities, the electronic cigarettes now on the market are not tobacco products under Smoke-Free Arizona in the first instance. Nothing in the statute or legislative history suggests that "smoking" or "tobacco product and accessories" includes electronic cigarettes. The aforementioned definitions of "smoking" and "tobacco product and accessories" both include the same three examples of tobacco products (i.e., cigarettes, cigars, and pipe tobacco), which supports the interpretation that "tobacco products" as used in the statute applies only to products that contain actual pieces of tobacco. The statute's stated intent of protecting people from "secondhand tobacco smoke," which is the byproduct of burning actual pieces of tobacco, further supports this interpretation.

Other States are likewise attempting to determine whether or to what extent their smoking provisions apply to electronic cigarettes. The Kansas Attorney General has concluded that the Kansas Indoor Clean Air Act does not apply to electronic cigarettes because it defines "smoking" as "possession of a *lighted* cigarette, cigar, pipe or *burning tobacco in any other form* or device designed for the use of tobacco." Kansas Attorney General Opinion No. 2011-015 (2011) (citing Kansas Statutes Annotated 2010 Supp. 21-4009(o)) (emphasis added). The Kansas Attorney General concluded that electronic cigarettes are not lighted and do not produce "burning tobacco." *Id.* The New Jersey Smoke Free Act was amended to expand its definition of "smoking" to include the inhaling of "vapor from an electronic smoking device." *See* N.J.

Rev. Stat. § 26:3D-57(3) (as amended by 2009 N.J. Sess. Law Serv. Ch. 182 (assembly 4227 and 4228) (West)). The definition of “electronic smoking devices” includes electronic cigarettes. *Id.* It does not appear that any State has analyzed statutory language similar to that contained in Smoke-Free Arizona and decided that it applies to electronic cigarettes. Based on commonly accepted definitions, the publicity pamphlet information, and other States’ interpretations of similar statutes, the smoking prohibitions of Smoke-Free Arizona do not apply to electronic cigarettes.

Conclusion

Electronic cigarettes are not subject to the Arizona tobacco luxury taxes set forth in A.R.S. title 42, chapter 3. The smoking prohibitions of A.R.S. § 36-601.01, also known as Smoke Free Arizona, do not apply to electronic cigarettes.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 15, 2014</p>	<p>No. I14-003 (R14-011)</p> <p>Re: Regulation of Fire District Boards</p>
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To: Honorable Andy Tobin
Speaker of the Arizona House of Representatives

Questions Presented

You have asked for an opinion on the following questions:

1. If a fire district board member is related to an employee by affinity (marriage) or by blood relation (consanguinity within the third degree), may that board member serve out the term of his or her office or does Arizona Revised Statutes (A.R.S.) § 48-805.03 require the board member to resign? In the alternative, may the relative or spouse resign instead of the board member?
2. Does the requirement that board members and fire chiefs be trained in "other matters that are reasonably necessary for the effective administration of a fire district," A.R.S. § 48-803(H), mandate a specific type of training, and does an association of Arizona fire districts have the discretion to determine what types of training satisfy this requirement?

3. Will board members or chiefs be entitled to “credit” for attending past training sessions sponsored by the Arizona Fire District Association toward their training requirement under A.R.S § 48-803(H)?

Summary Answers

1. If a board member and an employee are spouses, either the board member or the employee must resign immediately. If a board member and an employee are related, but are not spouses, then the board member need not resign.

2. The requirement to complete training on “other matters that are reasonably necessary for the effective administration of a fire district” does not mandate any particular type of training. Any training will satisfy this requirement so long as it is reasonably connected to the district’s administration. Associations of Arizona fire districts therefore have discretion, but not unlimited discretion, to create training programs to satisfy this section.

3. No. A board member or newly hired fire chief may not use past training sessions to satisfy the training requirement in A.R.S. § 48-803(H).

Background

Fire districts are political subdivisions of the State charged with providing fire services within specified areas. *See generally* A.R.S. § 48-805. Three-, five-, or seven member boards manage the districts. A.R.S. § 48-803(A). The board members are elected under the procedures outlined in A.R.S. § 48-802.

In 2013, the Legislature created a committee to study the performance of Arizona’s fire districts and to recommend ways in which the districts might be improved. *See* 2013 Ariz. Sess. Laws ch. 104, § 1. Based in part on these recommendations, the Legislature made a number of changes to the management of fire districts. *See* 2014 Ariz. Sess. Laws ch. 252 (S.B. 1387); *see*

also Ariz. H.R., House Summary as Transmitted to the Governor for S.B. 1387, 51st Legis., 2d Reg. Sess. (4/23/14), at 1. These changes were deemed “emergency measure[s] . . . necessary to preserve the public peace, health or safety” and went into effect immediately, on April 30, 2014, upon signature by the Governor. See 2014 Ariz. Sess. Laws ch. 252, § 15 (S.B. 1387)

Your questions involve several of these statutory changes. In interpreting these changes, the chief goal is to fulfill the intent of the legislature that wrote them. *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003). Determining the legislature’s intent begins with examining the language of the statute itself. *Id.* “If the language is clear,” then it should be applied “without resorting to other methods of statutory interpretation, unless application of the plain meaning would lead to impossible or absurd results.” *Id.* (internal citation and quotation marks omitted).

Analysis

A. Family relationships between board members and fire district employees.

There are two sets of provisions bearing on family relationships between board members and district employees. The first set of provisions governs spouses; the second set of provisions governs all other relatives.

- 1. If a board member is married to a district employee, either the board member or the employee must immediately resign.**

The first provision bearing on family relationships is A.R.S. § 48-805.03(B), which provides in relevant part that “the spouse of an employee of a fire district may not hold membership on the governing board of the fire district that employs that employee.” Violation of this provision is a class two misdemeanor. A.R.S. § 48-805.03(D). The terms of this provision are absolute: a person may not serve on a district board if he or she is married to a district employee. Accordingly, a board member who is married to an employee faces *immediate*

criminal liability if he or she continues to serve on the board. The board member therefore may not serve out the remainder of his or her term and should resign immediately.

Alternatively, the employee-spouse may immediately resign instead of the board member. However, the statute makes the *board member* criminally liable, not the employee-spouse. Accordingly, the primary duty to resolve the conflict lies with the board member. If the employee-spouse immediately resigns, that will also resolve the conflict. But if the employee-spouse does not immediately resign, then the board member must immediately resign or face criminal liability.

2. A board member need not resign if the board member is related to a non-spouse employee.

The second set of relevant restrictions governs non-spouse employees. Under A.R.S. § 48-805.03(A),

[i]t is unlawful for an elected or appointed officer or employee of a fire district to do any of the following:

1. Appoint or vote for appointment of any person who is related to that officer or employee by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of that fire district when the salary, wages or compensation of that appointee is to be paid from public monies or fees.
2. Appoint, vote for or agree to appoint or to work for, suggest, arrange or be a party to the appointment of any person in consideration of the appointment of a person who is related to that officer or employee within the degree prescribed by this section.

Violating these provisions is also a class two misdemeanor. A.R.S. § 48-805.03(D).

These provisions are narrower than the employee-spouse provisions in subsection (B). Unlike subsection (B), subsection (A) does not criminalize mere service on the board when a family member is also an employee. Instead, it criminalizes only (1) directly appointing or voting for the appointment of family members at taxpayer expense; or (2) assisting in the

appointment of someone else *in exchange for* the appointment of a family member. Because these provisions apply only to the initial “appoint[ment]” of non-spouse family members, they do not apply where the family-member employee has already been appointed. Accordingly, § 48-805.03(A) does not require board members who are related to non-spouse employees to resign their positions.

B. A Fire District’s Discretion to Determine What Training Programs Are “Reasonably Necessary for the Effective Administration of a Fire District.”

Under A.R.S. § 48-803(H), fire chiefs and board members must attend professional training provided by an association of Arizona fire districts. “The professional development training must include training on open meetings laws, finance and budget matters and laws relating to fire district governance and other matters that are reasonably necessary for the effective administration of a fire district.” *Id.* At the end of the year, the association that provided the training must submit a report “that describes the compliance with the training requirements to the county board of supervisors for every county in which the fire district operates.” A.R.S. § 48-803(I). Among other things, the report must include “[a] compilation of the professional development training delivered by the association.” *Id.*

Board members and fire chiefs who fail to meet their training requirements are “guilty of nonfeasance in office.” A.R.S. § 48-803(J). “Any person may make a formal complaint to the county board of supervisors regarding this failure to comply, and the county board of supervisors may submit the complaint to the county attorney for possible action.” *Id.* After receiving a complaint, “[t]he county attorney may take appropriate action to achieve compliance, including filing an action in superior court against a fire district governing board member or a fire chief for failure to comply with the professional development training requirements prescribed in this section.” *Id.* “If the court determines that a fire district governing board member or fire chief

failed to comply with the professional development training requirements prescribed in this section, the court shall issue an order removing the fire district governing board member from office or the fire chief from employment or appointment with the district.” *Id.*

The training provided must include training on “open meetings laws, finance and budget matters and laws relating to fire district governance and other matters that are reasonably necessary for the effective administration of a fire district.” A.R.S. § 48-803(H). You have asked whether any particular type of training falls within the category of “other matters that are reasonably necessary for the effective administration of a fire district.” The answer is no. Neither the statute nor its legislative history defines “matters that are reasonably necessary for the effective administration of a fire district.” Accordingly, the guiding principle is reasonableness. If the subject of the training may reasonably be thought necessary for the administration of a fire district, then it satisfies the statute.

Given the breadth of the term “reasonably,” it follows that fire district associations have discretion to determine what training to provide. However, the oversight provisions in subsection (J) demonstrate that this discretion is not unlimited. Fire district associations must submit their training records to the board of supervisors in every county in which they operate. A.R.S. § 48-803(I). That accountability demonstrates a legislative intent to vest county boards with sufficient oversight powers to ensure that training covers “matters that are reasonably necessary for the effective administration of a fire district.”

Similarly, subsection (J) allows any person to report a failure to comply with the training requirements. A county attorney may seek to remove a noncompliant fire chief or board member by filing an action in superior court. In determining whether to remove a board member or fire chief for failure to complete the training, the superior court will consider the scope of the word

“reasonably.” It will also likely consider the fire district association’s expertise in the management of fire districts. Ultimately though, the superior court must apply its own judgment to determine what is “reasonably necessary for the effective administration of a fire district.” *Cf. Chaney Bldg. Co., Inc. v. Sunnyside Sch. Dist. No. 12*, 147 Ariz. 270, 273, 709 P.2d 904, 907 (App. 1985) (“[C]ourts need not defer to administrative expertise unless they are convinced that the administrator is reasonably exercising this expertise.”) (quoting *New Pueblo Constr., Inc. v. State*, 144 Ariz. 95, 103, 696 P.2d 185, 193 (1985)). In sum, the statute gives fire district associations discretion to develop sufficient training programs, subject to oversight by county boards, and, ultimately, to a superior court’s determination that the training covered matters reasonably necessary to efficiently administer fire districts, based on the facts and circumstances.

C. Use of Past Training Sessions to Satisfy the Training Requirement in A.R.S. § 48-803(H).

With exceptions not relevant here, A.R.S. § 48-803(H) provides as follows:

Beginning with the 2014 general election . . . all persons who are elected or appointed to a fire district board and the fire chief who is appointed or hired by the district board shall attend professional development training that is provided by an association of Arizona fire districts. District board members and the fire chief shall complete at least six hours of professional development training, with board members completing their training within one year after the date of the certification of their election and for the fire chief, within one year after the date of hiring.

You asked whether board members and fire chiefs may use past training sessions to satisfy this requirement.

1. Board Members May Not Use Past Training Sessions to Satisfy the Training Requirement.

The statute provides that board members must complete their training “within one year *after* the date of the certification of their election.” *Id.* (emphasis added). Because this provision

specifically requires board members to complete their training “after” their election, board members cannot count prior training hours toward their training requirement.

2. Newly Hired Fire Chiefs May Not Use Past Training Sessions to Satisfy the Training Requirement.

The statute similarly provides that newly hired fire chiefs must complete “their training within one year *after* the date of hiring[.]” *Id.* (emphasis added). As with board members, this provision specifically requires newly appointed fire chiefs to complete their training “after” their appointment. Accordingly, newly appointed fire chiefs cannot count prior training hours toward their training requirement. Note, however, that this requirement applies only to appointed fire chiefs “[b]eginning with the 2014 general election.” Accordingly, the training requirement applies only to *newly hired* fire chiefs. Fire chiefs hired before the 2014 general election need not comply with the training requirement.

Conclusion

Board members may not continue to serve on a fire district board if the district employs their spouses. However, board members who have *non-spouse* relatives that are employed by their district may continue to serve. Fire district associations have discretion, but not unlimited discretion, to develop training programs “that are reasonably necessary for the effective administration of a fire district.” Board members and newly appointed fire chiefs may not use prior training sessions to satisfy the training requirement in A.R.S. § 48-803(H).

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>February 28, 2014</p>	<p>No. I14-002 (R14-002)</p> <p>Re: Interpretation of Arizona Law dealing with real estate broker's licensure as it relates to managing properties.</p>
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To: The Honorable Steve Pierce
Arizona State Senate

Question Presented

You asked for an opinion regarding real estate broker license exemptions under Arizona Revised Statutes ("A.R.S.") §§ 32-2101(48) and 2121(A)(1). Specifically, you asked the following:

1. Is a real estate broker's license required when a company that owns a property is a different legal entity from the company that manages the property, for compensation, but the same individuals control both companies?
2. Is an individual or an entity that is otherwise required to be licensed as a real estate broker exempt from licensure under A.R.S. § 32-2121(A)(1) if the individual or entity is managing his or her own property without receiving any special compensation?

Summary Answer

1. Yes. Pursuant to A.R.S. § 32-2101(48), a real estate broker license is required whenever a person or entity engages in real estate activity for another and for compensation¹.
2. Yes. Under A.R.S. § 32-2121(A)(1), an individual or entity is exempt from licensure when conducting real estate activity for the person's or entity's own property without receiving any special compensation.

Background

An Arizona Department of Real Estate (“Department”) statute defines real estate broker activities involving property management. That definition includes a list of several real estate activities and defines a real estate broker as “a person, other than a salesperson, who for another and for compensation” manages property. A.R.S. § 32-2101(48). A second statute further clarifies that a limited exemption from the license requirement exists for a natural person or an entity that is managing the person's or the entity's own property. A.R.S. § 32-2121(A)(1).

Analysis

The question presented is based on the premise that the company that owns the property is a different legal entity than the company that manages the property. Arizona Revised Statutes §§ 32-2121(A)(1) and 2101(48) both clearly limit exemptions for licensure to situations where individuals or entities are managing their own property. As explained below, because the company that manages the property does not own the property, these exemptions would not apply.

In interpreting a statute, the primary goal is to ascertain and implement legislative intent. *E.g., Harris Corp. v. Ariz. Dep't of Revenue*, 233 Ariz. 377, 381, ¶ 13, 312 P.3d 1143, 1147

¹ Compensation is any fee, commission, salary, money or other valuable consideration for services rendered or to be rendered as well as the promise of consideration whether contingent or not. A.R.S. § 32-2101(16). The Arizona Department of Real Estate construes compensation broadly.

(App. 2013). The statute's plain language is the most reliable indicator of its meaning. *Id.* Unless the statutory language is ambiguous, the statute's plain meaning governs. *Id.*

Pursuant to A.R.S. § 32-2101(48), "real estate broker means a person, other than a salesperson, who *for another* and for compensation" manages property. (Emphasis added.)

A narrow exemption from licensure exists under A.R.S. § 32-2121(A)(1) for individuals or entities that manage the *person's or the entity's own property* and do not receive special compensation or other consideration. Section 32-2121(A)(1) provides:

A. The provisions of this article do not apply to:

1. A natural person, a corporation through its officers, a partnership through its partners or a limited liability company through its members or managers that deals in selling, exchanging, purchasing, renting, leasing, managing or pledging *the person's or entity's own property*, including cemetery property and membership camping contracts, and that does not receive special compensation for a sales transaction or does not receive special compensation or other consideration including property management fees or consulting fees for any property management services performed, if the majority of an officer's, partner's, member's or manager's activities do not involve the acts of a real estate broker, cemetery broker or membership camping broker as defined in section 32-2101.

(Emphasis added.)

Consequently, the exemption is limited to the property owner. These statutes provide a bright-line rule and create a narrow exemption. The Department does not have discretion to make a case-by-case determination, considering the relationship of the two companies or the individuals controlling them or each company's structure and membership.

A 1963 Attorney General Letter Opinion also analyzed the A.R.S. § 32-2121(A)(1) exemption. Ariz. Op. Att'y. Gen. Op. 63-22-L. In the Letter Opinion, Attorney General Pickrell considered whether a person who was a corporate officer needed a real estate license to sell

property that the corporation owned when that person's only compensation was based on a set fee per unit. The Letter Opinion also considered whether a corporate officer needed a real estate license to sell property that the corporation owned when that person was on a salary and his only duties involved real estate sales. In both instances, the Attorney General concluded that the exemption did not apply and that the statute required a real estate license for those individuals. Although the statute's language has changed, the Letter Opinion's analysis is still relevant and provides further support for the conclusion that the exemption is narrow.

Conclusion

Arizona law regarding license exemptions for real estate brokers is clear and limited. The law requires a real estate broker's license when a company that owns the property is a different legal entity from the company that manages the property, regardless of company ownership or control. Furthermore, an individual or an entity is exempt from licensure under A.R.S. § 32-2121(A)(1) only if the individual or the entity is managing the *individual's or entity's own property* and does not receive special compensation or other consideration. In the question presented, one company owns the property and another company manages the property. Given those facts, the statute clearly requires the company managing the property to be licensed.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>January 30, 2014</p>	<p>No. I14-001 (R13-020)</p> <p>Re: Regulation of the Alarm Industry Pursuant to A.R.S. § 32-122.07(A)</p>
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To: Melissa Cornelius, Executive Director
Arizona Board of Technical Registration

Questions Presented

You asked for an opinion on the following questions regarding Arizona Revised Statutes ("A.R.S.") § 32-122.07(A), which outlines specific criminal convictions for which the Arizona Board of Technical Registration (the "Board") should deny certification to an alarm business or an alarm agent:

1. Does A.R.S. § 32-122.07(A) require the Board to deny an application for certification in the alarm industry based on any prior conviction for one of the enumerated crimes regardless of when the conviction occurred or whether the applicant's civil rights have since been restored?
2. Do the categories of crimes included in A.R.S. § 32-122.07(A) as grounds for denial of an application for certification in the alarm industry include both felony and misdemeanor convictions?

3. Is A.R.S. § 32-122.07(A)'s requirement that the Board deny an application for certification in the alarm industry for any prior felony or misdemeanor conviction for one of the crimes listed in the statute constitutional?

Summary Answers

1. Yes. Section 32-122.07(A) states that the Board "shall deny" an application for certification if the applicant has been convicted of any of the crimes listed in the statute. Other than an explicit three-year limitation on prior drug-related convictions, the statute does not include any temporal limitation on convictions that are grounds for denial of certification. Moreover, it does not create any exception to existing Arizona law that permits the denial of an occupational license to an applicant whose civil rights have been restored so long as the offense underlying the applicant's prior conviction is reasonably related to the functions of the occupation for which the license is sought. Through the plain language of the statute, the Legislature demonstrated its intent not to give the Board any discretion and instead required the Board to deny any applicant who has ever been convicted of one of the enumerated crimes.

2. Yes. Section 32-122.07(A) provides that the Board shall deny an application for certification if the applicant has ever been convicted of one of the specific crimes listed in the statute. The statute does not distinguish between misdemeanor and felony convictions. Given the plain language of § 32-122.07(A) and the fact that the Legislature did not expressly distinguish between felonies and misdemeanors, as it has in other statutes, it is clear that the Legislature intended § 32-122.07(A) to require the Board to deny applicants who have prior felony or misdemeanor convictions for the crimes referenced by the statute.

3. Yes. Under the appropriate equal protection analysis, § 32-122.07(A) is constitutional because the statute's requirement that the Board deny certification to any applicant

who has been convicted of one of the thirteen designated crimes is rationally related to the State's interest in protecting the public by regulating alarm professionals whose work directly affects the safety and property of Arizonans.

Background

Under Arizona law, a person shall not (1) operate an alarm business or (2) work as an alarm agent unless the person obtains the proper certification from the Board. A.R.S. §§ 32-121, -122.05(A), -122.06. Section 32-101(4)(a) defines an "alarm business" as "any person who, either alone or through a third party, engages in the business of either of the following: (i) Providing alarm monitoring services. (ii) Selling, leasing, renting, maintaining, repairing or installing a nonproprietor alarm system or service." Additionally, the statute defines an "alarm agent" as "a person, whether an employee, an independent contractor or otherwise, who acts on behalf of an alarm business and who tests, maintains, services, repairs, sells, rents, leases or installs alarm systems." A.R.S. § 32-101(3)(a).

As part of the application to the Board for certification, each alarm agent and controlling person of an alarm business must submit a completed fingerprint card for a background check. A.R.S. §§ 32-122.05(A), -122.06(B). Section 32-122.07(A) provides in pertinent part:

- A. The board shall deny an application for certification as an alarm business or alarm agent if a controlling person of an alarm business or an alarm agent has been convicted of any of the following:
 1. Theft.
 2. Burglary.
 3. Robbery or armed robbery.
 4. Criminal trespass.
 5. Sexual abuse of a vulnerable adult.
 6. Abuse of a vulnerable adult.
 7. Sexual assault.
 8. Any offense involving the exploitation of a minor.
 9. Molestation of a child.
 10. Homicide, including first or second degree murder and negligent homicide.

11. Distribution, manufacture or sale of marijuana, dangerous drugs or narcotic drugs if committed less than three years before the date of applying for certification.
12. Kidnapping.
13. Fraud by persons authorized to provide goods or services.

Analysis

A. Section 32-122.07(A) Requires the Board to Deny an Alarm Industry Certification Application if the Applicant Has Ever Been Convicted of Any of the Enumerated Crimes.

Section 32-122.07(A) provides that “[t]he board shall deny an application for certification as an alarm business or alarm agent” in the event the applicant “has been convicted” of any one of thirteen enumerated crimes. With the exception of the drug-related crimes set forth in subsection (A)(11), the statute does not include a time limitation on convictions for which the Board must deny an application. That is, the statute does not distinguish between a recent conviction for one of the thirteen enumerated crimes and a conviction for the same crime that may have occurred years prior to the applicant’s submission of the application for certification.

You have asked whether the statutory language gives the Board any discretion to grant certification to an applicant who has a prior conviction for one of the enumerated crimes. In interpreting a statute, the primary goal is to ascertain and implement the legislative intent. *See, e.g., Harris Corp. v. Ariz. Dep’t of Revenue*, 233 Ariz. 377, 381, ¶ 13, 312 P.3d 1143, 1147 (App. 2013). The plain language of the statute is the most reliable indicator of its meaning. *Id.* Unless the statutory language is ambiguous, the plain meaning of the statute governs. *Id.*

The plain language of A.R.S. § 32-122.07(A) indicates that the Legislature intended that the Board deny an application if an applicant has been convicted of any of the enumerated crimes, regardless of when that conviction occurred. Section 32-122.07(A) provides that the Board “shall deny” an application based on the prior convictions. The use of the word “shall” in a statute usually indicates that the Legislature intended a mandatory provision. *See, e.g., Ins. Co.*

of N. Am. v. Superior Court (Villagrana), 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990); *Joshua J. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 417, 421, ¶ 11, 286 P.3d 166, 170 (App. 2012). Although Arizona courts have interpreted the word “shall” in a statute to be merely directory in rare instances in which the legislative purpose is best achieved by such an interpretation, *see Joshua J.*, 230 Ariz. at 421, ¶ 11, 286 P.3d at 170, this rare exception does not apply here because nothing in A.R.S. § 32-122.07(A) indicates that the Legislature intended to use “shall” outside the usual mandatory manner. In fact, the legislative history for H.B. 2748, 50th Leg., 2d Reg. Sess. (Ariz. 2012)—the bill that is the source of A.R.S. § 32-122.07(A)—demonstrates that the Legislature intended the term “shall” to be a mandatory requirement. *See, e.g.,* Ariz. State Senate Research Staff, *Amended Fact Sheet for H.B. 2748 as Passed by the Senate*, at 4 (Apr. 5, 2012) (noting that H.B. 2748 “[r]equires the Board to deny an application for certification” if the applicant has been convicted of any of the enumerated crimes); Ariz. House of Representatives, *HB 2748 as Transmitted to the Governor*, at 2 (May 15, 2012) (noting that H.B. 2748 “[p]rescribes the offences [sic] that require [the Board] to deny an application for certification”).

The Legislature’s use of both “may” and “shall” in the same statute reinforces the conclusion that the Legislature recognized the difference between mandatory language and discretionary language and intended each word to carry its ordinary meaning. *Tanque Verde Unified Sch. Dist. No. 13 of Pima Cnty. v. Bernini*, 206 Ariz. 200, 212, ¶ 42, 76 P.3d 874, 886 (App. 2003); *HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 365, ¶ 15, 18 P.3d 155, 159 (App. 2001). The Legislature used both terms in this statute. *See* A.R.S. § 32-122.07(C) (“Within thirty days after the date of the notice [of denial], the applicant *may* request a hearing before the board.”) (Emphasis added.)

Although § 32-122.07(A) does not provide any blanket temporal limitation as to the convictions that are grounds for denying an application, it does provide a specific one. Section 32-122.07(A)(11) explicitly requires the Board to deny an application if the applicant has been convicted of “[d]istribution, manufacture or sale of marijuana, dangerous drugs or narcotic drugs *if committed less than three years before the date of applying for certification.*” (Emphasis added.) In interpreting a statute, an Arizona court would give each word, phrase, and clause meaning so as not to render any other part of the statute superfluous or redundant. *See, e.g., Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997); *Harris Corp.*, 233 Ariz. at 382-83, ¶ 19, 312 P.3d at 1148-49. If the Legislature had intended to give the Board discretion to grant certification to applicants who did not have recent convictions, then its clarification that certain drug convictions required denial only if “committed less than three years before the date of applying for certification” would be superfluous.

Finally, § 32-122.07(A) does not give the Board the discretion to grant certification to an applicant who committed one of the enumerated crimes but has since had his or her civil rights restored. Pursuant to A.R.S. § 13-904(E), the State is permitted to deny a convicted felon who has had his or her civil rights restored an occupational license, permit or certificate if the offense underlying the conviction “has a reasonable relationship to the functions of the employment or occupation for which the license, permit or certificate is sought.” As discussed in Part C below, the enumerated crimes in § 32-122.07 are sufficiently tailored to the functions of the alarm industry to satisfy the requisite nexus.

For these reasons, A.R.S. § 32-122.07(A) *requires* the Board to deny an application for certification in the alarm industry if the applicant has ever been convicted of one of the crimes

listed.¹ The language of the statute does not give the Board discretion to grant certification to an applicant who has ever been convicted of one of the thirteen crimes outlined in the statute.

B. Section 32-122.07 Requires the Board to Deny Applications Based on Misdemeanor and Felony Convictions for the Enumerated Crimes.

Section 32-122.07 requires that the Board deny applications if “a controlling person of an alarm business or an alarm agent has been *convicted*” of any of the enumerated crimes. (Emphasis added.) The term “conviction” applies to felonies and misdemeanors alike. *See, e.g.*, A.R.S. § 13-904(E) (referring to “conviction of a felony or misdemeanor”); A.R.S. § 31-331(5) (defining “prisoner” as a “person incarcerated in a detention facility who has been charged with or convicted of a misdemeanor”); *State v. Flores*, 227 Ariz. 509, 512, ¶ 10, 260 P.3d 309, 312 (App. 2011) (“The court convicted him of misdemeanor resisting arrest . . .”). The statute does not differentiate between felonies and misdemeanors; its language encompasses both. As you have indicated in your request for an opinion, some of the crimes listed in the statute can be misdemeanors or felonies under Arizona law. *See, e.g.* A.R.S. § 13-1802(G) (differentiating between levels of theft that constitute felonies and misdemeanors); A.R.S. § 13-1504(B) (differentiating same for actions constituting criminal trespass).

The plain language of § 32-122.07(A) does not explicitly limit the scope of crimes to felonies. Instead, the statute requires the denial of an application for certification if the applicant has been “convicted” of certain crimes. In interpreting the scope of a statute, an Arizona court will not read into the statute any terms that the Legislature could easily have used to limit the scope. *See State v. Arbolida*, 206 Ariz. 306, 308, ¶ 8, 78 P.3d 275, 277 (App. 2003) (refusing to

¹ Although the question of whether the Board had discretion to grant certification applications based on the date of an applicant’s prior conviction was not at issue in this Office’s previous opinion discussing implementation of H.B. 2748, language in that Opinion supports this conclusion. *See* Ariz. Att’y Gen. Op. I13-001, at 5 (finding that, as a result of the language in A.R.S. § 32-122.07(A), “the Board must necessarily deny an application for certification if an alarm agent or person designated as a controlling person for an alarm business has been convicted of one of the listed crimes”).

interpret a sentencing statute's use of the term "felonies" to exclude historical prior felonies because the Legislature could have easily differentiated such convictions if it had so intended). Had the Legislature intended to draft A.R.S. § 32-122.07(A) to include only prior felony convictions—not misdemeanor convictions—it could have done so, as it has in other circumstances. See A.R.S. § 8-533(B)(4) (providing that evidence sufficient to justify the termination of a parent-child relationship may include a parent's prior "conviction of a felony if the felony of which that parent is convicted is of such a nature as to prove the unfitness of that parent to have future custody and control of the child"); A.R.S. § 16-101(A)(5) (providing that every Arizona resident is qualified to register to vote so long as he or she "[h]as not been convicted of treason or a felony").

Finally, even if an Arizona court determined that A.R.S. § 32-122.07(A) is susceptible to multiple interpretations, it would not interpret the statute in a way that is inconsistent with other state statutes. See, e.g., *Metzler v. BCI Coca-Cola Bottling Co. of L.A., Inc.*, 233 Ariz. 133, ___, ¶ 11, 310 P.3d 9, ___ (App. 2013) (noting that, when interpreting statutes, the courts "strive to interpret related rules and statutes consistently"); *Bills v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 194 Ariz. 488, 494, ¶ 18, 984 P.2d 574, 580 (App. 1999) (noting that courts construe statutes together in order to try to achieve consistency within the overall statutory scheme). Section 13-904(E) provides as follows:

A person may be denied employment by this state or any of its agencies or political subdivisions or a person who has had his civil rights restored may be denied a license, permit or certificate to engage in an occupation by reason of the prior conviction of a felony or misdemeanor if the offense has a reasonable relationship to the functions of the employment or occupation for which the license, permit or certificate is sought.

(Emphasis added). Section 13-904(E) contemplates a state agency's ability to deny certain licenses, permits, and certificates to engage in an occupation to individuals who have been

convicted of “a felony or a misdemeanor” if the conviction “has a reasonable relationship to the functions of the employment or occupation for which the license, permit or certificate is sought.” To read A.R.S. § 32-122.07(A) to only apply to felony convictions would be inconsistent with the Legislature’s pronouncement in A.R.S. § 13-904(E).

C. Section 32-122.07(A) Is Constitutional.

The Equal Privileges Clause of the Arizona Constitution provides that “no law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.” Ariz. Const. art. 2, § 13. Similarly, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The state and federal equal protection guarantees are essentially the same and are both designed to secure equal opportunity for those who are similarly situated. *State v. Lowery*, 230 Ariz. 536, 541, 287 P.3d 830, 835 (App. 2012); *Queen Creek Summit, LLC v. Davis*, 219 Ariz. 576, 583, 201 P.3d 537, 544 (App. 2008).

As discussed above, A.R.S. § 32-122.07(A) requires the Board to deny an application for certification to work in the alarm industry if the applicant has ever been convicted of one of the thirteen enumerated crimes. A.R.S. § 32-122.07(A) therefore classifies certain convicted criminals who apply for certification in the alarm industry differently than other applicants.

A legislative classification allowing disparate treatment that does not implicate a fundamental right or a suspect classification need only be rationally related to a legitimate state interest to be constitutional. *See, e.g., Lowery*, 230 Ariz. at 541, 287 P.3d at 835; *Queen Creek Summit, LLC*, 219 Ariz. at 583, 201 P.3d at 544. The provisions in A.R.S. § 32-122.07(A) do not

implicate a fundamental right merely by creating a classification affecting a person's ability to obtain a license, permit, or certificate to work in the alarm industry. *See, e.g., Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 n.2 (9th Cir. 1985) ("There is no basis in law for the argument that the right to pursue one's chosen profession is a fundamental right for the purpose of invoking strict scrutiny under the Equal Protection Clause."); *Kuts-Cheraux v. Wilson*, 71 Ariz. 461, 466, 229 P.2d 713, 716 (1951) (noting "that there exists in Arizona no such thing as a *right* to practice medicine" and that there is only "the *privilege* to practice medicine as allowed and regulated by the legislature"); *Caldwell v. Pima Cnty.*, 172 Ariz. 352, 355, 837 P.2d 154, 157 (App. 1991) ("The right to pursue a particular occupation or to operate a particular business, however, is not a fundamental right."). Moreover, classifications based on prior criminal convictions do not rise to the level of suspect classifications. *See, e.g., United States v. Whitlock*, 639 F.3d 935, 941 (9th Cir. 2011) ("[N]either prisoners nor persons convicted of crimes constitute a suspect class for equal protection purposes.") (internal quotation marks omitted); *United States v. Smith*, 818 F.2d 687, 691 (9th Cir. 1987) ("We begin our review of this challenge by holding that persons convicted of crimes are not a suspect class.").

The Legislature's regulation of alarm-industry licensing in A.R.S. § 32-122.07(A) is constitutional if it is rationally related to a legitimate state interest. *Cf. Ariz. Bd. of Dental Exam'rs v. Fleischman*, 167 Ariz. 311, 314, 806 P.2d 900, 903 (App. 1990) (holding that a statutory requirement that a person desiring to practice denture technology have obtained a diploma in that field was rationally related to the goal of preventing unskilled persons from practicing in the field).

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1. Section 32-122.07(A) Furthers the State's Legitimate Interest in Safeguarding the Safety, Health, and Welfare of Alarm Industry Consumers.

The Legislature has stated that, similar to the State's other occupational licensing statutes, the purpose of the alarm licensing statute is to "provide for the safety, health and welfare of the public through the promulgation and enforcement of standards of qualification" for certain industries. A.R.S. § 32-101(A). Moreover, in creating the alarm-licensing requirements, the Legislature declared that it had a "statewide concern" for the "licensure, certification or registration of alarm businesses and alarm agents." Ariz. House of Representatives, *HB 2748 as Transmitted to the Governor*, at 1 (May 15, 2012).

Arizona and federal courts have previously held that Arizona statutes governing occupational licensing requirements for certain professions further the State's legitimate interest in protecting the public. *See, e.g., Martinez v. Goddard*, 521 F. Supp. 2d 1002, 1009 (D. Ariz. 2007) (finding that Arizona's statutory scheme for contractor licensing is rationally related to the State's legitimate government purpose of protecting the public); *Ariz. State Bd. of Dental Exam'rs*, 167 Ariz. at 314, 806 P.2d at 903 (determining that Arizona's statute creating certain requirements for dental licenses is rationally related to the State's legitimate government interest in "preventing unskilled persons from practicing in this field").

Protecting the public by regulating who can work in the alarm industry is a legitimate state interest. Because alarm businesses and alarm agents provide, install, and monitor security alarms for homes and businesses, *see* A.R.S. § 32-101(B)(2)-(4), consumers entrust them with their personal safety and property. Alarm agents and others working for alarm businesses have access to sensitive information about consumers' homes, possessions, security codes, and daily routines. This gives the State a legitimate interest in protecting the public from any potential abuse by alarm agents or alarm businesses who have access to such information. *Cf. State v.*

Taketa, 767 P.2d 875, 876 (Nev. 1989) (applying an equal protection analysis and determining that the State of Nevada “has a legitimate interest in maintaining the integrity of private investigation work” because “[t]he public trust may well be undermined by assigning security . . . to ex-felons”). Section 32-122.07(A) furthers this interest by preventing certification of individuals who have engaged in specified illicit activities that present potential risks to purchasers of security alarms and related services.

2. Section 32-122.07(A) Is Rationally Related to the State’s Interest.

State occupational-licensing regulations that deny licenses to individuals with certain criminal convictions have generally been found to be rationally related to a state’s interest in protecting the public. *See, e.g., Darks v. City of Cincinnati*, 745 F.2d 1040, 1043 (6th Cir. 1984) (upholding a city’s practice of denying dance hall licenses to all convicted felons because the city’s practice rationally “further[ed] the city’s legitimate purpose of insuring that dance halls are operated by persons of integrity with respect for the law” and without such a regulation a dance hall “could pose a significant threat to the peace of the community”); *Upshaw v. McNamara*, 435 F.2d 1188, 1190-91 (1st Cir. 1970) (acknowledging that “a person who has committed a felony may be thought to lack the qualities of self control or honesty that [being a police officer] requires” and rejecting equal protection challenge to Boston Police Commissioner’s refusal to hire an applicant who had been convicted of a felony); *Taketa*, 767 P.2d at 876 (upholding a Nevada statute prohibiting individuals with prior felony convictions from employment as private investigators).

In the few instances in which courts have overturned state statutes that deny occupational licenses to individuals with criminal convictions, those cases have involved a state’s blanket denial of such licenses to all such individuals, regardless of the type of crime for which they

were convicted. *See, e.g., Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y. 1986) (finding New York City Transit Authority's policy of denying employment to convicted felons regardless of the particular crime to be unconstitutional because "[b]efore excluding ex-felons as a class from employment, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job"); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1113 (N.D. Cal. 1980) (finding that a provision of a city charter that precluded any person "who shall have been convicted of a felony" from being employed with the city violated the Equal Protection Clause of the Fourteenth Amendment because "[t]he permanent and automatic disability which the City Charter makes out of a felony conviction, without any attempt to fit the classification to the legitimate governmental interests implicated in municipal employment decisions" was not reasonably tailored to city employment); *Smith v. Fussenich*, 440 F. Supp. 1077, 1080-81 (D. Conn. 1977) (determining that Connecticut's statute automatically denying an application for a license to work as a private investigator or security guard if the applicant had been convicted of any prior felony was unconstitutionally overbroad because "[f]elony crimes such as bigamy and income tax evasion have virtually no relevance to an individual's performance as a private detective or security guard").

However, in cases where a state statute that denies occupational licenses or positions of employment to individuals with criminal convictions is limited to certain types of convictions that are related to the occupation at issue, the statute meets the rational basis test. For example, in *Lopez v. McMahon*, 205 Cal. App. 3d 1510, 1515 (App. 1988), the court held constitutional a California statute that required the California Department of Social Services to deny an application for a license to operate a childcare facility if the applicant or any staff member,

administrator, or adult residing at the facility had been convicted of any crime other than a minor traffic violation. The statute allowed the department to grant an exemption from disqualification if the person convicted of the crime is of “sufficient good character”; however, the statute did not allow any exemption for individuals who had been convicted of certain crimes including crimes against children, sex offenses, crimes involving violence, or crimes involving a threat of violence. *Id.* at 1515, 1517.

The *Lopez* plaintiff’s application for a daycare facility license was denied because her husband, who resided with her, had been convicted of armed robbery. Even though the conviction occurred nearly ten years prior to the license application, the husband had never had another arrest or conviction, and all indications in the record demonstrated that he was “an upstanding citizen and a person of good moral character,” the plaintiff could not obtain a license under the statute. *Id.* at 1514. In addressing the plaintiff’s equal protection argument, the court applied rational basis review and specifically distinguished other cases in which courts had found that blanket denials of occupational licenses to all felons were unconstitutional. *Id.* at 1516. Instead, the *Lopez* court held the statute’s “narrow classification is rationally related to the legislative purpose to protect day care children against risk of harm.” *Id.* at 1517. Moreover, the court noted that the California Legislature “could reasonably conclude in the abstract that persons convicted of certain types of crimes—whether involving children, sex offenses or crimes of violence—pose a peculiar threat to the health and safety of children being cared for at the facility.” *Id.* The court upheld the statute despite the permanent bar that it imposed on applicants with certain convictions.

Like the challenged statute in *Lopez*, A.R.S. § 32-122.07(A) designates specific crimes that the Arizona Legislature believes to involve prior conduct that poses a potential danger to

customers of alarm companies and their agents. In fact, each of the crimes listed in A.R.S. § 32-122.07(A) involves conduct that, if committed again, would be assisted by the sensitive nature of the information to which individuals working in the alarm industry are privy. *Cf. Taketa*, 767 P.2d at 876 (finding that a Nevada statute precluding certain ex-felons from being licensed as private investigators was rationally related to the State's interest because the statute listed certain felonies that "stem[] from misconduct associated with the duties related to activities that a private investigator might be expected to engage in"). An individual in the alarm business can readily obtain information about a consumer's residence, pattern of activity, and daily routine that render the customer vulnerable. Additionally, alarm professionals likely have access to their clients' security passwords as well as a working knowledge of each client's security system. By limiting the restrictions of A.R.S. § 32-122.07(A) to the specific enumerated prior convictions, the Legislature ensured that it was not making an unconstitutional blanket denial of employment in the alarm industry. Moreover, A.R.S. § 32-122.07(A)'s permanent bar from the alarm industry of applicants who have a conviction for any of the designated crimes other than the drug-related offenses does not render the statute unconstitutional. *See, e.g., Lopez*, 205 Cal. App. 3d at 1517 (upholding permanent bar from childcare industry for certain types of criminal convictions); *Taketa*, 767 P.2d at 876 (upholding permanent bar from working as a private investigator for certain types of criminal convictions).

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Conclusion

The plain language of A.R.S. § 32-122.07(A) requires the Board to deny alarm-industry certification to applicants who have prior felony or misdemeanor convictions for any of the crimes listed in the statute. The statute does not violate the Equal Privileges Clause of the Arizona Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the restrictions are rationally related to the State's legitimate interests in protecting the public.

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