# 2011 AG Opinions

| Date | Description |
|---|---|
| December 12, 2011 | **No. I11-008 (R11-016)**<br>Re: Service of Citations Photo Enforcement Systems |
| September 12, 2011 | **No. I11-007 (R11-011)**<br>Re: Community Colleges: Student Not Lawfully Present in U.S. |
| September 21, 2011 | **No. I11-006 (R11-010)**<br>Re: Donations to Legal Defense Funds |
| August 12, 2011 | **No. I11-005 (R11-008)**<br>Re: Three Second Yellow Light Signal Requirement |
| July 7, 2011 | **No. I11-004 (R11-001)**<br>Re: Transaction Privilege Tax Upon Medical Marijuana Sales |
| July 7, 2011 | **No. I11-003 (R11-001)**<br>Re: Application of Title 16 to Recall Committees |
| June 8, 2011 | **No. I11-002 (R08-035)**<br>Re: Scope of Authority Under A.R.S. § 32-3612 With Respect to Appraisals of Nonfederally Related Transactions |
| May 4, 2011 | **No. I11-001 (R08-024)**<br>Re: The Acceptance of Standing Orders Under A.R.S. § 32-2811 by Persons Certified by the Medical Radiologic Technology Board of Examiners |

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>December 12, 2011 | No. I11-008<br>(R11-016)<br><br>Re: Service of Citations Photo Enforcement Systems |
|---|---|

To: The Honorable Frank Antenori
Arizona State Senate

## Question Presented

What are the requirements for service of citations and notices of violations stemming from traffic violations detected by photo enforcement systems under Arizona Revised Statutes (A.R.S.) §§ 28-1593 and 28-1602?

## Summary Answer

Section 28-1593(A) requires that a uniform traffic ticket and complaint be personally served by being delivered to the person against whom the complaint is brought or by any means that the Arizona Rules of Civil Procedure authorize and permits service by certified mail, return receipt requested, under certain circumstances. Where a law enforcement agency or its agents

seek to achieve service of a traffic ticket and complaint that a photo enforcement system has generated through a means other than those authorized by § 28-1593(A), the agency must inform the person against whom the complaint is brought that he or she is not obligated to identify the driver or to respond to the citation, but that failure to respond will probably result in the person being formally served and being required to pay service costs. Similarly, where a municipality or a company contracted to supply photo enforcement services provides a notice of violation, the notice must give the recipient the same information and must also state that the notice is not a court-issued document. A.R.S. § 28-1602. These statutory requirements apply to municipalities.

## Background

Some Arizona cities enforce traffic laws through photo enforcement. *See, e.g.,* City of Mesa, Photo Safety Enforcement FAQs, http://www.mesaaz.gov/police/PhotoEnforcement/Default.aspx ("The Mesa Police Department uses an automated traffic enforcement program to supplement traffic enforcement by Mesa police officers."); *see also* A.R.S. § 28-601 (defining photo enforcement system).

## Analysis

The language of a statute is the best and most reliable index of a statute's meaning. *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). Section 28-1593 sets forth the requirements for service of a traffic complaint, as well as the substantive requirements of notice

that must be included with such a document if it is not served in accordance with the statute and arises from photo enforcement.

Section 28-1593(A) provides that

> [a] traffic complaint may be served by delivering a copy of the uniform traffic ticket and complaint to the person charged with the violation or by any means authorized by the rules of civil procedure. At the discretion of the issuing authority, a complaint for a violation issued after an investigation in conjunction with a traffic accident may be sent by certified mail, return receipt requested and delivered to addressee only, to the address provided by the person charged with the violation.

However, "[i]f a law enforcement agency issues a citation as a result of a photo enforcement system" and serves that complaint in a manner "other than" the ones that § 28-1593(A) prescribes, "the agency shall inform the person that there is no obligation to identify the driver or respond to the citation." A.R.S. § 28-1593(C).[1] It must also inform the recipient that "[f]ailure to respond to the citation will result in the probability that the person will be formally served pursuant to state law and the Arizona rules of civil procedure which will likely result in the person being required to pay the costs of the service." *Id.*[2]

---

[1] Providing the uniform traffic citation and complaint generated from photo enforcement by means other than those permitted under § 25-1593(A) does not satisfy the statute's service requirements. *See* A.R.S. § 28-1593(C) (noting that where service is attempted by other means, recipient need not respond and may be "formally served.").

[2] In contrast, standing and parking complaints, "may be sent by regular mail to the address provided to the department by the individual made responsible for the alleged violation by the applicable statute or ordinance" and "[s]ervice of the summons and complaint is complete on mailing." A.R.S. § 28-1591(C).

A related statute, A.R.S. § 28-1602, provides for notices of violation "obtained using a photo enforcement system." A "notice of violation is "a notice issued by a photo enforcement company or municipality that is not a uniform traffic ticket or complaint." A.R.S. § 28-1602(C). Such notices "must state" that "[t]he notice is not a court issued document and the recipient is under no obligation to identify the person or respond to the notice" and that "[f]ailure to respond to the notice may result in official service that may result in an additional fee being levied." A.R.S. § 28-1602(B).

## Conclusion

Law enforcement agencies and those with whom they contract for services who do not serve photo-enforcement-generated traffic complaints pursuant to § 28-1593(A) must provide the information that § 25-1593(C) requires with the traffic complaint if the traffic complaint is served by some other means. Notices of violation issued in conjunction with photo enforcement systems by municipalities or photo enforcement companies must include the statements required by A.R.S. § 28-1602(B).

Thomas C. Horne
Attorney General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| | |
|---|---|
| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>September 12, 2011 | No. I11-007<br>(R11-011)<br><br>Re: Community Colleges: Student Not Lawfully Present in U.S. |

To: The Honorable Linda Gray
The Honorable Russell Pearce
Arizona State Senate

## Questions Presented

1. May a community college district classify a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes?

2. If this classification is improper, what penalties does a community college district face for providing such classifications?

3. May a community college district create separate tuition levels to circumvent the provisions of Proposition 300?

## Summary Answers

1. No. Proposition 300 prohibits a community college district from classifying a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes.

2. By violating Proposition 300, a community college board and its members risk exposure to several adverse consequences, including litigation and potential liability for foregone monies.

3. No. A community college district may neither (1) create separate tuition levels for persons who are not lawfully present in the United States that are lower than the out-of-state tuition rate, nor (2) use individual financial assistance to achieve the same result.

## Background

Historically, persons not lawfully present in the United States could establish domicile in Arizona and pay in-state tuition rates while attending State universities or community colleges. *See* Ariz. Att'y Gen. Op. I87-139. In 2004, the voters passed Proposition 200 to require State agencies to verify that applicants for "state and local public benefits" are lawfully present in the United States. *See* Ariz. Rev. Stat. ("A.R.S.") § 46-140.01. Proposition 200 did not define the phrase "state and local public benefits," and this office concluded that this section applied only to Title 46. *See* Ariz. Att'y Gen. Op. I04-010. Because some proponents of Proposition 200 disagreed with this interpretation, the State Legislature referred Proposition 300 to the voters in

order to prevent persons not lawfully present in the United States from receiving in-state tuition rates. *See Minutes of House Comm. On Appropriations*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Sen. Dean Martin, Proposition 300 Sponsor). In 2006, Arizona voters passed Proposition 300 with 71.4% approval. *See* Janice K. Brewer, *State of Arizona Official Canvass, 2006 General Election* 16 (2006). Proposition 300 added two sections relevant to this opinion. First, A.R.S. § 15-1803(B) was added, providing as follows:

> In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to § 15-1802 or entitled to classification as a county resident pursuant to § 15-1802.01.

Second, A.R.S. § 15-1825(A) was added, providing as follows:

> A person who is not a citizen of the United States, who is without lawful immigration status and who is enrolled as a student at any university under the jurisdiction of the Arizona board of regents or at any community college under the jurisdiction of a community college district in this state is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.

Proposition 300 also contained provisions: (1) preventing persons not lawfully present in the United States from participating in adult education classes provided by the Arizona Department of Education; (2) preventing persons not lawfully present in the United States from receiving childcare funding assistance; (3) requiring enforcement of Proposition 300's provisions without regard to race, religion, gender, ethnicity, or national origin; and (4) requiring State agencies administering these provisions to report various statistics on Proposition 300's enforcement. *See* Legislative Council, *Proposition 300: Analysis by Legislative Council, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 196–97 ("*Proposition 300: Analysis by Legislative Council*").

## Analysis

### I. Community College Districts May Not Classify a Person Who Is Not Lawfully Present in the United States as an In-State Student or a County Resident for Tuition Purposes.

Under A.R.S. § 15-1802.01(B), community college districts must adopt policies classifying students "for nonresident or resident tuition purposes." Before Proposition 300, community colleges could classify persons not lawfully present in the United States as in-state students for tuition purposes. *See* Ariz. Att'y Gen. Op. I87-139. Since the passage of Proposition 300, however, community college districts may not classify a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes. Section 15-1803(B) specifically precludes any such classification. This conclusion is consistent with Proposition 300's intent. *See Proposition 300: Analysis by Legislative Council*; *see also* House of Representatives, *Summary: S.C.R. 1031* (June 22, 2006) ("[p]rohibits a person who is not a United States citizen, a legal resident or without lawful immigration status pursuant to federal law from classification as an in-state student or county resident pursuant to statute").

### II. By Disregarding Proposition 300, a Community College Board and Its Individual Members Risk Adverse Consequences such as a Special Action Suit to Compel Compliance or a Suit by the Attorney General or Taxpayers Requiring Reimbursement for Unlawful Payment of Public Monies.

Because Proposition 300 contains no specific penalties or enforcement mechanisms, it is enforceable only through generally available enforcement mechanisms. Enforcement of its provisions in some circumstances will turn on a court's conclusion that the provisions are mandatory, not discretionary or directory. *See, e.g., Department of Revenue v. Southern Union Gas Co.*, 119 Ariz. 512, 514, 582 P.2d 158, 160 (1978); *Bilke v. State*, 221 Ariz. 60, 63 ¶ 12, 209 P.3d 1056, 1059 (App. 2009). For example, special actions may be brought under certain circumstances against government entities, such as community college districts, to "compel the

performance of an act which the law specially imposes as a duty." A.R.S. § 12-2021; Ariz. R.P. Special Actions 1. Violating a court's order to do so is a class 3 misdemeanor and is subject to court-ordered penalties such as fines and payment of attorney fees. *See* A.R.S. §§ 12-2029 to -2030. Additionally, under A.R.S. § 35-212(A), the Attorney General may "bring an action in the name of the state to enjoin the illegal payment of public monies . . . or if the monies have been paid, to recover such monies plus twenty per cent of such amount together with interest and costs, including reasonable attorney fees." If the Attorney General declines to bring such a suit, a taxpayer may bring the suit and may recover attorney fees if successful. A.R.S. § 35-213. Likewise, under the common law, a taxpayer residing in a community college district may have standing to sue to enjoin the district's unlawful payment of public money. *See Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432-33, 600 P.2d 44, 45-46 (App. 1979).

Suits may be brought against a community college district board as an entity. A.R.S. § 15-1444(B)(3). Individual members of a community college district board may also be personally liable; however, they "are immune from personal liability with respect to all acts done and actions taken in good faith within the scope of their authority." A.R.S. § 15-1443(C). Thus, the Attorney General or private citizens may bring suit to enforce Proposition 300, and several different penalties for violations may be available.

## III. Community College Districts May Not Circumvent Proposition 300 by Charging Less than Out-of-State Tuition for Persons Who Are Not Lawfully Present in the United States.

Proposition 300 does not allow community college districts to create tuition classifications lower than the out-of-state tuition level in order to circumvent the prohibition on charging in-state tuition levels to persons not lawfully present in the United States. Unambiguous statutes — those subject to only one reasonable meaning — are applied as written,

but if ambiguity is present, statutes are interpreted in light of their context, language, subject matter, historical background, effects, and intent. *Arizona Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 470 ¶ 10, 212 P.3d 805, 808 (2009); *see also State v. Gomez*, 212 Ariz. 55, 57 ¶ 11, 127 P.3d 873, 875 (2006). Here, Arizona law, as made clear by Proposition 300's intent and the statutory context,[1] does not afford persons who are not lawfully present in the United States eligibility for tuition rates lower than out-of-state tuition.[2]

### A. Proposition 300 was intended to require that persons not lawfully present in the United States must pay out-of-state tuition rates.

The primary objective in construing propositions adopted by the people is to give effect to the intent of the electorate. *See Gomez*, 212 Ariz. at 57 ¶ 11, 127 P.3d at 875; *see also* A.R.S. § 1-211(B) ("Statutes shall be liberally construed to effect their objects and to promote justice."). To determine the intent for a proposition referred to the voters by the Legislature, both the intent of "'those who framed the provision and . . . the intent of the electorate that adopted it'" must be examined. *See Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8, 167 P.3d 1264, 1267 (App. 2007) (quoting *Calik v. Kongable,* 195 Ariz. 496, 498 ¶ 10, 990 P.2d 1055, 1057 (1999)). Thus, in addition to the usual indicators of legislative intent such as committee minutes and fact sheets,

---

[1] Because the legislative intent and statutory context confirm a reasonable interpretation of the statutory language added by Proposition 300, it is not necessary to opine as to whether additional reasonable interpretations are possible. *See State ex rel. Ariz. Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (App. 1980) (reviewing legislative history "[w]ithout characterizing [the statute] as ambiguous").

[2] This interpretation is consistent with federal law. *See* 8 U.S.C. 1623(A) ("[persons] not lawfully present in the United States shall not be eligible on the basis of residence . . . for any postsecondary education benefit unless [U.S. citizens are] eligible for [the same] benefit . . . without regard to [residency]"); *see also Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 868-69 (Cal. 2010) (finding no preemption of state's ability to set postsecondary tuition rates for persons not lawfully present in the United States); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603 (E.D. Va. 2004) ("there is no Supremacy Clause bar to a state admissions policy that denies admission to illegal aliens, provided that in doing so, the institutions implementing the policy adopt federal immigration standards").

materials provided to the electorate may also be considered. *See id.* at 474 ¶¶ 15-16, 167 P.3d at 1269. Some important indicators of intent are found in the publicity pamphlet, including the Legislative Council's analysis and arguments for or against the proposition submitted by the public. *See Ruiz v. Hull*, 191 Ariz. 441, 450-51 ¶ 36, 957 P.2d 984, 993-94 (1998); *see also Calik*, 195 Ariz. at 500-01 ¶¶ 17-18, 990 P.2d at 1059-60 (relying on the legislative council's analysis).

Legislative statements about Proposition 300 and the materials provided to the voters form a unified narrative that clearly demonstrates an intention to require persons not lawfully present in the United States to pay out-of-state tuition rates. According to its legislative sponsor, Proposition 300 "does not mean illegal immigrants cannot obtain an education. It simply means taxpayers will not subsidize their education *just as taxpayers do not subsidize California residents* who attend Arizona State University, for example." *See Minutes of House Comm. on Appropriations*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Sen. Dean Martin, Proposition 300 sponsor) (emphasis added). Likewise, in another hearing, a committee member stated that he did "not believe the students are being penalized by not being able to get a taxpayer subsidy. The students can go to college, but *have to pay out-of-state tuition.*" *See Minutes of House Comm. On K-12 Educ.*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Rep. Eddie Farnsworth, Member, H. Comm. on K-12 Educ.) (emphasis added). Nothing in the legislative record contradicts this sentiment.

The legislative intent is echoed in the publicity pamphlet by the Legislative Council's analysis and the arguments of Proposition 300's proponents. Legislative Council summarized Proposition 300's effect as providing "that a state university or community college student who is not a United States citizen and who does not otherwise possess lawful immigration status in

this country is not entitled to waivers, grants or any other financial assistance paid in whole or part with state funds." *See Proposition 300: Analysis by Legislative Council.* Likewise, the bill's sponsor, Sen. Martin, argued for passage of Proposition 300 because

> US citizens from other states attending Arizona schools have to pay the full cost of tuition. However, citizens of foreign countries, who break the law to enter Arizona illegally, are given taxpayer subsidized tuition.
>
> It's not fair; it's not right. Vote YES on Prop 300 to save taxpayers millions in subsidies for illegals.

Senator Dean Martin, *Argument "for" Proposition 300, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 197. Another proponent of Proposition 300 argued, "It is indefensible that we should be charging students who come to Arizona for education from other states a large amount of money more than we charge students who have defied our laws by their illegal presence in our state." Don Goldwater, *Argument "for" Proposition 300, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 197. Thus, Proposition 300 must be construed to prohibit community college districts from setting tuition rates for persons not lawfully present in the United States lower than tuition rates for out-of-state students.

### B. Section 15-1803(B) prohibits tuition rates for persons not lawfully present in the United States that are lower than out-of-state tuition rates.

Statutes must be construed so as to avoid absurd results. *State v. Barr*, 217 Ariz. 445, 450 ¶ 20, 175 P.3d 694, 699 (App. 2008); *Mail Boxes v. Indus. Comm'n of Ariz.*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995) ("we must define [statutory terms] in a way that avoids absurdity and fulfills the legislature's purpose"). Likewise, courts must "'avoid construction of statutes which would render them meaningless or of no effect.'" *Graf v. Whitaker*, 192 Ariz. 403, 407, 966 P.2d 1007, 1011 (App. 1998) (quoting *State v. Clifton Lodge No. 1174, Benevolent &*

*Protective Order of Elks,* 20 Ariz. App. 512, 513, 514 P.2d 265, 266 (1973)). Proposition 300 prohibits community college districts from charging "in-state student" or "county resident" tuition rates for persons not lawfully present in the United States. A.R.S. § 15-1803(B). This provision would be rendered meaningless and an absurd result would occur if community college districts could simply set up a new fee classification equal to or slightly higher than in-state or resident tuition levels but still substantially lower than out-of-state tuition rates. The clear intent of Proposition 300 was to raise the tuition level for persons not lawfully present in the United States to the same tuition level that out-of-state students pay and to avoid giving persons not lawfully present in the United States an advantage over lawfully present students from other states. As such, A.R.S. § 15-1803(B) prohibits community college districts from setting up tuition classifications outside Arizona's statutory tripartite in-state/resident/out-of-state tuition classification system[3] in order to circumvent Proposition 300's mandate.[4]

### C. Section 15-1825(A) prevents community college districts from using individual financial assistance to circumvent the out-of-state tuition requirement for persons not lawfully present in the United States.

Under A.R.S. § 15-1825(A), community college districts may not give "tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies" to persons unlawfully present in the United States. When interpreting such provisions, "the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the

---

[3] This opinion does not decide whether Arizona's statutory scheme prohibits alternative tuition classifications (e.g., classifications based on reciprocal residency agreements that differentiate between residents of various out-of-district Arizona counties) for persons lawfully present in the United States.

[4] In addition to fulfilling Proposition 300's purpose and avoiding an absurd result, this interpretation is also consistent with Proposition 300's other relevant provision — A.R.S. § 15-1825(A) — which prohibits individual deviations from normal tuition rates as discussed below.

neighboring words with which it is associated." *U.S. v. Williams*, 553 U.S. 285, 294 (2008); *accord Norgord v. State ex rel. Berning*, 201 Ariz. 228, 231 ¶ 12, 33 P.3d 1166, 1169 (App. 2001). Likewise, "[t]he *ejusdem generis* canon of construction 'provides that general words which follow the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class.'" *Nielson v. Hicks*, 225 Ariz. 451, 453 ¶ 10, 240 P.3d 276, 278 (App. 2010) (quoting *State v. Barnett,* 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984)). To determine statutory meaning, courts will also examine "related statutes" that "may shed light on the proper interpretation of the statutes in question." *State v. Diaz*, 224 Ariz. 322, 324 ¶ 10, 230 P.3d 705, 707 (2010).

Here, A.R.S. § 15-1825(A) complements A.R.S. § 15-1803(B) by prohibiting community colleges from using various types of financial assistance to circumvent the out-of-state tuition requirement for persons not lawfully present in the United States. All of the listed terms in A.R.S. § 15-1825(A) refer to individualized assistance. By including the terms "tuition assistance" and "other financial assistance," Proposition 300 prohibits *any* individualized assistance that is subsidized or paid with state monies, including assistance not otherwise specified such as subsidized loans, tuition discounts, or work-study programs. Consequently, this interpretation is consistent with the evidence of Proposition 300's intent.

## Conclusion

Community college districts may not charge rates lower than out-of-state tuition for students not lawfully present in the United States, and Proposition 300 precludes creating special tuition classifications or awarding individualized financial assistance to circumvent this requirement. Violating these provisions may subject community college districts and members of community college boards to litigation, financial liability, and other penalties.

Thomas C. Horne
Arizona Attorney General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>September 21, 2011 | No. I11-006<br>(R11-010)<br><br>Re: Donations to Legal Defense Funds |
|---|---|

To: The Honorable Steve Pierce
Arizona State Senate

## Question Presented

If a lawsuit is filed pursuant to Arizona Revised Statutes ("A.R.S.") § 16-351 challenging a candidate's nomination petition signatures in order to disqualify the candidate from the ballot, are donations made to a legal defense fund for the sole purpose of covering the candidate's legal expenses to defend the lawsuit considered contributions within the meaning of A.R.S. § 16-901?

## Summary Answer

No. Consistent with interpretations of the Federal Election Commission, "contribution" as defined in A.R.S. § 16-901(5) does not include donations made to a legal defense fund for the sole purpose of covering the candidate's legal expenses to defend a lawsuit over nominating

petition signatures. Such donations, however, must be made to a separate fund that is not a political committee.

## Analysis

Contributions to candidates for political office in Arizona are regulated by Title 16. Section 16-901(5) defines the term contribution as "anything of value made for the purpose of influencing an election." The definition includes donations to support such activities as "supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer" and the retirement of campaign debts. *Id.* The statute, does not, by its terms, state that donations to defray the costs of defending a lawsuit that threatens a person's appearance on the ballot are contributions.

The definition of contribution, while broad, is limited to those donations "made for the purposes of influencing an election." Although the phrase "influencing an election" is not defined in § 16-901(5), the phrase has been interpreted by Arizona courts and would apply to donations made to support express advocacy on behalf of a candidate. *Cf. Kromko v. City of Tucson*, 202 Ariz. 499, 503, ¶ 10, 47 P.3d 1137, 1141 (App. 2002) (construing term "influencing the outcome of elections" in A.R.S. § 9-1500.14 to mean a communication that unambiguously "encourages a vote for or against a candidate or encourages the reader to take some other kind of action" related to the election) (quoting *Schroder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Cal. App. 2002)). Likewise, the specific examples enumerated in § 16-901(5) relate directly to campaigning, including opposing the circulation of petitions.[1] Defending a challenge

[1] Other provisions of § 16-901(5) are more specific. For example, the statute presumes that "[m]oney or the fair market value of anything directly or indirectly given or loaned to an elected official for the purpose of defraying the expense of communications with constituents, regardless of whether the elected official has declared his candidacy" is a contribution. A.R.S. § 16-901(5)(a)(ii); Ariz. Att'y Gen. Op. I00-007 ("If the Legislature had intended to adopt an ad

to petition signatures is neither campaigning nor advocacy, but rather the defense of a person's appearance on the ballot.

Furthermore, legal services that otherwise meet the definition of contributions, such as the review of campaign materials for compliance with election law, are exempt from the definition of contribution, provided that the attorney is paid by his or her regular employer. A.R.S. § 16-901(5)(b)(ix). Donations to a legal defense fund for the purposes of defending a challenge to candidate signatures do not otherwise meet the definition and, thus, the Legislature apparently did not intend such donation to be contributions.[2]

The statutory definition of "political committee" reflects the same principle. Political committees, as defined by A.R.S. § 16-901(19), include candidates and "association[s] . . . organized . . . for the purpose of influencing the result of any election" that "engage[] in *political* activity in behalf of or against a candidate." (emphasis supplied). Accordingly, donations to a legal defense fund for the sole purpose of defending a ballot challenge are not donations to a committee "engage[d] in political activity."

This result is consistent with the guidance of the Federal Election Commission. It has been the Federal Election Commission's longstanding policy that monies received and spent by a

---

hoc approach to constituent communications based on an evaluation of whether a specific correspondence had the purpose of influencing the outcome of an election, the Legislature would not have specified that monies received for constituent communications are 'contributions.'"); *see also* A.R.S. § 41-133 (setting forth provisions of office holder expense accounts for state elected officials).

[2] Additionally, Arizona law permits publicly financed candidates to maintain legal defense funds to cover the costs of "fines or civil penalties, [] costs or legal fees related to representation before the commission, or for defense of any enforcement action under [the Citizens Clean Elections Act]," and does not allow public funds to be used for these expenses. A.R.S. § 16-948(D). Because publicly financed candidates face severe restrictions on the acceptance of private campaign contributions, the allowance of private funding for a legal defense fund implies that such funds are not contributions. *See also* A.R.S. § 16-961(A) (stating that the term contribution, as used in the Citizens Clean Election Act, is defined in § 16-901).

legal defense fund are not "funds 'in connection with an election for federal office.'" F.E.C. Advisory Opinion 2003-15, 2003 WL 22019457 at *3. In Advisory Opinion 1996-39, the Commission explained that donations to secure a candidates' placement on the ballot were outside the purview of the Federal Election Campaign Act of 1971 because the ballot access litigation was "a condition precedent to the candidate's participation in the primary election." 1996 WL 577570 at *1. Thus "funds received and spent to pay for the expenses of the litigation [similar to that proposed in the question presented] would not be treated as contributions or expenditures for purposes of the Act, provided they are raised and spent by an entity other than a political committee." *Id.* at *1.[3]

**Conclusion**

Donations made to a legal defense fund for the sole purpose of defending a challenge to a candidate's petition signatures are not contributions within the meaning of § 16-901(5) provided they are made to a separate fund that is not a political committee.

Thomas C. Horne
Attorney General

[3] The FEC also advises that candidates should take care "to avoid activity which would influence the candidate's election" *Id.* at *2. Donations to a political committee are presumed to be for the purpose of influencing an election. *See* Ariz. Att'y Gen. Op. I11-003 ("A committee's effort in supporting or opposing a recall election . . . constitutes 'influencing an election' as that terms is used in § 16-901.").

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| | |
|---|---|
| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>August 12, 2011 | No. I11-005<br>(R11-008)<br><br>Re: Three Second Yellow Light Signal Requirement |

To: The Honorable Frank Antenori
Arizona State Senate

## Question Presented

Does Arizona Revised Statutes ("A.R.S.") § 28-643, which requires a minimum yellow light duration of three seconds, apply to yellow lights for left turns?

## Summary Answer

Under A.R.S. § 28-643, all traffic control devices must conform to the specification that the yellow light duration be at least three seconds. A plain reading of the statute indicates that the statute's language applies to *all* traffic lights, including those for left turns, and the legislative history confirms this interpretation.

## Background

Arizona Revised Statutes § 28-641 provides that the Director of the Department of Transportation "shall adopt a manual and specifications for a uniform system of traffic control

devices for use on highways in this state." In the 2010 Regular Session, the Arizona Legislature enacted and the Governor signed House Bill 2338, amending A.R.S. § 28-643. *See* 2010 Ariz. Sess. Laws ch. 213, § 1. The measure provides as follows:

> Local authorities in their respective jurisdictions shall place and maintain the traffic control devices on highways under their jurisdiction as they deem necessary to indicate and to carry out this chapter or local traffic ordinances or to regulate, warn or guide traffic. All traffic control devices erected shall conform to the manual and specifications prescribed in § 28-641. The manual shall include the specification that the yellow light duration must be at least three seconds.

According to your letter, some municipalities have determined that the statute's last sentence does not apply to yellow light durations for left turns and have allowed the default timers on yellow lights installed by private contractors to run for periods of time less than three seconds on left turns.

## Analysis

### I. The Plain Meaning of "Yellow Light Duration" in A.R.S. § 28-643 Includes the Duration of Both Yellow Lights for Straight-ahead Driving and Yellow Lights for Left Turns.

If a statute's language is plain and unambiguous, courts interpret the language as written without resorting to other methods of statutory interpretation. *Mid Kansas Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). In this case, the statute does not distinguish between traffic lights for straight-ahead driving and those for left turns. If the Legislature intended the term "yellow light duration" to apply only to straight-ahead driving, it could have specifically exempted left turns. It did not do so and instead chose more general language applicable to both left turns and straight-ahead driving. The statute's plain language encompasses the duration of yellow lights for left turns because these devices fall within the general term "yellow light duration."

## II. The Legislative History of A.R.S. § 28-643 Confirms that the Phrase "Yellow Light Duration" Applies to Left Turns.

The available legislative history for § 28-643 confirms that the legislature did not intend to distinguish between left turns and other yellow lights. *See State v. Gomez*, 212 Ariz. 55, 57, ¶ 11, 127 P.3d 873, 875 (2006) (noting that where a statute is ambiguous, the court may consider other tools of statutory construction). For example, legislative records demonstrate that in response to questions regarding the measure, the bill's sponsor indicated that it was intended to apply to both left-hand turns and straight-ahead driving. *See Minutes of H. Comm. on Transp. & Infrastructure*, 2010 Leg., 2d Reg. Sess. at 3 (Jan. 28, 2010).

## Conclusion

Under A.R.S. § 28-643, the requirement that the duration of a yellow light be at least three seconds applies to both left turns and straight-ahead driving. Consistent with the legislative history, a reading of the plain language "yellow light duration" compels the conclusion that the rule applies to *all* yellow lights.

Thomas C. Horne
Attorney General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>July 7, 2011 | No. I11-004<br>(R11-001)<br><br>Re: Transaction Privilege Tax Upon Medical Marijuana Sales |
|---|---|

To: The Hon. Scott Bundgaard
Arizona State Senate

## Questions Presented

You have asked for an opinion on the following questions:

1. Does current law require the State to impose a transaction privilege tax upon the sale of medical marijuana in Arizona?

2. Do medical marijuana dispensaries have a valid Fifth Amendment defense for the failure to file transaction privilege tax returns and pay the tax that is due?

## Summary Answer

1. Under current law, the proceeds of medical marijuana sales are taxable under the retail classification of the transaction privilege tax.

2. Even though the distribution of marijuana is a federal crime, medical marijuana dispensaries do not have a valid Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns and pay the tax that is due.

## Background

In the November 2010 general election, Arizona voters approved Proposition 203, the Arizona Medical Marijuana Act (the "Act"), which legalized the sale of marijuana for use by individuals with "chronic or debilitating diseases" under specified circumstances. While both the distribution and possession of marijuana remain criminal offenses under the Controlled Substances Act (21 U.S.C. §§ 801 through 971), marijuana sales that comply with the requirements established under the Act are permitted under Arizona law.

## Analysis

### I. Medical Marijuana Sales Proceeds Are Taxable Under the Retail Classification of the Transaction Privilege Tax.

The State of Arizona imposes a 6.6% transaction privilege tax on persons or entities engaged in taxable business classifications. Arizona Revised Statutes ("A.R.S.") § 42-5010; Ariz. Const. art. IX, § 12.1. The retail classification of the transaction privilege tax, more commonly known as the "sales tax," is established under A.R.S. § 42-5061, which in relevant part provides as follows:

> The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business.

The term "tangible personal property" is defined in A.R.S. § 42-5001(16) as "personal property which may be weighed, measured, felt or touched or is in any other manner perceptible to the senses." There can be no doubt that marijuana, which can be weighed, measured, felt,

touched, seen, tasted and smelled, falls within the scope of this definition. Moreover, "selling at retail" means "a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property." A.R.S. § 42-5061(V)(3). Therefore, medical marijuana dispensaries will be engaged in "the business of selling tangible personal property at retail," and unless an exemption applies, the proceeds of medical marijuana sales are taxable under the retail classification.[1]

While section 4 of the Act amended A.R.S. § 43-1201 to exempt medical marijuana dispensaries from income tax, there is no analogous provision in the Act exempting the proceeds of medical marijuana sales from the transaction privilege tax. Therefore, the Act itself does not shield these proceeds from sales tax.

Nor are these transactions exempt from sales tax under more generally applicable rules. In particular, medical marijuana sales proceeds do not constitute tax-exempt proceeds of income derived from the sale of prescription drugs under A.R.S. § 42-5061(8), because the Act does not contemplate prescriptions for medical marijuana. Instead, an individual applying for a registry identification card from the Arizona Department of Health Services must submit "written certification" from a physician specifying the patient's debilitating medical condition and stating that in the physician's professional opinion, the patient is likely to benefit from the medical use of marijuana. A.R.S. § 36-2801(18). Medical marijuana is not "prescribed" by a physician under these circumstances because the physician is not directing the patient to use marijuana. Moreover, in contrast to the fact pattern under which a physician writes a prescription that is

[1] Nothing in A.R.S. § 42-5061 limits the retail classification to business activities that are lawful, and, as a general proposition, an unlawful activity may be subject to tax. *Marchetti v. United States*, 390 U.S. 39, 44 (1968) (noting that the unlawfulness of an activity does not prevent its taxation). Therefore, even illegal sales of marijuana are currently subject to transaction privilege tax under the retail classification. For obvious reasons, however, criminal enterprises do not voluntarily disclose their sales revenues or otherwise comply with tax obligations.

delivered to a pharmacy, medical marijuana certification is submitted to the Arizona Department of Health Services, rather than to an organization that dispenses medical marijuana.

The fact that licensed physicians are prohibited under federal law from prescribing "Schedule I" controlled substances (as defined in § 812 of the Controlled Substances Act), including marijuana, further supports the conclusion that medical marijuana certification submitted to the Arizona Department of Health Services does not amount to a "prescription" for purposes of the prescription drug exemption established under A.R.S. § 42-5061(8).[2] And, it is well-settled law that tax exemptions are narrowly construed; therefore, it is unlikely that a court would broaden the scope of the prescription drug exemption to include medical marijuana certification. *Ariz. Dep't of Revenue v. Blue Line Distrib.*, 202 Ariz. 266, 266-67, ¶4, 43 P.3d 214, 214-15 (App. 2002) ("Tax exemption statutes are strictly construed against exemption.").

The only other retail transaction privilege tax exemption that could potentially apply to medical marijuana sales is the exemption set forth under A.R.S. § 42-5061(4) for sales of tangible personal property made by a federally recognized § 501(c)(3) charitable organization. While section 3 of the Act provides that medical marijuana can be lawfully dispensed only by nonprofit entities, it states that "[a] registered nonprofit medical marijuana dispensary need not be recognized as tax-exempt by the Internal Revenue Service." A.R.S. § 36-2806(A). This language implicitly recognizes that the distribution or dispensing of marijuana is a federal crime under the Controlled Substances Act, and it is therefore highly unlikely that the Internal Revenue

[2] In addition to meeting state law requirements, every person who dispenses a federally controlled substance must obtain registration from the United States Drug Enforcement Administration. 21 C.F.R. § 1301.11. This registration is available only for dispensing controlled substances listed on Schedules II, III, IV and V. 21 C.F.R. § 1301.13. Under the Controlled Substances Act, marijuana is listed as a Schedule I drug. 21 U.S.C. § 812(c). Therefore, marijuana cannot be dispensed under a prescription. *See also* 21 U.S.C. § 829 (governing "prescriptions" for controlled substances and establishing requirements associated with schedule II through V drugs only); *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 492 n.5 (2001) (noting that Schedule I drugs cannot be dispensed under a prescription).

Service would grant § 501(c)(3) status to a medical marijuana dispensary. In the unlikely event, however, that (1) a medical marijuana dispensary invites federal scrutiny by applying to the Internal Revenue Service for § 501(c)(3) status, and (2) such an application is granted, the proceeds of medical marijuana sales at that dispensary would be exempt from transaction privilege tax under current Arizona law.

In summary, neither of the only two potentially applicable tax exemptions are likely to apply, and sales of medical marijuana should therefore be treated as taxable sales of tangible personal property sold at retail for purposes of A.R.S. § 42-5061.

## II. Fifth Amendment Analysis.

The Act does nothing to alter the fact that the distribution of marijuana for any purpose, including medical treatment, is a federal crime. It is therefore possible that a medical marijuana dispensary would take the position that a requirement to submit transaction privilege tax returns to the Arizona Department of Revenue amounts to compelled self-incrimination, which is prohibited under the Fifth Amendment edict that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

As discussed below, however, there is no valid Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns.

### A. The Fifth Amendment Applies Where There Is an Appreciable Threat of Prosecution.

As a threshold issue, the Fifth Amendment privilege may be invoked only where there are substantial and real, and not merely trifling or imaginary, hazards of self-incrimination. *Marchetti*, 390 U.S. at 53; *Brown v. Walker*, 161 U.S. 591, 599-600 (1896) (quoting *Queen v. Boyes*, 1 B. & S. 311, 330 (Q.B. 1861) ("[T]he danger to be apprehended must be real and appreciable . . . not a danger of an imaginary and unsubstantial character, having reference to

some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.")). Therefore, the Fifth Amendment privilege against self-incrimination may be invoked by the medical marijuana dispensaries only if the threat of federal prosecution is real and appreciable.

In a widely circulated memorandum dated October 19, 2009 (known as the "Ogden Memorandum"), the United States Department of Justice provided the following advice to federal prosecutors in states that have enacted laws authorizing the medical use of marijuana:

> [T]he disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.[3]

While this memorandum may provide reassurance to medical marijuana users and their caregivers, it may not reflect an intent to permanently divert federal resources away from prosecuting medical marijuana clinics that are in compliance with state law, as indicated by the following language in a February 1, 2011, letter from the United States Department of Justice to the Oakland City Attorney:

> The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises

[3] A copy of this memorandum may be found on the website of the United States Department of Justice at http://blogs.usdoj.gov/blog/archives/192. On May 2, 2011, Arizona U.S. Attorney Dennis Burke issued a letter to the director of the Arizona Department of Health Services, Will Humble, reiterating the position taken in the Ogden Memorandum.

> that unlawfully market and sell marijuana. Accordingly, while the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the October 2009 Ogden Memorandum, we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law.[4]

It therefore appears possible that medical marijuana dispensaries in Arizona may be at risk of federal prosecution under the Controlled Substances Act. Because it cannot be assumed that a court would rule that there is no appreciable risk of federal prosecution under these circumstances, the merits of a Fifth Amendment defense to the tax filing requirement should be considered. As discussed below, however, Fifth Amendment jurisprudence does not allow the privilege against self-incrimination to be invoked in order to avoid generally applicable reporting requirements that do not target inherently suspect activities.

### B. The Fifth Amendment Does Not Shield Medical Marijuana Dispensaries from a Generally Applicable Requirement to File Transaction Privilege Tax Returns.

A generally applicable requirement to file tax returns cannot be avoided on the basis of the Fifth Amendment privilege against self-incrimination, even if the information submitted would tend to incriminate a taxpayer. In *United States v. Sullivan*, 274 U.S. 259 (1927), the taxpayer, who sold liquor in violation of the National Prohibition Act, was convicted of failing to file an income tax return, and the U.S. Supreme Court concluded that "[i]t would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." *Id.* at 263-64. While this 1927 opinion consists of only five paragraphs, it is directly on point, and it continues to be cited with approval by modern courts.

---

[4] A copy of this letter is available on the website for the Arizona League of Cities and Towns at http://www.azleague.org/event_docs/medical_marijuana0211/us_atty_letter.pdf.

Similarly, in 1971 the U.S. Supreme Court held that the Fifth Amendment privilege against self-incrimination was not infringed by a generally applicable statute that required a motorist involved in an accident to stop at the scene and provide his name and address, where (1) the statute was regulatory and noncriminal, (2) self-reporting was indispensable, and (3) the burden was on the public at large, as opposed to a highly selective group inherently suspect of criminal activities. *California v. Byers*, 402 U.S. 424, 430-31 (1971). The Court distinguished cases in which the privilege had been upheld by noting that "[i]n all of these cases the disclosures condemned were only those extracted from a highly selective group inherently suspect of criminal activities and the privilege was applied only in an area permeated with criminal statutes—not in an essentially noncriminal and regulatory area of inquiry." *Id.* at 430 (internal quotation marks omitted).

In *Marchetti*, for example, the U.S. Supreme Court held that the defendant's assertion of the privilege against self-incrimination constituted a complete defense to prosecution for the failure to register and pay an occupational tax on wagering. In that case, the Court recognized that wagering was a crime in almost every state, and that the tax was not imposed in an essentially noncriminal and regulatory area, but directed to a selective group inherently suspect of criminal activities. *Marchetti*, 395 U.S. at 47; *see also Haynes v. United States*, 390 U.S. 85, 100 (1968) (upholding Fifth Amendment privilege as a defense to a registration requirement for sawed-off shotguns, where requirement was directed principally at persons who were inherently suspect of criminal activities); *Leary v. United States*, 395 U.S. 6, 18 (1969) (upholding Fifth Amendment defense to provisions of the Marihuana Tax Act requiring the defendant to identify himself as an unregistered transferee of marijuana, a selective group inherently suspect of criminal activities.)

Here, there is no suggestion that the sales tax imposed under A.R.S. § 42-5061 is designed to require the disclosure of incriminating information. The taxable classification is the business of selling tangible personal property at retail, and retailers can hardly be characterized as a "select group that is inherently suspect of criminal activities." Instead, the requirement to file transaction privilege tax returns generally applies to taxable business classifications and is not associated with criminal law enforcement efforts. As noted by the U.S. Supreme Court in *Byers*:

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a link in the chain of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure called for by statutes like the one challenged here.

402 U.S. at 427-28. Therefore, notwithstanding the fact that transaction privilege tax returns filed by a medical marijuana dispensary might tend to incriminate the organization under federal law, the Fifth Amendment does not constitute a valid defense to a generally applicable requirement to report sales revenues and remit sales tax.

## Conclusion

Under current law, the proceeds of medical marijuana sales are taxable under the retail classification of the transaction privilege tax. Moreover, medical marijuana dispensaries cannot

invoke a Fifth Amendment defense to a generally applicable requirement to file transaction privilege tax returns and pay the tax that is due.

Thomas C. Horne
Attorney General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>by<br><br>DAVID R. COLE<br>SOLICITOR GENERAL*<br><br>July 7, 2011 | No. I11-003<br>(R11-005)<br><br>Re: Application of Title 16 to Recall Committees |
|---|---|

To: The Honorable Russell K. Pearce
Arizona State Senate

## Questions Presented

You have asked for an opinion on the following questions:

1. Does Arizona law prohibit corporate or labor union contributions to a committee supporting or opposing the qualification of a recall petition? If so, does that prohibition violate the First Amendment?

2. Do the provisions of Arizona Revised Statutes ("A.R.S.") §§ 16-912.01 and -914.01 apply to recall committees?

## Summary Answers

1. Yes. Under current law, corporations and labor unions may not contribute to recall committees. It would, however, be contrary to the United States Supreme Court's *Citizens*

* Attorney General Horne has recused himself from this matter. Accordingly, Arizona Solicitor General David R. Cole is authorized to sign this Opinion.

*United* decision to enforce this prohibition if the corporation or labor union is contributing to a recall committee that has not coordinated with a potential candidate for the office that is the subject of the recall election. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. No. Statutes such as A.R.S. §§ 16-912.01 and 16-914.01, which explicitly apply to ballot measure committees, do not apply to recall committees.

## Background

Article 14, section 18 of the Arizona Constitution provides that "[i]t shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action." Section 16-919 makes it "unlawful for a corporation or a limited liability company [or a labor organization] to make an expenditure or any contribution of money or anything of value for the purpose of influencing an election." State and federal court decisions have caused election officials to limit how they apply these prohibitions and have caused the Arizona Legislature to amend Arizona law in response. As a result, some of Arizona's campaign contribution and expense laws refer either directly or indirectly to recall committees, while others explicitly apply only to certain political committees named in the statute.

### The *Mecham Recall Committee, Inc. v. Corbin* Decision and the Legislature's Response

In *Mecham Recall Committee, Inc. v. Corbin*, the Arizona Supreme Court held that "a recall committee is not controlled by the provisions of §§ 16-901, *et seq.*," explaining that "[s]ince the statute does not mention recall committees, they are not included." 155 Ariz. 203, 205, 745 P.2d 950, 952 (1987). Following the decision, the Arizona Attorney General issued two opinions that were consistent with the court's ruling on recall committees. The first

Attorney General Opinion was issued after the court issued its order in *Mecham* but before the court published its opinion. It quotes the court's order as follows.

> IT IS ORDERED that A.R.S. § 16-901 thru 16-924 do not apply to the activities of the Mecham Recall Committee, Inc. in its circulation of the recall petitions and activities connected therewith.
>
> Opinion to follow.

Ariz. Att'y Gen. Op. I87-111 at 2. This opinion concluded that neither A.R.S. § 16-905 nor § 16-919 applied to recall committees. *Id.* at 3. Six months later, a second opinion concluded that

> [a]pplying a strict interpretation to the election statutes, as did the Arizona Supreme Court in *Mecham Recall Committee*, we find no mention of an anti-recall committee in the campaign contributions and expenses statutes. We, therefore, conclude that the raising and expenditure of funds for the purpose of defeating a recall petition drive . . . is not subject to the provisions of A.R.S. §§ 16-901 to -924.

Ariz. Att'y Gen. Op. I88-43 at 3.

In *Mecham*, the Arizona Supreme Court concluded its opinion by noting that if not having the State's campaign contribution and expense laws apply to recall committees "is believed to be a serious omission, then it is up to the legislature to cure the defect, not the courts." 155 Ariz. at 206, 745 P.2d at 953. In 1993, the Arizona Legislature addressed this potential defect, along with many others, in Senate Bill 1039. 1993 Ariz. Sess. Laws, ch. 226. Senate Bill 1039 generally revamped the election code and added recall elections to Title 16. It amended A.R.S. § 16-901 to define "election" as "an election for an initiative, referendum or other measure or proposition or a primary, general, recall, special or runoff election," and replaced the term "campaign committee" with "political committee," which it defined to include "[a] committee organized to circulate or oppose a recall petition or to influence the result of a

recall election." *Id.* § 1. The bill added A.R.S. § 16-913, which required that recall committees' campaign finance reports be filed within the same deadlines as other political committees' reports. *Id.* § 10. Then, in 1997, the Legislature amended A.R.S. § 16-901 again to define "contribution" and "expenditure" to include those made in support of or in opposition to recall elections. 1997 Ariz. Sess. Laws, ch. 201, § 1; *see also id.* § 11 (amending A.R.S. § 16-916 to identify the office in which filings for various recall committees should be filed).

The *Citizens United v. FEC* Decision and the Legislature's Response

In *Citizens United*, the United States Supreme Court struck down "[f]ederal law [that] prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." 130 S. Ct. 876, 886 (2010). The Court found that the federal government had no interest in discriminating against speakers based on their corporate identity. *Id.* at 913. The Court explained that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy" because "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.* at 910; *see also id.* at 902 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976))); *id.* at 909 (quoting the same passage in *Buckley*). Thus, the Court "conclude[d] that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.* at 909.

Just weeks after the Court announced its *Citizens United* decision, Governor Brewer signed House Bill 2788. 2010 Ariz. Sess. Laws, ch. 4. The bill added A.R.S. § 16-914.02, which provided details on how corporations, limited liability companies, and labor organizations could make independent expenditures "in an attempt to influence the outcome of a candidate election." *Id.* § 1. The bill also amended A.R.S. § 16-919 to expand the prohibition against corporate political action to include expenditures as well as contributions and to exempt actions taken in accordance with the new A.R.S. § 16-914.02. *Id.* § 2. Finally, the Legislature expanded the exceptions to A.R.S. § 16-919 that are found in A.R.S. § 16-920 to include independent expenditures made pursuant to A.R.S. § 16-914.02 by adding subsection (A)(6). *Id.* § 3.

The Structure of Title 16, Chapter 6, Article 1

Because Title 16, chapter 6 incorporates the recall process in its definitions of "contribution," "election," "expenditure" and "political committee," A.R.S. § 16-901(5), (7), (8), (19), many statutes in Title 16 explicitly apply to recalls. The following sections either refer to the recall process directly or use one of these terms without limitation: A.R.S. §§ 16-901.01 (express advocacy), -902 (political committee organization), -902.01 (political committee registration), -902.02 (out-of-state political committees), -904 (treasurer duties), -907 (earmarks), -913 (campaign finance reports), -914 (termination statements), -915 (campaign finance reports), -915.01 (surplus money), -916 (filing reports), -916.01 (electronic filing), -918 (campaign finance reports; penalties), and - 924 (enforcement).

Other statutes by their terms apply only to certain types of political committees. The following sections fall into this category: A.R.S. §§ 16-903 (candidate and exploratory committees), -905 (candidate and exploratory committees), -906 (candidate committees), -912 (candidate and independent expenditure committees), -912.01 (ballot measure committees),

-914.01 (ballot measure committees), and -917 (independent expenditure committees). Finally, a handful of statutes apply directly to entities other than political committees, although they impact all political committees. These sections are A.R.S. §§ 16-914.02 (corporations and labor organizations), -919 (prohibition on corporate/labor organization contributions), -920 (permitted corporate/labor organization expenditures), -921 (unlawful corporate/labor organization contributions), and -923 (volunteers). As to this last category of statutes, the Arizona Supreme Court has recognized that an election law can prohibit corporations or labor organizations from making a contribution without making it illegal for the recipient to receive the contribution. *Ariz. State Democratic Party v. Arizona*, 210 Ariz. 527, 530, ¶ 12, 115 P.3d 121, 124 (2005) (holding that A.R.S. § 16-919 does not "make it a violation for the Party to *accept* contributions from corporations, LLCs or labor organizations," and concluding "[i]n short, the State seems to have brought this action against the wrong party").

## Analysis

### I. Arizona Law Prohibits Corporate and Labor Union Contributions to a Committee Supporting or Opposing the Qualification of a Recall Petition.

As discussed above, Article 14, section 18 of the Arizona Constitution and A.R.S. § 16-919(A) make it unlawful for corporations, limited liability companies, and labor unions to make contributions or expenditures in order to influence elections. Title 16 defines "contribution" as "any gift . . . or anything of value made for the purpose of influencing an election including supporting or opposing the recall of a public officer," and "expenditure" as "any purchase . . . or anything of value made by a person for the purpose of influencing an election in this state including supporting or opposing the recall of a public officer." A.R.S. § 16-901(5), (8). Thus, by using the terms "expenditure" and "contribution," A.R.S. § 16-919 explicitly applies to recall elections. Indeed, the phrase used in the definitions of both "contribution" and "expenditure" is

"anything of value made by a person for the purpose of influencing an election in this state *including* supporting or opposing the recall of a public officer." A.R.S. § 16-901 (5), (8) (emphasis added). A committee's effort in supporting or opposing a recall election, therefore, constitutes "influencing an election" as that term is used in A.R.S. § 16-901.

In your letter, you suggest that because the statute prohibits only certain entities from *accepting* contributions from corporations and limited liability companies, corporations and limited liability companies are prohibited from *making* contributions only to those entities. It is true that it is unlawful for "the designating individual who formed an exploratory committee, an exploratory committee, a candidate or a candidate's campaign committee to accept" contributions from corporations, and that it is not unlawful for recall committees to accept contributions from corporations. A.R.S. § 16-919(A). It does not, however, follow from this premise that corporations and limited liability companies may lawfully contribute to recall committees. First, A.R.S. § 16-919(B) does not prohibit any entity from receiving contributions from labor organizations. To assume that labor organizations can contribute to any group because no group is prohibited from accepting their contributions would lead to an absurd result. Second, the Arizona Supreme Court rejected a similar argument in *Democratic Party*, where the State argued that, because A.R.S. § 16-919 prohibited corporations from making contributions for the purpose of influencing an election, the statute must also prohibit all entities, even those not listed in the statute, from receiving contributions. 210 Ariz. at 530, ¶ 12, 115 P.3d at 124. Explaining that it "must defer to the plain language of the statute," the court refused to "include within [those restricted by the statute] entities not named by the legislature." *Id.* Likewise, in this instance, the plain language of the statute determines the scope of the prohibition on corporate and labor union donations. Third, a plain reading of A.R.S. § 16-920 (A)(5) and (6),

which explicitly exempt contributions to certain political committees from the restrictions of A.R.S. § 16-919 but do not list recall committees among those exempted, supports the position that A.R.S. § 16-919 applies to contributions to recall committees.

You have also asked whether a committee formed for the purpose of supporting or opposing the recall of a public officer is attempting to influence an election. This is similar to the issue raised in *Democratic Party* where an administrative order required the Democratic Party to return corporate and union donations made to defer the party's operating expenses. 210 Ariz. at 528, ¶ 1, 115 P.3d at 122 Although the Arizona Supreme Court did "not decide whether the donations at issue were 'contributions,'" *id.* at 530, ¶ 14, 115 P.3d at 124, it noted that the judge who dissented from the opinion issued by the Arizona Court of Appeals would have found that monies provided by labor unions and corporations were not "contributions" within the meaning of A.R.S. § 16-919 because the entities in question were not attempting to influence an election, *id.* at 529, ¶ 6, 115 P.3d at 123. The dissenting opinion

> noted that A.R.S. § 16-919(F)(1) resolves any perceived ambiguity in § 16-919(A) and (B) by defining the term 'election' as relating to the election of an individual person to a particular office. [The dissenting judge] therefore reasoned that the contributions at issue were not given to influence an election and thus did not violate § 16-919."

*Id.* (citations omitted). First, the court did not adopt this reasoning in its opinion. 210 Ariz. at 530, ¶ 14, 115 P.3d at 122. Second, even applying that reasoning, the funds at issue in *Democratic Party* had been given to the party and had not been targeted to the election of an individual person to a particular office. *Id.* The efforts of a recall committee, by contrast, are directed at the election of an individual person to a particular office.

Your letter also notes the two-step recall process and questions whether there is "any election to any political office" that the committee may be trying to influence before the recall

petition qualifies for the ballot. Arizona law treats gathering signatures to put a candidate or a proposition on the ballot as an effort to influence the election that will follow if the effort is successful. For example, a ballot measure committee must register and file campaign finance reports before it can start collecting contributions or signatures to put a measure on the ballot. A.R.S. § 16-902, -902.01, -913. It is true that if the committee is unsuccessful, there will not be any election for that committee to influence. The same is true of candidates for regular elections who must form a campaign or exploratory committee before they collect the necessary signatures to be on the ballot, and therefore before it is assured that there will be an option to elect those candidates to a particular position. A.R.S. § 16-903. Nonetheless, taking the first step to getting a measure passed or a candidate elected—that is, getting the measure or the candidate before the voters—is still an effort to influence an election. Similarly, when a recall committee begins to collect signatures for the recall or when a recall committee opposes this effort, it is attempting to influence a specific election, even though the election may never happen.

Finally, the Arizona Supreme Court's holding in *Mecham* was abrogated by legislative amendments to Title 16. As mentioned previously, in *Mecham*, the court explained why it concluded that A.R.S. §§ 16-901 through -924 did not apply to recall elections. 155 Ariz. at 204-05, 745 P.2d at 951-52. It noted that there were no references to recall elections in A.R.S. § 16-901. *Id.* Now there are several. It noted that there was no mention of recall committees in the statutes requiring committees to file campaign finance reports. 155 Ariz. at 205, 745 at 952. Now A.R.S. § 16-913 requires political committees, which by definition include recall committees, to file reports. By adding these provisions, the Legislature responded to the court's invitation to "cure the defect" in the statute. *Id.* at 206, 745 P.2d at 953.

## II. Arizona Law Prohibiting Corporate and Labor Union Contributions Cannot Be Applied to Committees that Do Not Coordinate with a Candidate.

The United States Supreme Court held that when considering independent expenditures by corporations and labor organizations, "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy," because "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 130 S. Ct. at 910. Hence, a corporation or union cannot be prevented from making donations to a recall committee that does not coordinate with an individual who intends to run for the targeted office.[1] In your letter, you expressed concern that this results in an unlevel playing field in which the committee opposing the recall cannot accept contributions from corporations or labor organizations, but the committee supporting it can. That is not the case. A committee opposing the recall can do so without coordinating with the candidate. Moreover, if the committee supporting the recall is working with an individual who intends to run for the office being targeted, that committee could not accept contributions from corporations or labor organizations. Put another way, no one working on a recall committee that accepts corporate or labor union contributions is eligible to run for the targeted public office.

## III. Recall Committees Are Not Ballot Measure Committees.

Your letter asks whether recall committees must comply with the requirements of A.R.S. §§ 16-912.01 and -914.01. Section 16-914.01 applies only to political committees "acting in support of or opposition to the qualification, passage or defeat of an initiative or referendum or any other ballot measure, question or proposition." A.R.S. § 16-914.01(A). Similarly, A.R.S. §

[1] The holdings of the United States Supreme Court limit state constitutions to the same extent they limit state statutes. *See, e.g., Am. Fed'n of Labor v. Am. Sash & Door Co.*, 67 Ariz. 20, 26, 189 P.2d 912, 916 (1948) (holding that "an amendment [to the Arizona Constitution] has no greater validity and stands on no higher plane than legislative enactment insofar as being subject to attack for failure to square with the Federal Constitution").

16-912.01 applies only to "[a] political committee that makes an expenditure in connection with any literature or advertisement to support or oppose a ballot proposition." A.R.S. § 16-912.01(A). A recall committee is "organized to circulate or oppose a recall petition or to influence the result of a recall election." A.R.S. § 16-901(19)(d). A recall election is an election to political office, not an election on a ballot measure. In the recall election, "[t]he candidate receiving the largest number of votes shall be declared elected for the remainder of the term and shall begin serving the remainder for the term on his qualification for the office and on completion of the canvass." A.R.S. § 19-216(A). "The form of the ballot shall conform as nearly as practicable to the ballot prescribed for general elections." A.R.S. § 19-213. There is no reason to apply the restrictions placed uniquely on ballot measure committees to recall committees.

## Conclusion

Pursuant to Article 14, section 18 of the Arizona Constitution and A.R.S. § 16-919, corporations, limited liability companies and labor unions are prohibited from contributing to recall committees. Under the Supreme Court's *Citizens United* decision, the State cannot enforce this prohibition against committees that do not coordinate with candidates. Finally, recall committees are not required to comply with requirements that apply only to ballot measure committees.

David R. Cole
Arizona Solicitor General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>by<br><br>TOM HORNE<br>ATTORNEY GENERAL<br><br>June 8, 2011 | No. I11-002<br>(R08-035)<br><br>Re: Scope of Authority Under A.R.S. § 32-3612 With Respect to Appraisals of Nonfederally Related Transactions |
|---|---|

To: Daniel Pietropaulo, Executive Director
Arizona Board of Appraisal

## Question Presented

Does state law permit state certified and state licensed real estate appraisers to appraise real property in a nonfederally related transaction, regardless of the property's value or the transaction's complexity?

## Summary Answer

Section 32-3612(C), Arizona Revised Statutes ("A.R.S."), authorizes both state certified and state licensed real estate appraisers to conduct appraisals of any real property that is not related to a federal transaction regardless of the value of the property or the complexity of the transaction, so long as the appraiser meets the applicable ethical and practice standards.[1]

[1] All Arizona appraisers, whether licensed or certified, must complete an assignment in compliance with the Competency Rule, Ethics Rules and all Uniform Standards of Professional Appraisal Practice ("USPAP"), regardless of whether the transaction is federally related or nonfederally related. *See* A.R.S. § 32-3635; A.A.C. R4-46-401.

## Background

In 1989, Congress enacted Public Law 101-73, the Financial Institutions Reform, Recovery and Enforcement Act ("the Act") "to reform, recapitalize, and consolidate the Federal deposit insurance system to enhance the regulatory and enforcement powers of Federal financial institutions' regulatory agencies." H.R. Rep. No. 101-222, at 1 (Aug. 4, 1989). Title XI of the Act (sections 1101 through 1122) comprises the Real Estate Appraisal Reform Amendments. Section 1101 of Title XI states as follows:

> The purpose of this title is to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 1101, 103 Stat. 183, 511 (1989).

In section 1119(a)(1) of Title XI, Congress established that "[n]ot later than July 1, 1991, all appraisals performed in connection with federally related transactions shall be performed only by individuals certified or licensed in accordance with the requirements of [Title XI]."[2] *Id.* § 1119, 103 Stat. 183, 516. Section 1113 of Title XI established which federally related real estate transactions would require the services of a state certified appraiser, and section 1114 established that "[a]ll federally related transactions not requiring the services of a State certified appraiser shall be performed by either a State certified or licensed appraiser." *Id.* § 1114, 103 Stat. 183, 502.

---

[2] Under Title XI, a federally related transaction "means any real estate-related financial transaction which (A) a federal financial institutions regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates; and (B) requires the services of an appraiser." *Id.* § 1121(f), 103 Stat. 183, 517; *see also* A.R.S. § 32-3601(13).

Prior to the Act's enactment, Arizona did not regulate real estate appraisers. In response to the Act's federal mandate regarding who would be permitted to appraise real property in federally related real estate transactions, the Legislature established the State Board of Appraisal ("Board") for the purpose of "implement[ing] the provisions of title XI of the congressional financial institution reform, recovery and enforcement act of 1989." 1990 Ariz. Sess. Laws, ch. 313, § 1 (H.B. 2333).

**Analysis**

Section 32-3612, which establishes the parameters of the Board's certification and licensure classifications, states as follows:

> A. The following classifications of state licensed real estate appraisers and state certified real estate appraisers are established.
>
> 1. State certified general real estate appraisers consisting of those persons meeting the requirements for certification relating to the appraisal or appraisal review of all types of real property.
>
> 2. State certified residential real estate appraisers consisting of those persons meeting the requirements for certification relating to the appraisal or appraisal review of one to four residential units without regard to value or complexity.
>
> 3. State licensed real estate appraisers consisting of those persons meeting the requirements for licensing relating to appraisal or appraisal review of noncomplex one to four residential units having a value of less than one million dollars and complex one to four residential units having a value of less than two hundred fifty thousand dollars.
>
> B. Notwithstanding § 32-3602:[3]
>
> 1. All federally related transactions involving property with a value equal to or greater than one million dollars and complex one to four family residential real property shall be appraised by a state certified appraiser.

[3] The Board's license and certificate exemption statute.

2. All federally related transactions not requiring a state certified appraiser may be appraised by either a state certified or state licensed appraiser.

C. All nonfederally related transactions may be appraised either by a state certified or a state licensed appraiser.

Subsection (A) of A.R.S. § 32-3612 establishes the classifications and practice parameters of the state certified and licensed appraisers required under the Act. Subsection (B) of the statute mirrors the federal requirements of sections 1113 and 1114 of Title XI by setting forth the practice parameters for appraisals involving federally related transactions. In subsection (C), which has no counterpart in Title XI, the Legislature established who may conduct appraisals in Arizona for nonfederally related real property transactions. The Board's historical interpretation of subsection (C) has been that either a state licensed or state certified appraiser may appraise real property in nonfederally related transactions, so long as they do so within the parameters of their state classification as set forth in subsection (A). The Board has relied on the license and certification classifications established in A.R.S. § 32-3612(A) and on A.A.C. R4-46-201(B) to impose disciplinary sanctions against certified and licensed appraisers who performed appraisals in nonfederally related transactions of real property that fell outside their statutory license or certificate classification.[4]

In construing statutes, the goal is to fulfill the intent of the Legislature. *State v. Skiba*, 199 Ariz. 539, ¶8, 541, 19 P.3d 1255, 1257 (App. 2001). To do so, a statute's context and

[4] A.A.C. R4-46-201(B) states as follows:

B. Regardless of whether a transaction is federally related:

1. A State Licensed Residential Appraiser is limited to the scope of practice in A.R.S. § 32-3612(A)(3), and

2. A State Certified Residential Appraiser is limited to the scope of practice in A.R.S. § 32-3612(A)(2).

overall place in the statutory scheme is considered. *Oaks v. McQuiller*, 191 Ariz. 333, 334, ¶5, 955 P.2d 971, 972 (App. 1998). Where the statutory language is plain and unambiguous, the statute is followed as written. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶7, 165 P.3d 238, 240 (App. 2007). A statute is read to give "each word, phrase, clause, and sentence . . . meaning so that no part of the statute will be void, inert, redundant, or trivial." *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶17, 150 P.3d 773, 777 (App. 2007) (internal quotations omitted).

Subsection (C) of A.R.S. § 32-3612 provides that: "All nonfederally related transactions may be appraised either by a state certified or a state licensed appraiser." The plain, unambiguous language of the subsection indicates that either state certified or state licensed appraisers may appraise nonfederally related real property transactions, regardless of value or complexity. This interpretation gives meaning to subsection (C). Conversely, reading subsection (C) to say that state certified or state licensed appraisers may appraise nonfederally related transactions only within the parameters of their subsection (A) state classifications renders subsection (C) redundant and, therefore, meaningless. Subsection (A) already provides for and limits the scope of practice for state certified and state licensed appraisers. Thus, there would be no need for subsection (C) because whether a transaction is federally or nonfederally related, the license and certificate restrictions set forth in subsection (A) would control.

Further clarification of a statute's meaning may be found by looking at the Legislature's intent in enacting the provision. *See Dugan v. Fujitsu Bus. Comm'ns Sys., Inc.*, 188 Ariz. 516, 519, 937 P.2d 706, 709 (App. 1997) (stating that if a statute's language is unclear, courts "may look to other indicia of legislative intent, including subject matter, consequences, and the reason and spirit of the statute"). The House Bill Summary for HB 2333 states that: "State licensed real estate appraisers shall only appraise one to four [unit] family residential real property valued at

less than $1 million and not involving complex one to four family residential real property [units] *and all nonfederally related property.*" Ariz. H.R. Bill Summary for HB 2333m 39th Leg., 2d Reg. Sess., at 2 (Mar. 6, 1990) (emphasis added). Accordingly, as originally proposed, HB 2333 allowed state licensed appraisers to appraise all nonfederally related transactions without regard to value or complexity. This is consistent with and lends support to the interpretation of A.R.S. § 32-3612 as stated above. Prior to its final passage, the Legislature amended HB 2333 to include state certified appraisers, who have higher qualifications than state licensed appraisers, as also having the authority to appraise real property in any nonfederally related transaction.

Additionally, a February 16, 1990, House of Representatives Memo to the Tourism, Professional and Occupations Subcommittee explains that the purpose of HB 2333 "is to provide that federal and public policy interests in real estate-related transactions are protected by requiring that real estate appraisals in federally related transactions are written, and are performed by people whose competency has been demonstrated and who are subject to effective supervision." Ariz. H.R. Memo to the Tourism, Professions and Occupations Subcommittee on HB 2333, 39th Leg., 2d Reg. Sess., at 1 (Feb. 16, 1990). This statement reinforces the conclusion that in establishing the Board's appraiser classifications in subsection (A), the Legislature intended to meet the requirements Title XI placed on federally related transactions and that it set the scope of practice for state certified and state licensed appraisers in subsection (B) to comply with the Act. In enacting subsection (C), the Legislature did not mandate those same restrictions for nonfederally related real property transactions.

Under A.R.S. § 32-3612(C), both state certified and state licensed appraisers may perform appraisals in any nonfederally related transaction regardless of value or complexity.

## Conclusion

Section 32-3612(C) allows either a state certified or state licensed appraiser to appraise real property in the State of Arizona without regard to value or complexity for any nonfederally related transaction.

Thomas C. Horne
Attorney General

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| | |
|---|---|
| ATTORNEY GENERAL OPINION<br><br>by<br><br>THOMAS C. HORNE<br>ATTORNEY GENERAL<br><br>May 4, 2011 | No. I11-001<br>(R08-024)<br><br>Re: The Acceptance of Standing Orders Under A.R.S. § 32-2811 by Persons Certified by the Medical Radiologic Technology Board of Examiners |

To: Shanna Farish, Executive Director
Medical Radiologic Technology Board of Examiners

## Questions Presented

1. May a person certified by the Medical Radiologic Technology Board of Examiners ("MRTBE") accept standing orders to use ionizing radiation on patients presenting with particular conditions or a set of symptoms, or must he or she only accept specific orders from a licensed practitioner for each individual patient?

2. Could a technologist be guilty of unprofessional conduct if a patient receives unnecessary radiation due to inadequate, redundant, or erroneous orders?

## Summary Answer

Persons certified by the MRTBE may accept standing orders from licensed practitioners for particular conditions or symptoms and apply ionizing radiation to patients presenting with such conditions or symptoms and do not need an order from a licensed practitioner for each

specific patient.[1] In general, as long as certified individuals faithfully adhere to an order and act within the scope of the law under which they are licensed, there is no statutory basis for concluding that the technologist committed unprofessional conduct if a patient receives unnecessary radiation due to inadequate, redundant, or erroneous orders.

## Background

In 1977, the Arizona Legislature established the MRTBE Board and provisions governing persons certified to work in radiology. 1977 Ariz. Sess. Laws, ch. 145, § 10. Sections 32-2801 to 32-2843 of the Arizona Revised Statutes ("A.R.S.") require the MRTBE Board to ensure the adequate training and qualifications of persons operating x-ray equipment and limit the actions of certificate holders in order to protect Arizonans from the harmful effects of excessive and improper radiation.

There are multiple types of certificates. Section 32-2801(10) defines "practical technologist in podiatry certificate" as a certificate issued to "a person . . . who applies ionizing radiation to the foot and leg for diagnostic purposes while under the specific direction of a licensed practitioner."[2] Section 32-2801(12) defines a "practical technologist in radiology certificate" as a certificate issued to "a person . . . who applies ionizing radiation to specific parts of the human body for diagnostic purposes while under the specific direction of a licensed practitioner." Section 32-2801(15) defines a "radiologic technology certificate" as a certificate issued to "a person with at least twenty-four months of full-time study or its equivalent through an approved program and who has successfully completed an examination by a national certifying body."

[1] This Opinion concerns the ability of those certified by the Board to accept standing orders and does not address whether licensed practitioners may issue standing orders under their own statutes.
[2] Section 32-2801(8) defines "licensed practitioner" as "a person licensed or otherwise authorized by law to practice medicine, dentistry, osteopathy, podiatry, chiropractic or naturopathic medicine in this state."

A "radiologic technologist" is a person who holds a radiologic technology certificate that allows him or her "to apply ionizing radiation to individuals at the direction of a licensed practitioner for general diagnostic or therapeutic purposes." A.R.S. § 32-2801(13). Section 32-2811(A) states that "[n]o person may use ionizing radiation on a human being unless the person is a licensed practitioner or the holder of a certificate as provided in this chapter." Subsection B of A.R.S. § 32-2811 states:

> A person holding a certificate may use ionizing radiation on human beings only for diagnostic or therapeutic purposes while operating *in each particular case at the direction of a licensed practitioner*. The application of ionizing radiation and the direction to apply ionizing radiation are limited to those persons or parts of the human body specified in the law under which the practitioner is licensed. The provisions of the technologist's certificate govern the extent of application of ionizing radiation.

(Emphasis added.). Section 32-2801(5) defines "direction" as "responsibility for and control of the application of ionizing radiation to human beings for diagnostic or therapeutic purposes." A certificate may be revoked if the holder "[h]as applied ionizing radiation to a human being when not operating in each particular case under the direction of a duly licensed practitioner or to any person or part of the human body other than specified in the law under which the practitioner is licensed." A.R.S. § 32-2821(A)(9).

## Analysis

### I. Standing Orders Versus Specific Orders for Individual Patients.

As noted above, A.R.S. § 32-2811(B) states that persons certified by the MRTBE may use ionizing radiation "only for diagnostic or therapeutic purposes while operating in each particular case at the direction of a licensed practitioner." You have asked whether this statute allows a certificate holder to accept standing orders to use ionizing radiation on a patient presenting with a specific condition or set of symptoms and without receiving orders from a licensed practitioner with regard to a specific patient. In other words, is the phrase "in each

particular case" limited to orders for a particular individual, or does it include orders for a particular condition or set of symptoms? If it is limited to orders for a particular patient, then A.R.S. § 32-2811(B) would preclude a certificate holder from accepting standing orders for x-rays. On the other hand, if "in each particular case" includes a specific condition or set of symptoms, A.R.S. § 32-2811(B) would allow a certificate holder to accept standing orders for x-rays.

Under Arizona law, a court's primary goal in interpreting a statute is "'to fulfill the intent of the legislature that wrote it.'" *Bilke v. Arizona*, 206 Ariz. 462, 464, ¶11, 80 P.3d 269, 271 (2003) (quoting *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993)). Arizona courts seek to "determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). When the Legislature defines a term in a statute, one should apply that definition. *In re Andrew C.*, 215 Ariz. 366, 368, ¶15, 160 P.3d 687, 689 (App. 2007). When the Legislature does not offer its own definition or it appears from the context that the Legislature did not intend a special meaning, one gives words their ordinary meaning. *Mid Kan. Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). If the language of a statute is clear and unambiguous, there is no need to resort to methods of statutory interpretation. *State v. Harrod*, 218 Ariz. 268, 277, ¶28, 183 P.3d 519, 528 (2008). Statutory language is ambiguous where it "allows for more than one rational interpretation." *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 201, ¶3, 150 P.3d 773, 774 (App. 2007) (internal quotations omitted).

The Legislature has not defined the meaning of the word "case" as it is used in A.R.S. § 32-2811(B). "Case" is defined elsewhere as "an instance of disease or injury" but also as a "patient." *Merriam-Webster's Collegiate Dictionary* 191 (11th ed. 2008); *Simpson v. Owens*, 207 Ariz. 261, 273, ¶35, 85 P.3d 478, 490 (App. 2004) (noting that, in construing statutes, courts may reference well-known and reputable dictionaries). The first definition—an instance of disease or injury—indicates that "case" is not always tied to a particular person but instead includes a general medical condition that could afflict multiple human beings. The second definition—patient—would, however, tie "case" to a particular individual. Because "case" has multiple meanings and its definitions allow for more than one rational interpretation, one must apply statutory interpretation principles to discern the legislative intent behind the language in A.R.S. § 32-2811(B).

The first sentence of A.R.S. § 32-2811(B) states in its entirety, "A person holding a certificate may use ionizing radiation on *human beings* only for diagnostic or therapeutic purposes while operating in each particular *case* at the direction of a licensed practitioner." (Emphasis added.) While the first part of the sentence talks about limiting the use of ionizing radiation on "human beings" to diagnostic or therapeutic purposes, the second part of the sentence states that ionizing radiation may be performed for each particular "case" directed by a practitioner. If the Legislature intended to limit the performance of x-rays to situations where the licensed practitioner's order specifically names the patient, the statute could easily have been written to specify that the direction should be for a particular "human being" or "patient." Instead, however, the Legislature used two different terms in the same sentence—a *human being* may receive the ionizing radiation and a licensed practitioner may issue orders for a particular *case*. Thus, reading "in each particular case" in the context of the full sentence suggests that

"case" is not limited to an individual human being or patient, but may also include "an instance of disease or injury." As a result, the language of A.R.S. § 32-2811(B), "in each particular case" does not preclude the use of standing orders.[3]

## II. No Statutory Basis for Unprofessional Conduct

Generally, if a patient receives unnecessary radiation because of inadequate, redundant, or erroneous orders, there is no statutory basis for imputing unprofessional conduct to a certified individual who faithfully adheres to an order within the scope of the law under which they are licensed.[4] The statutes do not specifically identify any situation in which a certificate holder could be found guilty of unprofessional conduct for faithfully following an inadequate, redundant, or erroneous order. *See* A.R.S. § 32-2801(18) (unethical professional conduct); A.R.S. § 32-2811 (prohibitions and limitations); A.R.S. § 32-2821(A) (regulations for revocation or suspension of certificate; other disciplines); and A.R.S. § 32-2822 (unlawful acts). Because there is no statutory criterion for unprofessional conduct when a person acting within the scope of the law under which they are licensed faithfully follows an order, there is no statutory basis for a finding of unprofessional conduct if a patient receives unnecessary radiation due to an inadequate, redundant, or erroneous order.

## Conclusion

A.R.S. § 32-2811(B) does not prevent persons certified by the MRTBE Board from accepting standing orders applicable to a particular condition or set of symptoms and then using ionizing radiation without specific orders for each individual patient. There is no statutory basis

[3] A review of legislative history does not shed any additional light on the meaning of the language in A.R.S. § 32-2811(B).

[4] Theoretically, there may be a circumstance where the order is so facially deficient that compliance could constitute unprofessional conduct.

for imputing unprofessional conduct to a certified person when that individual faithfully adheres to orders and acts within the scope of the law under which he or she is licensed.

_____
Thomas C. Horne
Attorney General

*#256291*