**ARIZONA SUPREME COURT**

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| ROBERT BURNS,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>ARIZONA PUBLIC SERVICE COMPANY, et al.,<br><br>Defendants/Appellees. | Arizona Supreme Court No. CV-21-0080-PR<br><br>Court of Appeals Division One No. 1 CA-CV 19-0183<br><br>Maricopa County Superior Court No. CV2017-001831 |

# APPELLANT'S SUPPLEMENTAL BRIEF REGARDING PETITION FOR REVIEW

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## INTRODUCTION

The Appellees' arguments ignore the plain language of the Arizona Constitution and the Arizona Uniform Declaratory Judgments Act ("UDJA"). The Arizona courts cannot. The framers of the Arizona Constitution expressly and conspicuously delegated in Ariz.Const., art. 15, § 4 to "[t]he corporation commission, and ***the several members thereof***" (1) investigation and inspection powers over the records and affairs "of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state", and (2) "the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment." (emphasis added). That provision is unambiguous, and this Court should confirm its plain meaning: the framers established individual commissioner investigatory powers that the commissioners may separately enforce with the power of a court.

The UDJA, A.R.S. § 12-1831, *et seq.*, contains the plain language of a broad, remedial statute that grants individual Arizona Corporation Commission ("ACC") commissioners the right to judicial resolution of disputes over their constitutional investigatory powers. The UDJA does not exempt declaratory requests like Commissioner Burns sought. Rather, this Court has long held that a declaratory judgment action is the best way to resolve disputes like those here, and the Arizona appellate courts have resolved many questions involving ACC powers in declaratory judgment actions. This Court has also confirmed in multiple decisions that the UDJA

implicitly confirms the standing of government officials like Commissioner Burns to have their constitutional and statutory rights declared by the Arizona courts.

For these reasons, the Court should reverse the Court of Appeals' opinion for its error in interpreting both Ariz.Const., art. 15, § 4 and the UDJA, and should declare that Commissioner Burns indeed had the individual constitutional and statutory power to enforce subpoenas against APS, Pinnacle West and their shared CEO, and to call and question APS and Pinnacle West officials under oath in the APS rate case fact-finding hearing, without the interfering order by which his fellow commissioners blocked his investigatory actions. That declaration will end this case in Commissioner Burns' favor, and this Court should: (1) reverse the judgment of the Court of Appeals; (2) remand to the Superior Court with instructions to enter a final declaratory judgment in Commissioner Burns' favor; and (2) grant Commissioner Burns' attorneys' fees and taxable costs for the appeal.

## I. CANONS OF CONSTITUTIONAL CONSTRUCTION CONFIRM THAT COMMISSIONER BURNS HAD THE POWER TO ISSUE AND ENFORCE NVESTIGATORY SUBPOENAS.

Commissioner Burns sought a final declaratory judgment under the UDJA that, per the plain language of Ariz.Const., art. XV, § 4 and its supplementary statutes at A.R.S. §§ 40-241(A), 40-244: (1) he had individual authority to issue and enforce his investigatory subpoenas to Arizona Public Service Company ("APS"), its parent, Pinnacle West Capital Corporation ("Pinnacle West"), and their shared CEO, and to call and question APS and Pinnacle West officials under oath in the APS rate case evidentiary hearing; and (2) his fellow commissioners had no power to interfere with

the investigation Commissioner Burns was undertaking just because they disagree that his subpoenas and proposed witness questions were sufficiently "relevant" to the pending APS rate case. [*See, e.g.,* APPV1-0061 (Appellant's Complaint seeking Declaratory Judgment)]. The Appellees argue that section 4 does not provide an individual ACC commissioner any separate powers, but instead assigns the inspection and subpoena powers to the Commission acting through majority vote.[1] In their view, a majority of commissioners could quash Commissioner Burns' subpoenas and deny his proposed questioning of APS and Pinnacle West witnesses if they professed to believe the subpoenas sought insufficiently "relevant" information. [Resp. to Pet. at p. 9].

This Court must decide if the framers meant to grant individual commissioners separately-enforceable investigatory and subpoena powers, or if those powers are subject to control and interference by a Commission majority. Canons of construction dictate that the framers created independent powers.

**A. Section 4's Plain Language Provides Individual**

[1] The Appellees do not, and cannot, argue that APS, Pinnacle West, or their shared CEO were improper targets of art. XV, § 4 subpoenas. Those parties are, respectively, a "public service corporation" *see* Ariz.Const., art. XV, § 2 ("Public service corporation" defined), a publicly traded company, and the CEO and joint agent for both companies who was a witness to the companies' political spending decisions he authorized or knew of. Section 4 authorizes investigations and inspections involving all such parties. Ariz.Const., art. XV, § 4; *Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm'n*, 157 Ariz. 532, 534-35 (1988) (investigatory powers of the ACC "extend to all corporations which offer stock for sale to the public.").

**Commissioners Separate Investigatory Powers.** [2]

The plain language of Article XV, § 4 unambiguously authorizes individual commissioners to issue and enforce investigatory subpoenas.

This Court's "primary purpose in interpreting the Arizona Constitution is to effectuate the intent of those who framed the provision." *State v. Mixton*, 250 Ariz. 282, 290 (2021) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994)(internal quotations omitted). The "plain language" of a constitutional provision "is the best indicator of the intent" of those who enacted it. *McGuire v. Lee*, 239 Ariz. 384, 387 ¶ 10 (App. 2016); *Airport Props. v. Maricopa Cty.*, 195 Ariz. 89, 99 (App. 1999).

The Court's starting point is the "language of the provision [in question], for if the constitutional language is clear, judicial construction is neither required nor proper." *Perini Land & Dev. Co. v. Pima Cty.*, 170 Ariz. 380, 383 (1992); *Pinetop-Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302 (1981) (same). If the language at issue has a natural, obvious, and ordinary meaning, the provision is not ambiguous and the Court applies its "plain meaning." *Valley Nat'l Bank v. First Nat'l Bank*, 83 Ariz. 286, 294 (1958) (in construing a provision of the Arizona constitution, "the language employed must be taken and understood in its natural, ordinary, general and popular sense."); *see Jett*, 180 Ariz. at 119; *Heath v. Kiger*, 217 Ariz. 492, 494 (2008); *McElhaney Cattle Co. v. Smith,* 132 Ariz. 286, 290 (1982) ("[T]he

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[2] Appellees urge this Court to ignore the plain language of the Constitution because Commissioner Burns allegedly did not raise the plain language argument below. [Resp. to Pet. at p. 18]. They are wrong—Commissioner Burns relied on the plain language of § 4 throughout this litigation. [*See* Appellant's Opening Brief in the Court of Appeals) at p. 10 (arguing the "commissioners have a broad set of investigatory powers emanating" from § 4); APPV2-0127 (Appellant's Second Amended Complaint) at ¶ 81].

meaning to be ascribed to the [constitutional] words is that which is generally understood and used by the people."); *Winterbottom v. Ronan*, 227 Ariz. 364, 365-66 (App. 2011) (courts must not permit unambiguous language to be construed other than "'according to [its] literal meaning.'").

The language of § 4 is not ambiguous: it states that the commission, and the "several" commissioners, each independently have the power to "inspect and investigate" corporate records and affairs as well as to "enforce" investigatory subpoenas with the power of a court. In its entirety, § 4 reads:

> The corporation commission, ***and the several members thereof***, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, ***and of the several members thereof***, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state.

Ariz. Const., art. XV, § 4 (emphasis added). There is no question that "the several members thereof" refers to individual commissioners, as article XV uses such terms interchangeably. *See* Ariz.Const., art. XV, § 1(A),(B) (referring to commissioners as "member" or "members"). Moreover, the language and structure of § 4 confirm it delegates powers to individual commissioners and separately to the commission as a body: (1) the commas segregating the phrases "and the several members thereof"; (2) the use of the conjunction "and" at the beginning of those segregated phrases; and (3) the basic grammatical structure of the long sentence comprising § 4.

### 1. The use of commas and the conjunctive "and" preceding the phrases "the several members" and "of the several members," plainly segregates the individual members from the Commission acting as a body.

Two commas in § 4's delegation of "inspect and investigate" and "enforce the attendance of witnesses and the production of evidence" powers separate "the several members thereof" from "[t]he corporation commission." Two commas also separate "the purpose of the commission" from "[the purpose] of the several members thereof". And each of the separate "several members" clauses is preceded by the conjunction "and". This punctuation and structure plainly require that the "several members" are distinct recipients of the delegated powers.

The use of commas to separate nouns helps define the "plain language" of § 4 by showing the nouns identified in the segregated phrases are meant to be independent of one another—not duplicative or overlapping. *See, e.g.*, *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[A]s a result" of the separation of two noun phrases by commas, the two phrases "stand independent" of each other.); *see also*, *In re Jessi W.*, 214 Ariz. 334, 337 ¶¶'s 15-16 (App. 2007); *Ross v. Kanaga (In re Darmstadt Corp.)*, 164 B.R. 465, 470 (D. Del. 1994) (commas between two phrases in a statute indicates that "the draftsman intended to identify two independent claims."). In *State v. Feldstein*, 134 Ariz. 129, 130 (App. 1982), for example, the Court of Appeals found "[t]he language is clear" when a statute separated two nouns describing potential victims of an assault—(1)"'a peace officer'", and (2) "'a person summoned and directed by such officer while engaged in the execution of any official duties.'" "The placement of the comma [between the

two types of victims] clearly delineates" one from the other. *Id.* Similarly here, the separation of "the several members thereof" from "[t]he corporation commission" by commas clearly delineates between the commission as a body and the individual commissioners. The same applies to the second similar separation later in the section which clearly delineates "the purpose . . . of the several members thereof" from "the purpose of the commission." Ariz.Const., art. XV, § 4.

In addition, the repeated use by § 4 of the conjunction "and" after the first commas segregating the references to "the several members thereof" is especially important. This construction means the noun stated before the comma (the corporation commission) and the noun coming after it (the several members) are intended to be independent of each other. *See Ron Pair Enters.*, 489 U.S. at 241, 109 S. Ct. at 1030 (1989) (noting the drafters' intent to make two noun phrases "independent" was further confirmed by use of the conjunctive words "and any" before the second, separated phrase); *see also, United States v. Mottolo*, 605 F. Supp. 898, 903 (D.N.H. 1985) (reading phrases relating to "claims" and to "damages" that are set off by commas and the conjunctive "nor" as "independent clauses"). Arizona courts apply the same analysis. *Newland v. Fossey*, 2 Ariz. App. 394, 395 (App. 1965) (finding that use of the conjunctive "and" between two events specified in rule meant that the events were independently required, so there is "no ambiguity in the [provision] -- its meaning is clear and requires no resort to rules of construction.").

Thus, the plain meaning created by the commas and conjunctive "and" in § 4 is that the "the several members thereof" are meant to be independent of the "[t]he corporation commission." The framers intended § 4 powers to be independently

delegated to "the several members" and that their individual powers would not be subject to the whims of the commission.

**2. The grammatical structure of the provision supports Commissioner Burns' interpretation.**

The grammatical elements and structure of § 4 also affirm that the references to "the several members thereof" identify people to whom the section separately delegates the specified investigatory powers. The Court will first note that the initial phrase "and the several members thereof" is not an adjectival or adverbial phrase, *compare, Centric-Jones Co. v. Town of Marana*, 188 Ariz. 464, 468 (App. 1996), but instead a phrase that adds another independent subject to the sentence. Section 4 comprises a single sentence with two subjects: (1) "[t]he corporation commission", and (2) "the several members thereof." The verb of the sentence is "shall have." And there are two objects of that verb: (1) the "power to inspect and investigate" and (2)"the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment." Ariz.Const. art. XV, § 4.

Because there are two independent subjects to which the same verb and objects apply, § 4 could be accurately transcribed into two sentences: one which states that "***the several members of the corporation commission*** shall have power to inspect and investigate the property . . . and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation . . ., and for the purpose of ***the several members*** shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence

by subpoena, attachment, and punishment . . . .”; and another which delegates equivalent powers to the commission acting as a whole.

### 3. The Court may not render the specific references to “the several members” superfluous or redundant, nor ignore the conjunctive “and” that precedes those references.

To enforce the framers’ intent, the Court must “give meaning to ‘each word, phrase, and sentence [of the constitution]. . . so that no part will be void [sic], inert, redundant, or trivial.’” *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 406 (2020) (quoting *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949); *Morrissey v. Garner*, 248 Ariz. 408, 410 ¶ 8 (2020) (this Court strives “‘to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.’”). It must also presume “each and every clause in a written constitution has been inserted for some useful purpose[.]” *State ex rel Davis v. Osborne*, 14 Ariz. 185, 204 (1912); *see also Arizona E.R.R. v. State*, 19 Ariz. 409, 411 (1918)(“no clause, sentence, or word in the Constitution shall be superfluous, void, or insignificant.”).

The Appellees ask the Court to ignore the two specific references to “the several members” of the commission in § 4, and to instead presume they are merely a duplicative description of the commission acting as a body by majority vote. But this would render the “several members” references entirely redundant, superfluous, and trivial. They would be completely unnecessary as the section already repeatedly refers to “[t]he corporation commission” and “the purposes of the commission”. The Appellees’ reading also requires the Court to entirely ignore the conjunctive “and” that precedes the references to the “several members” as that conjunction conflicts

with the notion that the "several members" and the "commission", are, for purposes of § 4, the exact same thing.

Finally, the Appellees' interpretation of majority commissioner control over any § 4 investigations ignores the plain language of § 4 expressly providing that the individual commissioners may exercise powers to compel production and testimony "for the purpose of the several members" – meaning the framers accurately predicted individual commissioners might each have their own investigatory "purposes". *See id*. The Appellees' position would require the Court to violate its rule against ignoring words and rendering constitutional language superfluous.

**4. The Court must find the unique, specific references to "the several members" in Section 4 to be meaningful.**

Not only is § 4 itself free of ambiguity, its reference to the "several members" puts it in stark contrast with most all of article XV. Section 4 is located between sections whose plain language grants power only to the commission as a whole. *See* Ariz.Const., art. XV, §§ 3,5-6. None of those other sections even mentions the "several members" nor delegates them powers—all powers in those sections are instead given "the corporation commission". *Id.* So, individual commissioners may not separately decide what utility rates are reasonable, § 3, nor issue certificates of incorporation, § 5, nor make rules and regulations to govern ACC proceedings. *Id*. at § 6. Those sections delegate powers only to the "commission." The same is true of art. XV, §§ 14 and 19, which delegate other powers just to "the corporation commission". The framers made one conspicuous mention of powers that "the several members thereof" "shall have"—in § 4. *Compare* Ariz.Const., art. XV, § 4

*with id.* at §§ 3, 5-6, 14, 19. The Court must reject Appellees' suggestion that these unique references were mere accident or intentional redundancy.

It is "axiomatic . . . that where different language is used in different provisions, [the court] must infer that a different meaning was intended." *State v. Hernandez*, 244 Ariz. 1, 7 ¶ 29 (2018) (Bolick, J., concurring) (citing *Rochlin v. State*, 112 Ariz. 171, 176 (1975)). In *Rochlin*, this Court considered the constitutionality of the Public Safety Personnel Retirement System under provisions of Ariz.Const., art. IX, §§ 5, 8 that the Court noted contained significant language differences. *Rochlin*, 112 Ariz. at 176. The Court held:

> This difference in language must be respected. If the authors of the constitution had intended the sections to mean the same thing they could have used the same or similar language. The fact that they did not, requires the conclusion that the sections were meant to be different.

*Id.* This Court applies the same respect for language differences between parallel federal and state constitutional terms. *See Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354-55 (1989) (comparing free expression protections in Ariz.Const., art. 2, § 6 with First Amendment language); *State v. Ault*, 150 Ariz. 459, 463 (1986) (holding deviations in language between the Fourth Amendment and Ariz.Const., art. 2, § 8 "must be respected.").

In all of article XV, the only section that mentions "the several members" and indicates that they "shall have" powers that the "corporation commission" also "shall have" is § 4. The court cannot ignore these clear differences in language, and cannot render them superfluous. *See Rochlin*, 112, Ariz. at 176; *Arizona E.R.R.*, 19 Ariz. at 411. It must give them effect.

### 5. The commission order quashing Commissioner Burns' subpoenas violated the express recognition that the individual members may compel testimony and production of records for their individual purposes.

The Appellees argue that the other four commissioners had the right to quash Commissioner Burns' subpoenas and interfere with his request to call and question APS and Pinnacle West witnesses in the APS rate case evidentiary hearing because the other commissioners did not consider the information and testimony Burns sought sufficiently "relevant". [*See* Resp. to Pet. at p. 18]. They point to an ACC rule (Ariz.Admin.Code ("A.A.C." § R14-3-109(O)) allowing the commissioners, acting together by majority vote, to quash certain subpoenas the commission issues parties to a contested proceeding. But even assuming that rule applied to commissioner subpoenas (it does not[3]), this Court has held that administrative rules of the Commission cannot conflict with a "strict construction of the Constitution and implementing regulations."[4] *Ariz. Corp. Comm'n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 293 (1992) ("*Woods*"). Therefore, the ACC rules cannot define the scope of an

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[3] The ACC hearing rules allow a private party in a contested hearing to file an application asking the Commission to issue a subpoena for them, and the rules allow the Commission to quash such party subpoenas on a proper objection. *See* A.A.C. § R14-3-109(O). The rule Appellees cite thus deals exclusively with these subpoenas issued on the application of non-Commission parties – and not at all to the investigatory subpoenas an individual commissioner issues under Ariz.Const., art. XV, § 4 and A.R.S. § 40-241(A) to fulfill their personal investigatory purposes.

[4] Even the Legislature may not enact items contradicting the article XV delegations. *See Rural/Metro Corp. v. Ariz. Corp. Comm'n*, 129 Ariz. 116, 117-18 (1981); *Selective Life Ins. Co. v. Equitable Life Assurance Soc'y*, 101 Ariz. 594, 601 (1967) (Legislature may enact regulations on insurance companies "so long as such regulations do not conflict with the constitutional powers of the corporation commission."). Logically, neither can the Commission's majority.

individual commissioner's investigatory powers under article XV, § 4. If the Constitution says they have such powers, then any ACC rules to the contrary would be unconstitutional and void.

Furthermore, any rules allowing the commission to quash a single commissioner's subpoenas by majority vote directly conflicts with the language and expressed policy of article XV, § 4. Appellees argue that "nothing in Section 4's text authorizes a lone dissenting commissioner to pursue contrary purposes." [Resp. to Pet. at 18]. But section 4 does just that. It expressly acknowledges that the "several members" "shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment," "***for the purpose . . . of the several members thereof***." (emphasis added). So, the plain language affirms that the commissioners are each constitutionally empowered to issue and enforce subpoenas for their individual purposes. And, per this Court's decision in *Polaris Int'l Metals Corp. v. Arizona Corp. Comm.*, 133 Ariz. 500, 506 (1982), their purposes may as broad as a grand jury's, including "investigat[ing] merely on suspicion that the law is being violated, or even just because [the commissioner] wants assurance that it is not." *Id.*

Majority commissioner veto power is antithetical to such broad, individual investigatory discretion. Moreover, the Constitution's language reserves no right to the Commission majority to question or interfere with such individual purposes, and the Court may not judicially add a new provision to § 4 subjecting the investigatory powers of the "several members" to majority override. *See Boswell v. Phx. Newspapers*, 152 Ariz. 9, 13 (1986) (The Court may not "restrict the guarantee" of

such an "unrestricted" grant of power "by adding words of limitation contrary to the plain language used" or implying any sort of "restrictive adjectives or phrases").

The commissioner majority here objected to, and found a way to entirely stifle, the "purposes" of Commissioner Burns' investigation, by voting that they were not sufficiently "relevant" to the majority's view of the purposes of the APS rate case fact-gathering process. [*See* APPV2-0031 (Interlocutory Order)]. The plain language of art. XV, § 4 precludes the commission majority from disrespecting and blocking individual commissioner's investigatory discretion during the fact-gathering stages of ACC work. The other commissioners' order barring Commissioner Burns from completing his investigation was therefore a violation of his constitutional rights.

### B. Even if Article XV, Section 4 Were Ambiguous, Relevant Interpretive Tools Compel the Court to Recognize Delegation of Investigatory Powers to Individual Commissioners

Even if § 4 was ambiguous, the Court "may consider the history behind the provision, the purpose sought to be accomplished, and the evil sought to be remedied." 217 Ariz. at 495 at ¶ 9. These tools affirm Burns' interpretation.

#### 1. The Purpose and Evil Sought to Be Remedied.

The Arizona framers established through Ariz.Const., art. XV a "fourth branch of government" in the ACC, with more extensive power and jurisdiction than similar commissions in any other state, and uniquely combining executive, legislative and judicial powers. *See, Ariz. Corp. Comm'n v. Superior Court*, 107 Ariz. 24, 26 (1971); *State ex rel. Corbin v. Ariz. Corp. Comm'n*, 174 Ariz. 216, 218 (App. 1992).

The framers also established all the five commissioner positions as state-wide

elected offices responsible in principal part for protecting consumer interests against the power and overreaching of regulated public service corporations, like APS. *See, e.g., Woods*, 171 Ariz. at 290, 295 (affirming "the framers' intent of the Commission's function . . .: to protect consumers from abuse and overreaching by public service corporations."). This Court has noted that the "Arizona voters have protected the independence of the Commission—especially its provisions regarding election of commissioners—from constitutional amendment on numerous occasions." *Id.* at 290. The framers and voters have thus repeatedly expressed their intent that their commissioners be independent and individually accountable to voters. That individual constitutional responsibility can only be fulfilled if each commissioner enjoys broad individual and separately enforceable investigatory powers to bring facts they consider important to light. That is what the framers gave each commissioner in the plain language of § 4.

**2. The History Behind the Provision.**

The Arizona framers drew from Virginia's and Oklahoma's constitutions, with important contrasts. *See State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 300-01 (1914). For example, the Oklahoma constitution, like Arizona's, gives investigatory powers to "the commissioners, or either of them[.]" Okla. Const. Art. IX, § 28. However, the Arizona framers intentionally departed from the Oklahoma model, which expressly reserves the subpoena power to the commission as a whole. *Id*. at § 19. The Arizona distinction meaningfully expresses an intent to provide our commissioners broader and truly individual investigatory powers. *See, e.g.*, *Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. at 300-01 (distinctions between Oklahoma

and Virginia language makes Arizona ACC powers broader).

### C. Commissioner Burns Was Entitled to a Declaration That the ACC Statutes Granted Him the Same Individual Investigatory Powers.

The Arizona statutes that complement and implement parts of Ariz.Const., art. 15, § 4 contain similarly plain language acknowledging the separate powers of "each commissioner" to inspect records of public service corporations like APS and to depose such corporations' officers, agents and employees like in a court proceeding. *See* A.R.S. §§ 40-241(A), 40-244. This Court must ensure they are interpreted consistently with the terms of article XV, § 4, and should rule that the statutes also granted Commissioner Burns individual discovery powers that his fellow commissioners could not override on supposed "relevance" grounds. *See, e.g., Schecter v. Killingsworth*, 93 Ariz. 273, 282 (1963).

## II. COMMISSIONERS MAY BRING CLAIMS UNDER THE UDJA TO ENFORCE THEIR INDIVIDUAL INVESTIGATORY RIGHTS.

The Arizona Constitution and ACC enabling statutes provide some small monetary fine mechanisms that the Commission may invoke to minimally penalize (up to $5,000.00 per order violated) persons or entities who fail to comply with an individual commissioner's subpoenas or other investigatory orders. *See* Ariz.Const., art. XV, §§ 16, 19 (fines for violations of ACC "orders"); A.R.S. § 40-424(A) (confirming that persons or entities who "fail[] to observe or comply with any order, rule, or requirement of the commission ***or any commissioner***" "shall be in contempt of the commission" and may be fined) (emphasis added); A.R.S. § 40-425.[5] But the

[5] These penalty provisions apply to violations of commissioner "orders" or "requirements", which would include subpoenas and commands issued under the

primary objective of Commissioner Burns was not to seek some minimal civil penalty (which is no disincentive to companies with the wealth of APS and Pinnacle West anyway), but to have his subpoenas and testimonial requests fully complied with. To ensure their rights to compel compliance are confirmed and then enforced through judicial injunctive orders, and contempt powers, the individual commissioners are entitled to invoke the declaratory relief and "further relief" provisions of the UDJA[6], which this Court has long considered "the simplest and the best way" to resolve such disputes. *Merrill v. Phelps*, 52 Ariz. 526, 529 (1938).

The Court of Appeals' decision that a commissioner has no "standing" to seek a declaration of their rights ignores that Arizona's courts are "not constitutionally constrained to decline jurisdiction based on lack of standing because the Arizona Constitution, unlike the Federal Constitution, contains no 'case or controversy' requirement," and questions of ACC commissioner powers may be sufficiently ripe to justify review without any further "standing." *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 (2019)(internal quotations omitted).

Moreover, the Arizona courts have repeatedly considered the scope of the ACC's power in declaratory judgment actions. *See, e.g., City of Surprise*, 246 Ariz.

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article XV, section 4 authorization to act with "the power of a court of general jurisdiction". *See Ingalls v. Superior Court*, 117 Ariz. 448, 450 (App. 1977) (A subpoena is considered a court "order".)

[6] If a target of an investigatory subpoena or order refuses to comply after the court has declared that the commissioner may compel their compliance, the commissioner may invoke "further relief" authorized by A.R.S. § 12-1838 to enforce the declaration—including injunctive orders. *See Ariz. Biltmore Hotel Villas Condo. Ass'n v. Ariz. Biltmore Hotel Master Ass'n*, No. 1 CA-CV 13-0703, 2015 Ariz. App. Unpub. LEXIS 963, at *9 (App. July 30, 2015) (Mem. Dec. copy at Ex. A).

at 209-10 (2019).[7] In fact, as recently as 2019 this Court held that a city government could seek a declaration of the ACC commissioners' rights to interfere with the city's condemnation of a water utility. *Id*. at 209-10. This Court ruled that the city's "standing is suggested by Arizona's declaratory judgment statute, which provides that a party whose 'rights, status or other legal relations are affected by a statute' may seek declaratory relief regarding the statute's construction." *Id.* at 209 (citing A.R.S. § 12-1832).

This Court supported its *City of Surprise* ruling with its earlier decision in *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119 (2013). In *Dobson* the Court had found four individual members of a state commission (the Commission on Appellate Court Appointments), *acting individually*, had standing to both seek declaratory judgment on the constitutionality of a new statute impacting their work and to obtain an injunction prohibiting their commission from applying the statute. *Id.* at 122-24. The commissioners' individual standing to seek such relief was "implicitly recognized by Arizona's declaratory judgment statute, . . . A.R.S. § 12-1832." *Id.* at 122.

Finally, this Court acknowledged in *City of Surprise* § 12-1842 of the UDJA which states: "This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *Id.* That broad

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[7] *See also, Polaris Int'l Metals Corp*, 133 Ariz. at 506; *Ethington v. Wright*, 66 Ariz. 382, 384 (1948); *Pioneer Mut. Benefit Ass'n v. Corp. Comm'n*, 59 Ariz. 112, 113-121 (1942); *Am. Cable Television v. Ariz. Pub. Serv. Co.*, 143 Ariz. 273, 274 (App. 1983); *Lord v. Ariz. Corp. Comm'n*, 9 Ariz.App. 34 (App 1968).

remedial purpose echoes the sentiment this Court stated long ago in *Merrill*, 52 Ariz. at 529 where the plaintiff government official "claim[ed] that he, in his official capacity, has the right to perform certain acts, and that these rights are affected by certain statutes" and the defendant government official "claim[ed] the same right and that there is a decided controversy and uncertainty as to which official is correct in his contention." *Id*. This Court ruled that a "declaratory judgment is the simplest and the best way of determining" contests of governmental rights. *Id.*

Thus, Commissioner Burns' claims for a declaratory judgment confirming his rights to have APS, Pinnacle West and Mr. Brandt comply with his investigatory efforts require the courts to resolve his dispute with regulated parties and with other governmental officials resisting his constitutional powers. These are precisely the type of disputes the Court found appropriate for UDJA determinations in *City of Surprise*, *Dobson* and *Merrill*, giving him UDJA standing.

The applicability of the UDJA also alleviates all Appellees' concerns about unrestrained powers of individual commissioners to "compel responses to their own idiosyncratic discovery demands…." [Resp. to Pet. at p. 19]. The UDJA works both directions, and the target of an individual commissioner investigatory effort could seek a declaration that the particular request is not constitutionally authorized. Acknowledging the applicability of the UDJA provisions both enables investigatory target to have their rights protected, and ensures that no investigation will be sanctioned but those expressly authorized by Article XV, § 4.

## III. THIS COURT'S RULING IN FAVOR OF COMMISSIONER BURNS WILL END THIS LITIGATION IN HIS FAVOR, AND ENTITLE HIM TO RECOVER ATTORNEYS' FEES AND COSTS.

Because Commissioner Burns is out of office and can no longer investigate APS's and Pinnacle West's political and other spending practices, this Court's resolution of the two issues here—(1) whether Ariz.Const., art. XV, § 4 granted him individual investigatory rights his fellow commissioners could not override in the way they did, and (2) whether Commissioner Burns could seek resolution of his constitutional investigatory rights through a declaratory judgment action—will grant all relief sought through Burns' Second Amended Complaint that is still viable. Such a ruling would therefore entitle Commissioner Burns to an award of all his reasonable attorneys' fees and taxable costs for the appeal as a prevailing party. *See, e.g.,*A.R.S. § 12-348.01 (authorizing award to government officer of reasonable attorneys' fees for any lawsuit against "the state, or a[] . . . commission of this state . . ."; *City of Tempe v. State*, 237 Ariz. 360, 366-67 (App. 2015); A.R.S. § 12-1840; A.R.S. § 12-341 (costs). The Court should allow Burns to apply for fees and costs.

The Court should also hold the Superior Court obligated to issue Burns a final declaratory judgment that under Ariz.Const., art. 15, § 4 and A.R.S. §§ 40-241(A), 40-244 he was entitled to enforce his subpoenas against APS, Pinnacle West and their shared CEO, and to call and question APS and Pinnacle West witnesses in the APS rate case, without the interference his fellow commissioners imposed. That will end this case and allow Commissioner Burns to submit his application for attorneys' fees and taxable costs incurred in the Superior Court proceedings per A.R.S. §§ 12-341, 12-348.01, 12-1840 or other applicable provisions of Arizona law.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

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