IN THE SUPREME COURT

STATE OF ARIZONA

JAVAN "J.D." and HOLLY MESNARD, husband and wife, Petitioners, v. HONORABLE THEODORE CAMPAGNOLO, Respondent, DONALD M. SHOOTER, Respondent-Real Party-in-Interest.	No. Court of Appeals (Div. One) No. 1 CA-SA-20-0125 Maricopa County Superior Court No. CV2019-050782

PETITION FOR REVIEW
OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS
(JURISDICTION DECLINED)

Stephen W. Tully 014076
Bradley L. Dunn 028897
2375 E. Camelback Rd.
Suite 750
Phoenix, AZ 85016
602-631-4400

Attorneys for Petitioners Javan "J.D." and Holly Mesnard

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Petitioners Javan "J.D." and Holly Mesnard[1] ("Mesnard") petition the Supreme Court of Arizona to review the July 13, 2020 decision of the court of appeals declining to accept jurisdiction of Mesnard's Petition for Special Action on the issues set forth below. This Petition presents questions of pure law regarding the scope of legislative immunity, which is a matter of statewide concern. It also asks the Court to resolve a conflict among the appellate divisions on how to treat notice of claim letters on a motion to dismiss. Accordingly, it is highly appropriate for the this Court to accept this Petition. In compliance with Rule 23(d) of the Rules of Civil Appellate Procedure a copy of the superior court's decision that is the subject of this special action accompanies this Petition. (Superior Court's Ruling dated May 26, 2020, (the "Order"), **APP**[2] **021-036**).

INTRODUCTION

Real party-in-interest Donald M. Shooter, was expelled from the Arizona House of Representatives on February 1, 2018 following the release of an investigative report concerning allegations Shooter had engaged in inappropriate conduct with other House members, staff and lobbyists. The vote to expel him was 56-3. Shooter sued the former Speaker of the House, Petitioner J.D. Mesnard, for

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[1] Ms. Mesnard is being sued solely in her capacity as spouse of Mr. Mesnard. For ease of narrative the petition refers only to Mr. Mesnard.
[2] "APP" refers to the page numbers cited in Petitioner's Appendix to this Petition incorporated with a clickable link.

damages arising from his expulsion. Shooter's original complaint was dismissed by the superior court for failure to state a claim for relief. Shooter was granted an opportunity to amend his complaint, which he did. (**APP145-146**).

Shooter's Amended Complaint asserted six (6) causes of action, *viz.* 1) Defamation; 2) False Light Invasion of Privacy (abandoned and dismissed with prejudice); 3) State Constitutional Denial of Due Process (dismissed with prejudice); 4) Civil Conspiracy re Defamation; 5) Civil Conspiracy re False Light (abandoned and dismissed with prejudice); and 6) Civil Conspiracy re State Constitutional Denial of Due Process (dismissed with prejudice). (Amended Complaint ("FAC"), **APPV2**[3]**-021-135**)

Mesnard moved to dismiss the Amended Complaint on various grounds including legislative immunity. (Mesnard Motion to Dismiss **APPV2-136-171**). The superior court dismissed all the claims against Mesnard except the defamation claim and permitted the conspiracy claim based on the defamation claim to go forward as against all defendants. (Order at p. 9, **APP 029;**).

Mesnard's special action asked the court of appeals to overturn the portion of the Order in which the superior court refused to recognize the legislative immunity

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[3] APPV1 and APPV2 refer to Volumes 1 and 2 of relevant records from the case file that accompany this Petition but are filed as separate volumes due to file size limitation of AZTurbo Court.

of Mesnard from the defamation and conspiracy to commit defamation counts of the Amended Complaint. The superior court in its order stated that "..it is not as clear under Arizona law how far that absolute immunity extends. … without further guidance from Arizona appellate courts, this Court is reluctant to extend legislative immunity to every act allegedly conducted by Mesnard, simply because of his status as the Speaker of the House." The superior court refused to recognize Mesnard's immunity, not because it found it did not apply, but because it could not tell if it applied. The result is effectively the same as finding no immunity. Mesnard asked the court of appeals to clarify and confirm the broad scope of legislative immunity and its application to the facts alleged in Shooter's Amended Complaint. He now asks the same of this Court.

The special action also raised privilege to publish as a bar to Shooter's defamation claims based on the Arizona House of Representative's investigative report, and it also raised Arizona's notice of claim statute as a bar to Shooter's claims based on Mesnard's press release explaining his decision to move the House to expel Shooter. The court of appeals declined jurisdiction.

Acceptance of this Petition is appropriate. This appeal presents pure questions of law. The court of appeals, by refusing to hear Mesnard's petition, is shearing him of his legislative immunity and forcing Mesnard to defend himself in discovery over allegations from which he is not subject to account. At a minimum, the court has a

duty to state the scope of the immunity so that Mesnard may be entitled to its protection.

ISSUES PRESENTED FOR REVIEW

1. Whether Mesnard is absolutely immune from suit based on his actions complained of in the Amended Complaint.

2. Whether Mesnard's release of the investigative report from the law firm retained by the Arizona House of Representative to review the allegations against Mr. Shooter and others was privileged.

3. Whether the notice of claim filed by Shooter can be considered by the court on a motion to dismiss?

STATEMENT OF FACTS

From 2017 – 2019 J.D. Mesnard was the Speaker of the Arizona House of Representatives. During his tenure as Speaker, allegations surfaced of inappropriate behavior by then Representative Donald Shooter. Shooter demanded an investigation into the allegations and Mesnard directed that one occur. The House hired a law firm to perform the investigation. The law firm eventually produced a report with its findings (the "Report") (**APP 037-118**).

Subsequently, on February 1, 2018, Mesnard, as a member of the Arizona House of Representatives, sponsored House Resolution 2003. That resolution sought to expel Shooter from the Arizona House of Representatives. The members of the

Arizona House of Representatives passed H.R. 2003 and expelled Shooter from the House.

On or about April 16, 2018 Shooter's counsel served a notice of claim letter on Mesnard that among other things claimed: "The allegations and conclusions against Shooter based on a bogus policy and standard are defamatory and were publicly disseminated in the Special Counsel's report and repeated as fact in the media." The notice of claim letter did not reference any statements made in a press release by Mesnard issued on February 1, 2018. (Notice of claim letter, **APPV1-124-140**).

On January 29, 2019, Shooter sued Mesnard in superior court under several theories including for damages under 42 U.S.C. § 1983. The case was removed to federal court where the district court dismissed the 1983 claim and remanded the rest of the claims back to the superior court. (Fed. Order dated June 7, 2019, (**APP 119-133**).) The superior court then dismissed the rest of the counts in the complaint, but permitted Shooter to amend his complaint. (Superior Court's Ruling dated December 20, 2019, **APP 134-146**). Mesnard subsequently moved to dismiss the Amended Complaint. The superior court granted that motion in part and denied it in part. (Order, **APP 021-036**).

Shooter's remaining claims are a claim of defamation and a claim of conspiracy to commit defamation. Those claims are based on two alleged sources of

defamatory statements. (FAC ¶¶175-183, and 202-208 respectively, **APPV2-065-070**; **APPV2-080-087**). Shooter complains the contents of the Report defamed him. Shooter also claims that Mesnard defamed him in a press release issued on February 1, 2018 by Mesnard during session. (Press release, **APP 147**).

LEGAL ARGUMENT

Arizona Appellate courts have been clear in their pronouncements that Arizona's legislative immunity is as broad and comprehensive as the federal immunity. Due to its common law origins, legislative immunity under federal common law is afforded to state legislators even where not specifically provided for in a state's constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). "… the legislative immunity shielding members of the Arizona legislature is rooted in both federal common law and the Arizona Constitution." *Ariz. Indep. Redistricting Comm'm v. Fields* 206 Ariz. 130, 75 P.3d 1088 ¶16 (App. 2003). "… [C]ases construing the federal Speech or Debate Clause and the federal common law are persuasive in interpreting the scope of the immunity and privilege afforded by the Arizona Constitution." *Id.* Ft. Note 4.

In determining if legislative immunity applies "[t]he question to be resolved is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.' If they do, the petitioners 'shall not be questioned in any other place' about those activities since the prohibitions of the *Speech or Debate Clause*

are absolute." *Eastland v. United States Servicemen's Fund* 421 U.S. 491, 501, 95 S. Ct. 1813, 1820 citing *Doe v. McMillan*, 412 U.S. 306, 312-313 (1973).

A. The Investigative Report

i. Absolute immunity

The Amended Complaint admits that the Arizona House of Representatives retained a law firm to investigate the allegations of misconduct made against Shooter. Shooter complains that Mesnard is responsible for the contents of the Report and that the contents of the Report defamed him. (FAC ¶177, **APPV2-066**). The question before the court is whether Mesnard can be personally sued based on the contents of the Report as it was provided to the members of the House. To answer that the court must determine if the Report falls within the legitimate legislative sphere.

> In determining whether particular activities other than literal speech or debate fall within the "legitimate legislative sphere" we look to see whether the activities took place "in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). More specifically, we must determine whether the activities are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or **with respect to other matters which the Constitution places within the jurisdiction of either House**."

Gravel v. United States, 408 U.S., 606, 625 (1972). *Eastland v. United States Servicemen's Fund* 421 U.S. 491, 503, 95 S. Ct. 1813, 1822-3 (1975)(emphasis added).

“An absolute legislative privilege applies to legislators ‘performing a legislative function *although the defamatory matter has no relation to a legitimate object of legislative concern*.’” *Sanchez v. Coxon* 175 Ariz. 93, 97, 854 P.2d 126, 130 (emphasis added by court). “It is the occasion of the speech, not the content, that provides the privilege. Any other rule would frustrate the purposes for which immunity is granted.” *Id.* (interior citations omitted).

The occasion of the speech at issue here is a report and associated documents related to an investigation into the actions of Shooter by the Arizona House of Representatives. The investigation was performed pursuant to powers granted the legislature by the Arizona Constitution. Ariz. Const. Art. IV, Pt. 2, §§ 8 & 11. The investigation of claims by the House against one of its members is a legislative function. The fact that it was created by a third party is irrelevant. *Gravel v. United States*, 408 U.S. 606, 618, 92 S. Ct. 2614, 2623, 33 L.Ed.2d 583, 598 (1972)(Senator’s aides immune from suit for actions for which the Senator would be immune if done by himself). The Report was an integral part of the work of the investigation and well within the legitimate legislative sphere. It is no more subject to a claim of defamation than any other report or transcript of proceedings created by the legislature. *See Green v. DeCamp* 612 F.2d 368 (8th Cir. 1980) (Release of committee report privileged).

Mesnard is also absolutely immune from suit for authorizing its release to the public. There is no allegation Mesnard personally published the Report. To the extent Mesnard, as Speaker of the House, can be said to have authorized the release of the report to the public and therefore published it outside the legislature, Mesnard is immune from any claim based on his authorization. The Speaker of the House and the Clerk are the only officers of the House A.R.S. § 41-1102(B). Therefore Mesnard's action in authorizing the release of the Report would be an act he took in compliance with state law and in his legislative capacity. Mesnard is entitled to legislative immunity for legislative acts and that would include permitting House publication.

Accordingly, Mesnard is absolutely immune from Shooter's defamation claims based on the contents of the Report.

ii. Privileged Publication

Since the House was required to release the Report to the public, the release was also privileged and Mesnard is not subject to a claim of defamation for its publication. *Restatement (Second) of Torts*, § 590, 592A. This applies even if no immunity is recognized. The House was required to release the Report as it was a public record. A.R.S. §§39-121, 121.01 & 128. And the press was demanding its release. A fact the complaint tacitly and implicitly admits. (FAC ¶158, **APPV2-060**). Whether a document is a public record under Arizona's public records law presents

a question of law, which this court reviews de novo. *Griffis v. Pinal County*, 215 Ariz. 1, 3, P7, 215 Ariz. 1, 156 P.3d 418, 420 (2007). If there is any suggestion that the Report was not a public record, this court can confirm it is a public record and its publication privileged.

B. Press Release

i. Absolute immunity

The press release issued by then Speaker Mesnard occurred during a legislative session and concerned legislative matters. It was issued from the Speaker's office on government letterhead. It informed the public of the actions taken by the Speaker in response to actions taken by Shooter as a member of the Arizona House of Representative. The quotes contained in the press release explained the actions of the Speaker. (**APP 147**).

In a representative democracy constituents are entitled to know the basis of a legislator's actions. In this case the press release was within the outer perimeter of Mesnard's line of duty. As such, Mesnard is entitled to legislative immunity for the contents of the press release. *See Barr v. Matteo*, 360 U.S. 564, 575, 79 S. Ct. 1335, 1341, 3 L.Ed.2d 1434, 1443 (1959) (Press release by agency within absolute executive privilege. "The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint,…"). *See also Abercrombie v.*

McClung, 55 Haw. 595, 600-601, 525 P.2d 594 (1974), (defamatory statements by legislator to press regarding previous floor speech privileged) and *State ex rel. Okla. Bar Ass'n v. Nix*, 1956 OK 95,¶¶18 & 21, 295 P.2d 286 (Press release by legislator with defamatory speech privileged when issued during legislative session). The press release concerned matters within the work of the House of Representatives and was a regular part of the work of the legislature. The Court should hold that scope of legislative immunity in Arizona is broad enough to protect Mesnard's press release and therefore the defamation claim based on the contents of the press release must be dismissed.

ii. Notice of Claim

Each alleged defamatory statement by a defendant constitutes a separate publication giving rise to a separate cause of action. *State v. Superior Court*, 186 Ariz. 294, 299, 921 P.2d 697, 702 (App. 1996) (citing *Restatement (Second) of Torts* § 577A(1) & cmt. a (1977)). Shooter's 17-page Notice of Claim letter does not mention the February 1, 2018 press release or describe any claim for defamation based on its contents. The notice of claim letter does not describe a conspiracy to defame Shooter based on the contents of the press release. It describes no damages from the alleged defamatory press release. The notice of claim was not amended or supplemented with such claims. They are separate claims. Since Shooter did not file a notice of claim concerning the press release and the time to do so has long passed,

Shooter is barred from pursuing a claim of defamation based on it or pursuing the conspiracy claim based on the press release. *Falcon v. Maricopa Cty.*, 213 Ariz. 525, 527 ¶10 144 P.3d 1254, 1256 (2006).

Mesnard filed Shooter's notice of claim letter with his first motion to dismiss. The superior court citing the Arizona Court of Appeals, Division Two case *Jones v. Cochise County* 218 Ariz. 372 ¶7 (App. 2008) held that the notice of claim was a document outside the record. (Superior Court's Minute Entry dated November 15, 2019, **APP 148-150**). The superior court therefore refused to consider the notice of claim on a motion to dismiss and converted the case to a motion for summary judgment. During a status conference the court indicated that having changed the matter into a motion for summary judgment, he was inclined to allow Shooter discovery prior to ruling. As this would defeat Mesnard's immunity, Mesnard withdrew the argument concerning the notice of claim permitting the matter to be treated as a motion to dismiss. The matter moved forward as a motion to dismiss and the complaint was dismissed. (ME dated December 20, 2019, **APP 134-146).**

When Shooter amended his complaint he added claims related to the February 1, 2018 press release. (FAC ¶¶ 148, 178-182, **APPV2-056-057**; **APPV2-066-070**.) Mesnard again attached the notice of claim to his motion to dismiss and requested the claims be dismissed as time barred. (Motion to Dismiss ("MTD"), p. 7, **APPV2-142**; **APPV2-154-171**). The superior court could and should have considered the

notice of claim on Mesnard's motion to dismiss. This Court has held that public records regarding matters referenced in a complaint are not "outside the pleading" and the court may consider them without converting a case into a motion for summary judgment. *Coleman v. City of Mesa* 230 Ariz. 352, 356 ¶9, 284 P.3d 863, 867 (2012). Arizona Court of Appeals, Division One, has held that a notice of claim is a public record. *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 21, 159 P.3d 578, 582 (App. 2007). And in an unpublished opinion Division One held that the court could consider it on a motion to dismiss. *See Aprim v. City of Phx.*, 1 CA-CV 15-0500, 2016 Ariz. App., at *1, Unpub. LEXIS 1475, 2016 WL 6956608, ¶¶ 14-16 (App. Nov. 29, 2016). Therefore there is a dispute among the divisions on the treatment of a notice of claim that this court should resolve.

Even if that were not true, based on the superior court's earlier ruling, and in order to save effort and time, Mesnard asked the superior court, if it did not dismiss the case, to treat the notice of claim issue as a motion for summary judgment and hold that the claims based on the press release were barred. The superior court, without explanation, claimed the matter was not ripe. This was also error. The matter was fully briefed. The notice of claim and the Amended Complaint were before the superior court. No other fact/document is necessary for the resolution of the issue. You cannot file a suit without filing a notice of claim concerning the cause of action. And the court is charged with resolving the issue before trial at the earliest possible

time. A.R.S. §12-821.01. The issue was ripe. The claims concerning the press release should have been dismissed with prejudice.

CONCLUSION

As Judge Learned Hand wrote: "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949). There has been no suggestion that the actions of Speaker Mesnard with regard to the Report, including releasing it to the public, were outside his legislative authority. It was Mesnard's power as Speaker that caused the Report to be created and his power as Speaker that permitted its release to the public. Mesnard is entitled to have those claims dismissed. Similarly the press release was sent out from the Speaker's office on government letterhead, during a legislative session, regarding a legislative matter. Mesnard is immune from suit for its contents. The defamation claims related to the February 1, 2018 press release are also barred as Shooter did not comply with Arizona's notice of claim statute with regard to those claims.

Mesnard asks the court to accept this Petition and order appropriate relief.

DATED this 28th day of July, 2020.

HINSHAW & CULBERTSON LLP

By: /s/ Stephen W. Tully

Stephen W. Tully
Bradley L. Dunn
Attorneys for Petitioners Javan "J.D." and Holly Mesnard

PETITIONERS' APPENDIX

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Report dated January 28, 2018	APP 037-118
Federal Court's Order dated June 7, 2019	APP 119-133
Superior Court's Ruling dated December 20, 2019	APP 134-146
Press release dated February 1, 2019	APP 147
Superior Court's Minute Entry dated November 15, 2019	APP 148-150

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-050782 05/26/2020

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
J. Escarcega
Deputy

DONALD M SHOOTER

v.

STATE OF ARIZONA, et al.

THOMAS C HORNE

REBECCA BANES

DANIEL P QUIGLEY
STEPHEN W TULLY
JUDGE CAMPAGNOLO

UNDER ADVISEMENT RULING REGARDING MOTIONS TO DISMISS

The Court heard oral arguments on May 19, 2020, in regard to Defendant State of Arizona's Motion to Dismiss Plaintiff's Amended Complaint, filed on February 20, 2020; Defendants Kirk and Janae Adams' Motion to Dismiss, filed on February 27, 2020; and Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss, filed on February 27, 2020. At the conclusion of the oral arguments hearing, the Court took the Motions under advisement.

The Court has reviewed and considered the above-mentioned Defendant State of Arizona's Motion to Dismiss Plaintiff's Amended Complaint; Defendants Kirk and Janae Adams' Motion to Dismiss; Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss; Plaintiff's Responses thereto; Defendants' respective Replies; the Amended Complaint; the oral arguments; and the applicable law.

I. Procedural Background

On January 29, 2019, Plaintiff Donald M. Shooter filed a four-count Complaint in Superior Court against Defendants State of Arizona, Kirk and Janae Adams, and Javan "J.D." and Holly Mesnard, arising out of his expulsion from the Arizona House of Representatives on

February 1, 2018. Count One of the original Complaint alleged a violation of 42 U.S.C. §1983. Because of that, Defendants Adams and Mesnard removed the case to federal court on March 11, 2019 based on federal question jurisdiction. On Defendants' motions to dismiss, the United States District Court in CV-19-01671-PHX-DWL, entered a ruling on June 11, 2019, dismissing Count One, and remanding the case to the Arizona Superior Court, because the remaining Counts were based solely on State law.

After the case was remanded to State Court, the Adams and Mesnard Defendants filed motions to dismiss the remaining counts, in which the State of Arizona joined. On December 24, 2019, this Court issued a Minute Entry granting the motions to dismiss. The Court granted leave to Plaintiff to file an amended complaint that would attempt to address the deficiencies in the original Complaint. On January 31, 2020, Plaintiff filed the Amended Complaint, which contained six causes of action.

All of the Defendants filed motions to dismiss, seeking dismissal of the Amended Complaint as to all of the causes of action alleged therein.

II. Extraneous Matters

The Adams and Mesnard Defendants attached exhibits to their Motions to Dismiss. In considering a motion to dismiss for failure to state a claim, if the trial court considers matters outside the pleadings (extraneous matters), it must treat the motion as a Rule 56 motion for summary judgment, and allow the non-movant a reasonable opportunity to present all pertinent material in response. Rule 12(d), ARIZ. R. CIV. P.; *Strategic Development and Construction, Inc. v. 7th and Roosevelt Partners, LLC*, 224 Ariz. 60, ¶1 (App. 2010). Matters of public record or matters that are central to a complaint are not considered "extraneous matters." *Id.* at ¶¶13 & 14. Plaintiff's only exhibit to each of his Responses to the Motions to Dismiss was a copy of the Complaint. Referring to documents attached to a complaint are not extraneous matters. *Id.* at ¶10. Thus, attaching the complaint to a Rule 12(b)(6) pleading cannot be deemed to be extraneous.

The Adams' Motion to Dismiss contained the following exhibits:

Exhibit 1: House Resolution 2003 - Expelling Don Shooter from the House of Representatives

Exhibit 2: Sherman & Howard Report

Exhibit 3: Congressional Research Service-Expulsion of Members of Congress: Legal Authority and Historical Practice

The Court finds that Exhibit 1 is a public record, and is not extraneous. For the reasons stated in the Court's December 24, 2019 Minute Entry, Exhibit 2 is a public record and/or central to the Amended Complaint. Exhibit 3 is more akin to legal argument than to an evidentiary document. Both sides relied on Exhibit 3 for different reasons. To the extent that it is considered argument, the Court finds that Exhibit 3 is not extraneous. Therefore, the Court has considered the exhibits to the Adams' Motion to Dismiss as part of the Rule 12(b)(6) proceeding.

The Mesnards' Motion to Dismiss contained the following exhibits:

Exhibit 1: February 1, 2018 News Release issued by Mr. Mesnard

Exhibit 2: February 1, 2018 letter from Donald Shooter to Members of the House of Representatives

Exhibit 3: April 6, 2018 letter from Donald Shooter's attorneys to Mr. Adams, Mr. Mesnard, and Attorney General Mark Brnovich (Plaintiff's Notice of Claim)

The Court finds that Exhibit 1 is not extraneous for the same reasons that the Sherman & Howard exhibit is not extraneous. The press release's heading was from the Speaker of the House of Representatives, making it a public record. Further, there is no dispute that Exhibit 1 is an accurate copy of the press release, and the press release makes up a substantial part of the Amended Complaint. It is, thus, central to the Amended Complaint.

Exhibit 2, the letter from Donald Shooter, is extraneous. Exhibit 3 is a copy of Plaintiff's Notice of Claim, which the Court finds to be extraneous. *See Jones v. Cochise County*, 218 Ariz. 372, ¶7 (App. 2008) (approving the trial court's converting a 12(b)(6) proceeding to a Rule 56 proceeding, because the notice of claim was a document outside the pleadings). Apparently because the Court's December 24, 2019 Minute Entry also found that the Notice of Claim was an extraneous document, the Mesnards' attorney argued that the Court should convert only the notice-of-claim issue to a Rule 56 proceeding. The Court declines to entertain that argument. The issue of whether or not a notice of claim was valid goes beyond the four corners of a complaint. This issue is clearly one for summary judgment, but the Court does not believe that it is ripe for summary judgment at this time.

Therefore, the Court will not consider Exhibits 2 and 3 attached to the Mesnards' Motion to Dismiss.

III. Rule 8 and Rule 12(b)(6)

As a general policy matter, Rule 12(b)(6) motions are not favored under Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). The court assumes the truth of plaintiff's factual allegations when analyzing a complaint for failure to state a claim upon which relief can be granted. *Hogan v. Washington Mutual Bank, N.A.*, 230 Ariz. 584, §7 (2012). Arizona follows a notice pleading standard. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012). Rule 8 of the Arizona Rules of Civil Procedure provides that a plaintiff must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a complaint is to give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved. *Cullen v. Auto-Owners Insurance Co*., 218 Ariz. 417, ¶7 (2008).

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa,* 230 Ariz. 352, ¶46 (2012). Instead, the narrow question presented by a Rule 12(b)(6) motion is whether facts alleged in a complaint are sufficient to warrant allowing a plaintiff to attempt to prove his or her case. *Id.*

However, a complaint that states only legal conclusions, without supporting factual allegations, does not comply with Rule 8's notice pleading standard. *Cullen v. Auto-Owners Insurance Co*., 218 Ariz. 417, ¶7 (2008). A Court cannot accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 389 (App. 2005). Dismissal is permitted only when a plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Security Life Insurance. Co. v. State Department of Insurance,* 191 Ariz. 222, ¶4 (1998).

IV. The Amended Complaint

The Amended Complaint, like the original Complaint, arises out of a February 1, 2018 vote by the Arizona House of Representatives expelling Plaintiff from the House for conduct determined to be dishonorable and unbecoming of one of its members. The House voted 56-3 to expel Plaintiff. None of the parties disputes that the expulsion vote of Plaintiff was allowed by Art. 4, Part 2, Section 11 of the Arizona Constitution.

The U.S. District Court's recitation of the factual background taken from the original Complaint was thorough, and the factual background is the same in the Amended Complaint. Rather than repeat all the details of the factual background, the Court incorporates herein the

section entitled "Factual Background" in the District Court's Order of June 11, 2019, which is attached as Exhibit 1 to the Mesnards' Motion to Dismiss that was filed on September 23, 2019.

The Amended Complaint omitted two of the causes of action that were in the original Complaint. The §1983 cause of action was omitted based on the District Court's dismissal. The cause of action for wrongful termination was not re-alleged. The Amended Complaint also added a cause of action seeking independent relief for denial of state constitutional due process rights. The Amended Complaint contained the following six causes of action:

- First Cause of Action: Defamation
- Second Cause of Action: False Light Invasion of Privacy
- Third Cause of Action: State Constitutional Denial of Due Process
- Fourth Cause of Action: Civil Conspiracy re Defamation
- Fifth Cause of Action: Civil Conspiracy re False Light
- Sixth Cause of Action: Civil Conspiracy re State Constitutional Due Process

Plaintiff, both in his Responses and during oral arguments, "abandoned" the Second and Fifth Causes of Action, because Plaintiff had determined that a false light privacy claim was unavailable to him as a public figure. *See* footnote 1 to Plaintiff's Responses to the Adams and Mesnard Motions to Dismiss. There being no objection from Defendants, the Court will grant Defendants' Motions as to the Second and Fifth Causes of Action, based on Plaintiff's abandonment of those causes of action.

Aside from a request for injunctive relief tied to the Third Cause of Action, which is discussed below, the Amended Complaint seeks money damages, and declaratory relief that Defendants committed the causes of action against Plaintiff.

V. Discussion

A. The Expulsion Vote - Political Question

The original Complaint did not seek to overturn the expulsion vote of the House. The Amended Complaint is somewhat ambiguous as to whether it is asking this Court to set aside the expulsion vote.

In the text of the Amended Complaint, Plaintiff agrees that the House of Representatives has the power to expel a member under the Arizona Constitution, but that it cannot occur without due process. In section (iii)(b) of the Amended Complaint's request for relief, Plaintiff requests "prospective injunctive relief to expunge, from the Arizona House of Representatives records, the findings of the Sherman & Howard report and the actions of the Arizona House in expelling

Plaintiff Shooter." This request for relief was specifically tied to the third cause of action for Denial of State Constitutional Due Process.

During oral arguments, the Court noted that the request to expunge the expulsion action from the House's records appeared to be tantamount to a request to overturn the expulsion vote itself. Without the records of the expulsion, Plaintiff could then argue that no expulsion occurred, and that everything should return to the way it was before the vote. When asked during oral arguments whether Plaintiff was seeking to overturn the expulsion vote, Plaintiff's counsel was both hesitant and tentative in his answer. He did not affirmatively deny that Plaintiff was not seeking such relief.

On pages 6 through 9 of the Court's December 24, 2019 Minute Entry, the Court found that the expulsion proceedings and vote invoked the political question doctrine, such that this Court had no power to interfere with or overturn the expulsion of Mr. Shooter by the House of Representatives. The Court's ruling on the political question doctrine is the law of the case. The Court finds no reason to reconsider or revise the ruling. The Court fully incorporates herein Section B of the December 24, 2019 Minute Entry entitled "Political Question."

Therefore, this Court has no power to expunge the records or action of the House of Representatives in expelling Mr. Shooter. This Court has no power to overturn or set aside the expulsion Resolution.

As discussed below, this does not mean that Plaintiff may not have stated a claim for relief for certain actions allegedly taken by the individual defendants that may have caused independent harm to Plaintiff. Such claims are separate and apart from the proceedings instituted by the House.

B. First Cause of Action - Defamation

The Adams Defendants contended that there are no allegations of defamation against Mr. Adams in the Complaint. The Mesnard Defendants asserted the same, and additionally alleged that Mr. Mesnard has absolute legislative immunity, due to his role as the Speaker of the House during the relevant time period.

A defamation action compensates damage to reputation or good name caused by the publication of false information. *Godbehere v. Phoenix Newspapers, Inc*., 162 Ariz. 335, 341 (1989). To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation. *Id.* If the plaintiff is a public official or public figure, or if the matter is a public one, the plaintiff must prove actual malice to be successful. *Id*. at 342. Actual malice requires that the

publisher acted with knowledge of the falseness, or with reckless disregard of the truth. *Id*. at 342-3 (1989).

1. Kirk Adams

After a thorough review of the Amended Complaint, the Court is unable to find any specific allegations of defamation against Mr. Adams. In fact, the Amended Complaint, as well as Plaintiff's counsel's admissions during oral argument, confirmed that the defamation allegations are aimed solely at Mr. Mesnard. The Amended Complaint, like the original Complaint, fails to identify any defamatory act or acts allegedly committed by Mr. Adams. There are no allegations that Mr. Adams was involved in the publication of any allegedly defamatory information. Accepting the allegations in the Amended Complaint as true, Plaintiff would not be entitled to relief for defamation against Mr. Adams under any interpretation of the facts susceptible of proof.

2. Javan "JD" Mesnard

In the December 24, 2019 Minute Entry, the Court dismissed the cause of action for defamation against Mr. Mesnard on two grounds: 1) failure to provide well-pled facts to state a claim for relief; and 2) absolute legislative immunity.

The Amended Complaint provides substantially more well-pled facts against Mr. Mesnard than were contained in the original Complaint. Even though Plaintiff had no "property" interest in his seat in the House of Representatives, *Mecham v. Gordon*, 156 Ariz. 297, 302 (1988), that does not mean that Plaintiff may not be able to state a claim for relief against Mr. Mesnard as to specific defamatory statements allegedly made against Plaintiff.

In the Amended Complaint, Plaintiff alleged that Mr. Mesnard defamed Plaintiff by adding to or removing portions from the Sherman & Howard report before it was shown to the House Members or to the public. Plaintiff also alleged that Mr. Mesnard's press release contained untrue and defamatory statements that went beyond the mere statement of the facts.

Mr. Mesnard also argued that the defamation claim was insufficient as a matter of law on a variety of grounds. The Court cannot make such fact-based findings in a Rule 12(b)(6) proceeding. The issues of immunity, absolute or qualified, and the merits of the claims must be developed through the disclosure and discovery process. *See e.g., State ex. rel. Corbin*, 136 Ariz. at 594 (holding that even if the complaint has pleading deficiencies, a motion to dismiss should be denied if it appears that other pretrial procedures will cure the defective pleading).

The Court is not making a finding as to the ultimate truth of the allegations. The only test

in a Rule 12(b)(6) proceeding is whether the complaint states a claim for relief with well-pled facts, which are assumed to be true. Whether or not the well-pled facts will be proved is not a factor that a trial court can consider in ruling on a motion to dismiss.

In this case, the Amended Complaint meets the Rule 8 requirements, sufficient to allow the First Cause of Action to go forward against Mr. Mesnard. If disclosure and discovery fail to establish proof sufficient to meet Plaintiff's *prima facie* burden, then Defendants have the right to file a motion for summary judgment.

In its previous Minute Entry, this Court also extended absolute legislative immunity to Mr. Mesnard's alleged acts in regard to the Sherman & Howard report and the press release. The Court has reconsidered its prior ruling that the defamation claim against Mr. Mesnard is precluded by absolute legislative immunity. There is no question that a legislative privilege applies to a legislator's defamatory statements while performing a legislative function, even though the defamatory matter *has no relation to a legitimate object of legislative concern." Sanchez v. Coxon*, 175 Ariz. 93, 97 (1993) [emphasis in original]. It is the occasion of the speech, not the content, that provides the privilege. *Id*.

However, the ruling in *Sanchez* was narrowly tailored, and did not involve facts similar to those in the instant case. In *Sanchez*, the Supreme Court specifically limited its ruling by stating that "[t]he only question we decide is whether city and town council members have absolute legislative immunity for words spoken during a formal council meeting." *Id*. at 95. The Supreme Court extended that immunity, consistent with the Arizona Constitution's grant of such immunity to Arizona legislators for statements made during formal legislative meetings. *Id*. In this case, the alleged defamatory acts by Mr. Mesnard did not occur during formal legislative meetings.

Therefore, it is not as clear under Arizona law how far that absolute immunity extends. In extending that immunity to Mr. Mesnard in its December 24, 2019 Minute Entry, the Court relied on two federal appellate decisions. One of those cases was *Carlos v. Santos*, 123 F.3d 61, 66 (2d Cir. 1997), which held that a consultant's report initiated upon a legislator's inquiry was protected by absolute legislative immunity. The other case was *Green v. DeCamp*, 612 F.2d 368, 372 (8th Cir. 1980), which held that the mere release of a report to the media is a legitimate legislative activity protected by the Speech or Debate Clause of the U.S. Constitution. Even though those decisions were not precedential, this Court found them persuasive, because the U.S. Constitution's Speech or Debate Clause is akin to the same constitutional provision in Arizona.

Nonetheless, in reviewing those decisions again, and in considering the well-pled facts in the Amended Complaint, this Court is no longer convinced that the rulings in those federal cases should be applied to a defamatory action in an Arizona state court. Both of those cases

specifically applied their findings to §1983 claims. There are no §1983 claims in the Amended Complaint. Neither of those cases were based on Arizona law. Without further guidance from Arizona appellate courts, this Court is reluctant to extend absolute legislative immunity to every act allegedly conducted by Mr. Mesnard, simply because of his status as the Speaker of the House.

The Court will not extend absolute legislative immunity to Mr. Mesnard for the claims in the First Cause of Action, in the context of a Rule 12(b)(6) proceeding. The Court cannot make this determination without a well-developed record.

Because the Court finds that the Amended Complaint states a claim for relief under Rule 8 for defamation against Mr. Mesnard, the logical follow-up question is why does this not affect the expulsion decision of the House? The simple question is that the House and Mr. Mesnard are not the same. The House is a body politic, composed of its Members, only one of whom was Mr. Mesnard. The House exists as a separate entity. The best explanation of this difference comes from the U.S. Supreme Court in a decision that is over a century old. Noting that this principle applies to local governments, as well as Congress, the Supreme Court stated:

> The two houses of congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole….

U.S. v. Ballin, 144 U.S. 1, 6 (1892).

Therefore, even if Mr. Mesnard committed tortious actions, as claimed by Plaintiff, the evidence shows that the House acted in its legislative capacity with the involvement of 59 Members. The House of Representatives has the Constitutional power to set its own rules of proceedings.

The evidence shows that the Sherman & Howard report clearly stated that it relied on the "zero-tolerance" policy, and that such policy was not the normal one. The House was, therefore, made aware that the report was based upon a stricter standard than normal. Nothing prevented the House from applying a different standard if it so chose. The decision of Mr. Mesnard to retain an outside law firm, instead of presenting the matter to the Ethics Committee, was also known to the House. Nothing prevented the members of the House of Representatives from sending the matter to the Ethics Committee, or rejecting the Sherman & Howard report in whole or in part. Nothing prevented the Members of the House from ignoring Mr. Mesnard's position. The fact that the House could have chosen to follow other courses of action to reach the ultimate result was solely within the power of the House.

The Court is aware that the Supreme Court in *Ballin* also said that a legislature's independent right to act as a political entity is premised on it abiding by constitutional restraints and not violating fundamental rights. *Ballin*, 144 U.S. at 6. In this case, the House's proceedings provided due process, regardless of what Mr. Mesnard may or may not have done in his capacity as a single member of the House. The Judiciary cannot question the choice of proceedings that the House, as a body whole, ultimately followed in reaching its decision.

3. The State of Arizona

The State of Arizona has been sued only under the doctrine of *respondeat superior*. The State conceded that it is subject to the doctrine of *respondeat superior* as to the individual defendants in their capacities as State governmental officials. The State merely contended that the individual Defendants should be dismissed from the case, which would automatically dismiss the State.

An employer is vicariously liable for the negligent or tortious acts of its employees who are acting within the scope and course of their employment. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, ¶17 (App. 2000). Conduct falls within the scope, if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it. *Id.* The issue of whether an employee's tort is within the scope of employment is generally a question of fact. *Smith v. American Express Travel Related Services Co., Inc.*, 179 Ariz. 131, 136 (App. 1994).

Because the Court has found that the First Cause of Action in the Amended Complaint sufficiently states a claim for relief for defamation against Mr. Mesnard, the State must remain in the case under the doctrine of *respondeat superior* for any defamatory acts alleged against Mr. Mesnard. By the same token, the dismissal of Mr. Adams from the defamation claim relieves the State of any purported liability as to Mr. Adams on the First Cause of Action.

C. Second Cause of Action - False Light Invasion of Privacy

Plaintiff has abandoned this cause of action, and it shall be dismissed.

D. Third Cause of Action - State Constitutional Denial of Due Process

Plaintiff contended that he can assert an independent state-based right of action for the denial of his due process rights under the Arizona Constitution. This right of action has been denoted by other courts as a "stigma-plus" claim. A "stigma-plus" claim can arise when a party

has been deprived of a liberty interest in his reputation without due process of law. *Monserrate v. New York State Senate*, 599 F.3d 148, 158 (2d Cir. 2010). In order to prevail on a "stigma-plus" claim, the party must prove (1) the utterance of a statement that is injurious to reputation, that is capable of being proved false, and that he claims is false, and (2) some tangible and material state-imposed burden in addition to the stigmatizing statement. *Id*.

In the Amended Complaint, Plaintiff's Responses, and in oral arguments, Plaintiff relied on numerous cases from federal courts and foreign state courts that have adopted a "stigma-plus" due process claim. None of the authorities cited by Plaintiff came from a federal or state court in Arizona. The *Monserrate* case, heavily relied upon by Plaintiff, noted that New York does not have a provision in its state constitution for the expulsion of a member of the state legislature. Rather, the authority for expulsion in New York comes from statutory authority.

In all of the cases cited by Plaintiff, the authority for such a cause of action had to derive from a statute or from a judicially-created implied authority. It appears that the *Monserrate* case was the only case cited by Plaintiff that may have applied a "stigma-plus" claim to a state-based law. However, the *Monserrate* opinion pertained to a lawsuit filed under 42 U.S.C. §1983, and it was unclear whether a state-based right of action would have existed outside of the §1983 claim.

All of the other cases relied upon by Plaintiff discussed or applied the "stigma-plus" test in the context of the statutory authority under 42 U.S.C. §1983. *See Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019); Mann v. Vogel, 707 F.3d 872 (7th Cir. 2013); *Schepers v. Commissioner, Indiana Department of Correction*, 691 F.3d 909 (7th Cir. 2012); *Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005); *Miller v. California*, 355 F.3d 1172 (9th Cir. 2004); *Valmonte v. Bain*, 18 F.3d 992 (2nd Cir. 1994); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982).

Two other cases cited by Plaintiff, which also involved §1983 lawsuits, indicated that state-based torts may provide sufficient relief to avoid a stigma-plus claim under §1983. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding in a §1983 action that the party's interest in reputation was "simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."); *Sadallah v. City of Utica*, 383 F.3d 34,38-9 (2d Cir. 2004) (holding in a §1983 lawsuit that the party failed to show that the "plus" part of the doctrine was anything more than a defamation claim, which is a state-based action, and was not entitled to §1983 relief).

Arizona has no statute that creates such a cause of action. Although Plaintiff's counsel asked this Court to create such an implied right of action, Plaintiff's counsel also seemed to admit that such implied authority would need to be created by an Arizona appellate court.

The issue of whether or not a private right of action exists for violations of the Arizona Constitution was nearly reached by the Arizona Court of Appeals in *Howell v. Hodap*, 221 Ariz. 543 (App. 2009). In *Howell*, the plaintiff had initially brought a federal lawsuit under §1983 for violations of the Fourth Amendment. After losing in federal court, the plaintiff brought a lawsuit in state court alleging causes of action for deprivation of due process under the search and seizure provision in the Arizona Constitution.

The plaintiff in *Howell* argued that there should be a private right of action under the Arizona Constitution, because the Arizona Constitution's search and seizure rights were allegedly more expansive than those in the Fourth Amendment. The Court of Appeals avoided ruling on whether the rights were more expansive, and whether there was a private right of action, by rejecting the appeal on the grounds of *res judicata*. *Howell v. Hodap*, 221 Ariz. at ¶22. The Court held that the factual recitation of the state constitution violations in the state complaint was virtually identical to the factual recitation of the federal constitutional claims in the earlier federal court lawsuit, both of which involved the same parties, and arose out of the same facts and circumstances. Based on that, the Court of Appeals held that the state-based violations should have been raised in the federal lawsuit. *Id*.

The Court wants to make it clear that it cannot adopt, and is not basing its decision on, the *res judicata* reasoning that was used in *Howell*. Although the District Court dismissed Plaintiff's §1983 cause of action in the original Complaint, it remanded all of the state-based causes of action. Thus, even if Plaintiff had or could have raised this claim in federal court, it likely would have been remanded along with the other state-based claims. A *res judicata* analysis would, therefore, not be appropriate. The Court is simply holding that no such right of action exists under Arizona law.

While this Court is not creating such a right of action, the argument made in *Howell* about the expansiveness of the search and seizure rights under the Arizona Constitution may not apply to a claim of due process violations. Art. 2, §4 of the Arizona Constitution states: "No person shall be deprived of life, liberty, or property without due process of law." This is virtually identical to the Fifth Amendment, which states: "No person shall be…deprived of life, liberty, or property, without due process of law…." Neither provision is more expansive than the other.

However, the *Howell* court noted that the issue of whether there is a private right of action for search and seizure violations of the Arizona Constitution was an unresolved question of law. *Howell v. Hodap*, 221 Ariz. at ¶22. Whether there is a private right of action under the due process provisions of the Arizona Constitution is also an unresolved question of law.

Without an Arizona legislative enactment creating an express "stigma-plus" cause of action, or an appellate ruling that creates an independent implied "stigma-plus" authority, this

Court has no authority to countenance such a right of action.

As exemplified in the cases cited by Plaintiff, the stigma-plus right of action for state-based due process violations may only be available under 42 U.S.C. §1983. *See also Feliciano v. MCSO Sheriff Penzone*, 2018 WL 6565375, ¶18 (Ariz. App., Dec. 13, 2018) (unpublished memorandum decision holding that there is no private right of action for state-based due process claims, but allowing plaintiff to refile his complaint to allege federal constitutional violations under 42 U.S.C. §1983). In his original Complaint, Plaintiff sought relief under §1983. As previously mentioned, that cause of action was dismissed in federal court. Assuming that no private right of action exists under the Arizona Constitution, Plaintiff may have had his only bite at the "stigma-plus" apple in federal court.

E. Fourth Cause of Action - Conspiracy to Commit Defamation

For a civil conspiracy to occur, two or more people must agree to accomplish an unlawful purpose, or to accomplish a lawful object by unlawful means, which caused damages. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, ¶30 (App. 2000). A mere agreement to do a wrong imposes no liability. *Id.* An agreement plus a wrongful act may result in liability for civil conspiracy. *Id.* The actual agreement must be proven by clear and convincing evidence. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶100 (2002).

A conspirator is liable for any tortious act, even if it is unknown to the conspirator, which is committed in furtherance of the conspiracy. *Id.* at ¶31. This includes acts not personally committed by the conspirator. *Id.* The existence of a conspiracy may be inferred from the nature of the acts, the relationship of the parties, the interests of the conspirators, or other circumstances, and express agreement or tacit concert will, if proven, suffice to create liability. *Mohave Electric Cooperative, Inc. v. Byers*, 189 Ariz. 292, 306 (App. 1997) [citations omitted]. Circumstantial or inferential evidence may be shown to prove that parties were acting in concert. *Id.*

1. Mr. Mesnard and Mr. Adams

The Amended Complaint contains barely enough allegations to meet the low threshold of Rule 8's pleading requirements to state a claim for relief for conspiracy to commit defamation by Mr. Adams and Mr. Mesnard. The Court must accept the allegations as true, and, in doing so, the Court cannot say that Plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof.

2. The State of Arizona

As stated above, Plaintiff's only basis for suing the State of Arizona was under the doctrine of *respondeat superior*. The State relied on *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, *supra*, for the proposition that it could not be liable for civil conspiracy under the doctrine of *respondeat superior.* In *Baker*, the Court of Appeals addressed the issue of whether the employer could be liable for civil conspiracy to commit fraud perpetrated by an employee. The Court of Appeals ruled that the employer could be liable under *respondeat superior* for the act of fraud committed by its employee, but that the doctrine did not extend the employer's liability for civil conspiracy to commit that fraud. *Baker*, 197 Ariz. at ¶33.

The Court of Appeals in *Baker* noted that there were no cases that found an employer to be liable for its employee's acts to perpetuate a conspiracy to defraud under *respondeat superior*. *Id*. at ¶32. The Court of Appeals deduced that this absence of case law was because the term "conspiracy" generally indicates vicarious liability for a concerted action, such as fraud. *Id*. The Court of Appeals then reasoned that if an employer would be liable for conspiracy through *respondeat superior*, the employer would not only be liable for the concerted action committed by its employee, but would also be secondarily liable with all of the co-conspirators. *Id*. The *Baker* Court found that this "double" vicarious liability made the nexus between the employer and the alleged co-conspirators to be "too remote." *Id*.

The *Baker* holding forecloses the possibility that the State can be liable for civil conspiracy to commit defamation, as a matter of law. If the only alleged conspirators were the two individual Defendants in this case, there could be an argument that the *Baker* rule should not apply, because Mr. Adams and Mr. Mesnard were both "employees" of the State. The Amended Complaint, however, does not limit the alleged conspiracy to only Mr. Adams and Mr. Mesnard. The alleged conspiracy includes individuals who were not employees or agents of the State.

Therefore, the First Cause of Action in the Amended Complaint states a claim against the State under *respondeat superior* as to the concerted act of defamation allegedly committed by Mr. Mesnard only, but the Fourth Cause of Action cannot state a claim for conspiracy to commit defamation under *respondeat superior*.

F. Fifth Cause of Action – Conspiracy to Commit False Light Invasion of Privacy

Plaintiff has abandoned this cause of action, and it shall be dismissed.

G. Sixth Cause of Action – Conspiracy to Violate State Constitutional Due Process

Based on the Court's finding that there is no private right of action for violation of State

Constitutional Due Process, there can be no right of action for conspiracy to commit such a violation.

VI. Conclusion

For the reasons stated above, the Court finds that the First Cause of Action in the Amended Complaint fails to state a claim for relief for defamation as to Mr. Adams. The Second and Fifth Causes of Action were abandoned by Plaintiff. The Court further finds that the Third and Sixth Causes of Action fail to state a claim for relief as a matter of law, because there is no independent State cause of action for deprivation of State Constitutional Due Process. The Court further finds that the Fourth Cause of Action fails to state a claim for relief as to the State of Arizona.

IT IS ORDERED that Defendant Mesnard's request to convert a portion of his Motion to Dismiss to a Rule 56 proceeding is denied.

IT IS FURTHER ORDERED that Defendant State of Arizona's Motion to Dismiss Plaintiff's Amended is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendants Kirk and Janae Adams' Motion to Dismiss is granted in part and denied in part.

IT IS FURTHER ORDERED that the First Cause of Action for defamation is dismissed with prejudice as to Defendants Kirk and Janae Adams.

IT IS FURTHER ORDERED that the Second Cause of Action for false light invasion of privacy and the Fifth Cause of Action for conspiracy to commit false light invasion of privacy are dismissed with prejudice.

IT IS FURTHER ORDERED that the Third Cause of Action for denial of state constitutional due process, including, but not limited to the prospective injunctive relief to expunge matters from the Arizona House of Representatives' records, and the Sixth Cause of Action for conspiracy to commit denial of state constitutional due process are dismissed with prejudice.

IT IS FURTHER ORDERED that the Fourth Cause of Action for conspiracy to commit defamation is dismissed with prejudice as to the State of Arizona.

IT IS FURTHER ORDERED that the remaining causes of action in the Amended Complaint that have not been dismissed in whole or in part shall proceed.

IT IS FURTHER ORDERED that the Defendants shall file their respective Answers no later than June 29, 2020.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court.

/ s / HONORABLE THEODORE CAMPAGNOLO

HON. THEODORE CAMPAGNOLO
JUDGE OF THE SUPERIOR COURT

125 YEARS
SHERMAN & HOWARD

201 East Washington Street, Suite 800, Phoenix, Arizona 85004-2327
Telephone: 602.240.3000 Fax: 602.240.6600 www.shermanhoward.com

Craig A. Morgan
Lindsay H. S. Hesketh
Sherman & Howard L.L.C.
Direct: **602.240.3062**
E-mail: **cmorgan@shermanhoward.com**
lhesketh@shermanhoward.com

J.D. Mesnard
Speaker of the House
1700 West Washington Street
Phoenix, Arizona 85007

Dear Mr. Speaker:

The Arizona House of Representatives (the "House") retained the law firm of Sherman & Howard L.L.C.--through its attorneys Craig A. Morgan and Lindsay H. S. Hesketh--as independent special counsel to: (1) investigate allegations of harassment and inappropriate conduct involving Representative Don Shooter (R, District 13) and Representative Michelle Ugenti-Rita (R, District 23)[1]; and (2) report our findings and conclusions concerning whether those allegations are true, and if so, whether they violated the House's expansive *Policy On Workplace Harassment* (the "Policy").

This is our Report.[2]

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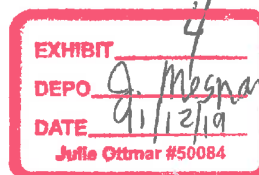
[1] Mr. Shooter asked the Speaker of the House to commission this investigation. Some allegations of misconduct concern Mr. Shooter's conduct while he served as a State Senator (2011-2016). Others concern allegations of misconduct while he served as a State Representative (2017-present). We will indicate his position where appropriate. As for Ms. Ugenti-Rita, her status as a legislator has thus far only been in her capacity as a State Representative (2011-present).

[2] We have changed the names of some of the individuals included in this Report to honor their requested privacy. This should not be understood to diminish the veracity of those individuals.



I. OUR ROLE AND THE SCOPE OF OUR INVESTIGATION AND REPORT.

At the outset, it is important that we clarify (1) our role as special counsel and (2) what this investigation is and what it is not.

We were charged with:

(1) Investigating allegations of harassment or other inappropriate behavior made against Mr. Shooter, some in his capacity as a Senator, and others in his capacity as a Representative;

(2) Investigating allegations of harassment or other inappropriate behavior made against Ms. Ugenti-Rita; and

(3) Determining whether any of those allegations have merit, and if so, whether the actions giving rise to the allegations violated the Policy.

This investigation was *not* a "fishing expedition", nor a means to gather information to substantiate a predetermined outcome. We started with the universe of allegations supplied to us from our client (many of which were reported in the press), and then set out in search of the truth. Our goal was simple: to determine, as best we can, what happened, if anything, and whether it violated the Policy.

That said, as the investigation unfolded, we were presented with additional allegations of misconduct against both Mr. Shooter and Ms. Ugenti-Rita. Some of those additional allegations came from accusers who had not yet spoken on the record with the media. Some of those additional allegations came from accusers who already had gone public with other allegations, which already were the subject of this investigation. We investigated, as prudent and after consultation with our client, *all* allegations reported to us that appeared to be supported by someone with personal knowledge of the alleged misconduct, or other verifiable evidence--as opposed to someone merely reporting hearsay or an "anonymous tip", in which case we would instruct the secondary source of the information to place us in contact with the primary source of the information, which sometimes occurred and sometimes did not. In the latter cases, our inquiry would end.

Finally, we were *not* charged with recommending what action, if any, the Speaker of the House, or its Members, can or should take in response to our findings. That is a task left to the House and its Members.

II. THE INVESTIGATIVE TEAM AND PROCESS.

A brief discussion about the investigative process itself is helpful to understand how we made our findings and reached our conclusions.

Sherman & Howard attorneys Craig A. Morgan and Lindsay H. S. Hesketh led the investigation. We were assisted, at times, by other attorneys and staff from Sherman & Howard. We reported to, and received direction and support from, members of the House's bipartisan special investigation team, whom the Speaker selected to initially investigate these matters before

retaining Sherman & Howard as special counsel.[3]

Suffice it to say, we cannot ignore the current paradigm in many social power structures (gender, sexual, racial, and others) that has been in place and tolerated--often blindly and without reason--for far too long. That inevitable social seismic shift, however, had no bearing on how we conducted our investigation or our ultimate findings and conclusions. Our investigation was guided not by politics, populist sentiment, or press coverage--but by fairness, accuracy, thoroughness, professionalism, and respect. Throughout our investigation, we called things how we saw them, using our best judgment in light of the facts and circumstances before us. Rumors had no place in this investigation, and we found ourselves constantly having to identify and separate rumor from fact, given what we very quickly discovered to be a deep-rooted culture of rumor and innuendo fostered by many (although by no means all) of those who participate or meddle in capitol affairs.

The investigation consisted mainly of (1) reviewing publicly available information, (2) reviewing of information not otherwise publicly available, and (3) conducting multiple (and in several cases, lengthy) interviews with over 40 individuals, some of whom were interviewed more than once.

The substantial majority of the interviews occurred in-person and were attended, at minimum, by Mr. Morgan and Ms. Hesketh. Sometimes logistics, happenstance, geographical restraints, or simple prudence required an interview to occur telephonically, and/or with just one of us present (the latter being a very rare occurrence). We did not digitally record any of the interviews, and none occurred under oath. We did everything we could to accommodate every interviewee and make the interview as comfortable as possible.

We carefully scrutinized and analyzed all interview testimony and whatever documentary information we received. We used our judgment, in light of the facts and circumstances revealed through the investigative process, to cull the reliable from the unreliable and the trustworthy from the untrustworthy. We followed up and sought additional information from those we believed would provide helpful information or insight, whenever we thought doing so would be prudent.

While we refused to engage those who proffered nothing more than bald rumor or innuendo, we generally erred on the side of caution and pursued investigation when those who presented what appeared to be relevant information also provided us with a source who could potentially verify the information through firsthand knowledge (as opposed to through hearsay) sufficient to corroborate or discredit the information we received. We took care to give everyone we spoke with every opportunity to (1) tell "their side of the story" as fully and completely as they desired, and (2) convey whatever information the person considered worthwhile.

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[3] These men and women worked tirelessly for the People of Arizona and the House, at all hours and every day, while juggling a vast array of personal and professional responsibilities--all to ensure the integrity, fairness, and accuracy of this investigation. This was not necessarily "their job", but they did it well and without complaint. It is important to note that this group did not attempt to influence the outcome of this investigation (and did not do so). They were concerned only with enabling us to determine the truth, with as minimal disruption to the House's business as possible. It cannot be overemphasized how proud the Speaker, House, its other Members, and their constituents should be of this group of dedicated public servants who wanted so much to just "do the right thing" by everyone involved or potentially affected by this process. Their assistance to us was invaluable.

III. THE HOUSE'S ZERO TOLERANCE POLICY AGAINST HARASSMENT AND GENERAL PROHIBITION OF DISORDERLY CONDUCT.

Disorderly conduct by Members of the House is prohibited. *See* Ariz. Const. art. IV, pt. 2 § 11; Rules of the House of Representatives of the State of Arizona, Rule 1. The Policy is an extension of that prohibition.

The Policy intentionally prohibits a very expansive array of conduct (1) by employees or Members of the House and (2) against other employees or Members of the House, or those who appear or have business before the House (*e.g.*, lobbyists, the press, or even the public). In that regard, the Policy states:

> "The House ***will not permit conduct that includes, but is not limited to,*** the following:
>
> **Discrimination:** Unequal and unlawful treatment of an individual, or unwelcome, verbal, written, physical conduct, or electronic communication that either degrades or shows hostility or aversion towards a person, arising because of that person's inclusion in one of the categories protected by state or federal civil rights laws.[4]
>
> **Sexual Harassment:** Sexual discrimination that violates Title VII of the Civil Rights Act of 1964 and/or the protections in state statute, title 41, chapter 9, Arizona Revised Statutes. Sexual harassment can take different forms:
>
> (1) *Unwelcome sexual advances* or suggestions, demands, or requests for sexual favors, or other verbal or physical harassment that is inherently sexual in nature;
>
> (2) *Offensive remarks* about a person's gender;
>
> (3) *Quid pro quo* sexual harassment is the promise of advancement or some benefit in exchange for sexual favors.
>
> **Hostile Work Environment:** An environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive. A hostile work environment is determined by looking at all of the circumstances including, but not limited to:
>
> (1) The frequency of the alleged harassing conduct;
>
> (2) The severity of the alleged harassing conduct;
>
> (3) Whether the alleged harassing conduct was physically threatening or humiliating; and
>
> (4) Whether the alleged harassing conduct has the purpose or effect of unreasonably interfering with an employee's work performance or

[4] For example, state and federal laws (1) prohibit discrimination in employment on the basis of race, color, religion, sex, age, disability, national origin, and genetic test results, and (2) prohibit an employer from taking adverse employment action against employees who enforce their legal rights, or support someone else choosing to enforce legal rights.

creating an intimidating, hostile, or offensive environment.

Retaliation: Any act of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or individuals exercising rights under this policy.

Quite simply, the House policy with regard any of the above conduct will always be one of zero tolerance." (some emphasis added)[5]

The expansiveness of the Policy is intentional and that cannot be overemphasized. The House has had a long-standing anti-harassment policy. The Policy is the most current written version of that long-standing policy and was commissioned by the current Speaker of the House with, among other things, the express intention to clarify the existing policy and its expansiveness.[6] Moreover, by its plain language, the Policy encompasses a very wide array of conduct and is meant to be more restrictive and prohibitive than the law would be in a judicial or administrative setting--all so as to enable the House and its Speaker the wide latitude necessary to make the House the safe and inviting workplace and institution Arizona deserves.[7] For example, the Policy is a "zero tolerance" policy prohibiting harassing "conduct that includes, *but is not limited to*" the examples provided in the Policy. (emphasis added) In that regard, the Policy is not the same as, and is not necessarily informed by or subject to, legal or other standards applicable in a lawsuit or administrative proceeding involving workplace or other harassment. The Policy is self-contained and governs conduct involving employees or Members of the House, or those who appear or have business before the House. What one might have to prove to establish, or to overcome, an allegation of harassment or workplace misconduct in a court or administrative proceeding is not necessarily applicable with regard to the Policy. *This is an important distinction.* Nor do the factors courts or other tribunals consider at when evaluating claims of workplace harassment or other misconduct necessarily matter for purposes of determining whether there has been a violation of the House's Policy. That said, the Policy references some "legal" concepts that play a role in a judicial or administrative setting, and which one might consider when evaluating whether a violation of the Policy has occurred.

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[5] Policy, effective as of November 2017 (the start of this investigation) and provided previously to the Members of the House. The Policy has since been amended to include a new complaint form and admonition that "No harassment for any reason will be tolerated."

[6] *See* Rules of the House of Representatives of the State of Arizona, Rule 3(B) ("All House employees shall be under the immediate direction of the Speaker of the House ...."); 4(B) ("The Speaker shall preserve order and decorum ...."); (F)("The Speaker shall have the general control of the House Chamber and the corridors, passages and committee, hearing and staff rooms of the House of Representatives and all other matters which pertain to the House of Representatives building and related parking lots.").

[7] The Policy and its procedures, while more restrictive than the law, are consistent with policies found reasonable by courts and the EEOC's policy of encouraging effective internal policies and grievance mechanisms. *See* 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take *all steps necessary* to prevent sexual harassment from occurring, ...") (emphasis added); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."); *Cross v. Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d 977, 982 (8th Cir. 2010) ("Employers are free to draft harassment policies *that are more stringent than Title VII, and they should be permitted to do so without fear* that they will incur additional liability as a result of their efforts.") (emphasis added); *cf. Oliver v. Microsoft Corp.*, 966 F. Supp. 2d 889, 896 (N.D. Cal. 2013) (defendant's internal investigation revealing it had violated its internal policies did not evidence that the company necessarily violated the law where its policies were more restrictive).

The Policy has no time limitations during which a complaint must be made (*e.g.*, a statute of limitations). The Policy does not restrict itself to conduct that occurred while the Member or employee accused of violating the Policy served as a Member or employee of the House. For example, if a complaint is made against a Member or employee for alleged conduct while that Member or employee served in the Senate, then the Policy empowers the House to investigate that claim and determine whether a violation of the Policy occurred, and if so, any appropriate remedial action.

In short, (1) the Policy's scope of prohibited conduct is generally much more expansive than what the law (in a judicial or administrative setting), or other similar policies, might provide, and (2) except to the extent (if any) expressly incorporated into the Policy, the standards of proof or presumptions one would encounter in a judicial or administrative setting are not applicable when evaluating whether a violation of the Policy occurred. Accordingly, the investigation was conducted in light of the House's very expansive *zero tolerance* Policy, as opposed to whether someone might be able to state and prove a claim for workplace harassment, discrimination, or hostile work environment in a court or administrative proceeding.

IV. A VERY BRIEF SUMMARY OF SPECIAL COUNSEL'S FINDINGS.

We investigated two categories of allegations: those made against Mr. Shooter and those made against Ms. Ugenti-Rita. In short, we have concluded:

1. There is credible evidence that Mr. Shooter (i) has violated the Policy, and (ii) by his repeated pervasive conduct has created a hostile working environment for his colleagues and those with business before the Legislature. That said, as the Report reveals below, not all of the allegations against Mr. Shooter are supported by independent credible evidence (such as allegations that he inappropriately physically touched a lobbyist at a bar, or made an obscene sexualized gesture to a lobbyist at an event).

2. There is no independent, credible evidence that Ms. Ugenti-Rita violated the Policy.

The remainder of this Report details our findings and conclusions--witness by witness and document by document--with regard to the allegations we investigated.

V. SPECIAL COUNSEL'S FINDINGS AND CONCLUSIONS.

1. MS. UGENTI-RITA'S ALLEGATIONS AGAINST MR. SHOOTER.

Ms. Ugenti-Rita made several public allegations against Mr. Shooter and made additional allegations during her interview on November 29, 2017. We will address each of these allegations.

(a) THE RELATIONSHIP BETWEEN MS. UGENTI-RITA AND MR. SHOOTER.

Because many of the allegations Ms. Ugenti-Rita made against Mr. Shooter were not witnessed by others, their relationship became relevant to our analysis of, among other things, credibility and whether the Policy was violated.

Ms. Ugenti-Rita and Mr. Shooter were both elected in 2010 and sworn into their respective positions during the 2011 session. She informed us that she and Mr. Shooter became familiar with one another through casual encounters, including work events, orientation for new legislators, and other group gatherings involving legislators.

In the beginning, Ms. Ugenti-Rita believed Mr. Shooter was a "boisterous, overly friendly guy" and a "character". She stated that they had no real reason to engage with one another, beyond pleasantries, because they were in different chambers (she in the House, and at that time, he in the Senate). Ms. Ugenti-Rita noted that she believed Mr. Shooter was a "pervy old man" but told us that she did not think he would shy away from that characterization. While being interviewed about specific allegations discussed in this Report, certain individuals--including Gretchen Jacobs, Representative Regina Cobb, Brett Mecum, and Senator Karen Fann--also described Mr. Shooter using terms such as "a character", "flirtatious", and "class clown". They also noted that Mr. Shooter was known for making off-color comments and engaging in sexually suggestive banter with friends. Mr. Shooter acknowledged similar characteristics in himself when he wrote a letter to all Republican Representatives in 2016 during his run for Speaker, in which he promised to "cut back on the beer and jokes out of respect for the office and the institution". Similarly, Ms. Jacobs and former Representative David Stevens informed us that Ms. Ugenti-Rita had a general reputation for having a sense of humor laced with sexual overtones and engaging in banter with her colleagues--at least during her first two years at the Legislature. Our independent research of publicly available information corroborated these opinions. For example, during a recorded House Government Committee session in 2012, a Representative stated, "Michelle, I have a hot date tonight." Ms. Ugenti-Rita responded, "No, you don't; stop it. Your right hand doesn't count." This is one public example of the type of banter others believe Ms. Ugenti-Rita engaged in regularly with her colleagues.[8]

Ms. Ugenti-Rita stated that when she and Mr. Shooter were new to the Legislature, he took an obvious interest in her right away. He would make comments to her such as, "You're beautiful today", "Mmm, that's a good-looking skirt", or "Michelle, you're making it hard to concentrate". She recounted that he often commented on her clothing and personal appearance almost immediately upon seeing her. Mr. Shooter would also immediately try to engage her in conversation at events. Ms. Ugenti-Rita stated that this type of attention was tolerable in the beginning but became much more intense during the 2011 session. Ms. Ugenti-Rita conveyed to us that she perceived her and Mr. Shooter as being professional acquaintances but nothing more. Ms. Ugenti-Rita told us that she and Mr. Shooter were in a "liberty caucus" comprised of

[8] Our reference to Ms. Ugenti-Rita's sense of humor or actions toward others is not intended in any way to suggest she invited or is deserving of any harassment from anyone. However, her sense of humor and past actions are relevant to the credibility of her statements in which she told us she felt subjectively harassed. We will discuss this more below as relevant.

legislators who would attend meetings (in a legislator's office, among other locations). She told us that she stopped attending these meetings in legislative offices after a while to avoid being in close proximity with Mr. Shooter.

We presented Mr. Shooter with an overview of Ms. Ugenti-Rita's description of his behavior toward her and her perception of their relationship. Mr. Shooter admitted to making comments about her appearance and explained that he made those comments because he intended them to be compliments. Mr. Shooter noted that he makes similar comments about physical appearance, such as clothing choices, to other legislators (men and women), and other people generally, which he also intends as compliments. In this respect, he told us that he did not treat Ms. Ugenti-Rita differently than he treats others. He also explained that although he will tell people they look nice, it does not mean he wants to "bed" them, and he does not interpret others' compliments toward him to mean those persons want to have sex with him. Although Ms. Ugenti-Rita informed us that she and Mr. Shooter were nothing more than colleagues, Mr. Shooter's recollection was substantially different. He recalled that when they were both new to the Legislature, he and Ms. Ugenti-Rita were part of a group of new legislators who would go out for drinks after work and socialize casually. Mr. Shooter recalled liking Ms. Ugenti-Rita (as a friend and colleague) because she was smart, and he believed she was "brave" for running for office. Mr. Shooter told us that he and Ms. Ugenti-Rita were good friends after the 2010 election and into the 2011 session. He stated that she confided in him about personal matters, such as her marriage. He also stated that Ms. Ugenti-Rita would regularly engage in banter with him and the other members of their social group, including jokes with sexual overtones. When asked about the liberty caucus, Mr. Shooter explained that the caucus contained a group of like-minded legislators who would meet, have pizza, and discuss business matters. He stated that some of the Members of this group would typically go out for drinks after their meetings. He also stated that Ms. Ugenti-Rita would attend both the business and, at times, the social gatherings. While explaining his perception of their relationship, Mr. Shooter alleged that Ms. Ugenti-Rita asked him if he wanted to "do cocaine" sometime around 2012. Mr. Shooter said he declined. Ms. Ugenti-Rita adamantly denied ever doing cocaine or asking Mr. Shooter to do so.[9]

Mr. Shooter recalled that this friendship waned at some point during the middle of the 2011 session. He told us that he did not know why, but Ms. Ugenti-Rita suddenly went "dark" and stopped communicating with him in the same way as before. This behavior is consistent with Ms. Ugenti-Rita's recollection of her feelings and actions toward him--*i.e.*, that she began to passively avoid him during the 2011 session. Although their friendship began to dissipate, interview testimony from others demonstrates that Mr. Shooter and Ms. Ugenti-Rita still remained friendly through the summer of 2011.

In an effort to obtain a complete understanding of the relationship between Mr. Shooter and Ms. Ugenti-Rita, we asked other interviewees whether they ever had observed the two legislators interact. Very few could recall witnessing any memorable interactions between them. Of those who could, they did not recount overtly negative interactions. Ms. Jacobs saw Ms. Ugenti-Rita looking upset when Mr. Shooter disengaged from conversation with her at a Legislative event during 2011. Interviewee 1 remembered seeing (1) Ms. Ugenti-Rita, Mr. Shooter, and David Stevens having drinks one night after work during the summer of 2011, and (2) all three legislators laughing, talking, and having a good time. David Stevens recalled this as well and believed

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[9] To be clear, we do not conclude one way or the other that Ms. Ugenti-Rita ever made that request or has ever done illegal drugs of any kind. Indeed, when asked if there were others who would be able to corroborate this allegation, Mr. Shooter would not provide any additional information. We merely convey this as uncorroborated information that Mr. Shooter provided in support of his *apparent perception* of (1) their relationship (perhaps as being more than mere professional acquaintances) or (2) her possible perception of him (as more of a friend).

everyone had a good time. David Stevens also stated that he would characterize Ms. Ugenti-Rita and Mr. Shooter as being "personal friends" at that point in time. David Stevens, who also was a member of the liberty caucus, stated that after the business portion of the meetings, some members would go out for a drink afterward to socialize. David Stevens said that he and Mr. Shooter would "always" do so and recalled that Ms. Ugenti-Rita would go sometimes during 2011 and 2012.

We also interviewed Ms. Ugenti-Rita's ex-husband, Frank Ugenti, concerning his knowledge of her allegations and her relationship with Mr. Shooter. Mr. Ugenti informed us that he believed Mr. Shooter would make unprofessional comments to Ms. Ugenti-Rita and others. He also informed us that he and Ms. Ugenti-Rita would strategize about how she should handle Mr. Shooter's comments toward her, suggesting most or all of Mr. Shooter's conduct was unwelcome. While Mr. Ugenti's statements corroborate certain information, we note that he appears to have (1) had a protective, and perhaps reactionary attitude when it came to Ms. Ugenti-Rita's relationship with some of her colleagues at the Legislature, and (2) a bias in favor of Ms. Ugenti-Rita. For example, he informed us that there were many times Ms. Ugenti-Rita had to stop him from confronting Mr. Shooter and potentially "dropping him". Similarly, there were several allegations against Mr. Shooter that Mr. Ugenti did not recall, in response to which he informed us that Ms. Ugenti-Rita "probably knew better" than to tell him, because it would have caused him to find Mr. Shooter and confront him verbally and physically. Based on Mr. Ugenti's description of his actual and potential reactions to certain alleged conduct, we find it likely that Ms. Ugenti-Rita may not have been completely open with Mr. Ugenti about her friendship and interactions with Mr. Shooter out of concern that Mr. Ugenti would react in a manner Ms. Ugenti-Rita might have preferred to avoid.

Ultimately, we find that Ms. Ugenti-Rita and Mr. Shooter had some type of personal friendship, beyond professional formalities, after they were elected in 2010 and during at least part of the 2011 session. While their friendship may not have been as strong as Mr. Shooter perceived, it was likely not as inconsequential as Ms. Ugenti-Rita described. Others observed reciprocal interactions between the two legislators beyond professional formalities including David Stevens, Mr. Mecum, and Ms. Jacobs. Ms. Cobb, Ms. Fann, Mr. Mecum, and Ms. Jacobs also informed us that Mr. Shooter makes routine flirtatious comments and jokes but usually (not always) only among friends (or persons he perceives as friends)--not strangers or limited acquaintances.[10] This further supports a conclusion that Mr. Shooter and Ms. Ugenti-Rita maintained a personal friendship of some kind, at least during 2010 and for part of 2011.[11]

(b) <u>Ms. Ugenti's Rita's Alleged Confiding In Her Now Fiancé Brian Townsend.</u>

Ms. Ugenti-Rita believed she told Brian Townsend about most, if not all, of her alleged encounters with Mr. Shooter.[12] With respect to Mr. Townsend's recollection of whether Ms. Ugenti-Rita told him about the incidents outlined in this Report, we believe he lacks credibility.

We identified several inconsistencies in Mr. Townsend's testimony concerning Ms. Ugenti-

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[10] This statement does not mean Mr. Shooter does not make comments about strangers' appearances, but testimony from other interviewees indicates that if Mr. Shooter makes comments about strangers or persons he does not know well, he tends to communicate these types of comments to friends rather than the subject directly.

[11] To be clear, again, our conclusion concerning the legislators' relationship does not suggest that Ms. Ugenti-Rita's specific allegations against Mr. Shooter were invited or welcomed or appropriate in any manner. This background informs the subjective perspectives of both Ms. Ugenti-Rita and Mr. Shooter and provides context for some of the alleged incidents set forth below.

[12] Mr. Townsend was a House staff member at the time of many of these alleged incidents.

Rita's allegations against Mr. Shooter. For example, when asked whether he and Ms. Ugenti-Rita spoke about her going public with her allegations of harassment beforehand, Mr. Townsend denied it. When pressed, Mr. Townsend admitted that they had discussed whether Ms. Ugenti-Rita should do so and go to the press. We asked Mr. Townsend for any specific topics they spoke about, but he insisted they simply spoke about possible "ramifications" generally and denied that they considered specific ramifications. We find this unbelievable, if for no other reason, than it seems nearly impossible to discuss "ramifications" without any measure of specificity--other than to say "there may be ramifications", which was not the implication we received from Mr. Townsend when he finally confessed that possible ramifications had been discussed. Given the amount of detail Mr. Townsend had about other incidents in this Report and his admitted involvement in Ms. Ugenti-Rita's preparation for her interviews with us (discussed below), we find it highly unlikely that he and Ms. Ugenti-Rita did not discuss specific possible consequences that could result from her decision to make public allegations against legislators.

In addition, we believe Mr. Townsend consulted with Ms. Ugenti-Rita concerning the details he and Ms. Ugenti-Rita intended to disclose to us *before* we interviewed either of them. Ms. Ugenti-Rita prepared a list summarizing all of the alleged incidents for our initial interview. While Mr. Townsend told us he had never seen this complete list, he later admitted that he had spoken with Ms. Ugenti-Rita about all of the listed incidents while she was forming the list. When asked whether he could remember Ms. Ugenti-Rita telling him about other incidents, Mr. Townsend could not recall any. Further, when asked if he could remember how the alleged incidents made Ms. Ugenti-Rita feel at the time they occurred, or what happened, as conveyed by her to him, Mr. Townsend referred us to the list as opposed to stating, in his words, what he was allegedly told. Put differently, he directed us to consult what Ms. Ugenti-Rita had written. We find it likely that Mr. Townsend had been coached before his interview, or if not, then he refused to be candid by, among other things, not sharing his personal recollection of events conveyed to him, and instead directing us to Ms. Ugenti-Rita's prepared notes. Thus, and in light of certain actions he committed which are discussed below, we do not find that Mr. Townsend's claimed recollection of any of the allegations against Mr. Shooter, as conveyed to him by anyone, to be a credible source of independent evidence corroborating Ms. Ugenti-Rita's allegations.[13]

Accordingly, in light of this background, we will address Ms. Ugenti-Rita's specific allegations against Mr. Shooter.

(c) ALLEGED INCIDENT NO. 1: THE LIBERTY CAUCUS MEETING--FEBRUARY OR MARCH 2011.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

Around February or March 2011, Ms. Ugenti-Rita attended a liberty caucus meeting in a lobbyist's office. Before the meeting began, she informed other attendees that she could not stay long because she had to leave to breastfeed her infant child. After her comment, Ms. Ugenti-Rita recalled Mr. Shooter stating: "That's one lucky baby. I wish I was that baby." Ms. Ugenti-Rita stated that she did not laugh but gave him a dirty look. She felt belittled, isolated, and harassed. Ms. Ugenti-Rita noted that other members of the liberty caucus may have been in the same room at the time, but she did not know if anyone else heard the comment.

[13] In addition to Brian Townsend, Ms. Ugenti-Rita told us that she reported Mr. Shooter's conduct to former Speaker Andy Tobin. We contacted Mr. Tobin about that, and he could not recall Ms. Ugenti-Rita ever reporting conduct by Mr. Shooter.

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter could not recall making this specific comment. He did not go so far as to *deny* making it, but stated that if he had made it, it would have been in response to Ms. Ugenti-Rita's initial banter. Mr. Shooter stated that when Ms. Ugenti-Rita would bring up the subject of breastfeeding, she would typically make a gesture in the form of holding her hands, open-palmed, next to the sides of her chest (palms opened toward either side of her chest) and move her hands up and down slightly while talking about breastfeeding. Mr. Shooter thought it was likely she made this same gesture when she announced at the liberty caucus meeting that she would need to leave early to breastfeed, which prompted him to respond with his comment.[14] Although we could not corroborate this gesture being made at this specific liberty caucus meeting, David Stevens recalled another time he saw Ms. Ugenti-Rita make a similar hand motion while speaking to another legislator at a *different* event.

(iii) DAVID STEVENS' RECOLLECTION OF THE EVENT.

Ms. Ugenti-Rita stated that she thought David Stevens may have attended this meeting, so we contacted him.

David Stevens told us that he was likely at this meeting, and if Ms. Ugenti-Rita made a comment about nursing, he would not have thought much about it. When asked about Mr. Shooter's comment, David Stevens did not recall it, but stated that a comment like that would have stood out to him.

(iv) CONCLUSION.

We find that this incident likely occurred, given Mr. Shooter's acknowledgment that it sounded like something he would have said. Based on the totality of the evidence, however, we do not find that Ms. Ugenti-Rita was subjectively offended and felt harassed by Mr. Shooter's comment. Their observed friendship *at this time* (which appears to have included this type of back-and-forth), and her demonstrated reputation for engaging in this type of banter, undermine her stated recollection of her feelings in early 2011.

While we found Ms. Ugenti-Rita generally credible, facts we discovered during our investigation suggest that her current memory of her feelings and reactions to certain past conduct may be clouded by her more recent feelings toward Mr. Shooter--mainly disdain and dislike. For example, Ms. Ugenti-Rita unequivocally denied having any relationship of any kind with Mr. Shooter beyond professional salutations. While this statement supports her position that his conduct was never welcome, others observed the two legislators getting along, socializing as friends after-hours, and engaging in off-color banter at or around the timeframe during which this incident occurred. That evidence demonstrates that a personal friendship and comfort-level existed between the legislators, making it difficult to conclude that, in early 2011, the alleged conduct (as improper, off-color, and offensive as it may be to others) was unwelcome. Based on our understanding, their relationship at the time was a personal friendship outside of the confines of the Legislature, which likely included suggestive joking. We do not find that a reasonable person would find that Mr. Shooter's comment was unwelcome (at least not at the time). Thus, this alleged conduct did not violate the Policy.

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[14] Ms. Ugenti-Rita denied ever making the gesture.

(d) Alleged Incident No. 2: The Restaurant Raffle--June 2011.

(i) Ms. Ugenti-Rita's Allegations.

Ms. Ugenti-Rita informed us that, in celebration of her birthday in June of 2011 or 2012,[15] she and some other legislators went to a restaurant in Old Town Scottsdale to celebrate. The date of this dinner was sometime during the workweek and not on her actual birthday. Ms. Ugenti-Rita recalled that the restaurant was hosting a raffle for which the prize was a beach cruiser bicycle.

During our initial interview, Ms. Ugenti-Rita stated that, as the dinner was wrapping up, Mr. Shooter presented her with the beach cruiser (seemingly out of nowhere), while everyone was getting ready to leave, and told her it was her birthday present. When asked how he got the bike, he said something like, "I have my ways." Ms. Ugenti-Rita was relatively adamant that no one in her party participated in the raffle or even seemed to be paying attention to it. She recalled seeing Mr. Shooter talking to someone at the raffle booth at some point during the night but did not know or inquire why. It did not seem important to her at the time.

Ms. Ugenti-Rita recalled displaying shock and confusion, and not any type of pleasure. She was caught off guard and did not understand why Mr. Shooter was giving her a bicycle. She felt like she was put on the spot, trapped, and did not want to ruin her other colleagues' time at the event. She was not happy about receiving the bike but remembered eventually talking logistics about how to get the bike home. Ms. Ugenti-Rita still has the bike, which is kept at her parents' house, but it is missing its seat. She told us that she did not use the bike but saved it as a form of evidence of Mr. Shooter's conduct in case it worsened. Ms. Ugenti-Rita believed (and still believes) Mr. Shooter's conduct was inappropriate and unwelcome.

(ii) Mr. Shooter's Response.

Mr. Shooter remembered this event and the bicycle. He stated that he believed he and Ms. Ugenti-Rita were still friends (though not as close as earlier that year or in 2010), and he bought the bicycle at the raffle to give to her as a birthday gift. He explained that he routinely buys birthday gifts for his friends. Mr. Shooter said that he paid for the cost of the bicycle and presented Ms. Ugenti-Rita with the "winning" raffle ticket. Her raffle ticket number was called, and she won the bicycle.

Mr. Shooter told us that Ms. Ugenti-Rita thanked him for the bicycle after that night and that she told him she had used the bicycle at the beach during the week after the event. He stated that he remembered gifting her the beach cruiser because she had told him she was going to the beach. During a follow-up interview, Ms. Ugenti-Rita denied that she had ever used the bicycle at the beach, and denied thanking him for the bicycle after that night.

(iii) Another Interviewee's Recollection Of The Event.

We spoke with Interviewee 1, who attended this dinner for a short period of time. Interviewee 1 recalled that all dinner attendees were in pleasant moods, joking, and laughing. Interviewee 1 also remembered that the attendees were discussing a raffle and a bicycle, but could not remember specifics. Interviewee 1 left the dinner early, after staying for about an hour. Interviewee 1 never saw the bicycle.

At some point after this dinner, possibly the next day, Interviewee 1 asked Ms. Ugenti-Rita

[15] Ms. Ugenti-Rita could not recall whether this dinner took place in 2011 or 2012. Interviewee 1, an attendee, believed it was June 2011.

about the bicycle and recalled her saying that she had to go back and pick up the bike. Interviewee 1 stated that Ms. Ugenti-Rita's comment about having to pick up the bike was benign and did not cause Interviewee 1 think much about it at the time. Interviewee 1 did not recall Ms. Ugenti-Rita appearing particularly angry or happy about the bicycle--the conversation was not colored by any memorable emotion.

(iv) DAVID STEVENS' RECOLLECTION OF THE EVENT.

David Stevens also attended the event. David Stevens believed that Ms. Ugenti-Rita invited Mr. Shooter to the event, but he did not witness her do it. David Stevens based his belief on the fact that Ms. Ugenti-Rita had invited him.

David Stevens recalled the group having a good time. He remembered Mr. Shooter presenting Ms. Ugenti-Rita with the bicycle as a birthday present and her thanking Mr. Shooter for the gift. David Stevens also recalled that Ms. Ugenti-Rita mentioned that she could use it with her children. David Stevens remembered that Ms. Ugenti-Rita's ex-husband drove to the restaurant to pick up her and the bike. Overall, by David Stevens' account, Ms. Ugenti-Rita appeared to appreciate the gift.

(v) FRANK UGENTI'S RECOLLECTION OF THE EVENT.

Mr. Ugenti recalled that he did not attend the event but believed he had to drive back to pick up the bicycle. He stated that he thought the gift was strange but did not think too much about it at the time.

Mr. Ugenti also stated that Ms. Ugenti-Rita and their children used the bicycle.

(vi) CONCLUSION.

This incident occurred. However, we received two versions of how Mr. Shooter presented the bicycle and the aftermath. Each account colors the narrative differently.

We followed up with Ms. Ugenti-Rita about this incident, including the raffle ticket. She could not recall whether Mr. Shooter gave her a raffle ticket but did not deny it. This varied from the way she initially conveyed this incident to us. When asked if she went back to pick up the bicycle, she stated that she believed her then-husband (who did not attend the event) picked her and the bicycle up at the restaurant. This reconciles with Interviewee 1's recollection in that someone, on Ms. Ugenti-Rita's behalf, had to make an otherwise unplanned trip to the restaurant to pick up the bicycle. This alone raises the question: If this was such an offensive and unwelcome gesture, then why go through the trouble of accepting the gift, let alone coordinating the logistics to get the gift home? That Ms. Ugenti-Rita went through the effort of retrieving the gift, and it appears by multiple accounts she welcomed it openly and without apparent hesitation, lends credence to Mr. Shooter's version of events.

Similar to Ms. Ugenti-Rita's significantly understated description of her and Mr. Shooter's friendship, at least during 2010 and part of 2011, her initial account of this event and her subjective feelings seemed exaggerated and intended to villainize Mr. Shooter's actions, which were seemingly friendly at the time. We reach this conclusion based on the inconsistencies during Ms. Ugenti-Rita's initial interview and follow-up interview, and our interview with Mr. Ugenti. During our initial interview with her, Ms. Ugenti-Rita told us that Mr. Shooter presented this bicycle to her out of nowhere, completely unexpected, and that no one in her party participated in or even paid attention to the restaurant's raffle. Mr. Shooter then allegedly bombarded Ms. Ugenti-Rita with this bicycle while everyone was getting ready to leave. Yet during our follow-up interview, Ms. Ugenti-Rita conceded that Mr. Shooter may have given her a raffle ticket that would

be announced as the winning ticket, which at minimum paints a somewhat different picture in which Ms. Ugenti-Rita would not have been surprisingly confronted with the bicycle while leaving, but would have actually had advance notice that her raffle ticket would be called. Interviewee 1's and David Stevens' recollections also support this second scenario. Moreover, while Ms. Ugenti-Rita claimed that she made a point not to appear grateful and did not use the bicycle, David Stevens remembered Ms. Ugenti-Rita thanking Mr. Shooter and going one step further by noting that her children would enjoy the bicycle (and they seemingly did according to Mr. Ugenti).

Based on all of this, we question (1) Ms. Ugenti-Rita's present recollection of (i) her feelings and (ii) her reaction at the time this incident occurred, and (2) the veracity of her statements about Mr. Shooter's actions and intentions at the time.

Based on the foregoing, we find that Mr. Shooter's account of this incident is likely more accurate. Neither Interviewee 1 nor David Stevens recalled any negative, tense, or similarly uncomfortable exchange between Mr. Shooter and Ms. Ugenti-Rita during or after the bicycle incident occurred. Interviewee 1 recalled everyone talking about the bicycle as a subject of conversation and not in any particularly negative way. Were it otherwise, one would think such negativity would have stuck out in Interviewee 1's recollection. Indeed, even Ms. Ugenti-Rita admits that she was not outwardly hostile.[16] Overall, had this gesture been as immensely unwelcome as Ms. Ugenti-Rita described, we find it unlikely that she would have acted as reported by others, let alone coordinated the retrieval of the bicycle, kept it, and allowed her family to actually use it. In this context, we do not find Mr. Shooter's gift of the bicycle was unwelcome or otherwise violated the Policy.[17]

(e) ALLEGED INCIDENT NO. 3: THE LA CANASTA MEETING--JUNE 2011.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

Ms. Ugenti-Rita attended lunch with Mr. Shooter in June 2011. She presented us with a handwritten memorandum, dated June 30, 2011, describing this lunch (*see* Exhibit 1) and told us that she wrote the memorandum at or around the time of the lunch. She also mentioned this incident and read portions of the handwritten memorandum during a televised interview.

Ms. Ugenti-Rita conveyed the following background to us: Mr. Shooter asked her to go to lunch at La Canasta after a tort reform meeting. The two attended lunch alone. According to Ms. Ugenti-Rita, the two had a strained relationship at this time. She claims that she agreed to go alone because she thought it could possibly de-escalate the situation. She thought she might have the opportunity to address his behavior she believed was inappropriate. She also thought it was a controlled environment, *i.e.*, lunch during the day without alcohol, and would minimize any inappropriate behavior by him. The specifics of Ms. Ugenti-Rita's allegations are set forth in her memorandum. *See* Exhibit 1. Ms. Ugenti-Rita explained that she wrote the memorandum so, if things got worse, she would have this memorandum to corroborate her claims. She stated that Mr. Shooter's comments were so over-the-top and made her so uncomfortable, mad, and frustrated that she decided to create this memorandum. She stated that, if she did not write the comments down, she did not know if she would have believed them herself. Ms. Ugenti-Rita explained that she wanted a contemporaneous statement of the event. She was not scared for her physical safety, but "was very concerned that it was just going to get worse." When we asked what she meant by "it", she said she meant Mr. Shooter's "continued pursuit of trying to get [Ms. Ugenti-Rita] to sleep

[16] She also claims she did not express any overt gratitude or excitement either.

[17] How Mr. Shooter managed to secure the gift is irrelevant for purposes of determining whether the actions alleged violated the Policy.

with him."

Other than the memorandum itself and her word, we have no evidence that Ms. Ugenti-Rita wrote this memorandum on June 30, 2011, or otherwise at or around the time of the lunch. There are several points that cause us to question the veracity of the memorandum and when it was actually created (although Ms. Ugenti-Rita stands by its truth and contemporaneous creation with the lunch in question). We note that the memorandum does not list the date of the tort reform meeting that occurred at or around the date of this memorandum. We find it unusual that Ms. Ugenti-Rita would not have completed the date (even if incorrect), if she had created this memorandum at or around the time this lunch occurred, *i.e.*, after the tort reform meeting. Additionally, Mr. Townsend stated that Ms. Ugenti-Rita told him about the events in the memorandum at or around the time they happened, but he allegedly did not know that this memorandum existed until after Ms. Ugenti-Rita made public accusations against Mr. Shooter. We find it curious--and frankly, unbelievable--that Ms. Ugenti-Rita would not have (1) told Mr. Townsend that she had memorialized the event when she apparently told him many other details involving her interactions with Mr. Shooter, including all 11 incidents listed in this Report, or (2) shared the memorandum with him sometime during their relationship and before speaking about it with the press (at minimum, perhaps when the couple were generally discussing unspecified "ramifications" associated with making public allegations of harassment).

(ii) MR. SHOOTER'S RESPONSE.

We allowed Mr. Shooter to read the memorandum and respond to Ms. Ugenti-Rita's allegations. Mr. Shooter could not recall the specific lunch. He told us that it was possible he went to lunch with Ms. Ugenti-Rita and expressed an attraction to her but that he would not have meant it in any romantic way. Mr. Shooter explained to us that he is "attracted" to strong and articulate women, which includes Ms. Ugenti-Rita and others. He adamantly and somewhat angrily denied telling Ms. Ugenti-Rita that he "loved" her.[18] He speculated that if he had said it, it would have only been in the context of friendship and in a jovial manner, which he does with other friends.[19] Mr. Shooter denied that he would have told Ms. Ugenti-Rita he loved her romantically.

Mr. Shooter took issue with some statements in the memorandum. First, Ms. Ugenti-Rita's memorandum states that Mr. Shooter told her that he had been married for 32 years. Based on the date of the memorandum, Mr. Shooter stated that he would have been married 35, not 32, years.

Second, despite the memorandum, he stated that he could not recall Ms. Ugenti-Rita *ever* expressing to him happiness in her previous marriage. This statement is consistent with Mr. Shooter's (1) recollection of specific stories, the details of which are not relevant here, Ms. Ugenti-Rita purportedly told Mr. Shooter during their friendship, and (2) statement that Ms. Ugenti-Rita would confide in him about her marital issues before the "dark" period of their friendship.[20]

Third, Mr. Shooter denied that he ever uses, or used, his authority as a sword or a shield. He told us an anecdotal story about when he realized the seriousness of his position and avowed never to take legislative matters lightly. Mr. Shooter recalled the piece of legislation referenced in Ms. Ugenti-Rita's memorandum and explained that he helped push it through the Senate because he

[18] Mr. Ugenti told us that Ms. Ugenti-Rita never told him that Mr. Shooter expressed his love for her.

[19] Before our interview with Mr. Shooter, Ms. Jacobs told us that Mr. Shooter sometimes tells his friends he loves them.

[20] Mr. Shooter told us, at the beginning of the second day of our interview with him, that Ms. Ugenti-Rita would talk to him about her marriage in 2010 and early 2011.

supported it. He denied pushing it through for Ms. Ugenti-Rita.

Fourth, Mr. Shooter remembered Ms. Ugenti-Rita telling him that she could not schedule meetings with certain people and, at the time, thinking that her need to contact these people was urgent. He told us that (1) he offered his help to Ms. Ugenti-Rita, (2) she did not decline his offer to help, and (3) he called these individuals to ask them to speak with her. Mr. Shooter also noted that he has provided this type of assistance to other legislators.

(iii) **CONCLUSION.**

While we give the memorandum some weight, we have questions as to its complete truth and reliability. As noted above, the blank date of the tort reform meeting seems out of place if the memorandum was written very close to the meeting. It seems strange that *some* date was not filled in, even if it was incorrect, given that the memorandum appears to have been written in an attempt to document--with temporal and factual precision--unrequited advances that she worried could escalate in frequency or severity. The fact that this appears to be the only written memorandum Ms. Ugenti-Rita created to record her interactions with Mr. Shooter also seems peculiar, given all she has alleged to have occurred, and further raises concerns about the memorandum's reliability. This is based on (1) Mr. Ugenti's statements that Ms. Ugenti-Rita kept a diary in 2011 and would write in it on a regular basis, and (2) again, the purported reason Ms. Ugenti-Rita created and kept the memorandum. Indeed, during a follow-up interview, we also observed Ms. Ugenti-Rita keeping some notes in a diary or journal of some sort. Ms. Ugenti-Rita did not produce any self-authored contemporaneous writings related to other encounters.[21] Because she did not produce them to us, we assume they do not exist. Thus, we find it somewhat difficult to believe that Ms. Ugenti-Rita would deviate from her normal pattern of documenting her daily life, which apparently did not include contemporaneous writings memorializing her other experiences with Mr. Shooter (some of which, as explained below, clearly violated the Policy), except this one time.

That said, based on the foregoing, we find credible evidence that the following events occurred: (1) the legislators went to lunch alone, (2) Mr. Shooter helped push a bill through (but not necessarily on behalf of Ms. Ugenti-Rita), and (3) Mr. Shooter asked certain persons to meet or speak with Ms. Ugenti-Rita. We, however, could not find independent, credible evidence to support the allegations that Mr. Shooter told Ms. Ugenti-Rita that he loved her in a romantic manner, or that he pushed a bill through the Senate on her behalf in an effort to flex some kind of political muscle with the goal of impressing her.

We note that, at the time this lunch meeting occurred, Ms. Ugenti-Rita had not told Mr. Shooter that his comments were unwelcome. She told us, however, that she had tried to convey her desire to distance herself from him by deflecting his comments and choosing not to attend certain events, so as to avoid having to interact with him. Of course, a victim of harassment need not always expressly tell the harasser "no" or to "stop" before behavior constitutes discrimination or harassment. But the evidence and the facts in this instance inform us that Ms. Ugenti-Rita and Mr. Shooter had a personal friendship from late 2010 through part of 2011. While their relationship appeared to become more and more distant beginning sometime in the middle of the 2011 session, they both remained in the liberty caucus together and seemingly remained cordial. Then, soon

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[21] She also provided audio recordings to her lawyer. Although we were not permitted to have our own copies of those recordings, we were permitted to listen to them and take notes. Those recordings appeared to be an audio diary, reflecting on her time at the Legislature. We find them credible because those recordings included Ms. Ugenti-Rita's candid opinions concerning a variety of issues that arose during her tenure as a legislator in April 2012. While those opinions included an interaction with Mr. Shooter and her related feelings, he was not the primary topic of those recordings, making them all the more substantively believable.

after the 2011 session and days before the date of her memorandum, Mr. Shooter was invited to Ms. Ugenti-Rita's birthday celebration. Based on our understanding of how Ms. Ugenti-Rita and Mr. Shooter got along during her birthday celebration and before, they both exhibited behavior consistent with some type of personal friendship (though, admittedly not as close as they had been in 2010 and earlier 2011). That said, Ms. Ugenti-Rita's recollection of her subjective feelings in June 2011 may be questionable. In addition to the concerns stated above about the missing date, we cannot reconcile the obvious contempt Ms. Ugenti-Rita expressed toward Mr. Shooter in her memorandum with the third-party observations of her having a good time with Mr. Shooter at the restaurant mere days before she allegedly wrote it. Notwithstanding that inconsistency, we believe Ms. Ugenti-Rita could have interpreted his remarks in a way that made her feel embarrassed and angry (particularly his offer to call third parties to help her connect with them). However, we did not find evidence that his conduct occurred because of her sex, as opposed to a legislator facing obstacles that a colleague chose to try and help remedy as a professional courtesy.

In light of the foregoing, we do not believe Mr. Shooter's conduct violated the Policy.

(f) ALLEGED INCIDENT NO. 4: THE ALEC CONFERENCE IN NEW ORLEANS --AUGUST 2011.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

In or around August 2011, Ms. Ugenti-Rita attended an American Legislative Exchange Council ("ALEC") conference in New Orleans. Ms. Ugenti-Rita recalled that, after she checked into her room, Mr. Shooter knocked on her hotel room door. She looked out the peephole and saw Mr. Shooter holding a six-pack of beer. He was alone, and no one else was in Ms. Ugenti-Rita's hotel room. Ms. Ugenti-Rita ignored him, and Mr. Shooter left.

Ms. Ugenti-Rita told us that she sent Mr. Townsend text messages about the event when it happened. Neither Ms. Ugenti-Rita nor Mr. Townsend had copies of these text messages, and there is no other proof the text messages actually ever existed.

We asked Ms. Ugenti-Rita if she knew how Mr. Shooter knew where to find her in the hotel. She said she believed their rooms were adjacent (randomly and not purposely) and that they may have seen each other entering their rooms after checking into the hotel. Ms. Ugenti-Rita thought Mr. Shooter's actions were "very aggressive" because he made an effort to contact her at ALEC when they otherwise would have had no contact. Ms. Ugenti-Rita told us that Mr. Shooter did not call her in advance of knocking on her door. She stated that she felt harassed. She felt like "clearly he's not stopping". She was getting angry at this point because he was not stopping and she did not know why someone would not deal with him.[22]

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter could not remember this specific incident but stated that he would not be surprised if it happened. He told us that he tends to act this way at conferences with both male and female friends and colleagues. He stated that Ms. Ugenti-Rita never discussed this incident with him.

(iii) MS. REGINA COBB AND MS. KAREN FANN.

At Mr. Shooter's request, we asked Ms. Cobb and Ms. Fann whether Mr. Shooter had ever

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[22] Ms. Ugenti-Rita informed us that she told former Speaker Tobin about Mr. Shooter's alleged misconduct and harassment toward her. Mr. Tobin could not recall Ms. Ugenti-Rita ever doing so.

knocked on their hotel doors at conferences with beer. Ms. Cobb told us that Mr. Shooter had never knocked on her hotel room door at a conference but noted that she does not give out her hotel room number to others. That said, she stated that Mr. Shooter would call and invite her to join him for drinks in the hotel bar with others.

Ms. Fann stated that Mr. Shooter has knocked on her hotel room door at conferences to invite her to socialize and drink, along with others.

(iv) **MR. UGENTI'S RECOLLECTION OF THE ALLEGED EVENT.**

Mr. Ugenti also recalled hearing about this event from Ms. Ugenti-Rita. He claimed to remember her returning from the conference looking distraught and upset and that she relayed the details of this incident to him. Mr. Ugenti claims that Ms. Ugenti-Rita had to stop him from going after Mr. Shooter physically (Mr. Ugenti claims he was in his truck and going to go "drop him"--meaning Mr. Shooter). Ms. Ugenti-Rita did not tell us during either of her interviews that her feelings about this incident carried throughout the entire conference until the time she returned home.

(v) **CONCLUSION.**

We find it credible that this incident occurred. Indeed, Mr. Shooter did not deny that it probably happened. We do not find, however, that Mr. Shooter's knock on Ms. Ugenti-Rita's hotel door at ALEC, with a six pack of beer, violated the Policy.

While we believe Ms. Ugenti-Rita's subjective feelings are credible,[23] we do not believe that Mr. Shooter acted in this way because of her sex, or that a reasonable person would perceive Mr. Shooter's behavior as harassing conduct. When Ms. Ugenti-Rita did not respond, Mr. Shooter simply moved on. Other interviewees corroborated that Mr. Shooter often invites colleagues to drink and socialize with him by either calling or knocking on their hotel doors. Thus, this behavior under these circumstances is consistent with Mr. Shooter's admitted and corroborated testimony of his tendency to knock on his friends' and colleagues' hotel doors at conferences to recruit them to drink and socialize. We also note that, at this time, while Mr. Shooter and Ms. Ugenti-Rita were not as close as they had been during 2010 and early 2011, they still were friendly. Mr. Shooter had just celebrated Ms. Ugenti-Rita's birthday in June of that same year. Without more,[24] we cannot conclude that, in this instance, Mr. Shooter's behavior violated the Policy.

(g) **ALLEGED INCIDENT NO. 5: THE 2011 HOLIDAY GIFT--DECEMBER 2011.**

(i) **MS. UGENTI-RITA'S ALLEGATIONS.**

In December 2011, around Christmas time, Ms. Ugenti-Rita found a gift bag with tissue paper

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[23] While we find Ms. Ugenti-Rita's self-described feelings credible, we give no weight to Mr. Ugenti's observations of Ms. Ugenti-Rita after the conference. Ms. Ugenti-Rita did not convey to us that this incident left her distraught for the entire conference. Furthermore, we do not have evidence to corroborate that Ms. Ugenti-Rita arrived home from the conference feeling upset because of this incident, as opposed to anything else that happened at the conference or elsewhere in her personal life.

[24] For example, we found no evidence that Mr. Shooter was targeting Ms. Ugenti-Rita or even knew for sure that it was her room he approached. Interviewees informed us that legislators are often grouped in adjacent rooms at these types of events. Based on the evidence, it is possible that Mr. Shooter simply began knocking on all doors down his hallway to try to find colleagues who wanted to socialize.

sitting on her chair in her legislative office. A bottle of tequila and an unsigned card were inside the bag.

The card reads, "Know you like Tequila, There is a song about 'you and Tequila' by Kenny Chesney. Have a Merry Christmas!" Ms. Ugenti-Rita looked up the song soon after receiving the card. Ms. Ugenti-Rita recalled that a short time after she received this gift, Mr. Shooter asked her if she had received it, thereby confirming the gift and card were from him.

Ms. Ugenti-Rita told us that she did not expressly tell Mr. Shooter that his comments or actions were inappropriate or unwelcome. However, at this point, by even Mr. Shooter's account, he was aware that Ms. Ugenti-Rita had changed her behavior toward him for several months. She would not answer his telephone calls or communicate with him in the way she once had.

Like the other conduct alleged, this gesture made her feel uncomfortable and harassed.

(ii) **Mr. Shooter's Response.**

When we showed Mr. Shooter the unsigned Christmas card, he admitted that it was in his handwriting and looked like a card he would leave.

The lyrics of the referenced song are as follows:[25]

Baby, here I am again
Kicking dust in the canyon wind
Waiting for that sun to go down
Made it up Mulholland Drive
Hell bent on getting high
High above the lights of town

You and tequila make me crazy
Run like poison in my blood
One more night could kill me, baby
One is one too many
One more is never enough

Thirty days and thirty nights
Been putting up a real good fight
And there were times I thought you'd win
It's so easy to forget
The bitter taste the morning left
Swore I wouldn't go back there again

You and tequila make me crazy
Run like poison in my blood
One more night could kill me, baby
One is one too many
One more is never enough

When it comes to you
Oh, the damage I could do

[25] https://www.azlyrics.com/lyrics/kennychesney/youandtequila.html; https://www.youtube.com/watch?v=Q8XkLrErSHw

It's always your favorite sins
That do you in

You and tequila make me crazy
Run like poison in my blood
One more night could kill me, baby
One is one too many
One more is never enough

Never enough
You and tequila
You and tequila

We read the lyrics to Mr. Shooter aloud and asked him what message he intended to convey by referencing them in his communication with Ms. Ugenti-Rita. He told us that he referred to the song because he intended it to mean Ms. Ugenti-Rita was "making him crazy" because she went "dark" on him and would not communicate with him anymore. Mr. Shooter said that he knew she liked tequila, which is why he gave her the bottle as a gift. He also told us that he did not reference the song for its sexual overtones. He simply wanted to know what he had done wrong because he could not figure out what happened to their friendship.

(iii) CONCLUSION.

We find credible evidence that this incident occurred. Mr. Shooter does not deny that he left the gift as alleged. We also find that, at this point, Mr. Shooter knew Ms. Ugenti-Rita was blatantly ignoring him and distancing herself from him. We do not find credible that Mr. Shooter referenced the Kenny Chesney song in a platonic manner. The lyrics are overtly sexual, implying a romantic desire for another person. By December of 2011, even Mr. Shooter recalled that their friendship had not repaired and, by this time, it had been nearly six months since Mr. Shooter and Ms. Ugenti-Rita socialized outside of work similar to how they had for Ms. Ugenti-Rita's birthday. While a Christmas gift would not have necessarily constituted harassment, his reference to "You and Tequila", given its overtly sexual implication, pushes his conduct beyond appropriate friendliness or workplace pleasantries. Indeed, by Mr. Shooter's own admission, the legislators were not friendly (or at least she had withdrawn from the friendship) at this point--hence his alleged reason for referencing the song in the first place.

In this instance, Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and occurred because of Ms. Ugenti-Rita's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

(h) ALLEGED INCIDENT NO. 6: UNANNOUNCED OFFICE VISIT--APRIL 2012.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

Ms. Ugenti-Rita recalled that around April 2012, Mr. Shooter stopped by her office unannounced. He made small talk and then told her that "everyone" wanted to know whether her breasts were "real or fake". Ms. Ugenti-Rita believed she responded with something to the effect of: "What are you talking about? That's disgusting." She told us that he did not apologize. Mr. Shooter left her office, and she went on with her day.

Ms. Ugenti-Rita stated that she felt objectified, belittled, and mad because he clearly felt like

he could act in that way without fear of any repercussions.

Later, Ms. Ugenti-Rita allowed her lawyer to play digital recordings for us, over the telephone, purportedly made on April 4 and 5, 2012. The recordings appeared to be some sort of personal recorded diary concerning her attempt to have her election bill pushed through the Senate. The recording addressed several matters related to her legislative effort. However, relevant to this investigation were her comments that Mr. Shooter had come to her office to discuss her election bill, and how and why the Senate rejected her bill. The recordings reflect that during that conversation, Mr. Shooter made sexual innuendos, including comments about her breasts. Ms. Ugenti-Rita stated in the recording that the comments made her "very uncomfortable" and that "He'll be next. He'll be the next person I confront, but not now. Now is not the time." We find these recordings particularly credible and reflective of Ms. Ugenti-Rita's then perception and feelings because her statements throughout the recordings, about everything she was discussing, were especially candid and uncensored.

(ii) <u>MR. SHOOTER'S RESPONSE.</u>

Mr. Shooter flatly denied that this happened. He stated that Ms. Ugenti-Rita had told him previously that her breasts were implants, without his prompting.[26]

(iii) <u>MR. UGENTI DOES NOT RECALL BEING TOLD ABOUT THE INCIDENT.</u>

We spoke with Mr. Ugenti, and he stated that he could not recall being told about any incident where Mr. Shooter asked Ms. Ugenti-Rita about her breasts (although he stated that maybe he was not told about the incident because he would have confronted Mr. Shooter and maybe Ms. Ugenti-Rita wanted to avoid that).

(iv) <u>CONCLUSION.</u>

While we cannot find independent credible evidence that Mr. Shooter specifically asked whether Ms. Ugenti-Rita's breasts were "real or fake", we nonetheless conclude that, in light of Ms. Ugenti-Rita's recordings from April 2012,[27] Mr. Shooter made unwelcome sexualized comments to and about Ms. Ugenti-Rita, including about her breasts.

In this instance, Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and occurred because of Ms. Ugenti-Rita's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

(i) <u>ALLEGED INCIDENT NO. 7: THE SCOTTSDALE PLAZA GOP FUNDRAISER --AUGUST 2012.</u>

(i) <u>MS. UGENTI-RITA'S ALLEGATIONS.</u>

Ms. Ugenti-Rita and Mr. Shooter both attended a GOP Fundraiser at the Scottsdale Plaza Resort around August 2, 2012. Ms. Ugenti-Rita was confident about the date because Joe Arpaio

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[26] Ms. Ugenti-Rita denied that she made that remark to Mr. Shooter.

[27] *See* footnote 21, *supra*.

and Steven Segal were special guests, and she has a photo from the event that contained its date.

Ms. Ugenti-Rita stated that, when it was time to leave the event, Mr. Shooter insisted on walking her to her car. She believed she would have declined at first, but he would have insisted, and she then would have given in. She felt like she had two options: either cause a scene or accept his offer. To avoid making a scene or appearing rude in front of her colleagues and other attendees, she allowed Mr. Shooter to walk her to her car. She said that this made her feel uncomfortable.

Ms. Ugenti-Rita recalled that, once at her car, Mr. Shooter told her that he had reserved a suite at the Scottsdale Plaza Resort with a fireplace and asked her to join him in his room. Ms. Ugenti-Rita responded with something to the effect of: "No, I'm married. What are you talking about?" She recalled that he would not stop persisting, and it came to the point where she had to get into her car in order to escape him. Ms. Ugenti-Rita also remembered Mr. Shooter saying something to the effect of: "What do you want me to do? I'm just a man." He allegedly made her feel like it was her fault he was making these advances.

(ii) <u>Mr. Shooter's Response</u>.

Mr. Shooter remembered this GOP event and recalled attending it with his friend from Yuma, Glen Thomas ("Spike") Curtis. Mr. Shooter did not recall walking Ms. Ugenti-Rita to her car, but told us that it could have happened, because he does that for a lot of women. He denied saying anything to Ms. Ugenti-Rita about having a suite or inviting her to spend the night with him. He also noted that he would not have reserved a hotel room because he has an apartment in Phoenix. Mr. Shooter said that Ms. Ugenti-Rita never mentioned this event to him.

Mr. Shooter provided us with his credit card statement for the month of August 2012. He informed us that it was the only credit card he used during August 2012. The statement does not contain a room reservation at the Scottsdale Plaza Resort. While this does not completely contradict Ms. Ugenti-Rita's allegations, it raises the obvious question: why would Mr. Shooter describe a suite at the hotel to her if he did not have one, and what would he have done had Ms. Ugenti-Rita accepted his alleged invitation?

(iii) <u>Glen Thomas ("Spike") Curtis' Recollection Of The Event</u>.

We spoke with Mr. Curtis, who recalled attending the event. He believed he drove from Yuma to Phoenix and met Mr. Shooter at Mr. Shooter's apartment. He recalled riding in Mr. Shooter's car to the event. He did not believe that either of them reserved a hotel room, but given the time that had passed, he was not positive. He told us that he typically slept on Mr. Shooter's couch when he visited from Yuma. He also noted that whenever he would visit Phoenix to see Mr. Shooter, they would stay together the whole time. He volunteered that he has visited Phoenix relatively frequently to spend time with Mr. Shooter. Mr. Curtis stated that when he visits, Mr. Shooter does not go out or socialize without Mr. Curtis.

We asked Mr. Curtis whether Mr. Shooter has ever mentioned Ms. Ugenti-Rita. Mr. Curtis could not recall any conversations specifically about her but could remember conversations involving other former legislators. Mr. Curtis also did not recall Mr. Shooter ever stating that he was attracted to another legislator, Ms. Ugenti-Rita or otherwise. Mr. Curtis thinks that, given their friendship, Mr. Shooter would have confided in him that type of information. Mr. Curtis recalled Mr. Shooter telling him that another legislator (identity unknown) had made advances toward him at one point, and that it made Mr. Shooter feel uncomfortable.

(iv) MR. UGENTI DOES NOT RECALL BEING TOLD ABOUT THIS INCIDENT.

Ms. Ugenti-Rita thought she had told Mr. Ugenti about this incident. Mr. Ugenti did not recall Ms. Ugenti-Rita telling him about Mr. Shooter inviting her to his hotel room.

(v) MS. UGENTI-RITA CONFRONTED MR. SHOOTER ABOUT HIS BEHAVIOR IN 2012.

Ms. Ugenti-Rita also recalled confronting Mr. Shooter about his general conduct sometime in 2012 but could not recall exactly when. She told us that she went through with him examples of his actions that she deemed unwelcome and inappropriate, and told him to stop. Although Mr. Shooter did not believe Ms. Ugenti-Rita ever told him why she ended their friendship, he again did not deny that she confronted him at some point.

(vi) CONCLUSION.

We find that there is no credible evidence corroborating the allegation that Mr. Shooter invited Ms. Ugenti-Rita to a hotel room, but we find credible evidence that Mr. Shooter violated the House's Policy when he insisted on accompanying Ms. Ugenti-Rita to her vehicle at a time when he was admittedly aware she was avoiding him, not interested in his friendship, and she was distancing herself from him.

Regarding the alleged invitation to come to his hotel room, Mr. Shooter denies having done so, and more critically, we do not find *independent* credible evidence to support this allegation. Mr. Shooter's credit card statements and Mr. Curtis' testimony suggest that Mr. Shooter did not invite her to a suite or describe a hotel room to her because he does not appear to have had one. Moreover, while Mr. Shooter is a self-admitted "bullshit-er", we find it unlikely that he would describe a specific hotel suite to someone and invite her to join him there, if he did not have one, and then risk embarrassment if she accepted his invitation and he could not deliver the room.[28] Moreover, other witnesses support the conclusion that this type of conduct--soliciting someone to come to his hotel room, presumably for romantic or sexual reasons--is out of character for Mr. Shooter. Ms. Cobb and Ms. Fann both conveyed to us that while Mr. Shooter makes off-color--sometimes inappropriate--jokes, they have never heard him suggest he wants to have sex with anyone, let alone proposition someone.

With respect to Mr. Shooter's insistence on walking Ms. Ugenti-Rita to her vehicle, we believe that *under the circumstances*, it violates the Policy. Mr. Shooter does not deny he did so, and in fact, stated that he could have. Moreover, in this instance, we find Ms. Ugenti-Rita's stated subjective feelings credible in light of the time that had passed since she began distancing herself from Mr. Shooter--including since Mr. Shooter's 2011 Christmas card referencing a song with obvious sexual overtones. We also find that a reasonable person would perceive Mr. Shooter's conduct as harassing in light of his previous conduct and Ms. Ugenti-Rita's ongoing avoidance of him--avoidance Mr. Shooter recognized and acknowledged at least by 2012 (and by the time at issue). Although walking an individual to a vehicle, or insisting upon doing so, may seem (or be) innocuous in isolation, Ms. Ugenti-Rita and Mr. Shooter were not friends--or even neutral acquaintances--at this point; in fact, she had essentially written him off *and he recognized as much* (hence the tequila and song lyrics, which according to him was, at minimum, a gesture made in an effort to understand why she was distancing herself from him). Thus, the relationship between them no longer stood on neutral ground--she had conducted herself in a way, for almost one year

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[28] Mr. Shooter could have possibly scrambled to reserve a room, but it still seems unlikely that he would have acted as alleged.

at this point, to convey her desire to no longer socialize with Mr. Shooter in any manner. Yet he would not relent, even after his 2011 Christmas gift and card yielded no return on his advances. We believe a reasonable person would find Mr. Shooter's insistence on being alone with Ms. Ugenti-Rita in a hotel parking lot, at night, at that juncture, to amount to harassing conduct.

If Ms. Ugenti-Rita confronted Mr. Shooter before the Scottsdale Plaza event, her doing so further supports a finding that Mr. Shooter violated the Policy. Although Mr. Shooter stated that he did not believe Ms. Ugenti-Rita ever explained her reasons for pulling away from their past friendship, his primary reason for this belief was that he is baffled by her allegations and never knew she believed his conduct was unwelcome. He did not deny that she spoke with him about his conduct, but he believed she never explained her feelings to him because he could not "understand" from where her now-expressed feelings of hostility came. But his inability to "understand" why she is now making these allegations, and why she had distanced herself from him, does not contradict Ms. Ugenti-Rita's representations that she asked him to stop his behavior toward her or otherwise undermine her subjective feelings at the time--again, a time when her desire to distance herself from him was conveyed loudly and clearly.

Moreover, Mr. Shooter may have felt confused by her eventual confrontation due to what he alleges was her silence in response to what he had allegedly done to offend her, but we do not find his allegations of silence evidence that she never tried to send a clear message for him to leave her alone. He has acknowledged her attempts to distance herself from him, and silence can be deafening when accompanied by overt action (such as going out of the way to avoid someone, not returning repeated messages, and the like). Indeed, Mr. Shooter has no more right to an explanation for why Ms. Ugenti-Rita decided to cut ties from him than he does to harass her for one. Even today, Mr. Shooter seems to believe that he did nothing wrong, evidenced by his recent address to his colleagues during the 2018 session, stating that he did not realize his own conduct was inappropriate.[29] So, perhaps Mr. Shooter's failure to "understand" Ms. Ugenti-Rita's attempt to cut all contact with him at this point resulted from his failure to agree with her feelings, rather than her failure to convey them, since he did not (and still does not) believe he had done anything wrong. Regardless, his attempts to force interaction with Ms. Ugenti-Rita at the time of this incident were clearly at risk of offending her, and he knew it, because she had made it clear--at least by avoidance and silence--that she wanted nothing to do with him or his advances (no matter how innocent they may have been in his mind).

In the end, Mr. Shooter's acknowledgment that his friendship with Ms. Ugenti-Rita began waning during the 2011 session and was seemingly over by the end of 2011, in light of all the other facts and information described herein, supports a finding that his insistence on walking Ms.

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[29] Ms. Ugenti-Rita said she confronted Mr. Shooter about his conduct, again, in 2015, at a GOP Salute Dinner. Ms. Ugenti-Rita told us that she "let him have it" and explained why his past behavior was unacceptable and inappropriate. She said that he told her he wanted to make amends. Mr. Shooter vaguely recalled this encounter but stated that he again walked away not understanding why she had pulled away from their friendship. He remembered believing that Ms. Ugenti-Rita intended to explain everything to him because he recalled thinking he would finally know why their friendship ended. Yet, he claims that he walked away still not "understanding" why they were no longer friends. We believe this interaction took place and that Ms. Ugenti-Rita likely explained her feelings and the behavior she found inappropriate. We also believe it likely that Mr. Shooter walked away still not understanding what happened to their friendship, likely because he did not know why she would find his behavior inappropriate because he does not believe his behavior to be inappropriate. We believe Ms. Ugenti-Rita did explain her feelings to him. Again, Mr. Shooter does not deny that Ms. Ugenti-Rita confronted him. Thus, Mr. Shooter's comments to his colleagues during harassment training, that he did not know what he had done was inappropriate, are especially noteworthy. *See* **Exhibit 2**.

Ugenti-Rita to her car that evening constituted harassing conduct under the Policy. While we find it reasonable that a person who believes he has lost a good friend, without reason, may attempt to communicate with that person for some time after the fact to reconcile the loss, we find it unreasonable that such person (1) would attempt to discuss the falling out or restart a friendship by leaving an unsigned Christmas card referencing a romantic country song on her office chair, and (2) then, after prolonged silence and isolation from that person, force an unwanted interaction by insisting on walking her to her vehicle--alone.

In this instance, Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and admittedly occurred because of Ms. Ugenti-Rita's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

(j) ALLEGED INCIDENT NO. 8: THE BUSINESS CARD LEFT ON THE WINDSHIELD--2013.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

Ms. Ugenti-Rita attended a Willetta Partners' Open House reception in 2013.[30] When she left the reception and arrived at her car in the parking lot, she found Mr. Shooter's business card left on her car window.[31] He had written the acronym "TOY" on the card, which stood for "Thinking Of You". Finding this card made Ms. Ugenti-Rita feel similarly to the other incidents she complained of, and she found his conduct inappropriate.

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter brought up this incident during his interview *before* we asked him about it. While he could not remember many details other than leaving the card, he believed he made this gesture because he was "mourning" a friendship. Mr. Shooter told us that he had never had a friendship end so abruptly.

(iii) CONCLUSION.

While Mr. Shooter conveyed his actions to be an innocent and friendly gesture, we find his claimed innocence difficult to reconcile with the fact that, at this point (2013), Ms. Ugenti-Rita had significantly reduced her contact with him--possibly to no contact at all other than when necessary at the Capitol--for a significant amount of time. She had rebuffed his prior advances and confronted him at least once. By 2013, the legislators' friendship had been "dark"--nonexistent for at least two years. Mr. Shooter acknowledged this isolation.

In this instance, Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and occurred because of Ms. Ugenti-Rita's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

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[30] Ms. Ugenti-Rita was not positive of the specific date, but believes this occurred in 2013.

[31] Whether the card was left on the Ms. Ugenti-Rita's side window or windshield is unclear, but also immaterial.

(k) ALLEGED INCIDENT NO. 9: THE EVENT AT TOMMY BAHAMAS RESTAURANT--DECEMBER 2013.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

ALEC hosted a reception at Tommy Bahamas in Scottsdale, Arizona around December 2013. Mr. Shooter allegedly pointed out a waitress to Ms. Ugenti-Rita and told her that (1) he believed the waitress resembled Ms. Ugenti-Rita, and (2) because he could not "have" her, the waitress would have to do. In response, Ms. Ugenti-Rita claims she rolled her eyes and walked away.

When asked why the two legislators would have been having a private conversation, Ms. Ugenti-Rita explained that they were not. Rather, she says, what likely happened was that they were both part of a larger conversation circle. Then, as individuals began moving elsewhere at the reception, Ms. Ugenti-Rita and Mr. Shooter ended up next to each other for a moment, at which time Mr. Shooter made these comments.

Ms. Ugenti-Rita felt like Mr. Shooter had an obsession with her. By the end of 2013, she believed she had given him a clear message that she was not interested in him. She speculated that he made these comments to try to provoke a reaction from her. Mr. Shooter's alleged comments made her feel harassed.

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter vehemently denied this allegation and that he made the comments in question. He told us that he has only been with one woman in the past 40 years (his wife).

(iii) CONCLUSION.

We could not find independent, credible evidence to corroborate this allegation.[32] Thus, we cannot conclude this occurred.

(l) ALLEGED INCIDENT NO. 10: THE ALEC CONFERENCE IN SAN DIEGO-- SUMMER 2015.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

Ms. Ugenti-Rita attended an ALEC conference in San Diego, possibly in the summer of 2015. While waiting with other conference attendees in the lobby of the hotel before a harbor cruise, Mr. Shooter arrived dressed as a pirate and carrying a toy sword. He poked her with the sword playfully in the side of her stomach. She pushed the sword away and told him to stop. Ms. Ugenti-Rita also told us that after she told him to stop, he went on to poke other attendees with the sword. His actions made her feel "marginalized, tiny", and embarrassed.

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter recalled dressing as a pirate for this event and stated that he may have poked Ms. Ugenti-Rita with a sword. He believed that he likely poked other persons too (a fact Ms. Ugenti-Rita corroborated). Mr. Shooter told us that if Ms. Ugenti-Rita asked him to stop, he would have stopped.

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[32] Ms. Jacobs informed us that she was at this event but did not witness any interactions between Ms. Ugenti-Rita and Mr. Shooter and, therefore, could not state whether this did or did not occur.

(iii) CONCLUSION.

We find that this incident occurred. Whether it violated the Policy, however, is a closer call. By this time, it was 2015. Mr. Shooter was well aware that Ms. Ugenti-Rita wanted nothing to do with him. Indeed, it seemed that he perhaps "got the message", since the last alleged incident Ms. Ugenti-Rita reported to us occurred sometime in the summer of 2013--approximately two years earlier. To be sure, we find Ms. Ugenti-Rita's feelings credible given what we find her to have endured, and Mr. Shooter more or less corroborates her story that the incident occurred.

But notwithstanding his prior misconduct and its pervasiveness vis-à-vis Ms. Ugenti-Rita, he did not seem to target her at this time. Indeed, by both legislators' accounts, Mr. Shooter did not seem to seek out Ms. Ugenti-Rita specifically and he playfully poked numerous people. Thus, although the behavior at issue arguably may not be appropriate for a sitting legislator to engage in while representing the People of Arizona at a public function, we do not find that it rises to a level of conduct, in this specific instance, that violates the Policy from an objective standpoint. That said, it should have been obvious to Mr. Shooter that he needed to stop engaging Ms. Ugenti-Rita in any manner unrelated to official business. Period.

(m) ALLEGED INCIDENT NO. 11: THE ALEC RECEPTION AT DONOVAN'S STEAK & CHOP HOUSE--DECEMBER 2016.

(i) MS. UGENTI-RITA'S ALLEGATIONS.

In December 2016, Ms. Ugenti-Rita attended an ALEC reception at Donovan's Steak & Chop House in Phoenix. She recalled standing in a conversation circle, when Mr. Shooter allegedly approached and pulled the tie on her wrap dress, after which he supposedly made a snarly laugh. Ms. Ugenti-Rita grabbed the tie before it could come undone, yelled out "Shooter!" in an exasperated tone, and walked away to fix her dress tie. She claims that based on the design of her dress, her entire dress would have opened and exposed her if the tie had come undone. Ms. Ugenti-Rita felt "small" and violated. She perceived his actions as mean and felt bullied by them.

(ii) MR. SHOOTER'S RESPONSE.

Mr. Shooter recalled this event and remembered poking fun at another legislator. Mr. Shooter did not recall pulling on Ms. Ugenti-Rita's dress tie and denied that he would do something like that, or ridicule her in that way.

(iii) SENATOR DEBBIE LESKO.

Ms. Ugenti-Rita believed Ms. Lesko may have witnessed the event but was not sure. We spoke with Ms. Lesko, but she did not witness this event and did not know whether it happened.

(iv) CONCLUSION.

We cannot conclude that this incident occurred because there is no independent, credible evidence to corroborate Ms. Ugenti-Rita's allegations.

2. AMY LOVE'S MEETING WITH MR. SHOOTER IN HIS OFFICE.

Ms. Love, the Deputy Director of Government Affairs for the Arizona Supreme Court, alleges that she had an inappropriate interaction in Mr. Shooter's Senate office where, among other things, he grabbed and jostled his crotch, at her face level, approximately an arm's length away from her face.

(a) THE RELATIONSHIP BETWEEN MS. LOVE AND MR. SHOOTER.

Ms. Love is a lobbyist for the Arizona Supreme Court. She meets with the appropriations chairs and their policy advisors in both the House and Senate. Ms. Love and Mr. Shooter interact often, because while in the Senate, and for a time while at the House, he was chairperson of the relevant Appropriations Committee.

(b) MS. LOVE'S ALLEGATIONS.

Mr. Shooter was the chairperson of Senate appropriations. Ms. Love tried to set meetings with Mr. Shooter three times, but each time he would cancel at the last minute. After the third cancellation, Ms. Love claims that her colleague asked her how the meeting went. Ms. Love told her colleague that Mr. Shooter had cancelled again. Ms. Love claims her colleague told Ms. Love that Mr. Shooter "needs to *see* you" and that she needed "to get *in front* of him", at which time Mr. Shooter would talk to her. The message was clear to Ms. Love that, if Mr. Shooter *saw* her, he would stop canceling the meetings, because he would find her physically attractive.

On February 12, 2013, Ms. Love went to the Senate Caucus Room and waited for the meeting to end. Afterward, she approached Mr. Shooter from behind his chair while he was packing up to leave. She asked him if he had a minute. He peered behind himself, and looked her up and down twice while saying "Absolutely" in a slow, exaggerated manner (*e.g.*, using extra syllables). Ms. Love said she would wait in the hallway.

The two began walking in the hallway, and when she introduced herself as "Amy Love with the Supreme Court," Mr. Shooter stopped in his tracks and said: "You're Amy Love with the Supreme Court." Ms. Love told Mr. Shooter that she had been trying to meet with him for quite some time. He responded that he knew it and that he was trying to send a message to the Courts. Ms. Love told him that the message had been received. Mr. Shooter then said something to the effect of: "I don't see why we can't speak" and instructed her to schedule a meeting with him. Ms. Love was concerned he would cancel again, but he said he would not do so.

On February 13, 2013, Ms. Love testified during a HHS Committee hearing on a new liquor bill. She spoke with liquor lobbyists afterwards who said that they had a meeting with Mr. Shooter and asked if she wanted to join. Ms. Love discovered the liquor lobbyists' meeting was 30 minutes before her meeting with Mr. Shooter, so she agreed to join (and minimize the chances that he could cancel again).

On February 18, 2013, Ms. Love attended the liquor lobbyist meeting in Mr. Shooter's office. He seemed surprised to see her and asked why she was there. She explained she was there for the liquor bill meeting and that the other lobbyists had invited her.

After all of the liquor lobbyists left, Ms. Love and Mr. Shooter were alone. He began admonishing the Court of Appeals for its *Cave Creek* opinion on school funding. After Ms. Love had been through her talking points and realized she was not getting through to Mr. Shooter, she looked out the window to collect her thoughts. Mr. Shooter then stopped in the middle of what he was saying and asked Ms. Love if she was going to cry. Ms. Love noted that she gets teary eyed relatively easily, and when asked if she will cry, almost surely does. Ms. Love responded with

something like, "I just want to help people." She began to cry.[33]

Mr. Shooter then stated something to the effect of: "Calm down. No need to get upset. You're killing me with those big brown eyes of yours. You've made some good points."

Mr. Shooter told Ms. Love that they could keep the conversation open. He then began to get up from his desk and walk toward the door, signaling that the meeting was ending. Ms. Love began gathering her things from the floor.

Mr. Shooter stopped at the side of his desk, in front of Ms. Love (who was still sitting) and told her not to bring "that guy" (her male colleague) with her in the future. Ms. Love said that, at that juncture, she and Mr. Shooter were less than an arms-length away from each other. Mr. Shooter told her not to bring *any* guys with her and that he would *only* meet with her.

He then said something to the effect of: "I'm a sucker for the pretty ladies. Everyone else around here thinks it. I'm the only one who has the balls to say it."

When Mr. Shooter said the word "balls", he grabbed his entire crotch, and then shook it. Ms. Love said she could see the outline of his genital area.

Mr. Shooter's crotch was about forehead level in relation to Ms. Love, who was still sitting, and approximately an arm's length away from her.

Ms. Love then responded with something to the effect of: "That's fine, Sir. I'm happy to work with you. Just so you know, my little sister has told me frequently that I'm the only woman she knows who would enter a pissing contest without a dick." Mr. Shooter responded: "I'd kind of like to see it."

Ms. Love said the whole meeting made her feel mortified but primarily because she was not sure how she could successfully lobby Mr. Shooter. She also stated that she felt immense pressure since he made it clear that he did not want anyone else but her to lobby him from her agency. Ms. Love recalls telling her supervisor what happened after the incident. She said her supervisor was very supportive and asked if something should be said. Ms. Love told her supervisor not to say anything because she "[has] to work in this town."

Ms. Love said she didn't know what to really do at the time of this incident. She felt helpless. She is concerned that, because of Mr. Shooter, she had to look and act a certain way or else her client's budget would be in trouble.[34] Ms. Love felt it was important for us to know, and volunteered on her own without prompting, that one reason for her decision to come forward was that she had come to understand that Mr. Shooter had been making derogatory comments about her alleged job performance to others, thus placing her job or future career aspirations in possible jeopardy.

(c) MR. SHOOTER'S RESPONSE TO THE ALLEGATIONS.

Mr. Shooter stated that he has met with Ms. Love quite a bit. When asked about their professional relationship, he simply stated that she is a lobbyist with the courts. We conveyed to Mr. Shooter Ms. Love's narrative concerning his grabbing and shaking his crotch, at her face level, approximately an arm's length away. In response, he stated that he did not remember the incident

[33] She did the same as she recounted her experience to us.

[34] Ms. Love also recounted that there have been times she believes Mr. Shooter has attempted to "look out" for her employer and provide her with warnings of possible looming budget cuts.

in question, *noted that it could have happened*, but *probably* did not happen, because "Amy Love's not that cute" (he stated that looks are just one factor in whether he thinks this happened). Mr. Shooter also noted that Ms. Love is very liberal, stated that he does not believe this is a left-wing conspiracy, but said that there is a fundamental difference in the way people view things (meaning people from different political parties). Mr. Shooter admitted that he probably told Ms. Love not to bring her male colleague with her, because Mr. Shooter does not like him.

(d) CONCLUSION.

We find Ms. Love's detailed allegations credible. We note her incentive to protect her job and future career aspirations could be cause for concern, but the fact that she disclosed this motive for coming forward (among other motives) without prompting (we certainly may never have found out about this) speaks well of her character and credibility. Also, that motive does not diminish the fact that even Mr. Shooter could not unequivocally deny her allegations. As for her after-the-fact verbal reaction to Mr. Shooter's actions, while relevant, it alone does not diminish what he did or she endured.

As for the allegations themselves, Mr. Shooter noted that, while he does not really recall the incident or believe the incident occurred because he finds Ms. Love unattractive, he equivocated and conceded that it nonetheless could have happened. Putting aside that such actions are apparently within the realm of those Mr. Shooter cannot unequivocally say he would never commit so as to deny they occurred outright, his defense against the likelihood of the incident having occurred seems to be his perception of (1) Ms. Love's physical appearance and (2) her political leanings.

His perception of Ms. Love's physical appearance is of no consequence and cannot render him blameless. Either he acted as alleged or he did not. Given the gravity of the allegations made against him, one would think he would have a definite, concrete position on the matter. Yet, he was unable to unequivocally deny Ms. Love's allegations and even conceded they were possibly true. We cannot ignore this significant fact.

As for Ms. Love's purported "liberal" leanings, to the extent this statement was meant to imply that perhaps her reaction to Mr. Shooter having grabbed and shook his crotch--at her face level, approximately an arm's length away from her face, while she was sitting in his office during a lobbying visit--would have been viewed differently (read: less offensively) were she more politically conservative, we conclude that Ms. Love's reaction was as appropriate as it was non-partisan.

In the end, Mr. Shooter's inability to unequivocally deny Ms. Love's allegations, combined with the detail she provided and her candor and demeanor during her interview, leads us to conclude that the event occurred just as Ms. Love reported. Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and occurred because of Ms. Love's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

3. MI-AI PARRISH (FORMER PUBLISHER OF THE ARIZONA REPUBLIC), DAVID BODNEY (AN ARIZONA ATTORNEY), AND THEIR MEETING WITH MR. SHOOTER IN MARCH 2016.

Ms. Parrish and Mr. Bodney allege that, in March, 2016, while at the State Capitol lobbying legislators about a bill, Mr. Shooter--someone Ms. Parrish had no relationship with and had never before met--made an inappropriate and sexually charged comment directed toward her, namely, expressing his regret about not having had sexual intercourse with Asian twins in Mexico.

(a) MS. PARRISH'S AND MR. BODNEY'S ALLEGATIONS CONCERNING THEIR MEETING WITH MR. SHOOTER.

In March 2016, Ms. Parrish and her lawyer David Bodney went to the State Capitol to meet with approximately five to seven Senators about a bill concerning public notice, which newspapers opposed.[35] Mr. Bodney asked Ms. Parrish to go with him and lobby because she was new to Phoenix and the new Publisher of The Arizona Republic. Both believed that Ms. Parrish's participation in this lobbying effort would send a positive message. They chose their meetings based on Senators whose votes were still undecided. During their meetings with various Senators, Ms. Parrish and Mr. Bodney learned that legislators were receiving ample pressure from Senate leadership to pass the bill (and, presumably, making the lobbying effort all the more important).

Some meetings involved other lobbyists, in addition to Ms. Parrish and Mr. Bodney, lobbying the issue. Their meeting with Mr. Shooter was in the middle of the various other scheduled interviews--neither the first, nor the last. Only Ms. Parrish and Mr. Bodney attended their meeting with Mr. Shooter.

When they met with Mr. Shooter, Ms. Parrish and Mr. Bodney sat in Mr. Shooter's office, in either chairs or on a couch, while Mr. Shooter sat across from them behind his desk. Ms. Parrish recalls seeing pink Sheriff Arpaio tent-city underpants and a Duck Dynasty poster in Mr. Shooter's office. The office door was shut. Ms. Parrish and Mr. Bodney introduced themselves, and Ms. Parrish began leading the conversation, following her pre-determined talking points. Ms. Parrish and Mr. Bodney stated the entire meeting was meant to be about business, which they believe that Mr. Shooter knew, because they had scheduled the meeting to discuss a very specific piece of legislation.

After Ms. Parrish presented her talking points, Mr. Shooter gave a "soliloquy" about how he is an independent thinker, independent voice, and takes his own counsel.[36] He stated that he often would think for himself without counsel, and sometimes wouldn't talk to anyone about issues, as he wanted to make decisions on his own. He stated something to the effect of: "I'm the kind of guy who does whatever he wants." Eventually, this led to him saying, while looking directly at Ms. Parrish: "I've *done* everything on my bucket list"--followed by a pause, after which he said "Well, except that one thing." (emphasis added) Ms. Parrish responding something to the effect of: "Tell me, Senator, what's that one thing you didn't *do*" or "haven't *done*"? (emphasis added) Mr. Shooter responded to Ms. Parrish: "Those Asian twins in Mexico."

Ms. Parrish is Korean-American.

At that time, Ms. Parrish and Mr. Bodney decided that the meeting was over and ended it early. The meeting lasted about 15-20 minutes in total. Neither Ms. Parrish nor Mr. Bodney felt like he

[35] A Ballard Spahr employee set up these meetings.

[36] Mr. Bodney and Ms. Parrish noted that other Senators asked for facts and figures and engaged in more of a dialogue. Mr. Shooter did not ask questions or appear to take the matter seriously.

or she could say anything in response to Mr. Shooter's statement; they felt as though they were in a horrible situation.

They described the incident and how it made them feel very carefully and deliberately, calling it unforgettable and notable. Ms. Parrish added that the incident was memorable and familiar. Ms. Parrish stated that she was taken aback, and the interaction was unforgettable to her because (1) it was in a Senator's office, (2) on official business with an appointment, (3) to discuss a bill that would affect hundreds of thousands of people, (4) Mr. Shooter knew who she was and her position, and (5) Mr. Shooter knew Mr. Bodney was a lawyer. Mr. Bodney generally echoed Ms. Parrish's comments and added that he felt awful and ashamed about the situation. He felt bad for asking Ms. Parrish to accompany him and felt like he put her in that situation. Ms. Parrish described Mr. Shooter's behavior as inappropriate, unacceptable, and unprofessional, and Mr. Bodney echoed her description.

(b) <u>MR. SHOOTER'S RESPONSE TO THE ALLEGATIONS.</u>

Mr. Shooter remembered meeting Ms. Parrish, and that she had a man with her, but claims that at the time, Mr. Shooter did not know who that man was. Mr. Shooter believed the meeting was just a "meet-and-greet" with <u>The Arizona Republic's</u> new publisher. He does not recall Ms. Parrish lobbying about any legislation.

Mr. Shooter does not remember making the "Asian twins in Mexico" comment *but has no reason to doubt that he did so*. Mr. Shooter said that, if he made that statement, (1) it probably wasn't the right time or place to do so in a professional setting, (2) he did not mean to offend anyone, and (3) if he offended someone, "then that's unfortunate."

Mr. Shooter then stated that he did not know that something had happened to Ms. Parrish earlier in her life that offended her (we assume this is a reference to Ms. Parrish's account of prior instances of harassment she had suffered, which were discussed in <u>The Arizona Republic</u>). Then he noted that (1) he sometimes tells jokes that he thinks are funny but that other people do not consider funny, and (2) 80% of the time, however, people think his jokes are funny.

(c) <u>CONCLUSION.</u>

At best for him, Mr. Shooter does not remember making the "Asian twins in Mexico" comment but has no reason to doubt that he did so. That Mr. Shooter cannot unequivocally deny having made this statement is troubling in itself, because it means that at minimum such statements are not outside the "norm" for him, such that he can be certain he would not have said something so highly inappropriate and offensive in his Legislative office. Even so, we are aware of no evidence that could conceivably transfigure the interaction between Mr. Shooter, Ms. Parrish, and Mr. Bodney as one rooted in humor or satire so as to remotely support his attempt to paint his comment as a joke of some sort. Moreover, there is no evidence remotely creating any conceivable contextual avenue by which any reasonable person could conclude that a comment about regretting having not had sex with Asian twins in Mexico could have been even remotely appropriate conversation during the meeting in question. To the contrary, the evidence shows that Ms. Parrish and Mr. Bodney were in Mr. Shooter's office to lobby him, in his capacity as an elected official, about pending legislation. In other words, they were there on business.

In addition, Mr. Shooter's attempt to inject prior familiar instances of harassment that Ms. Parrish suffered, and his alleged 80% joke approval rating, into the discussion about whether he made the statements at issue or its offensiveness, was very concerning. Mr. Shooter's reference to Ms. Parrish's prior victimization was apparently meant to imply that those experiences may have somehow misinformed Ms. Parrish's perception of his actions, or worse, perhaps somehow justified what he did as having been taken out of context or blown out of proportion. Suffice it to

say that, were this what Mr. Shooter meant to accomplish, he failed. That said, even if his position were true (and we do not believe that to be the case), his theory (1) fails to diminish Mr. Bodney's equally troubled and credible perception of the incident, and (2) does not make Mr. Shooter's actions--with two complete strangers, in his Senate office, on official business, concerning legislation--any more appropriate or less shocking. Likewise, Mr. Shooter's comment about how well his jokes are usually received seemed meant to diminish his actions, by implying that Ms. Parrish and Mr. Bodney merely lack a sense of humor. It is inappropriate to tell two complete strangers who are appealing to your good graces and powerful position, who believed they were advocating to save Arizona jobs, that your one regret is the failure to have had sex with Asian twins in Mexico.

We conclude that credible evidence supports Ms. Parrish's and Mr. Bodney's allegations. Mr. Shooter's conduct, at minimum as directed to Ms. Parrish, was inappropriate, subjectively unwelcome, and degrading conduct that occurred because of her sex and race. Mr. Shooter's conduct also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination, (2) sexual harassment, and (3) conduct contributing to a hostile work environment.

4. **MARILYN RODRIGUEZ'S ALLEGATIONS OF UNWANTED TOUCHING AND VERBAL HARASSMENT AGAINST MR. SHOOTER.**

Marilyn Rodriguez alleges that Mr. Shooter (1) placed his hand on her knee, without permission, during a meeting at the Windsor in Phoenix, Arizona, (2) made inappropriate comments toward her during a social event at Hob Nobs, in Phoenix, Arizona, and (3) made an inappropriate comment toward her, in passing, in connection with a "Arizona Capitol Times Fashion Show" fitting event. We will address each incident in turn.

(a) **ALLEGED INCIDENT NO. 1: THE WINDSOR MEETING WHERE MS. RODRIGUEZ ALLEGES THAT MR. SHOOTER GRABBED HER LEG.**

Ms. Rodriguez alleges that, on May 15, 2013, Mr. Shooter inappropriately grabbed her leg, without permission, during a meeting at the Windsor, in Phoenix, Arizona.

(i) **MS. RODRIGUEZ'S ALLEGATIONS.**

Around budget time in 2013, and while working for Veridus, Ms. Rodriguez claims to have had a private, one-on-one meeting with Mr. Shooter in his Senate office, during which she attempted to lobby him.[37] It was a short meeting, during which she was interrupted, unable to address her topic, and after which she felt she had done a poor job lobbying Mr. Shooter. Sometime during that meeting, Mr. Shooter suggested they meet outside of the office and after work hours.

Ms. Rodriguez stated that Mr. Shooter's request put her in a bind; as a new lobbyist she did not want to fail, but his reputation preceded him. She ultimately decided to accept the invitation, and asked another lobbyist--Amanda Rusing--to attend, mainly because Ms. Rodriguez did not want to be alone with Mr. Shooter. Ms. Rodriguez could not recall why she specifically chose to ask Ms. Rusing to attend, but said (1) they had a budding friendship at the time, and (2) she knew Ms. Rusing was Mr. Shooter's former assistant and believed he treated her respectfully. Ms. Rodriguez stated that while she asked Ms. Rusing to attend the meeting, Ms. Rodriguez does not recall if she told Ms. Rusing that her attendance was requested because Ms. Rodriguez felt unsafe around Mr. Shooter. Ms. Rodriguez made it clear to us that that she was *not* going to get drinks *alone* with Mr. Shooter, and she was *not* comfortable being *alone* with him. The implication appearing to be that, even if in a public setting like a bar, Ms. Rodriguez was uncomfortable meeting with, and would not meet with, Mr. Shooter alone.

Ms. Rodriguez was adamant that (1) the meeting at the Windsor occurred within a couple days, to a week, after her unproductive meeting with Mr. Shooter in his office (at which he allegedly asked Ms. Rodriguez to meet him outside the office after hours), and (2) she did *not* ask Ms. Rusing to schedule the meeting with Mr. Shooter, because (i) he suggested the meeting, and (ii) Ms. Rodriguez has *never* asked another lobbyist to schedule a meeting for her because she believes it would be unprofessional to do so.

Ms. Rodriguez believes she, Ms. Rusing, and Mr. Shooter met at the Windsor around happy hour, but Ms. Rodriguez could not recall the exact time. She stated that it was not dark outside when they met, but that it was a beautiful evening. Ms. Rodriguez stated that the trio were sitting together on the Windsor's patio, with herself and Ms. Rusing sitting next to one another, and Mr. Shooter sitting across from the two of them.

Ms. Rodriguez stated that, at some point while on the patio, Gretchen Jacobs joined the group.

[37] At the time, Mr. Shooter was the Chairperson of the Senate Appropriations Committee.

Ms. Rodriguez was surprised to see Ms. Jacobs. Ms. Rodriguez does not recall exactly when Ms. Jacobs arrived, but noted that by the time of her arrival, Ms. Rodriguez, Ms. Rusing, and Mr. Shooter already had started a tab. Ms. Rodriguez does not recall who paid for the patio drinks.[38] Ms. Rodriguez stated that this meeting was the first encounter she had ever had with Ms. Jacobs, although Ms. Rodriguez knew of Ms. Jacobs. Ms. Rodriguez believes (but cannot be certain) that the four of them had maybe two rounds of drinks and stayed on the Windsor's patio for about an hour. Ms. Rodriguez does not recall ever being alone with Mr. Shooter on the patio. Ms. Rodriguez reported that while on the patio (1) she was unable to lobby Mr. Shooter, and (2) while she cannot be certain about the conversation, she recalls not talking about the substantive issues she wanted to address. Ms. Rodriguez noted that she had discomfort with lobbying for her clients in Ms. Jacob's presence. Ms. Rodriguez recalls she had a "bob" haircut at the time, and that Ms. Jacobs told Ms. Rodriguez that her haircut was a "bitch haircut."

Ms. Rodriguez stated that while she does not recall Ms. Rusing leaving specifically, (1) *everyone* got up to leave from the Windsor patio, (2) Ms. Rusing left before Ms. Rodriguez, and (3) she watched Ms. Jacobs wait for her car. Ms. Rodriguez stated that while everyone was leaving, she asked Mr. Shooter if he would stay behind for one more drink because she was determined to lobby him for her client. This request was allegedly made while standing in the walkway between the patio seating area and the enclosed restaurant/bar. In other words, Ms. Rodriguez and Mr. Shooter were to stay behind, *at her suggestion and alone,*[39] to meet without Ms. Rusing--the person Ms. Rodriguez claims to have asked to attend the Windsor meeting so as to not be alone with Mr. Shooter.

According to Ms. Rodriguez, *after* Ms. Rusing and Ms. Jacobs *left* the Windsor, Mr. Shooter and Ms. Rodriguez--again, allegedly *alone*--relocated to the indoor bar area. Ms. Rodriguez believes this was likely around sunset, but cannot be sure. She claims the two sat at the bar and that Mr. Shooter sat to her right. Ms. Rodriguez claims that she did not know anyone else sitting in or around the bar. Ms. Rodriguez does not recall Mr. Shooter being noticeably intoxicated and commented that he appeared to still have his "wits about him."

Ms. Rodriguez claimed that while at the bar, Mr. Shooter kept wanting to make small talk, but eventually she was able to start lobbying him. Ms. Rodriguez reported that the duration of time spent at the bar is blurred in her mind, but that after she started lobbying Mr. Shooter, he reached over to her with his left hand and deliberately and intentionally gripped her knee. Ms. Rodriguez claims that she then (1) pushed his hand away, (2) turned away, and (3) expressed that it was not okay, she did not consent for him to do that, and it was inappropriate. Ms. Rodriguez believes that Mr. Shooter then said something to the effect of: "I'm just like a dog chasing a car, I wouldn't know what to do once I caught up with it"--although she *cannot be sure* he said this at that time.[40] Ms. Rodriguez claimed that she did not respond, *paid the bar check* with a Veridus credit card,

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[38] As will be discussed below, both Ms. Jacobs and Ms. Rodriguez split the cost of this tab.

[39] We do not suggest that a person invites misconduct by being alone with someone else. We emphasize this point, because it is inconsistent with Ms. Rodriguez's initial statement that she was uncomfortable and refused to be alone with Mr. Shooter, hence Ms. Rusing's invitation.

[40] Ms. Rodriguez stated that while she cannot be sure this was the precise occasion during which he made the statement in question, she cannot think of another time when he would have said it. It is difficult to believe that Ms. Rodriguez would not recall whether this specific statement was made at or around the time Mr. Shooter grabbed her leg, when she seems to vividly recall (1) where people were sitting, (2) who left before she did, (3) that it was a beautiful evening, (4) Ms. Jacobs waiting for her car, (5) the "bitch haircut" comment, (6) how she specifically reacted to the alleged touching and how it made her feel, (7) on which knee the touching allegedly occurred, and (8) that she paid the bar check with a company credit card (which made her feel gross).

and then left the Windsor.

Again, Ms. Rodriguez was unequivocal that Ms. Jacobs was *never* at the inside bar with Mr. Shooter and Ms. Rodriguez, including when the alleged touching occurred.

Ms. Rodriguez then stated that (1) the next day she returned to Veridus and told a group of people about the incident and (2) got the impression that she would not have to lobby Mr. Shooter again. When asked to whom at Veridus she conveyed the Windsor incident, Ms. Rodriguez identified Jeff Sandquist and Sharon Hossler. Ms. Rodriguez also stated that, at some point after the Windsor incident, she told Representative Mark Cardenas what had happened and asked for his advice.[41]

Ms. Rodriguez conveyed that the alleged incident made her feel shocked, ashamed, taken advantage of, out of control for the first time in a very long time, sick, gross (after picking up the bar tab), and terrified (because if she mishandled the situation, it could end her career).

(ii) Amanda Rusing's Recollection Of The Windsor Meeting.

Ms. Rusing believes the Windsor meeting was mid-session (maybe February or March), but was unsure of the year. She reported that, at least at that time, she and Ms. Rodriguez were friends, whereas they are more acquaintances now who get together maybe once a year.

Ms. Rusing recalled that *Ms. Rodriguez asked Ms. Rusing* to set up the meeting with Mr. Shooter at the Windsor because Ms. Rusing had once worked for him. Ms. Rusing does not recall how she contacted Mr. Shooter to schedule the meeting--it could have been by text, or she could have walked into his office to schedule the meeting. Ms. Rusing also cannot recall, one way or the other, Mr. Shooter's sentiments about meeting with Ms. Rodriguez at the Windsor when asked to do so. Ms. Rusing noted, however, that Mr. Shooter has stated generally--at times prior to and after the Windsor meeting--that he does not like Ms. Rodriguez, "she's a snake", and she is not trustworthy. In Ms. Rusing's opinion: "I don't think he liked her too much." That said, Ms. Rusing does not recall Mr. Shooter stating, to her, that he would be uncomfortable meeting with Ms. Rodriguez at the Windsor.

Concerning the meeting at the Windsor, Ms. Rusing reported that no noteworthy occurrences or interactions stick out in her mind. Ms. Rusing does not recall who arrived at the Windsor when, but that at one point she, Ms. Rodriguez, and Mr. Shooter were there sitting on the patio. Ms. Rusing does not remember the seating arrangement. She recalls that Ms. Jacobs arrived while the group was already on the patio (sometime after Ms. Rusing arrived). Ms. Rusing does not remember why Ms. Jacobs was there but also would not have questioned her attendance.

Ms. Rusing left before the night ended. She believes that she probably stayed for two drinks and some snacks before leaving. She does not recall if she paid for herself, or if Ms. Jacobs paid, but would not be surprised if Ms. Jacobs paid. Ms. Rusing recalls that when she left, Ms. Jacobs, Ms. Rodriguez, and Mr. Shooter were still at the Windsor. Ms. Rusing does not recall witnessing (1) Mr. Shooter touch Ms. Rodriguez's leg, (2) Ms. Rodriguez asking Mr. Shooter to stop touching her leg, or (3) any awkward moments between Ms. Rodriguez and Mr. Shooter. Ms. Rusing stated that the event "seemed like a fun night" and that "nothing stuck out about that night in [her] mind".

Ms. Rusing further noted that (1) no one called her after that night to discuss the meeting or report any misconduct, and (2) Ms. Rodriguez specifically did not tell Ms. Rusing about any

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[41] She does not remember when this happened, but believes she may have done this by calling Mr. Cardenas.

alleged inappropriate behavior. Ms. Rusing stated that, at the time of the alleged incident, she would have "assumed [Ms. Rodriguez] would have told [Ms. Rusing]" about any inappropriate behavior. Ms. Rusing expressed surprise that Ms. Rodriguez did not say anything to Ms. Rusing about the alleged incident, because if something happened to her with some "creepy old man," Ms. Rusing would want to warn her young female friends to stay away.

Ms. Rusing reports that, when she heard about the alleged incident at the Windsor through the press, she was surprised and considered the matter "pretty out of left field". Ms. Rusing believes Ms. Rodriguez's allegation of inappropriate touching is out of character for Mr. Shooter. Ms. Rusing noted that while he tells "inappropriate jokes" that may sexualize men or women, she has never seen him touch people, and he has never made Ms. Rusing feel like "clutching her pearls", harassed, or uncomfortable. When asked if Mr. Shooter would make personal sexual comments to a person, about that person, Ms. Rusing responded: "I can't see him doing that".

It is noteworthy that Ms. Rusing had considered her and Ms. Rodriguez friends at one point, and Ms. Rusing did not personally disparage Ms. Rodriguez whatsoever.

(iii) GRETCHEN JACOBS' RECOLLECTION OF THE WINDSOR MEETING.

Ms. Jacobs was at Windsor with Ms. Rodriguez and Mr. Shooter on the night in question.[42] Ms. Jacobs recalled that (1) Mr. Shooter called her the night before he was scheduled to meet with Ms. Rodriguez and Ms. Rusing at the Windsor, (2) conveyed his belief that Ms. Rodriguez did not like him and thought he was a hillbilly, (3) stated that he was dreading the meeting, and (4) asked Ms. Jacobs to attend because Ms. Rusing could not stay the entire time and he thought the meeting would be miserable.[43] Ms. Jacobs told Mr. Shooter that she had other meetings scheduled for the day of the Windsor meeting and was not sure whether she could attend. Ultimately, however, she was able to attend the Windsor meeting.

When Ms. Jacobs arrived at the Windsor, Ms. Rusing, Ms. Rodriguez, and Mr. Shooter were sitting at a round table on the patio. Ms. Jacobs joined them and sat next to Mr. Shooter. Ms. Jacobs sat across from Ms. Rusing, and Ms. Rodriguez and Mr. Shooter were sitting across from one another. After approximately 20-30 minutes outside, (1) Ms. Rusing left, (2) Ms. Jacobs paid a bill, and (3) Ms. Rodriguez, Mr. Shooter, and Ms. Jacobs went inside to the bar area.

Contrary to Ms. Rodriguez's recollection of events, Ms. Jacobs adamantly (and convincingly) stated that she went inside with Ms. Rodriguez and Mr. Shooter after the group left the patio and Ms. Rusing left the Windsor. According to Ms. Jacobs, once inside, she, Ms. Rodriguez, and Mr. Shooter sat at the bar. Ms. Rodriguez sat between Ms. Jacobs and Mr. Shooter. The three of them were there, together, approximately 20-30 minutes. Ms. Rodriguez was lobbying Mr. Shooter to add a line item to the budget, but he told her it was too late in the session. Ms. Jacobs suggested increasing an existing line item in the budget, such as for the Department of Education, and then

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[42] All percipient witnesses we were able to interview corroborate this. And those to whom Ms. Rodriguez claimed to have conveyed the alleged incident also state that, according to Ms. Rodriguez, Ms. Jacobs, at minimum, attended part of the Windsor meeting, and allegedly ruined Ms. Rodriguez's lobbying efforts.

[43] Ms. Jacobs conveyed her understanding that Ms. Rusing is Mr. Shooter's former assistant and leveraged that relationship to obtain a meeting for Ms. Rodriguez with Mr. Shooter at the Windsor. Ms. Jacobs stated that she understood that Ms. Rodriguez had been trying to meet with Mr. Shooter but had been getting stonewalled. Ms. Jacobs noted her belief that Ms. Rusing asked for this favor of Mr. Shooter to help Ms. Rusing make work-related connections.

requesting the Department designate those funds to Ms. Rodriguez's client.[44] Ms. Jacobs noted that, after this interaction, Ms. Rodriguez appeared irritated at Ms. Jacobs, ignored her suggestion, and continued to push Mr. Shooter for a new line item. Ms. Jacobs also recalled making a comment, while sitting at the bar, about Ms. Rodriguez's haircut looking mean.

Ms. Jacobs was unequivocal that (1) Ms. Rodriguez left the Windsor for the evening *before* Ms. Jacobs and Mr. Shooter left, and (2) *after* Ms. Rodriguez left, Ms. Jacobs and Mr. Shooter remained at the bar for another 20-30 minutes.[45] Ms. Jacobs stated that she and Mr. Shooter were relieved when Ms. Rodriguez left, and both commented on Ms. Rodriguez's so-called "millennial" lobbying style. Ms. Jacobs recalls that Mr. Shooter said something to the effect that Ms. Rodriguez did not like him before that evening and probably does not like him now. Ms. Jacobs finished her drink and then left.

Ms. Jacobs does not recall any behavior out of the ordinary. She did not get the impression, at least then, that Ms. Rodriguez would be vindictive about that night but did feel like Ms. Rodriguez felt contempt for both Ms. Jacobs and Mr. Shooter after the meeting. Ms. Jacobs thought the night was awkward, but did not believe anyone had been harassed. Ms. Jacobs stated that she felt that Ms. Rodriguez's behavior that evening at least implied that she did not respect either Mr. Shooter or Ms. Jacobs. Ms. Jacobs stated that she would be surprised if anything happened between Ms. Rodriguez and Mr. Shooter, given the mutual dislike among them at that time, and because the allegations of improper touching would be inconsistent with her knowledge of Mr. Shooter's character (she believes that, other than hugging, Mr. Shooter is generally hands off).[46]

(iv) Mr. Shooter's Recollection Of The Windsor Meeting And Response To Ms. Rodriguez's Allegation That He Gripped Her Knee.

Mr. Shooter does not recall *ever* meeting with Ms. Rodriguez in his office prior to the Windsor meeting. He stated that he would be surprised if he ever did because of his ill feelings toward Ms.

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[44] Ms. Jacobs and Ms. Rodriguez do not agree about which of Ms. Rodriguez's then-clients she was lobbying. Moreover, Ms. Rodriguez denies that Ms. Jacobs made any such suggestion because Ms. Rodriguez states that she was never able to actually lobby for her client in front of Ms. Jacobs in the first place.

[45] Ms. Jacobs does not recall if she left Ms. Rodriguez and Mr. Shooter alone at the bar for any moment during the time the three of them were together at the bar. However, Ms. Jacobs is certain Ms. Rodriguez left *before* Ms. Jacobs, and in any event, Ms. Jacobs did not witness Mr. Shooter touch Ms. Rodriguez's knee, or see a change in Ms. Rodriguez's demeanor.

[46] When Ms. Jacobs read Ms. Rodriguez's allegations, as printed in the Arizona Capitol Times, she was concerned with both the allegations, and the omission of Ms. Jacobs as having attended the Windsor meeting. Ms. Jacobs contacted the Arizona Capitol Times and asked whether Ms. Rodriguez made the reporter who wrote the article aware of Ms. Jacobs' attendance at the Windsor meeting (but simply left that fact out of the article). According to Ms. Jacobs, the Arizona Capitol Times responded that, per the reporter who wrote the article, Ms. Rodriguez *never mentioned* Ms. Jacobs. Ms. Jacobs then asked the newspaper to have the reporter ask Ms. Rodriguez whether Ms. Jacobs had been at the Windsor meeting. In an e-mail, the Arizona Capitol Times responded, in part: "One of our reporters called Marilyn, and Marilyn confirmed you were there - but not all the time. She said you had joined them at one point, but left before she did and it was just the two of them after you left." We surmise that Ms. Jacobs' concern with Ms. Rodriguez having left Ms. Jacobs out of the initial story is because Ms. Rodriguez knew Ms. Jacobs was at the bar and would contradict the allegations. At minimum, when pressed, it appears Ms. Rodriguez conceded that Ms. Jacobs was at least at the meeting for a period of time but claimed Ms. Jacobs left before the alleged touching.

Rodriguez. That said, he also stated that "anything's possible", and thus it is possible he does not remember the meeting.

Indeed, Mr. Shooter withheld very little when describing (1) his opinion of, and feelings for, Ms. Rodriguez, or (2) his perception of their relationship. Mr. Shooter denied having a working relationship with Ms. Rodriguez, noting that he "didn't like her" and "didn't trust her." He believed that she "basically hated" him, because he is a "conservative Republican", and he made it very clear that the two of them did not like each other. Mr. Shooter claimed that he went so far as to tell his assistant to never schedule a meeting with Ms. Rodriguez because she was banned from his office.[47] Mr. Shooter further noted that he had disliked Ms. Rodriguez before the Windsor meeting and when she made her allegations in the press. He characterized her as (i) "inconsequential" and on the "peripheral" as a lobbyist, (ii) not very good at her job, and (iii) not very nice. Mr. Shooter stated that he believes a person cannot be good at anything if that person is not a good person (presumably, at minimum, implying Ms. Rodriguez is not a good person).[48] In the end, it is clear that Mr. Shooter and Ms. Rodriguez strongly disliked, and still dislike, each other.

Mr. Shooter stated that Ms. Rusing asked him to take a meeting with Ms. Rodriguez. He claims he obliged, *only as a favor to Ms. Rusing*, and would not have met with Ms. Rodriguez otherwise. Ms. Rusing and Ms. Rodriguez were already at the Windsor when he arrived. The three sat on the patio. Mr. Shooter stated that he asked Ms. Jacobs to attend the meeting with him, and she arrived while he, Ms. Rusing, and Ms. Rodriguez were still on the patio. After Ms. Jacobs arrived, the group sat on the patio a little longer. Mr. Shooter recalled that Ms. Rodriguez had just had a haircut that "looked awful" and that Ms. Jacobs had made a comment about the haircut.

Mr. Shooter recalled that Ms. Rodriguez wanted to talk about a budget item during the meeting. He could not remember any specifics about the item, but he recalls (1) telling Ms. Rodriguez "it'll never work", and (2) she became "grumpy" after he shut down her proposal. Mr. Shooter recalled Ms. Jacobs making a suggestion about how to possibly accommodate Ms. Rodriguez's budget request, and that it was a good suggestion. Mr. Shooter noted that he found the entire meeting painful.

Mr. Shooter stated that, eventually, Ms. Rusing left the Windsor. Sometime after Ms. Rusing left, Mr. Shooter, Ms. Jacobs, and Ms. Rodriguez went inside to the bar and had a few drinks. Mr. Shooter recalls that Ms. Rodriguez was the next person to leave the Windsor, because he recalls discussing her hair with Ms. Jacobs again after Ms. Rodriguez left. Mr. Shooter recalls it being a pretty early evening, and speculated that Ms. Jacobs probably paid.

Mr. Shooter insisted he was *never* alone with Ms. Rodriguez, and "made sure of that", because it would have been a nightmare. He adamantly denied ever touching Ms. Rodriguez's leg and is unwavering that her allegation is false.

(v) **Representative Mark Cardenas Does Not Recall Ms. Rodriguez Mentioning That Mr. Shooter Gripped Her Leg Or Harassed Her At The Windsor.**

We interviewed Mr. Cardenas because Ms. Rodriguez unequivocally claimed that she told him

[47] We attempted, but were unable, to corroborate this statement with Mr. Shooter's former assistant.

[48] While Mr. Shooter's description of his feelings for Ms. Rodriguez seemed sincere, we take no position regarding whether those feelings are justified or empirically supportable. We only report them because they provide context for purposes of our investigation of this allegation.

about the Windsor meeting, the alleged touching, and even asked for his advice about the matter.

Mr. Cardenas had no recollection whatsoever of Ms. Rodriguez (1) telling him about an incident at the Windsor with Mr. Shooter, or (2) any incident where Mr. Shooter had touched Ms. Rodriguez inappropriately. Indeed, Mr. Cardenas unequivocally stated that he "definitely would" remember a story about inappropriate touching if Ms. Rodriguez had told him such a story, because he remembers "every instance" concerning when lawmakers cross the line with lobbyists.

It is noteworthy that Mr. Cardenas considers he and Ms. Rodriguez to have a friendly working relationship, and he generally had nothing negative to say about, and did not disparage, her.

(vi) **JEFF SANDQUIST DOES NOT RECALL MS. RODRIGUEZ MENTIONING THAT MR. SHOOTER GRIPPED HER LEG OR HARASSED HER AT THE WINDSOR, BUT INSTEAD, RECALLS ONLY MS. RODRIGUEZ'S FRUSTRATION WITH HER UNSUCCESSFUL AND INTERRUPTED LOBBYING EFFORT.**

We interviewed Mr. Sandquist because Ms. Rodriguez stated that (1) she told him about the Windsor meeting the next day, including the touching incident, and (2) in light of her report, she got the impression that she would not have to lobby Mr. Shooter again.

Mr. Sandquist is a principal at Veridus and was so at the time Ms. Rodriguez allegedly met with Mr. Shooter at his office, and later, the Windsor. Mr. Sandquist recalled Ms. Rodriguez going to the Windsor to have drinks with Mr. Shooter, but does not recall the exact issue that the two of them were supposed to discuss during that meeting.

Mr. Sandquist stated that, the next day after the Windsor meeting, Ms. Rodriguez was very unhappy with how the meeting went. Mr. Sandquist, however, does *not* recall her unhappiness being because of Mr. Shooter harassing or touching her. Instead, Mr. Sandquist recalls Ms. Rodriguez's unhappiness being because (1) another female lobbyist (Ms. Jacobs) was there, acted unfriendly, and interfered with the conversation Ms. Rodriguez was trying to have with Mr. Shooter, and (2) the meeting generally was unproductive.

More critically, Mr. Sandquist (1) does *not* recall Ms. Rodriguez saying that Mr. Shooter touched her leg, or that she and Mr. Shooter were ever alone (although Mr. Sandquist stated, somewhat apologetically, that he has no reason to necessarily doubt her story), and (2) has no recollection of being told Mr. Shooter acted inappropriately at the time of the alleged Windsor incident or at any other time.[49] Mr. Sandquist noted that had Ms. Rodriguez told him of inappropriate touching or other behavior, he would have remembered and would have met with other partners at Veridus and addressed the issue immediately. Mr. Sandquist stated that he may have discussed the Windsor meeting incident with others at his firm, and that none, to his knowledge, have a recollection of the incident as reported to the press by Ms. Rodriguez.

Mr. Sandquist expressed his general awareness that Ms. Rodriguez did not like lobbying Mr. Shooter, but to Mr. Sandquist's knowledge, her preference was not because of any allegations of sexual harassment. Rather, it was because Ms. Rodriguez was primarily a Democratic lobbyist. Mr. Sandquist also stated that Ms. Rodriguez preferred not to lobby Mr. Shooter because she felt doing so was not productive (thus, usually someone else would do so). Even so, Mr. Sandquist

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[49] Mr. Sandquist noted that he did not speak with Ms. Rodriguez about the Windsor incident since the day after the meeting occurred, except as in the sense of how *Ms. Jacobs* (as opposed to Mr. Shooter) had treated Ms. Rodriguez. Again, to the best of Mr. Sandquist's recollection, Mr. Shooter's conduct or alleged treatment of Ms. Rodriguez was not discussed.

does not recall any instance of Ms. Rodriguez stating that she did not want to lobby Mr. Shooter.

Mr. Sandquist presents very credibly. He did not disparage Ms. Rodriguez. He apologetically made it clear that he had no basis upon which to doubt Ms. Rodriguez's story, but he stood firm on his recollection of what Ms. Rodriguez had reported to him after the Windsor meeting.

(vii) SHARON HOSSLER DOES NOT RECALL MS. RODRIGUEZ MENTIONING THAT MR. SHOOTER GRIPPED HER LEG OR HARASSED HER AT THE WINDSOR.

We contacted Ms. Hossler because Ms. Rodriguez informed us that she told Ms. Hossler "everything".

We asked Ms. Hossler if she recalled Ms. Rodriguez telling Ms. Hossler that Mr. Shooter touched Ms. Rodriguez's leg at the Windsor. Ms. Hossler did *not* recall being told that, and believed she would have remembered if Ms. Rodriguez had told her. Ms. Hossler, however, recalled Ms. Rodriguez being unhappy about the Windsor meeting, because Mr. Shooter brought Ms. Jacobs. Ms. Hossler stated that Ms. Jacobs and Ms. Rodriguez have never gotten along; they would work together when necessary, but they did not socialize. Ms. Hossler vaguely remembered that perhaps Ms. Jacobs and Ms. Rodriguez "had words" at the Windsor meeting but could not remember the exact words (it may have been related to the "bitch haircut" comment discussed above).

Ms. Hossler does not recall Ms. Rodriguez telling her that she would no longer lobby Mr. Shooter. However, Ms. Hossler believed that, at some point, someone told her not to schedule Ms. Rodriguez to lobby Mr. Shooter alone because Ms. Hossler always scheduled him to meet with other lobbyists. Ms. Hossler could not recall when that directive may have been made.

In the end, it is clear that Ms. Hossler could not remember Ms. Rodriguez ever telling Ms. Hossler about any alleged touching or other harassment at the Windsor meeting.[50]

(viii) CALENDARS AND RECEIPTS.

During her first interview, Ms. Rodriguez stated that she had no documentation or receipts to support her story regarding the Windsor meeting, but that she would see whether her former employer at the time, Veridus, had any such information. Rather than wait, we contacted Veridus ourselves and obtained (1) the receipts that Ms. Rodriguez submitted for reimbursement for drinks and food at the Windsor on 5/15/13, and (2) Ms. Rodriguez's calendar for the relevant time period as it pertained to any scheduled meetings with Mr. Shooter. In addition, Ms. Jacobs supplied us with a bank statement for 5/15/13, evidencing purchases at the Windsor. All of this information was revealing.

Ms. Jacobs' bank statement for 5/15/13--the date of the Windsor meeting and the same date of the receipts Ms. Rodriguez supplied to Veridus for reimbursement--showed two charges at the

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[50] It is noteworthy that at the beginning of the interview, Ms. Hossler stated that she believed it was a good thing that women could finally speak up for themselves and volunteered reasons for why Ms. Rodriguez would not have shared the Windsor incident (without us asking and without actually having spoken to Ms. Rodriguez about why she never revealed the incident), projecting that perhaps Ms. Rodriguez harbored feelings of shame and embarrassment. None of this, however, reconciles (1) Ms. Rodriguez's unequivocal position that she shared the alleged touching at the Windsor meeting with Ms. Hossler, Mr. Sandquist, and Mr. Cardenas, with (2) the reality that *none* of them recall ever being told about the alleged touching.

Windsor from that date. One of those charges was for the exact same amount as Ms. Rodriguez's receipt, including a $10 tip--evidencing that they likely split the bill. The second charge was for a much lower amount and supports Ms. Jacobs' assertion that she was in the bar with Ms. Rodriguez and Mr. Shooter. Ms. Rodriguez's receipt from the bar totaled $13, $3 of which was a tip. Ms. Jacobs' second charge, although for $23--more than $13--is easily explained by Ms. Jacobs' claim that it is common for her to leave a large tip. Regardless, Ms. Jacobs' bank statement suggests she paid for a drink or two *at the indoor bar* and left a tip. This charge was also *after* the dinner charge ($64.38), further indicating it was likely part of the indoor bar tab. In short, the bank statements and receipts show that the bills for drinks or food consumed on the patio, and at the bar, were split between, and paid by, *Ms. Jacobs and Ms. Rodriguez*. Therefore, the documentation (1) supports Ms. Jacobs' and Mr. Shooter's positions that *Ms. Jacobs was at the indoor bar*, and (2) belies Ms. Rodriguez's position that (i) Ms. Jacobs left before Ms. Rodriguez and Mr. Shooter went to the indoor bar after the other two attendees had left, (ii) where the two were *always alone*, (iii) and Ms. Rodriguez *paid the bill* and left after Mr. Shooter allegedly gripped her knee. Stated differently, the documentation places Ms. Jacobs at the bar, and corroborates her and Mr. Shooter's positions that Ms. Rodriguez left the Windsor before the two of them (after which they continued to discuss Ms. Rodriguez). This, combined with the fact that not one person Ms. Rodriguez claims to have told about the alleged touching recalls ever having been told about it (but many recall the presence of Ms. Jacobs, and Ms. Rodriguez's reaction to Ms. Jacobs' attendance), renders it highly improbable that the alleged touching occurred.

Ms. Rodriguez's calendar appointments and related documents are likewise revealing. Ms. Rodriguez confirmed that the standard operating procedure at Veridus for scheduling an appointment with a legislator is that (1) a lobbyist tells the scheduler a meeting is required, (2) the scheduler works with the legislator's office to secure a meeting, and (3) once secured, every lobbyist receives a calendar appointment for the meeting. Ms. Hossler confirmed this practice, and stated that either she or the front desk will create calendar appointments, and that 99% of meetings will go through her or the front desk and make it on the calendars of Veridus lobbyists. She said, very rarely, a lobbyist may run into a legislator and take a meeting right then, but that 99% of all scheduled meetings are on the calendar.

Under that standard operating procedure for scheduling meetings with legislators, assuming it was followed, Ms. Rodriguez should have had an appointment on her calendar for both the meeting with Mr. Shooter a few days to a week before the Windsor meeting, and the Windsor meeting. Ms. Rodriguez's calendar appointments related to Mr. Shooter, including those before and after the Windsor meeting, do not reflect a meeting had been scheduled at Mr. Shooter's office as reported. In fact, the closest calendar meeting with Mr. Shooter was on April 4, 2013--*more than one month before the Windsor meeting*. Of course, it is possible that this instance fell within the 1% of those impromptu meetings that do not make the formal calendar, but no one stated this was the case, and given the evidence and the inconsistencies with Ms. Rodriguez's story, we cannot comfortably give her the benefit of the doubt and conclude that this specific meeting occurred. But, even if we did give Ms. Rodriguez the benefit of the doubt concerning this meeting, it still does not reconcile (1) her claim that she told others that Mr. Shooter gripped her knee while the two of them were *alone at her request*--someone whom, again, she was clear she would never be alone with, hence inviting Ms. Rusing to the Windsor meeting, (2) with the facts that (i) none of those people recall being told about the alleged touching (but recall Ms. Rodriguez's frustration with Ms. Jacobs), (ii) Ms. Jacobs and Mr. Shooter insist that Ms. Jacobs was at the bar and Ms. Rodriguez left before them, and (iii) Ms. Jacobs apparently paid at least part of the bill incurred at the indoor bar.

With regard to the Windsor meeting, it appears there was a calendar appointment created internally in the Veridus system, but not accepted by, or sent to, a recipient. Whereas, there was another calendar appointment for the Windsor meeting--*generated by Ms. Rusing and accepted by Ms. Rodriguez*. This is consistent with Ms. Rusing's and Mr. Shooter's position concerning who

scheduled the Windsor meeting and why, but inconsistent with Ms. Rodriguez's story.

(ix) <u>CONCLUSION</u>.

We followed up with Ms. Rodriguez to (1) explain the evidentiary and factual inconsistencies with her allegations, and (2) give her an opportunity to address or reconcile those issues, or direct us to any information or other evidence supporting her allegations.

We conveyed our findings and concerns to Ms. Rodriguez. Ms. Rodriguez nonetheless stood by her prior statements, and offered that Ms. Hossler might recall being told about the alleged touching, because Ms. Rodriguez told Ms. Hossler "everything".[51] Ms. Rodriguez also told us that she might have told another one of her friends about the Windsor meeting. Ms. Rodriguez offered to connect us with him, but she did not.

When asked why there was no meeting scheduled with Mr. Shooter, as would have occurred per Veridus' standard operating procedure for scheduling a meeting (a procedure Ms. Rodriguez confirmed), she could not offer a reason, other than maybe Mr. Shooter's office informed the scheduler that he was available that day, she received instructions to go, and went without any calendar appointment in place for that impromptu meeting. This seems unlikely (albeit, possible), and there is no evidence to corroborate that was the case. But even were this the case, again, it does not resolve several other inconsistencies in the evidence that undermine Ms. Rodriguez's allegations.

When presented with the calendar invite from Ms. Rusing for the Windsor meeting, Ms. Rodriguez speculated that perhaps she and Ms. Rusing had created a calendar invite. Even if true, it does not negate *both* Ms. Rusing's and Mr. Shooter's recollection that Ms. Rusing--and not Ms. Rodriguez--scheduled the Windsor meeting. At most, it just shows that both women sent an invite for the meeting. Relatedly, when presented with Ms. Rusing's and Mr. Shooter's positions that it was *Ms. Rusing* who scheduled the Windsor meeting at Ms. Rodriguez's request, she reiterated that she scheduled the meeting herself and merely asked Ms. Rusing to attend. Ms. Rodriguez stated that while she did not want to call Ms. Rusing a liar, Ms. Rodriguez nonetheless recalled the event differently than Ms. Rusing. There is no evidence, other than Ms. Rodriguez's recollection, to support her position that she, and not Ms. Rusing, scheduled the Windsor meeting. Whereas, the documents Veridus provided, together with other witness accounts (including those concerning the strained relationship between the accuser and the accused), support the conclusion that Ms. Rodriguez asked Ms. Rusing to schedule the Windsor meeting with Mr. Shooter, and that she did.

In the end, Ms. Rodriguez stuck by her narrative, but there are simply too many inconsistencies to conclude that her allegation has merit. Accordingly, based on the foregoing, we conclude that there is no credible evidence establishing that Mr. Shooter gripped Ms. Rodriguez's leg at the Windsor on the night in question.

(b) <u>ALLEGED INCIDENT NO. 2: THE "FUN CAUCUS" EVENT AT HOB NOBS</u>.

Ms. Rodriguez alleges that, in 2013 or 2014, Mr. Shooter made inappropriate and sexually suggestive comments concerning or toward her at a social event.[52]

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[51] We interviewed Ms. Hossler (*see* above). She had no such recollection.

[52] Ms. Rodriguez said that she did not tell the media about this incident, because (1) it was hard enough to tell her first story about the alleged touching, but also (2) she did not recall the incident until after her interview concerning the Windsor incident.

(i) Ms. Rodriguez's Allegations.

Ms. Rodriguez and Mr. Cardenas planned a series of "fun caucus" events, meant to be a bipartisan event to bring legislators from both parties together to socialize.

The event in question (1) occurred in approximately 2013 or 2014 at Hob Nobs in Phoenix, Arizona,[53] but (2) after the Windsor meeting. At the event, Ms. Rodriguez, Mr. Cardenas, and two lobbyists began playing the board game RISK. Ms. Rodriguez believes she was sitting next to one lobbyist (sharing a bench), and Mr. Cardenas and the other lobbyist were across from her.

After the group had started playing the game, Ms. Rodriguez noticed Mr. Shooter was present. He sat next to Ms. Rodriguez on the bench (to her right), and she recalls then scooting closer to the lobbyist to her left. While she was shaking the dice in her hands, she noticed Mr. Shooter was looking at her but didn't think much about it. When she shook the dice a second time, she realized that Mr. Shooter was noticing the way her body quavered while she shook the dice. By the third round, Ms. Rodriguez did not shake the dice, but moved them around in her hand and placed them on the table. Ms. Rodriguez states that, at that time, Mr. Shooter said something to the effect of: "No, you've gotta shake them. I like it when you do that." Ms. Rodriguez did not respond but claims to have made up an emergency and immediately left the event. She stated that she did not finish the game.

Ms. Rodriguez recalled feeling angry, gross, and mad after the Hob Nobs incident. She thought she was in a safe space. She did not choose to sit next to Mr. Shooter, or to attend an event she knew he would attend. Ms. Rodriguez felt like confronting Mr. Shooter could ruin her career, which is why she made up an emergency to leave.

At some point after the Hob Nobs event, Ms. Rodriguez spoke to Mr. Cardenas. She conveyed that she may have spoken with Mr. Cardenas about the Hob Nobs incident multiple times. She claimed to have told Mr. Cardenas that either she could go to fun caucus events, or Mr. Shooter could go, but not both of them. She believes (but is not positive) that Mr. Cardenas told her he would talk to Mr. Shooter about the situation. A short time after the alleged incident, Ms. Rodriguez reported that she saw Mr. Shooter in the lobby of the Senate, at which time he put up his hands in a surrender position (a common reactionary description by many who we interviewed throughout this investigation), looked at her with big eyes, and then left. This made Ms. Rodriguez think Mr. Cardenas had spoken with him.

(ii) Mr. Mark Cardenas' Recollection Of The "Fun Caucus" Event At Hob Nobs.

Mr. Cardenas stated that he met Ms. Rodriguez around January 2013, during his first year at the Capitol. They were a part of a casual group of younger lobbyists and lawmakers, of similar age, who started working at the Capitol around the same time. This group would occasionally get together outside of the office. Mr. Cardenas stated that he and Ms. Rodriguez started a "fun caucus" intended to organize all young people, from both sides of the aisle, to socialize together.

Mr. Cardenas believes that sometime in 2014, he and Ms. Rodriguez decided to have a "fun caucus" board game night, and decided on Hob Nobs as the location. At this point, Mr. Cardenas had a listserv his assistant would use to notify invitees about the location, time, and date of fun caucus. Mr. Cardenas recalled that his then-assistant mentioned that Mr. Shooter planned to

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[53] Ms. Rodriguez believed the event may have occurred in either 2013 or 2014. Mr. Cardenas recalls the event may have occurred in 2014. Both of them, and Mr. Shooter, nonetheless recall that the event occurred.

attend. Mr. Shooter asked Mr. Cardenas for a ride to the event, and he agreed. Mr. Cardenas picked Mr. Shooter up from his Phoenix residence.[54]

Mr. Cardenas stated that he could tell Ms. Rodriguez was acting differently at Hob Nobs. Mr. Cardenas asked her what was wrong during the event, and she said something like, "I don't want to be around Senator Shooter." Mr. Cardenas asked why, and Ms. Rodriguez responded with something like, "He's just creepy." Mr. Cardenas asked Ms. Rodriguez if they should call it a night early, and Ms. Rodriguez told him they could just talk about it tomorrow. After this conversation, a group of attendees began to play the board game RISK. Mr. Cardenas noted that Mr. Shooter sat next to Mr. Cardenas, and Ms. Rodriguez was somewhere across from them. Mr. Cardenas recalled Ms. Rodriguez sitting next to an individual different than the lobbyist she identified.

Mr. Cardenas recalls Mr. Shooter saying something creepy about Ms. Rodriguez's chest (but does not remember specifics), and that Ms. Rodriguez subsequently pulled up her blouse.[55] Ms. Rodriguez did not say anything in response to Mr. Shooter.

When asked about whether Mr. Shooter may have made a comment about how Ms. Rodriguez shook the dice during the game, Mr. Cardenas recalled Mr. Shooter saying something to Ms. Rodriguez about shaking the dice harder, or that he liked when she shook the dice (although Mr. Cardenas could not remember exactly what was said). Mr. Cardenas stated that the table was surrounded with RISK players, and they all played for about two hours before stopping. Mr. Cardenas stated that Ms. Rodriguez stayed the entire time (despite her statement that she feigned an emergency and immediately left). Mr. Cardenas recalled Ms. Rodriguez leaving before he left, but she did not tell him why she was leaving. Mr. Cardenas also noted that everyone left not too long after Ms. Rodriguez. Mr. Cardenas stated that Ms. Rodriguez was visibly uncomfortable the entire night.

The following day, Mr. Cardenas knew Ms. Rodriguez would be at the Capitol, so he found her to talk about the event the night before. He says he apologized to Ms. Rodriguez for bringing Mr. Shooter, and stated he would not bring him to any other events. Ms. Rodriguez told Mr. Cardenas (1) that it was fine, (2) but that she did not like being around Mr. Shooter, and (3) that "he's creepy." Mr. Cardenas said that he would talk to Shooter about it, and in response Ms. Rodriguez thanked Mr. Cardenas. Mr. Cardenas told us that his conversation with Ms. Rodriguez was very short.

About one week later, Mr. Cardenas had to lobby Mr. Shooter about a bill. He heard that Mr. Shooter liked to drink, so Mr. Cardenas bought Mr. Shooter a bottle of Scotch and planned to lobby him. At 8:30 a.m. one day at the Capitol, Mr. Cardenas saw Mr. Shooter walking from the direction of the parking lot. Mr. Cardenas shouted to Mr. Shooter, saying something like, "Hey, I'm here to meet with you" and showed him the bottle. Mr. Shooter responded that it was too early to drink. Mr. Cardenas responded that he had the good stuff, to which Mr. Shooter replied: "Just a skosh." At the end of that meeting, Mr. Cardenas told Mr. Shooter, casually, something to the effect of: "Hey, just so you know..." or "I'm just letting you know..." someone at the Capitol said you said something inappropriate about her chest. Mr. Cardenas said that he told Mr. Shooter: "I don't want to make it a big deal." Mr. Shooter responded as though it was not a big deal. Mr.

[54] The use of the term "residence" is not meant to state or imply that Mr. Shooter permanently "resides" in Phoenix. The term "residence" is meant to convey the place where it is believed Mr. Shooter had stayed while attending to his business or legislative duties while in Phoenix during the time in question.

[55] Ms. Rodriguez did not convey this incident to us, although we have no reason to disbelieve Mr. Cardenas' recollection.

Cardenas did not say anything else to Shooter about Hob Nobs, mention Ms. Rodriguez by name, or discuss it again.

(iii) Mr. Shooter's Recollection Of The "Fun Caucus" Event At Hob Nobs.

Mr. Shooter remembered attending the Hob Nobs event but did not initially recall whether Ms. Rodriguez attended. He remembered people were playing games (not him; he found it boring).[56] Mr. Shooter attended to see what the event was about. He believes he was probably the only Republican to attend.

Mr. Shooter recalled someone picking him up. When asked if it could have been Mr. Cardenas, Mr. Shooter said it was probably him.[57] He recalled they parked a block or two away and had to walk a little bit to arrive at the restaurant.

Mr. Shooter emphatically denied making a comment about Ms. Rodriguez shaking dice and does not recall making a comment about her chest. Mr. Shooter does not remember Mr. Cardenas ever talking to Mr. Shooter about making an inappropriate comment, but readily confessed that *it could have happened*, if Mr. Cardenas said it happened. According to Mr. Shooter, he does not believe Mr. Cardenas is trying to kill Mr. Shooter politically, so Mr. Cardenas may be telling the truth. Mr. Shooter also stated that, if Mr. Cardenas heard Mr. Shooter make a comment about Ms. Rodriguez's chest, then *it could be possible* that Mr. Shooter did so (but he did not know for sure). When asked why Mr. Cardenas would say something happened if it had not, Mr. Shooter said he would not be surprised if Ms. Rodriguez told Mr. Cardenas something happened when it did not (a statement that conflicts with his prior indication that Mr. Cardenas may be telling the truth, at least concerning whether Mr. Shooter made an inappropriate comment). Eventually, Mr. Shooter stated that (1) he *does not recall* making any comment about Ms. Rodriguez's chest (as opposed to denying having done so), and (2) would be pretty surprised if it happened, because he does not find Ms. Rodriguez attractive (compelling us to wonder, had he found her attractive, would he not be surprised if he had made the comment).[58]

(iv) Conclusion.

At minimum Mr. Shooter: (1) denies making a sexualized comment about how Ms. Rodriguez shook dice; (2) does not recall making sexualized comments about her chest, but believes them to be unlikely because he does not find Ms. Rodriguez attractive; but (3) stated that if Mr. Cardenas heard Mr. Shooter make a comment about Ms. Rodriguez's chest, then it could be possible that Mr. Shooter did so (but he did not know for sure). We cannot ignore the inconsistencies with Ms. Rodriguez's allegations concerning the Windsor meeting. However, unlike those allegations, Mr. Cardenas corroborated Ms. Rodriguez's story (and offered an additional observation of

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[56] Mr. Shooter also stated that he went because he found out from a lobbyist who worked for Ms. Jacobs at the time had planned to use Ms. Jacobs' credit card to pay for everything. The lobbyist apparently would not invite Ms. Jacobs because she was too old for this get together. It is unclear to us why this fact compelled Mr. Shooter to attend the event or why he even mentioned this information to us.

[57] He initially recalled perhaps being picked up by another legislator's "gay assistant" whom Mr. Shooter recalled being a nice person. We have no idea why Mr. Shooter felt it necessary to state this specific information.

[58] Later, (during an interview on 12/15/17), when asked whether it was possible that he made a neutral comment about Ms. Rodriguez's chest to Mr. Cardenas--not intended for her to hear--Mr. Shooter noted that it would make more logical sense for that to have happened, than for him to have made a sexual comment about her chest.

inappropriate conduct of his own concerning Ms. Rodriguez's chest). We cannot discern any motive for Mr. Cardenas to risk his reputation by being dishonest about his recollection of events, and we find him--and his recollection of events--credible.

Thus, we conclude that there is credible evidence that Mr. Shooter made inappropriate, sexualized comments directed toward Ms. Rodriguez at the Hob Nobs event about (i) how she shook the dice, and (ii) her chest. The comments were of a sexualized nature, and at least with regard to the "shaking of the dice" comment, directed to Ms. Rodriguez for her to hear. Thus, in this instance, Mr. Shooter's conduct was inappropriate, subjectively unwelcome, and occurred because of Ms. Rodriguez's sex. It also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination, (2) sexual harassment, and (3) conduct contributing to a hostile work environment.

(c) ALLEGED INCIDENT NO. 3: THE NOVEMBER 2015 CAPITOL TIMES FASHION SHOW FITTING.

Ms. Rodriguez alleged that, in November 2015, Mr. Shooter made an inappropriate and sexually suggestive comment concerning or toward her; in passing, as she was leaving a clothing boutique for a fitting in connection with her participation in a fashion show event hosted by the Arizona Capitol Times.[59]

(i) MS. RODRIGUEZ'S ALLEGATIONS.

In approximately November 2015, Ginger Lamb, then with the Arizona Capitol Times, asked Ms. Rodriguez to participate in a fashion show event. Ms. Rodriguez agreed. In connection with the event, Ms. Rodriguez went to a women's clothing boutique in Arcadia for a fitting, but cannot recall the name of the boutique. As Ms. Rodriguez was walking up to the boutique, she saw Ms. Jacobs and Mr. Shooter leaving the boutique. Ms. Rodriguez claimed to have been cordial to the two, and said hello. Ms. Rodriguez stated that (1) Mr. Shooter offered to stay behind to help her in the dressing room, and (2) Ms. Jacobs then playfully hit Mr. Shooter and told him something to the effect of: "You can't say things like that." Ms. Rodriguez believes she said something to them, to the effect of she was running late, and then moved inside the boutique.

Ms. Rodriguez recalled feeling uncomfortable, harassed, exasperated, and irritated. Ms. Rodriguez stated to us: "Every time I'm around this man, he finds a way to harass me."

(ii) GRETCHEN JACOBS' RECOLLECTION OF THE FITTING.

Ms. Jacobs did not recall Mr. Shooter making a comment to Ms. Rodriguez at a fitting for a fashion show event hosted by the Arizona Capitol Times. Ms. Jacobs recalled (1) leaving the boutique with Mr. Shooter and worrying that it looked like they had been shopping together and (2) running into someone going in the boutique while Ms. Jacobs and Mr. Shooter were leaving. Ms. Jacobs did not remember who it was they ran into but stated it could have been Ms. Rodriguez. Ms. Jacobs recalled exchanging pleasantries with the person that she and Mr. Shooter ran into and did not remember Mr. Shooter making any flirtatious or suggestive comment to that person. Ms. Jacobs believes she would have remembered any such comment having been made to Ms.

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[59] Ms. Rodriguez said that she did not tell the media about this incident, because (1) it was hard enough to tell her first story, but also (2) she did not recall the incident until after her interview concerning the Windsor incident.

Rodriguez, because it would have led Ms. Jacobs to believe Mr. Shooter actually liked Ms. Rodriguez, which in Ms. Jacobs' mind would have been something new. Ms. Jacobs noted that Mr. Shooter only makes those types of comments to individuals he considers friends or those he likes, and it is clear on all fronts, at least to Ms. Jacobs, that Mr. Shooter and Ms. Rodriguez dislike one another.

(iii) Mr. Shooter's Recollection Of The Fitting.

Mr. Shooter recalled going to a boutique with Ms. Jacobs for a fitting. He does not recall seeing Ms. Rodriguez on the way in, or way out, and does not remember saying anything to Ms. Rodriguez that day. As the discussion progressed, Mr. Shooter (1) said the alleged fitting room comment "sounds like horse crap to me", (2) then stated that "anything's possible", (3) then stated that the comment "doesn't sound like me" and he would not interact with Ms. Rodriguez, and (4) then he denied ever making the comment to Ms. Rodriguez.

(iv) Conclusion.

Unlike with the Hob Nobs incident, there are no percipient witnesses to this alleged encounter to corroborate Ms. Rodriguez's allegation. Mr. Shooter's meandering "denial" aside, Ms. Jacobs certainly has no recollection of the encounter as Ms. Rodriguez alleged it to have transpired, and Ms. Jacobs' recollection seems credible (and probable) to us. Moreover, and again, it is difficult to ignore the inconsistencies with Ms. Rodriguez's allegations concerning the Windsor meeting, and to therefore give her the benefit of any doubt, when she is the only percipient witness to recall the incident as she reported it. We readily admit that the comment Mr. Shooter is alleged to have made certainly fits within his well-established reputation for uninvited, unrequited, improper and off-color comments that rarely (if ever) have a contextual place in ordinary civil discourse. Indeed, even Ms. Jacobs noted that Mr. Shooter makes those types of comments, but just to individuals he considers friends or those he likes (among whom, all appear to agree, Ms. Rodriguez is not). But given concerns with her veracity stemming from her Windsor-related allegations, we simply cannot conclude this allegation is credible when Ms. Rodriguez's recollection is her only evidence supporting her position. Accordingly, we conclude that there is no credible evidence to support this allegation.

5. KENDRA PENNINGROTH.

Ms. Penningroth alleges that, in June 2017, while covering the "Best Of The Capitol" event as an intern for the Arizona Capitol Times, Mr. Shooter (a Representative at this time)--a man she had no relationship with and did not personally know--embraced her in a prolonged, uncomfortable, and inappropriate manner.

(a) MS. PENNINGROTH'S ALLEGATIONS.

We reviewed with Ms. Penningroth the Arizona Capitol Times article reporting her allegations, and she confirmed the article's accuracy.[60]

Ms. Penningroth stated that he eventually released her from the hug, but kept his hand on her lower back for approximately 15 seconds. She stated that Mr. Shooter then (1) began telling Mr. Nicla (another intern for the Arizona Capitol Times) not to take any photos, (2) promised he would be good that night, (3) told Ms. Penningroth that he was a private man, and he did not want any photos, and (4) stated that he was there to have fun. Ms. Penningroth stated that she laughed awkwardly, and tried to step back, but Mr. Shooter would not let her do so. Ms. Penningroth stated that Mr. Nicla was giving her a "what the f***" look during the incident. Afterward, Mr. Nicla asked Ms. Penningroth whether she knew him. She did not and had never met Mr. Shooter before this incident.

Ms. Penningroth stated that the encounter made her feel awkward and uncomfortable. She stated Mr. Shooter's behavior was "really inappropriate" and that no one around her did anything about it, which caused her to feel a different sort of discomfort. She stated that she did not feel scared, or think that Mr. Shooter would hurt her, but she still felt rattled. She went into the bathroom and cried after the incident.[61]

Ms. Penningroth stated that she told her colleagues at the Arizona Capitol Times what happened to her at the event with Mr. Shooter. She stated that her female colleagues were angry and wanted to say something. Ms. Penningroth believes she told them to let it go and did not want to do anything formally or make it a big deal. Ms. Penningroth stated that no one seemed surprised about her experience, but no one told her that it happened all of the time. She has heard that Mr. Shooter is where the party is at but has not heard any other instances about similar hugs. She has heard Mr. Shooter is known to get crazy. Other than the incident, she has had no other encounters with Mr. Shooter.

(b) MR. NICLA'S RECOLLECTION OF THE INCIDENT.

We spoke to Mr. Nicla because Ms. Penningroth told us that he witnessed the incident at the June 2017 Best Of The Capitol event.

Mr. Nicla was taking photographs at the event. When Mr. Shooter approached, he hugged Ms. Penningroth. Mr. Nicla said that the hug lasted too long and looked weird. When asked if he thought it seemed inappropriate, he responded, "Absolutely." Mr. Nicla commented that it was

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[60] The Arizona Capitol Times called Ms. Penningroth (via Katie Campbell) when the Shooter stories were breaking and asked if Ms. Penningroth would go on the record about the incident. She did.

[61] Ms. Penningroth noted that she worked in Washington D.C. in the past, and things like this had happened before. This statement makes her reaction and feelings all the more profound and illustrates just how inappropriate and uncomfortable the interaction was for her.

probably not how a grown man should conduct himself. Mr. Nicla said that Mr. Shooter probably said something, but Mr. Nicla could not recall what was said. Mr. Nicla recalled Mr. Shooter was touching Ms. Penningroth's back in a weird way, but he did not touch her below the waist.

Mr. Nicla said that, in the moment, the hug looked like a hug that lasted too long. Mr. Nicla believes Ms. Penningroth pulled away and Mr. Shooter let her go. Mr. Nicla said that he and Ms. Penningroth packed up soon after that and they did not talk about it again. Mr. Nicla did not see Ms. Penningroth cry. Mr. Nicla recalled that Ms. Penningroth looked disgusted and kind of uncomfortable. Afterward, he or Ms. Penningroth made a comment to the effect of: "Well, that was kind of weird." Mr. Nicla thinks Ms. Penningroth told him she was uncomfortable.

(c) MR. SHOOTER'S RESPONSE TO THE ALLEGATIONS.

Mr. Shooter did not recall hearing about Ms. Penningroth's story in the Arizona Capitol Times. He said it is possible that he hugged her, because he's a "hugger" when he meets people. He stated that he hugged Governor Jan Brewer when he met her, and he hugs both men and women, but he does not grab people's butt (we did not ask him whether he did the latter; he volunteered the information).

While he believes that it is possible he hugged Ms. Penningroth, he claims that he would not have pressed her face into him on purpose. He also denies that he would have held her or stopped her from moving back. He does not remember anyone in particular asking him for a photograph, but it was plausible he told someone not to take any photographs, and that he is a private man, because from his perspective, contact with the press is never good. Then, in an attempt to seemingly reconcile Ms. Penningroth's story with his own habits, he said that hugs are relative. He typically hugs people where his arms fall in front of his chest--so typically the shoulders of people.

Later, on the floor of the House of Representatives, Mr. Shooter seemed to apologize for certain interactions involving him hugging others, recognizing they were ill-received and "perceived as creepy and lecherous". *See* Exhibit 2. He said: "I was beyond embarrassed to hear that what I thought were welcomed and well-intentioned hugs were perceived as creepy and lecherous. I didn't know. As soon as I did know, I have been – and am, so sorry." This statement is at minimum consistent with his concession that he very well could have touched Ms. Penningroth as reported, and a far cry from a firm denial.

(d) CONCLUSION.

We cannot find any reason to disbelieve Ms. Penningroth's recitation of both the incident, and how it made her feel. To the extent he witnessed the incident, Mr. Nicla corroborates Ms. Penningroth's story, and while it seems they did not discuss the incident in any great detail after it transpired, even Mr. Nicla noted that she appeared disgusted and uncomfortable.

Moreover, Mr. Shooter does not unequivocally deny the incident occurred; instead he minimized the incident, and by implication Ms. Penningroth's reaction, by claiming a hug is a subjective act that he does all the time, to men and women alike (but not in any intentionally inappropriate manner). Then, of course, there is his statement on the House Floor.

The impropriety of intimately touching a complete stranger in any manner whatsoever without asking for, or at least receiving, permission to do so cannot be ignored. This is so, no matter what the perpetrator of the touching intended. Basic norms of social interaction dictate that you simply do not touch someone, on purpose, without permission--by hug or otherwise. Indeed, even a handshake requires one to extend a hand and the other to grab that hand of free will. Many people simply do not want to be touched by strangers--even if the stranger is of fame or repute. And in

this instance, Ms. Penningroth--a young student intern just doing her job--certainly does not appear to have invited any sort of physical contact with Mr. Shooter by seeking his permission to be photographed. Yet, the contact occurred anyway --uninvited.

We conclude that credible evidence exists to support Ms. Penningroth's allegations. Mr. Shooter's physical actions against Ms. Penningroth were inappropriate, subjectively unwelcome, and occurred because of her sex. Mr. Shooter's actions also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination, and (2) conduct contributing to a hostile work environment.

6. <u>TARA ZIKA</u>.

Ms. Zika initially came forward with her allegations against Mr. Shooter in an Arizona Capitol Times article. She alleges that, over the course of three days in August 2017, while attending the League of Arizona Cities and Towns annual conference in Tucson, Arizona (at the Hilton El Conquistador hotel), Mr. Shooter (a Representative at this time): (1) blew her a kiss; (2) made a comment about her legs; (3) made a comment about her butt; and (4) made a hand gesture toward her, mimicking oral sex.[62]

(a) MS. ZIKA'S ALLEGATIONS.

(i) DAY ONE.

According to Ms. Zika, on the first day of the conference, she and her colleague Aaron Genaro occupied their booth, for their employer, during a combined exhibit session and networking event. They finished their work in the late afternoon or early evening. They then headed to the dining area where dinner would be served. Mr. Genaro was walking in front of her. As they were approaching the doors to the dining area, Ms. Zika noticed a group of five to six men standing outside the doorway. Mr. Shooter was among these men, but Ms. Zika did not know Mr. Shooter at the time and, therefore, did not recognize him.

One of the men (whom she now knows was Mr. Shooter) waved her over to the group. She believed that he may have been a prospective client, so she began to make her way over to him. As she was walking toward him, she alleged that he blew her a kiss. She rolled her eyes at him and walked past the group. While she passed, Mr. Shooter made a comment about her legs. She could not recall the comment, but stated that she clearly heard it at the time and was 100% confident that he made a comment about her legs.

Ms. Zika claimed that she caught up with Mr. Genaro and told him about the incident. She told Mr. Genaro that the man (Mr. Shooter) must have been intoxicated. Mr. Genaro asked her where the man was located. Ms. Zika told him "back there", and suggested they keep walking forward. She and Mr. Genaro then ate dinner without issue and without any further encounters with Mr. Shooter at that time.

Based on her alleged encounter with Mr. Shooter, Ms. Zika decided to go back to her room for the night, around 8 p.m. When she got to her room, she recalled that she wanted to steam or iron the exhibit banner for the next day. She walked back to the exhibit room, grabbed the cloth, and headed back to her room. To reach her hotel room, Ms. Zika had to pass through the hotel lobby, which also contains a bar. Various people were sitting and standing around socializing and drinking in this area. The lobby contained a walkway in its center, which led to the hallway of elevators and some hotel rooms (including hers). She walked down this path to head back to her hotel room, holding the exhibit cloth. She saw Mr. Shooter standing with a woman (Ms. Zika later found out that this woman was Ms. Fann) in the lobby.

As she walked by Mr. Shooter, Ms. Zika claimed to have heard him say: "I'd take that ass for days." She believed he looked her in the eyes when he said it. Ms. Zika rolled her eyes and walked by, angry. She walked all the way down the hallway but became nervous that Mr. Shooter was following her. Ms. Zika recalled that Mr. Shooter's side was facing the hallway. She turned around and saw that Mr. Shooter was still standing with Ms. Fann but he leaned back, looked her

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[62] Ms. Zika pointed out a few areas in the Arizona Capitol Times article she believed were inaccurate or a mischaracterization of her story. We do not address those specific areas here, but rather, address Ms. Zika's allegations as she conveyed them to us.

in the eyes, and placed his fingers in a "V" shape at his mouth and stuck his tongue out between his fingers, making a gesture for oral sex. Ms. Zika continued on to her room, but then stopped, because she had become very angry.

She stated that she had decided to confront Mr. Shooter. She walked back toward him, and according to her, as she did so, he began making hand gestures, placing his palms against his chest and then up in an "I surrender" pose, signaling a "who me" type gesture. As she approached, she heard Mr. Shooter saying things like, "Uh oh, uh oh" and "Am I in trouble?" She said that he kept repeating himself. She then recalled saying, "Listen, you f***", but did not remember the exact words after that. She remembered telling Mr. Shooter generally that she did not appreciate how disrespectful he had been or his inappropriate comments. Ms. Zika believed she said something to the extent of: "You might be showing off to your little friends, but I guarantee you every woman in here thinks you're a creep." Mr. Shooter then allegedly asked Ms. Zika if she knew who he was (she did not). Ms. Zika claims that she responded that she did not care who he was, at which point Mr. Shooter began saying: "You don't know me." At that point, Ms. Zika said she asked Mr. Shooter where he worked and tried to look at his shirt for a nametag. He then covered something on his shirt. Ms. Zika later came to believe that Mr. Shooter was covering his pin, which identified him as a legislator. After Mr. Shooter allegedly refused to reveal his identity, Ms. Zika said that she instructed him not to look at or talk to her for the rest of the conference or ever again. Mr. Shooter allegedly told her: "It won't happen again." She then left and went back to her hotel room. Ms. Zika said that Ms. Fann looked alarmed during this confrontation.

Ms. Zika stated that, afterward, she called or sent text messages about the alleged incident to her supervisor (Dr. Dodenhoff), her boyfriend, and Angela Cichelero.

(ii) **Day Two.**

The next day of the conference, Ms. Zika realized the man from the previous night was Mr. Shooter. During the symbolic flag ceremony, she looked at a flyer she had received about the event. One page contained the names and photographs of current State legislators. She recognized Mr. Shooter from his photograph and sent text messages to Dr. Dodenhoff about her discovery.

Later that night, Ms. Zika and Mr. Genaro attended a "bash" at the conference. The party was held in a hotel suite of some sort where beer was kept in the bathtub. They went to grab beers, and when they turned around, they saw Mr. Shooter. Mr. Genaro asked Ms. Zika if she wanted to leave but she declined and suggested they just avoid him.

Ms. Zika also saw Gretchen Jacobs at the party, and that she and Ms. Jacobs formally met at that time. Ms. Zika said she spent some of the party speaking to a "council member" about one of Ashton Tiffany's clients.

At one point, Mr. Shooter approached Ms. Zika and put his hands up in the "I surrender" type position, saying that he was "not touching" or "not doing anything" when he walked past her. Ms. Zika said that Mr. Shooter made this remark and put his hands up every time he walked past her at the party. Ms. Zika told Mr. Shooter that he did not need to keep doing that, and to consider what he had done "forgotten", but not to do it again. Mr. Shooter allegedly apologized to Ms. Zika and told her he did not realize she was "so sensitive." He also told Ms. Zika that he could not change, he was not politically correct, but that he would not "do anything." He told her it had been a joke. Ms. Zika responded that it was 2017, and Mr. Shooter needed to learn how to treat women differently. Ms. Zika believed Ms. Jacobs was nearby when Mr. Shooter apologized and may or may not have heard what he said.

During the party, Ms. Zika recalled being approached by Ms. Jacobs. Ms. Jacobs told Ms. Zika that she did not realize, at the time of Ms. Zika's confrontation with Mr. Shooter on day one

of the conference, that Ms. Zika worked for one of Ms. Jacobs' clients. Ms. Jacobs also stated that "they" were all in the hotel lobby making fun of Mr. Shooter after watching Ms. Zika confront him. Ms. Jacobs told Ms. Zika that Mr. Shooter is harmless. Ms. Zika did not believe she shared with Ms. Jacobs all of the details of her interactions with Mr. Shooter from the day before.

After formally meeting, Ms. Zika said that Ms. Jacobs began introducing Ms. Zika to other people at the conference saying, "This is the one that went after Shooter", or something similar. Ms. Zika said that people at the conference knew she had confronted Mr. Shooter--it was not a secret.

(iii) **DAY THREE.**

The next night, Ms. Zika saw Ms. Jacobs in the hotel lobby bar. They talked about the incident again. Ms. Zika believed a woman associated with the conference may have been present and that Mr. Sonny Borrelli[63] was present, but did not appear to be listening. Both Ms. Jacobs and the other woman told Ms. Zika that Mr. Shooter was "harmless", which Ms. Zika found disappointing.

As expressed by Ms. Zika to Mr. Shooter, his conduct made her feel angry. She believed it was unwelcome and inappropriate.

(b) **MR. SHOOTER'S RESPONSE.**

(i) **DAY ONE.**

When asked to recall his interaction with Ms. Zika at the 2017 conference, if any, Mr. Shooter recalled a much more limited encounter. Mr. Shooter remembered being in the hotel lobby/bar area standing with other men. He said that Ms. Fann may have been nearby, but could not be certain. He recalled that Ms. Zika walked by them, which prompted Mr. Shooter to comment to the group of men (*not Ms. Zika*), "Boys, that looks like two bobcats fighting in a tote sack." Mr. Shooter stated that the comment was intended only for the group to hear. He does not believe that she heard it and denies that he was looking her in the eyes when he said it.

Mr. Shooter remembered that Ms. Zika may have walked about 40 to 50 feet down the hallway that led to the elevators and other hotel rooms, then turned around and came walking back toward him. Mr. Shooter believed that when she turned around, the other men in the group were laughing at his comment. Ms. Zika then confronted Mr. Shooter. He could tell that she was not happy.

Mr. Shooter said that he apologized with his hands up in an "I surrender" mannerism, and Ms. Zika told him something like, "I don't like your comments." Mr. Shooter responded with, "What'd I say?" Based on Ms. Zika's response, Mr. Shooter did not believe she had heard his actual comment. Mr. Shooter recalled apologizing and telling Ms. Zika that it would not happen again. Mr. Shooter did not recall Ms. Zika saying, "Listen, you f***", but acknowledged that she may have stated that he was showing off for his friends. Mr. Shooter adamantly denied trying to cover his lapel pin, which identified him as a legislator.

We asked Mr. Shooter about Ms. Zika's other allegations, including blowing the kiss, a

[63] We interviewed Mr. Borrelli about the discussion, but he did not recall it, and stated the interview was the first time he had heard of the incident. He stated that had he heard about something as vulgar as the oral sex gesture, he would have interjected himself into the situation as an intermediary and confronted Mr. Shooter about the incident. Mr. Borrelli reported that he has known Mr. Shooter for five years, characterized him as a "clown", but never witnessed him be vulgar with or toward a woman.

separate comment about her legs, the "ass" comment, and the oral sex gesture. While Mr. Shooter admitted that he had made the bobcats comment, he denied all of the other allegations. Notably, Mr. Shooter became visibly angry when we brought up Ms. Zika's other allegations concerning the alleged kiss and oral sex gesture. He told us that he felt like a "beach at Normandy" and could not simply sit back and take it--with "it" meaning the allegations he considers false.

(ii) DAY TWO.

The next morning, Mr. Shooter recalled Ms. Zika approaching him and apologizing. Ms. Zika told him that she knew who he was and that her boss has asked her to apologize. Ms. Zika told him that she had taken a photo of Mr. Shooter and sent it to her boss and/or boyfriend (Mr. Shooter could not recall). Mr. Shooter told Ms. Zika that she did not need to apologize and that he was sorry that he had done something to offend her.

Mr. Shooter also attended the party that night, known as "Intergov". He recalled walking by her with his hands up in an "I surrender" gesture and thought that he probably said: "I'm not doing anything." He did not recall specifically saying that but acknowledged that sounded like something he would say. He did not remember Ms. Zika asking him to stop doing any of those things.[64]

(c) DR. DODENHOFF'S RECOLLECTION OF WHAT MS. ZIKA TOLD HIM.

We interviewed Dr. Dodenhoff because Ms. Zika believed that she called Dr. Dodenhoff the evening of day one of the conference, to tell him about her interactions with Mr. Shooter. Ms. Zika believed that she told Dr. Dodenhoff about the blown kiss, the legs comment, and the butt comment, but not the oral sex gesture. We asked whether there was any reason she would have omitted the oral sex gesture detail, and she told us that she was not sure. She speculated that she may have been embarrassed, but upon further reflection, she stated that she may have told him about the oral sex gesture after all.

Dr. Dodenhoff told us that they *did not speak*, but communicated over a series of text messages. Ms. Zika's text messages to Dr. Dodenhoff, as summarized by him, mentioned only two alleged incidents, that Mr. Shooter (1) blew her a kiss, and (2) made a comment about her legs among a group of men. The text messages also described Ms. Zika's confrontation with Mr. Shooter, during which she voiced her disapproval of his conduct. On balance, Ms. Zika's messages also mentioned that Mr. Shooter told her "it wouldn't happen again."

Ms. Zika's messages to Dr. Dodenhoff *did not* mention a comment about her butt or an oral sex gesture, and we cannot discern any good reason why, if this happened, she would not have mentioned it to Dr. Dodenhoff under the circumstances.

Dr. Dodenhoff did not have any additional, relevant information to offer about the allegations Ms. Zika made against Mr. Shooter.

(d) AARON GENARO'S RECOLLECTION OF WHAT MS. ZIKA TOLD HIM.

Mr. Genaro could not recall many details relevant to Ms. Zika's allegations. Mr. Genaro remembered only that Ms. Zika told him that a man had made "crude *comments*" to her. (emphasis added) He did *not* recall Ms. Zika telling him that anyone had blown her a kiss or made any other kind of *gesture* toward her. We cannot discern any good reason why, if these crude gestures were made, she would not have mentioned the specific gestures to her colleague, or at least mentioned

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[64] Mr. Shooter left the conference and did not attend day three.

that a gesture of some kind were made.

(e) ANGELA CICHELERO'S RECOLLECTION OF WHAT MS. ZIKA TOLD HER.

We interviewed Ms. Cichelero telephonically (she lives out of state) because Ms. Zika believed she also told Ms. Cichelero--Ms. Zika's close friend--about Mr. Shooter's actions.[65]

Ms. Cichelero recalled Ms. Zika telling Ms. Cichelero (1) about a man who made sexual remarks, and (2) possibly that he made gestures, but Ms. Cichelero was not entirely sure and could not recall whether Ms. Zika described any of the alleged gestures. In the end, Ms. Cichelero could not recall for certain if Ms. Zika told her that a man had made any gestures at Ms. Zika at all. Ms. Cichelero believed Ms. Zika sounded disgusted and uncomfortable, but could not recall any specific words Ms. Zika used.

(f) GRETCHEN JACOBS' RECOLLECTION OF THE EVENT AND HER DISCUSSIONS WITH MS. ZIKA.

(i) DAY ONE.

Ms. Jacobs met Ms. Zika, for the first time, at the conference. During the first night of the conference, Ms. Jacobs recalled sitting in the hotel bar, after dinner, with a group of people.[66] Mr. Shooter and Ms. Fann moved away from the group's table, closer to the center of the hotel lobby, to have a conversation. They were standing in Ms. Jacobs' front line of vision, but she could not hear their conversation. She could, however, see their body language while they were talking. At one point, Ms. Jacobs said that Mr. Shooter may have been talking to some men in the nearby hallway, but she was not positive. She believed one of those men was Greg Wilkinson.

While still sitting at the table facing Ms. Fann and Mr. Shooter, Ms. Jacobs recalled that, suddenly, a woman (whom she later discovered was Ms. Zika), stormed up to Mr. Shooter, interrupted his conversation with Ms. Fann, and saw Mr. Shooter's hands go up in an "I surrender" manner. She could not hear what was said but thought it looked like Mr. Shooter was apologizing.

Ms. Jacobs recalled Mr. Shooter and Ms. Fann returned to the group's table, and Mr. Shooter told the group that (1) Ms. Zika told him she knew he "said something" about her, (2) he apologized and that it would not happen again, (3) he had admittedly made a comment about two bobcats in a sack, the other men laughed, and Ms. Zika turned around while they were laughing, but (4) he did not believe Ms. Zika could hear what he had said. Mr. Shooter also told Ms. Jacobs, and the others, that he embarrassed Ms. Zika and should not have done it. Ms. Jacobs believed he sounded sincere.

Ms. Jacobs did not witness Mr. Shooter blow Ms. Zika a kiss, or display any kind of oral sex gesture toward her. Ms. Jacobs believes that kind of behavior, especially the latter, would be extremely out of character for Mr. Shooter.

(ii) DAY TWO.

The next day, Ms. Jacobs recalled meeting Ms. Zika during the mid- to late-morning. Ms. Jacobs saw her client, Ms. Zika's employer, and then saw Ms. Zika. Ms. Zika told Ms. Jacobs that she found out whom she had yelled at (Mr. Shooter), and Ms. Zika indicated that she should

[65] We also attempted to call Ms. Zika's significant other three times, but we were unable to reach him. Ms. Zika told us that she told him about these events as well.

[66] We interviewed other individuals Ms. Jacobs identified at the table, but only Ms. Fann had any recollection of the interaction between Ms. Zika and Mr. Shooter.

probably apologize. Ms. Jacobs told Ms. Zika not to worry about it. Ms. Jacobs conveyed her belief that what Ms. Zika did was funny and "gutsy" and that Mr. Shooter could handle it.

Ms. Zika described the situation to Ms. Jacobs. She told Ms. Jacobs that she walked by Mr. Shooter and the other men, could feel them staring at her, and heard the men laughing. Ms. Zika then walked back to her room, thought or felt like she was being followed, and turned around. Ms. Zika saw that no one was following her but then went back and yelled at Mr. Shooter (which Ms. Jacobs witnessed).

Later, at the Intergov party, Ms. Jacobs saw Ms. Zika waiting for the restroom. Mr. Shooter came out of the restroom and inched by Ms. Zika sideways with his hands up, saying he was not trying to offend her and smiling. Ms. Zika was telling Mr. Shooter to "stop it". Ms. Jacobs interpreted Mr. Shooter's actions as sincere and was surprised Ms. Zika seemed offended by his actions.

At this same event, Ms. Zika rehashed the first night with Ms. Jacobs. Ms. Zika explained that she had called Dr. Dodenhoff, and Dr. Dodenhoff informed Ms. Zika that the man had been Mr. Shooter. Dr. Dodenhoff recommended Ms. Zika talk to Ms. Jacobs. Ms. Zika, again, stated that she thought she had "messed up" because Mr. Shooter is important. When Ms. Zika went over the incident with Ms. Jacobs, she did not mention that Mr. Shooter blew her a kiss, made an oral sex gesture, or told Ms. Zika that he would "take that ass for days." Ms. Zika only stated that she believed Mr. Shooter had said "something" about her.

(iii) <u>Day Three</u>.

On the third night of the conference, Ms. Zika, Ms. Jacobs, and another conference attendee were in the lobby bar talking. Ms. Zika began talking about how she met Mr. Shooter again, and the other conference attendee said something like, "Shooter doesn't scare me. It's all an act." The other conference attendee then took a phone call and left the conversation.

Ms. Zika repeated to Ms. Jacobs that she believed Mr. Shooter said "something" but never stated what she believed he said or that she overheard him. Ms. Jacobs told Ms. Zika that she believed her reaction had been disproportionate to what she understood happened, *i.e.*, Mr. Shooter made an unknown comment about Ms. Zika and the other men laughed.

Ms. Zika then confided in Ms. Jacobs another personal incident (not involving Mr. Shooter) she had experienced shortly before the 2017 conference. Ms. Jacobs stated that she then understood Ms. Zika's reaction to Mr. Shooter. Ms. Zika also told Ms. Jacobs that Mr. Shooter had made a comment about Ms. Zika being "sensitive", which Ms. Zika found demeaning.

(g) <u>Ms. Fann's Recollection Of The Event</u>.

Ms. Fann attended the 2017 conference and recalled needing to talk privately with Mr. Shooter but could not recall the topic of discussion. She remembered being in the hotel lobby bar area, and stepping away from the group to speak with Mr. Shooter. They stood near the hallway that led to the hotel rooms so that they could hear one another. To the best of Ms. Fann's memory, Mr. Shooter's back was to the hallway and Ms. Fann was facing the hallway.

When they were speaking, Ms. Fann said it was likely that their conversation was interrupted by other attendees they knew who were walking past them. Thus, although Ms. Fann and Mr. Shooter intended to speak to one another, they were also taking breaks to talk to others around them who happened by.

Ms. Fann recalled a young woman (Ms. Zika) walk past the two of them, then turned around

after walking down the hallway, come back, and approach Mr. Shooter. She does not recall what Ms. Zika said to Mr. Shooter, but believed Ms. Zika mentioned something about not appreciating something. After Ms. Zika walked away, Ms. Fann looked at Mr. Shooter and asked him what it was about. Mr. Shooter responded that he did not know. Ms. Fann and Mr. Shooter then rejoined their group.

Ms. Fann could not tell us one way or another whether Mr. Shooter made any comments about Ms. Zika or made any gestures toward her. She did not remember seeing or hearing anything and told us that Mr. Shooter never told her that anything had happened. Ms. Fann mentioned, however, that there was "no way" Mr. Shooter was drunk at the time of this run-in with Ms. Zika, but he had likely had a couple of drinks.

(h) GREG WILKINSON'S RECOLLECTION OF THE EVENT.

We spoke to Mr. Wilkinson because we understood that he may have heard Mr. Shooter make a comment about Ms. Zika at the conference. Mr. Wilkinson could not remember much about the event and had difficulty recalling the timeline of what he could recall. He recalled, however, witnessing only one interaction between Ms. Zika and Mr. Shooter.

Mr. Wilkinson thought he had been in a talking circle with Ms. Zika, Ms. Jacobs, and two others. Mr. Shooter was not with them at the time. Mr. Wilkinson believed this was the first night of the conference at Intergov, but was not positive.[67] He said that Ms. Zika walked away to talk to another group of people, and Mr. Shooter came into the talking circle at that point. Mr. Wilkinson believed Mr. Shooter made a comment about Ms. Zika's butt, likely about bobcats, but Mr. Wilkinson could not recall the exact words.

Shortly after Mr. Shooter made his comment, he saw Ms. Zika approach Mr. Shooter. He believed Ms. Zika either overheard the entire comment or part of it, and believed that was why she had confronted Mr. Shooter. Mr. Wilkinson does not recall exactly what was said but remembered Mr. Shooter apologizing and saying something to the effect of: "I'm sorry. I didn't mean anything by it." Mr. Wilkinson said that Mr. Shooter acknowledged that he had made an inappropriate comment. Mr. Wilkinson thought Mr. Shooter's apology put an end to the incident for both himself and Ms. Zika.

We asked whether it was possible Ms. Zika was discussing an incident other than the bobcats comment with Mr. Shooter. Mr. Wilkinson was confident that they were discussing the bobcats comment.

Mr. Wilkinson did not witness any other encounters between Ms. Zika and Mr. Shooter.

(i) CONCLUSION.

Of the four allegations Ms. Zika makes against Mr. Shooter, we conclude there is credible evidence supporting only *one* of her allegations.

We find credible evidence that Mr. Shooter made a crass and inappropriate comment comparing Ms. Zika's butt to "bobcats in a tote sack", in the hotel lobby bar, just before Ms. Zika confronted Mr. Shooter about his behavior. Mr. Shooter admits that he made this comment (and

[67] Based on our understanding, Intergov was on the *second* night of the conference. We believe it is likely that Mr. Wilkinson's memory may have confused events and timeframes.

others, like Mr. Wilkinson[68] and Ms. Jacobs, corroborate the comment was made). Mr. Shooter's bobcats remark was subjectively unwelcome and resulted in Ms. Zika's embarrassment, anger, and humiliation--all as evidenced by her reaction to the comment and the apparent spectacle that followed. There is no plausible way, under the facts as we understand them, that Mr. Shooter could have expected this comment to be remotely acceptable to Ms. Zika--or any reasonable person under these circumstances. Regardless of whether she heard or knew the exact words spoken, (i) she claims to have heard something, (ii) Mr. Shooter admits he made the bobcats comment, and (iii) his words were degrading and made based on her sex. Mr. Shooter's actions in this regard also contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

That said, we *cannot* conclude that credible evidence supports any of Ms. Zika's remaining allegations.

First, although we find Ms. Zika's text to Dr. Dodenhoff concerning the kiss significant, we cannot conclude that this text alone proves that Mr. Shooter blew a kiss at her. While it is possible that she simply omitted this detail from the information she relayed to Ms. Cichelero, Mr. Genaro, and Ms. Jacobs, we find it unlikely that she would not have shared this information with at least one of them--especially in light of her assertion to us that she *did* tell Mr. Genaro (who had no recollection of being told as much) and that Ms. Cichelero is Ms. Zika's close friend (and likewise had no recollection of a *specific* gesture). Moreover, our interviews with Ms. Zika, Ms. Cichelero, Mr. Genaro, and Ms. Jacobs left us with the strong impression that Ms. Zika has no problem speaking her mind, or discussing issues or events with others. For example, we understand that she shared the details of a very personal story, involving harassment, with Mr. Genaro and Ms. Jacobs (after knowing Ms. Jacobs for the mere length of the conference). It seems Ms. Zika shared that very personal story as part of an attempt to justify to others her reaction to Mr. Shooter at the conference. Given all this, we believe it is unlikely Ms. Zika would not share with Mr. Genaro or Ms. Jacobs that Mr. Shooter blew her a kiss, if he had done so. Moreover, no one we interviewed claims to recall seeing Mr. Shooter blow Ms. Zika a kiss. On balance, we cannot conclude that this incident actually occurred.

Second, we also cannot conclude that Mr. Shooter made additional comments about Ms. Zika (either about her legs, or that he would "take that ass for days"). Ms. Zika told Mr. Genaro that a man (Mr. Shooter) had made "crude comments" toward her on one occasion during the 2017 conference. Ms. Zika told Ms. Jacobs that she knew Mr. Shooter had "said something" during the incident in the hotel lobby after dinner. Yet, Ms. Zika's texts to Dr. Dodenhoff relay that Mr. Shooter made only *one* comment about her, after which she confronted him, and the *only* comment Ms. Zika mentioned to Dr. Dodenhoff was one about her legs. We believe that, in light of all the credible evidence, the purported "legs" comments was actually the bobcat comment.

As for the "take that ass for days" comment, we find it difficult to believe that Ms. Zika would not have also mentioned Mr. Shooter making that specific comment (or at least having made

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[68] Although Mr. Wilkinson believed this occurred at the Intergov party, our interview with him made obvious that he did not have a clear recollection of the timeline of events. For example, he believed that Mr. Shooter made these comments on the first night, but at the Intergov party. We find it likely that Mr. Wilkinson is confusing the timeline of events. Regardless of timing, however, Mr. Wilkinson's account is consistent with other witness statements--including Mr. Shooter--indicating that Mr. Shooter made an inappropriate comment about Ms. Zika, which she confronted him about.

multiple comments) to Dr. Dodenhoff the night of the alleged incident, or to Ms. Jacobs, or Mr. Genaro, or Ms. Cichelero.[69] We reach this conclusion, given (1) the intensely offensive nature of the alleged comment, and (2) Ms. Zika's apparent repeated discussions of the incident (for example, with Ms. Jacobs) over the course of the conference, in what seemed to be an effort to justify her reaction or seek assurances from others that her reaction was appropriate. It is very difficult to conclude--under the facts as we understand them, and based on our interview with Ms. Zika and others--anything other than: had Ms. Zika heard this precise statement, she would have at least told someone about it. There is no evidence, however, that she did so--let alone corroborating evidence that Mr. Shooter made the statement.

Finally, we cannot conclude that Mr. Shooter made a gesture at Ms. Zika mimicking oral sex. Based on our interviews, and witness recollections, Ms. Zika did not tell Dr. Dodenhoff, Ms. Cichelero, Mr. Genaro, or Ms. Jacobs about this gesture, but told each of them other details about her alleged interactions with Mr. Shooter (and told Ms. Jacobs about a very personal unrelated harassment incident). While it is possible Ms. Zika simply decided not to tell anyone this detail for unspecified personal reasons, we do not believe it to be probable. No persons who were present at the time Mr. Shooter would have made this gesture saw it happen. While Ms. Fann could not speak one way or another about whether it happened, other witnesses denied seeing Mr. Shooter make this gesture at the time Ms. Zika alleged it occurred--just before she confronted him. For example, Mr. Wilkinson, who was present during the bobcats comment, which we believe was the comment made just before Ms. Zika confronted Mr. Shooter, never saw Mr. Shooter make any type of oral sex gesture after his bobcats remark. Similarly, Ms. Jacobs did not see Mr. Shooter make any gestures resembling oral sex in the hotel bar lobby that first night.[70] Given all this, and the lack of corroborating evidence, we find there is no credible evidence to support this allegation.

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[69] We find it difficult to conclude that Ms. Zika confused the "bobcats in a tote sack" comment (the comment Mr. Shooter admits making and others corroborate he admittedly made) with the alleged "I'd take that ass for days" comment (a comment that is not corroborated anywhere). Indeed, her text messages sent shortly after the encounter only reference *one* comment *about her legs*.

[70] This is not to say that Mr. Shooter has never made an offensive *gesture* toward another person. Ms. Love, for example, would beg to differ. *See*, above. That said, according to some who know Mr. Shooter, they leave the impression that this sort of *public* activity is a bridge too far, even for Mr. Shooter. Ms. Cobb, who socializes with Mr. Shooter often, stated that she has witnessed Mr. Shooter make off-color jokes but never any gestures toward anyone. Mr. Borelli, who has known Mr. Shooter for five years, also stated that he has never seen Mr. Shooter be vulgar with or toward a woman. Indeed, by many accounts--who each acknowledge Mr. Shooter's penchant for inappropriate, off-color, and improper sexualized comments--this behavior would apparently be out of character for Mr. Shooter. We cannot say for sure whether this is generally the case (nor are we charged to do so). But we can conclude, at least in this instance, we are aware of no credible evidence corroborating the allegation that Mr. Shooter made this *specific* gesture.

7. <u>Mr. Shooter's Comments To Representative Athena Salman On The House Floor.</u>

Ms. Salman alleges that during the first week of the 2017 session, she was introduced to Mr. Shooter for the first time, and he responded, on the House floor: "You'll be a nice view to look at."

(a) <u>Ms. Salman's Allegations.</u>

Ms. Salman informed us that the <u>Arizona Capitol Times</u>, in an article, accurately summarized her allegation against Mr. Shooter. She informed us that her interaction with Mr. Shooter occurred on the House floor. She stated that this interaction was the first time she had met Mr. Shooter. It made her feel uncomfortable and as though Mr. Shooter had reduced her to her appearance. His remark made her realize that she would have to navigate a culture of discrimination against women at the House. At the time he made this comment, Ms. Salman was not aware that Mr. Shooter had a reputation for making inappropriate comments or off-color remarks.

(b) <u>Mr. Shooter's Response.</u>

Mr. Shooter admitted to making a comment similar to what Ms. Salman alleged. Mr. Shooter recalled he said something to the effect of: "You'll be a pretty addition to the House."[71] Mr. Shooter also states: "I am amazed my statements have such a profound effect on people."

He also acknowledged that he intended his remark to be a commentary on her looks. He noted, however, that he intended it as a compliment and said it to make Ms. Salman feel welcome. Mr. Shooter said that his comment was not meant to be "sexual". Mr. Shooter stated that he believed women like to feel pretty and that he tells a lot of women they are pretty, even when he thinks they are *not* pretty, because he wants to make people feel attractive.

(c) <u>Conclusion.</u>

We find Ms. Salman's subjective perception credible. She had never spoken with, or formally met, Mr. Shooter--a colleague--before that day. Given her new position in the Legislature, we believe she was sincere in stating that she found Mr. Shooter's comment inappropriate and unwelcome.

We also find that a reasonable person would find Mr. Shooter's comment to be degrading and made on the basis of sex. Mr. Shooter admittedly made this remark because (1) Ms. Salman is a woman and (2) apparently he wanted to make her feel pretty--as opposed to welcome her to the Legislature on the merit of her own achievements and treating her as an equal. We believe a new female legislator, meeting a senior legislator (and chairperson of the Appropriations Committee) for the first time on the House floor, would feel demeaned and humiliated by a blatant comment reducing her merit to her appearance (and the implication that Mr. Shooter looks forward to ogling at her). While there may be a time and a place to compliment a person's appearance, we believe a reasonable person would find it offensive if a senior colleague's first and only remarks in meeting her focused on her ability to add to the sexually aesthetic pleasantness of the House. Mr. Shooter's actions contributed to "[a]n environment that a reasonable person would consider hostile or abusive, and the person who is the object of the harassment perceives it to be hostile or abusive." *See* Policy. Accordingly, we find that Mr. Shooter's behavior amounted to the sort of harassment

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[71] Mr. Shooter started by stating: "I remember stating …" only to then interject "If I remember". Obviously, he either remembered or he did not. Suffice it to say, we believe he remembers the interaction and his comment on Ms. Salman's physical appearance.

that the House's Policy was developed to prevent, including (1) discrimination and (2) conduct contributing to a hostile work environment.

8. REPRESENTATIVE WENONA BENALLY'S INTERACTION WITH MR. SHOOTER IN THE HOUSE MEMBERS' LOUNGE.

Ms. Benally alleges that she overheard Mr. Shooter tell an offensive and sexually suggestive joke to another Representative, in her presence, while they were in the House Members' Lounge.

(a) MS. BENALLY'S ALLEGATIONS.

Ms. Benally recalled that the incident occurred around the end of March or beginning of April 2017, during a floor session. She recounted that she had to leave the floor, during debate, to participate in a conference call. She moved to the Members' Lounge, and sat on one end of a couch. She was the only person in the Members' Lounge at that time.

Approximately 10 minutes before her call ended Mr. Shooter exited the floor and sat on the couch across from her, on the opposite end. They were not directly across from one another. Ms. Benally recalled that another legislator sat across from Mr. Shooter, on the same couch as Ms. Benally, but at the opposite end.

Ms. Benally could hear the two men speaking as her conference call ended, because they were talking loudly and were close to her. She stated that they were talking and laughing. Mr. Shooter started the conversation stating that the floor debate was taking too long and people were talking too much and grandstanding. Ms. Benally told us that Mr. Shooter routinely made these comments and jokes, and she was not offended by them. When Ms. Benally's call ended, she turned her body toward the men, because she thought that they were going to continue to joke about the floor debate. Ms. Benally could not recall whether other legislators were present in the Members' Lounge at this time.

Ms. Benally claims that Mr. Shooter said to another legislator: "Well [legislator], I keep my gun locked and loaded right here." Mr. Shooter then patted the upper inside of his thigh, close to this groin. Mr. Shooter then added, "I like to keep it under my desk." The other legislator laughed and responded to Mr. Shooter, something to the effect of that he did not "swing" that way. Ms. Benally could not recall Mr. Shooter's exact retort, but told us that he said something about approaching the other legislator from behind. While Mr. Shooter was in the middle of making this statement, Mr. Shooter locked eyes with Ms. Benally, immediately stopped talking, abruptly stood up, and walked back to the floor. The other legislator followed.

Ms. Benally stated that she felt invisible and stunned. She wondered how two male colleagues could have this conversation in front of her, and was shocked that Mr. Shooter was talking about his penis in front of her. That said, Ms. Benally did not believe Mr. Shooter was directing this comment at her, but she perceived that Mr. Shooter felt like he could say whatever he wanted, regardless of his audience. She did not believe Mr. Shooter made this comment to make her feel uncomfortable.

(b) **Mr. Shooter's Response.**

Mr. Shooter vaguely remembered this event after we recounted Ms. Benally's recollection.[72] He told us that his joke was not intended for Ms. Benally. He acknowledged, however, that he was probably talking about his penis and not about a gun.

(c) **Conclusion.**

While we find that this incident occurred, we do not find that it violates the Policy. We cannot conclude that Ms. Benally felt subjectively degraded, humiliated, or harassed by Mr. Shooter's juvenile banter with another legislator. During the interview and without prompting, Ms. Benally told us that she did not believe her allegation constituted harassment. When asked why, Ms. Benally stated that she did not trust the process--a response that did not necessarily answer the question posed.[73] Ms. Benally said she felt harassed only after we later asked her, bluntly, whether she felt harassed by this conduct. This response, however, came *after* her spontaneous remark that she did not believe Mr. Shooter's conduct constituted harassment. We consider her spontaneous remark that she did not believe Mr. Shooter's conduct constituted harassment to be a more credible recitation of her true feelings about the incident.

We believe that she thought the incident she witnessed was inappropriate. We also find credible that she believes some at the House have a deep-rooted misogynistic attitude--an inquiry far beyond the scope of our investigation, however we cannot ignore that some of the conduct we find to have occurred, and in some instances been minimized, is certainly consistent with that sort of culture. We have not ignored Ms. Benally's concerns, and we have conveyed them to our client. Ms. Benally seems eager to be a constructive part of that process. We do not, however, believe that Ms. Benally felt subjectively discriminated against, because of her sex, at the time Mr. Shooter made those comments. By Ms. Benally's own account, the circumstances strongly suggest Mr. Shooter did not intend for Ms. Benally to hear his conversation with another legislator, and it seems Mr. Shooter may have been unaware that she was paying any attention to their conversation. As soon as Mr. Shooter became aware that Ms. Benally was listening, he immediately stopped talking and left the room. Mr. Shooter also stated that his remarks were intended for the other legislator (not Ms. Benally) only, and we believe that to be the case given how Ms. Benally described the conversation to us. Indeed, Ms. Benally knew that Mr. Shooter was not directing the comment at her, and she told us that she forgot about the entire incident for nearly two weeks, after which time something else triggered this memory for her.

In the end, colleagues engaging in crude banter should be aware of third parties who may not welcome this type of conduct. And under the right circumstances, such banter may well violate

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[72] Initially Mr. Shooter recounted a very different event, which he apparently believed to be the allegation Ms. Benally had made. That event concerned Mr. Shooter walking from the Members' Lounge to the floor, when another male legislator suddenly stopped, Mr. Shooter bumped into him, and then apparently said "be careful big fella, this thing is loaded." Mr. Shooter stated that he did not know where Ms. Benally was in relation to that incident but that it was not directed toward her and was just "another ill-advised comment". That incident, however, was not the incident Ms. Benally reported to us. Regardless, Mr. Shooter's recounting of a totally different incident, and characterization of it as "ill-advised", reveal his knowledge that his irreverent actions (apparently plentiful enough to not know for sure which action is at issue) are not always appropriate.

[73] We note that Ms. Benally expressed a strong distrust of the investigation process throughout the interview. She stated that she believed nothing would happen, because nothing happened "before." She based this opinion on her previous reporting of this incident to her leadership and what she perceived to be a lack of follow up with her.

the Policy. That said, we do not find, under these circumstances, a violation of the Policy.

9. <u>Allegations Concerning Comments Made About Representative Darin Mitchell.</u>

We interviewed Mr. Mitchell and his wife, Sondra, concerning their allegations against Mr. Shooter. While they shared with us various general complaints about his behavior and demeanor throughout the time they have known him,[74] the focus of their complaint relevant to this investigation concerned statements Mr. Shooter made, concerning Mr. Mitchell to Adam Stevens at a 2016 GOP Awards Dinner at the Biltmore. The Mitchells had no personal knowledge of these events and they were not present when Mr. Shooter made his comments.[75] Because of their lack of first-hand knowledge, we interviewed Adam Stevens to receive his firsthand account.

(a) <u>Adam Stevens' Recollection Of Mr. Shooter's Statements Concerning Mr. Mitchell And His Wife.</u>

Adam Stevens stated that he called Mr. Mitchell the day after the 2016 GOP Awards Dinner to tell him what had happened. Adam Stevens explained that he went to the hotel bar after the dinner with a handful of other people.[76] As they were sitting together, Adam Stevens could hear Mr. Shooter approaching from behind him, and all the people at his table turned to look at Mr. Shooter. Once at the table, Adam Stevens recalled that Mr. Shooter spoke with him for approximately 1.5 hours. Their conversation began with small talk and then Mr. Shooter brought up the then-occurring election for Speaker of the House. At that time in 2016, Mr. Shooter, Mr. Mitchell, and others were in the running.

Adam Stevens stated that Mr. Shooter said something to the effect of: "You're looking at the next Speaker of the House". Adam Stevens then asked Mr. Shooter how he was going to win and whether it was strange running against someone from the same district.

Mr. Shooter then told Adam Stevens that he would take Mr. Mitchell into a bathroom and "ass f***" him, make Sondra Mitchell watch, and do it until Mr. Mitchell loved Mr. Shooter and would vote for him. Adam Stevens said that Mr. Shooter made "air humping" movements while he made this comment.

Adam Stevens said it was an uncomfortable moment and perceived that the women at the table were uncomfortable.[77] He also noted, however, that he did not believe anyone at the table took

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[74] Mr. Mitchell was forthcoming about his general dislike of Mr. Shooter, and stated that the feeling was mutual from Mr. Shooter. Mr. Mitchell conveyed that their dislike for one another was well known at the Legislature. Mr. Shooter agreed.

[75] Mr. Mitchell also made additional allegations against Mr. Shooter concerning what seem to be nothing more than politicking. We questioned Mr. Shooter about these allegations, who denied that any of his actions were done improperly or for an improper purpose. We ultimately concluded they did not fit within the realm of potential harassment or discrimination for purposes of our investigation. They appeared to be more of a product of political brinksmanship, which Mr. Mitchell also acknowledged.

[76] We reached out multiple times to three other individuals sitting with Adam Stevens in the bar after dinner. Matt Morales did not return any of our calls and Aimee Rigler declined to speak with us. Boaz Witbeck was the only other person present who was willing to speak with us about Adam Stevens' allegations.

[77] Again, we were unable to confirm whether any women at the table were uncomfortable because they were either (1) unidentified, or (2) if identified, we were unable to reach them, or (3) they declined to speak with us.

Mr. Shooter's comments seriously. Adam Stevens said he called Mr. Mitchell the next day.

(b) <u>**Mr. Shooter's Response**</u>.

During our initial interview, Mr. Shooter did not recall this specific incident in 2016. He acknowledged that he would have said "rough stuff" about Mr. Mitchell if he was "fired up" (*i.e.*, angry) at the time. More importantly, during our initial interview, Mr. Shooter *denied* that he would have said anything sexual about Mr. Mitchell.

Then, on January 9, 2018, Mr. Shooter read a statement on the House floor, apologizing for some of the allegations made against him. *See* <u>**Exhibit 2**</u>. In this statement, *Mr. Shooter acknowledged making comments at this 2016 GOP dinner and described them as relating "to buggery"*. Buggery is a synonym for sodomy. Either Mr. Shooter was not being totally forthcoming during our interview, or upon reflection he determined that the allegations were in fact true. Regardless, we interpret Mr. Shooter's January 9, 2018 statement as an *admission* that Adam Stevens' allegations about Mr. Shooter's comments are accurate.

(c) <u>**Gretchen Jacobs Stated These Comments Were Likely Made**</u>.

Ms. Jacobs confirmed that Mr. Shooter likely made comments about Mr. Mitchell at the GOP dinner. Apparently, when Ms. Jacobs and Mr. Shooter discussed this allegation, Mr. Shooter told her that he did not recall making that statement, but that it sounded like something he would say. Ms. Jacobs told us that she agreed with him that, indeed, he probably did say it.

(d) <u>**Boaz Witbeck Was There, But Does Not Recall Any Comments**</u>.

Mr. Witbeck did not recall hearing any of Mr. Shooter's comments. He stated that he remembered seeing Mr. Shooter at their table, but Mr. Witbeck was engaged in a different conversation. He also told us that he did not believe Mr. Shooter stayed at their table for 1.5 hours straight, but would visit for a moment, then move along and talk to others, and then come back. In any event, Mr. Witbeck did not witness the alleged incident.

(e) <u>**Conclusion**</u>.

We conclude that Mr. Shooter made these awful comments to Adam Stevens (and probably around others) about the Mitchells. While the Mitchells may perceive Mr. Shooter's comments as inappropriate, unwelcome, and/or humiliating--*and correctly so*, Mr. Shooter did not make these comments directly to the Mitchells or, as far as we can ascertain, for their personal consideration. Indeed, we have no evidence that Mr. Shooter intended for his remarks to reach the Mitchells at all.

We do not discount the Mitchells' subjective feelings and find them completely credible. What Mr. Shooter said was horrible, unacceptable, and inappropriate. But we cannot conclude that his comments (1) made to a third party *non-complainant*, (2) who does not work at the House or with the House, (3) without the intent of having that third party actually convey those comments to the Mitchells, violate the Policy under these specific facts.

To be sure, our conclusion should not be read to condone such statements or conduct, or render such statements never to violate the Policy. Indeed, Mr. Shooter stated on January 9, 2018, that he "should have never said it", and he is absolutely correct in that regard. We find his conduct to be inappropriate and reprehensible. But, given the scope of the investigation, we are constrained to conclude that Mr. Shooter did not violate the Policy *under these specific circumstances*.

10. AN UNKNOWN CITY EMPLOYEE'S ALLEGATIONS AGAINST MR. SHOOTER.

In an Arizona Capitol Times article dated November 8, 2017, an unknown woman, identified as a "city employee" alleged that (1) she attended the 2015 League of Arizona Cities and Towns conference in Tucson, where (2) she met Mr. Shooter at an "after-hours" event. When she greeted him, he proceeded to hug her and grabbed her butt. She told the Arizona Capitol Times that she pushed him back and pulled away. When she went to tell her friends what happened, she stated that Mr. Shooter began mocking her.

We were unable to identify the person who made these allegations and, thus, could not confirm their veracity. Nonetheless, we asked Mr. Shooter whether he remembered this incident, but he did not. He stated that he likely hugged this unknown person, but denied that he would have hugged her in a "creepy way" or grabbed her butt.

We found no credible evidence to support these allegations and, thus, cannot conclude this incident even occurred.

11. The Alleged Incident At The Phoenix Public Market.

In a November 8, 2017 Arizona Capitol Times article, two unidentified female lobbyists alleged that Mr. Shooter made inappropriate sexual comments to them at the Phoenix Public Market during an education event. The article describes Mr. Shooter's comments as "extreme and sexual in nature", but does not detail any specifics. Geoff Esposito, however, was quoted in that article as corroborating the allegations.

(a) Geoff Esposito's Observations, And Recounting Of What He Was Told, By Someone Else, Allegedly Happened.

We were unable to identify the two lobbyists referenced in the Arizona Capitol Times article, and they did not reach out to us.

We began our investigation into these allegations by speaking with Geoff Esposito, who was quoted in the article concerning these allegations.

Mr. Esposito recalled that sometime during the 2017 session, likely near the beginning of it, he was at the Phoenix Public Market on a Thursday for a regular happy hour hosted by an educational organization. He was sitting in the outdoor bar area near the window that opens into the restaurant. From his viewpoint, he could see two young, female lobbyists inside the restaurant speaking with Mr. Shooter. He could not hear their conversation and did not observe any inappropriate touching. He also noted that around this same time, he was engaged in a conversation with his friends and, thus, his attention was directed more toward his own conversation.

Mr. Esposito then began receiving text messages from one of the lobbyists, which said things like "SOS". This prompted Mr. Esposito to enter the restaurant. He attempted to interrupt the two lobbyists' conversation with Mr. Shooter by introducing himself to Mr. Shooter. Mr. Esposito had never met Mr. Shooter before this event.

When Mr. Esposito approached, Mr. Shooter allegedly pressed his palm in the center of Mr. Esposito's chest, pushed Mr. Esposito away (physically moving Mr. Esposito) and said, "I'm working on something here, buddy." Mr. Esposito then stepped back into the talking circle and turned his back to Mr. Shooter, attempting to exclude Mr. Shooter from the conversation. As Mr. Esposito began engaging the lobbyists in conversation, Mr. Shooter almost immediately walked away.

Mr. Esposito provided us with a secondhand account of Mr. Shooter's alleged remarks as conveyed by those to whom they were allegedly directed, but Mr. Esposito made it clear that he did *not* have personal knowledge of any of the conversation between Mr. Shooter and the two female lobbyists.

We asked Mr. Esposito to provide us the names and contact information of the two female lobbyists. Mr. Esposito would not do so. We asked him to reach out to them, and ask if they would be willing to speak with us. He agreed to do so. We followed up with him after the meeting and he told us that the two female lobbyists would not speak with us. We understand from Mr. Esposito that the anonymous lobbyists, who are in their twenties, are afraid to come forward because they fear this investigation is a witch hunt, fear nobody will believe the story, and fear their careers could be compromised.

(b) Mr. Shooter's Response.

Mr. Shooter did not remember any details of this event, but recalled attending an event at the

Phoenix Public Market. He does not normally go there, and he could not recall the purpose of the event. He believed that he was the lone Republican at the event he attended. When asked whether he made sexual comments to anyone at the event, he adamantly denied doing so.

(c) CONCLUSION.

We cannot conclude that Mr. Shooter made sexually charged comments to two unidentified female lobbyists at the Phoenix Public Market, as alleged in the Arizona Capitol Times article, because we have no information, other than hearsay, that the incident occurred.

As we noted in the beginning of this Report, our investigation was never intended to be--and was not--a fishing expedition. We typically would not pursue the investigation of witness accounts without first having a complainant, *i.e.*, a person with firsthand knowledge of the alleged incident. In this instance, however, we interviewed Mr. Esposito: (1) for his firsthand account of Mr. Shooter's behavior toward Mr. Esposito; and (2) to request that he inform the two unnamed lobbyists that we would need to interview them before we could consider whether their allegations constituted a violation under the Policy.[78] Again, Mr. Esposito informed us that he had relayed our message to the unidentified lobbyists, but they never contacted us, and we were never provided with their contact information. Thus, regardless of how credible we find Mr. Esposito, because nobody with firsthand knowledge of the alleged incident has come forward, we cannot conclude there is any credible first-hand evidence that this incident occurred.

Similarly, even assuming that we find Mr. Esposito entirely credible, under the facts available to us, we cannot conclude that his allegation that Mr. Shooter physically pushed Mr. Esposito violated the Policy. First, we have no evidence corroborating the alleged pushing, and that alone gives us pause, because it appears that the only people who could provide that information are the anonymous lobbyists who refuse to speak with us. Second, and in any event, without more, there is no evidence that the alleged pushing--while highly inappropriate for anyone (especially a legislator) and improper--occurred in a manner that violates the Policy.

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[78] Although Mr. Shooter could have admitted to the allegations, we would still be unable to confirm that his actions were subjectively unwelcome without speaking with the complainants directly.

12. Mr. Shooter's Allegations Against Ms. Ugenti-Rita, Made In The Media, After She Went Public With Her Allegations.

(a) Mr. Shooter's Allegations.

After Ms. Ugenti-Rita came forward with her public allegations against Mr. Shooter, he made a statement to 3TV on Tuesday, November 7, 2017, apologizing in response to her allegations and stating he "apparently said things that were insensitive and not taken well."[79] Later that night, after learning of Ms. Ugenti-Rita's specific allegations, Mr. Shooter issued the following statement:

> "Earlier today I was told that Ms. Ugenti was upset by some comments I made, but I wasn't given any details on what she had accused me of saying. I responded that if I had said the wrong things I was sorry and that I would talk with her. Since then, I've actually seen the text of Ms. Ugenti's accusations and I absolutely withdraw my apology. I've been happily married for 41 years, I've never cheated on my wife, and there isn't a woman on this planet I would leave my wife for. Michelle and I got along well when we were both first elected, as we shared a similar irreverent sense of humor, were both conservatives, etc. But that's all.
>
> The trouble with Ms. Ugenti stems from my publicly voiced disapproval over how she has conducted herself personally, with staff, and later with legislation. While virtually every member of the legislature just whispered disapprovingly at Ms. Ugenti's conduct, I actually said things out loud. I was particularly critical of her carrying on a very public affair with House staff, specifically the House Speaker's Chief of Staff. I knew Frank, Michelle's husband and the father of her kids, and I thought it was a lousy thing to do. In fact, I complained about it to the Speaker at the time. Obviously, she didn't want my advice or opinion and she continued the affair until it destroyed her marriage. To say that we didn't get along after that time would be an understatement. Later I took offense to the way she screwed with really good bills, like being the only Republican to vote no on a Blue Lives Matter bill to better protect the police from violent assault.
>
> I can't speak to anything anyone else did or didn't do, but Ms. Ugenti is the only member of the Legislature to make masturbation jokes to a fellow member (and pastor) during a committee hearing, and to my knowledge she is the only member of the Legislature to carry on a very public affair with a subordinate.
>
> Ms. Ugenti is lying about me and I have asked Speaker Mesnard to have the entire matter investigated by the House Ethics Committee / Counsel.
>
> At the conclusion of their work, I will consider taking further legal action in this matter."[80]

Mr. Shooter's public statement raised two possible allegations concerning Ms. Ugenti-Rita's violation of the Policy: (1) an alleged extramarital affair; and (2) Ms. Ugenti-Rita's statement to another Representative, during a House Government Committee session, concerning masturbation.

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[79] http://www.azfamily.com/story/36788791/powerful-lawmaker-accused-of-sexual-harassment-at-az-state-capitol.

[80] *Id.*

Consistent with the Policy, we interviewed Mr. Shooter about his allegations.[81]

We asked Mr. Shooter about his personal knowledge of either of these incidents and how these incidents made him feel.

First, though not necessarily dispositive, Mr. Shooter did not have firsthand knowledge of either of the incidents. Neither Ms. Ugenti-Rita, nor the former staff member involved in the alleged affair, ever told Mr. Shooter that they had any kind of personal relationship, and he did not witness interactions conclusively evidencing any extramarital affair. Mr. Shooter also acknowledged that he did not know Frank Ugenti, but recalled seeing him once on the mall at the Capitol, despite his statement to 3TV. Similarly, Mr. Shooter was not in attendance at the 2012 committee meeting in which Ms. Ugenti-Rita made her comment, nor was he watching the comment contemporaneously when it was made.

Second, regardless of Mr. Shooter's firsthand knowledge, he made clear to us that he did not feel offended, harassed, or uncomfortable by either of the foregoing allegations. Neither incident was directed at him, or occurred in his presence.

(b) **<u>CONCLUSION</u>.**

Our approach to this investigation has been pointed and focused on allegations supported by persons with firsthand knowledge. In instances where allegations are made, but through hearsay and without corroboration by persons with firsthand knowledge, we could not conclude that they occurred or that they violated the Policy.

Under certain circumstances, we are sure that acts between separate parties, neither of whom lodge a complaint under the Policy, may constitute a violation of the Policy vis-à-vis a third person. However, this is not such a circumstance. Mr. Shooter readily acknowledged that he did not witness either of the allegations, nor feel that the conduct was harassing or otherwise discriminatory toward him on the basis of a protected class, such as his sex. His reason for making these statements appeared to align more with his objective of challenging Ms. Ugenti-Rita's credibility (that she was offended by certain alleged conduct). In the end, with regard to Mr. Shooter's public allegations against Ms. Ugenti-Rita, (1) he lacked firsthand knowledge, (2) he did not feel offended, uncomfortable, or otherwise harassed by the her alleged conduct, and (3) no persons with firsthand knowledge and a plausible claim of discrimination or harassment came forward to complain of a violation of the Policy regarding the incidents Mr. Shooter identified in the media.

Accordingly, under the facts as presented to us, we find that there is no credible evidence that Ms. Ugenti-Rita violated the Policy.

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[81] We corroborated that Ms. Ugenti-Rita made this statement, as stated in Section V.1(a). No other complainants came forward concerning this statement.

13. Allegations That Ms. Ugenti-Rita Engaged In, Or Facilitated, Unwelcome Harassing And Offensive Communications.

During the course of our investigation, multiple third parties, and Mr. Shooter, brought to our attention that Interviewee 2 and Interviewee 3 may have information concerning multiple violations of the Policy by Ms. Ugenti-Rita.

We approached these allegations in the same manner as those levied by third parties against Mr. Shooter. We reached out to Interviewee 2 and Interviewee 3, the persons we understood to have personal knowledge of the alleged incidents, to determine whether they would participate in an interview with us. They both did so.[82]

(a) The Alleged Unwelcome Harassing And Offensive Communications.

Interviewee 2 and Interviewee 3 described to us three specific incidents involving Brian Townsend and possibly Ms. Ugenti-Rita.[83] The conduct involved unsolicited, sexually explicit communications from Mr. Townsend, possibly with Ms. Ugenti-Rita's knowledge and participation. We have no doubt that the unsolicited, unwelcome, and harassing contact occurred and would qualify as a violation of the Policy, leaving the only question being whether and the extent to which Ms. Ugenti-Rita participated in, or knew of, the alleged misconduct.

(b) Ms. Ugenti-Rita's Response.

Ms. Ugenti-Rita unequivocally denied any knowledge of, or involvement in, the conduct. We found her testimony in this regard credible. She was visibly distraught, briefly lost the composure and confidence she had generally displayed during our interactions with her, expressed genuine surprise and shock, and conveyed sincere sympathy for Interviewee 2.[84]

(c) Mr. Townsend's Response.

Mr. Townsend corroborated Ms. Ugenti-Rita's denial of involvement or knowledge, taking complete ownership for the alleged conduct and explaining that he acted in this manner to hurt and humiliate her. While we noted his lack of credibility in connection with other matters, we observed a visceral reaction from him when confronted with these allegations. Mr. Townsend immediately became emotional, expressing that he knew the discovery of his actions would be the "death knell" in his career and relationship with Ms. Ugenti-Rita. Although he attempted to calm himself several times, he would become wrought with emotion time and again as we pressed him further for answers and explanations concerning the allegations and Ms. Ugenti-Rita's potential involvement. He would cry at times and appeared to tremble throughout the discussion of this topic. His answers and recollection were consistent throughout and consistent with the information we had already

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[82] If Interviewee 2 and Interviewee 3 had chosen not to participate in these interviews, we likely would have reached the same conclusion as we did in other similar scenarios--which we were unable to conclude the event happened, because of a lack of credible evidence.

[83] Both individuals also conveyed a fourth incident to us, which we have concluded is immaterial to our ultimate conclusion.

[84] Before finalizing this Report, we reached out to Interviewee 2 to inform the Interviewee of Ms. Ugenti-Rita's denial of involvement to provide Interviewee 2 with an opportunity to respond. Interviewee 2 did not deny that Ms. Ugenti-Rita may not have been involved and "hoped" that was the case.

obtained.

(d) **CONCLUSION.**

While we conclude the foregoing incidents occurred, we found no independent, credible evidence that Ms. Ugenti-Rita was involved in, or even knew of, those incidents. To the contrary, the independent, credible evidence supports only a finding that Mr. Townsend *acted alone and without Ms. Ugenti-Rita's knowledge or participation* when committing the egregious and potentially unlawful acts at issue. Thus, we conclude that, with regard to these allegations, Ms. Ugenti-Rita did not violate the Policy.

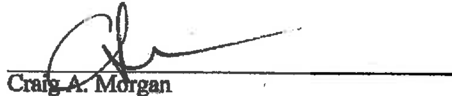
VI. SUMMARY.

As we stated at the beginning of this Report, our sole function was to investigate allegations reported to us that appeared to be supported by someone with personal knowledge of the alleged misconduct, or other verifiable evidence. We were not tasked with providing any recommendation to the House about how to address those allegation that we found credible and in violation of the Policy. After conducting dozens of interviews, often several hours in length, and reviewing all evidence offered to us, our investigation led us to the following findings:

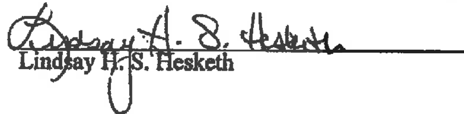
1. There is credible evidence that Mr. Shooter has violated the Policy. His repeated pervasive conduct has created a hostile working environment for his colleagues and those with business before the Legislature. Although we could not conclude that *all* of the allegations made against Mr. Shooter occurred, or if they did, also violated the Policy, there remain several credible allegations evidencing that Mr. Shooter has engaged in a pattern of unwelcome and hostile conduct toward other Members of the Legislature and those who have business at the Capitol. That pattern of conduct has occurred from the time he was first elected to the Senate to as recently as 2017; and

2. While we investigated multiple allegations against Ms. Ugenti-Rita, we could not conclude that there is any independent, credible evidence that Ms. Ugenti-Rita personally engaged in, or otherwise participated in, conduct that violated the House's Policy.[85]

Respectfully submitted this 29th day of January, 2018.



Craig A. Morgan



Lindsay H. S. Hesketh

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[85] We note that the investigation and final Report would not have been possible without the support of (1) the House and its many employees, (2) the trust of, guidance from, and collaboration with the House's bipartisan special investigation team, and (3) the cooperation of all interviewees, including those who are not identified in in this Report.

EXHIBIT 1

June 30, 2011 / 6/1/11

after the TORT reform meeting I went to lunch with Don Shooter reluctantly. He proceeded to thank me for spending time with him. It got awkward fast b/c Sen. Shooter wouldn't stop telling me how attracted he was to me & how he thinks about me constantly. He said he has only felt this way about 3 women total in his life and he can't explain why he is so attracted to me but he's going to embrace it. I don't know how to respond at this point - I start to get anxious. I start to fidget in my seat. I tell him thank you, but really I want to tell him to stop!

Of Course, this isn't the 1st time Sen. Shooter tells me how infatuated he is with me. But for some reason it feels different this time - I guess... maybe... for the 1st time I can see he's not ... I don't know why he's telling me all this - I am constantly reminding him how happily married I am - but he is not fazed. The point where it gets really wierd is when he tells me that he loves me and asks if there is an oppurtinity for "us" to be together in the future. Just then he bursts out "I have been married for 32 years and have never done anything" - he says this as if its suppose to give me peace of mind and convince me he really is a honorable guy.

About a week before this and unprompted, Sen. Shooter tells me that the only reason my #2644 bill got thru the senate was b/c of HIM - he said it was dead & because he blew life back into it it was able to pass. What a demeaning arrogant thing to say. I took this as a threat! And then he had the audacity to ask me "do I feel uncomfortable b/c he is such a powerful senator?" He continues to go on & on about how he was the

DS 00194

only reason my bill passed & kept referring to himself as a powerful senator. the implication he was making was that I had to rely on him & if I wanted my bills to pass in the future I had to continue to give him my time and attention.

Here's Another example of Sen. Shooter asserting him & his authority.

Before he told me how instrimental he was in my bill passing I was making proffesional small talk & told him about a few people I was trying to get ahold of for business. like a typical alfa male he called each one of these ind. & told them they had to call me. This completely undermined me & I found it totally out of line. When these ind. called me back & told me Sen. Shooter insisted they call me I was embarresed & angry.

EXHIBIT 2

DS 00196

Point of personal privilege:

Our legislative community is currently going through an intense period of self-evaluation on the topic of how we treat each other, where we have been failing to do things right, and how we need to do things better.

My own involvement in all of this has been greatly magnified as a result of a complaint that was filed against me for reasons that I believe are largely unrelated to the complaint itself.

But that complaint was followed by a number of additional complaints, the majority of which were sincere and which exposed me to the knowledge that my actions were not always received as intended, and that worse still, they caused genuine discomfort or pain.

At first, my response was largely defensive, borne of frustration at a few complaints that were not true or were made for a personal or political vendetta.

But it would be a mistake to treat each and every complaint the same, if I failed to learn from legitimate complaints, and if I failed to recognize and apologize for those actions that caused damage or hurt.

We, as a larger Capitol community, cannot begin to heal until those of us who have made mistakes begin the process ourselves. For me, that means learning and changing, so I stand before you today because it is my desire that we now begin to heal.

The healing won't start in earnest, at least with respect to the people whom I have hurt, without me recognizing that comments I have made in jest, over the past seven years, were not received in the spirit in which they were intended. Quite the contrary. Some were jarring, insensitive, and demeaning.

I don't need to wait for an investigative report to know that.

In the past, when I've told a joke that landed badly and realized it, I have always apologized. My purpose is always to entertain and to get people smiling and laughing, and that has been my style as a farmer and a legislator. But when someone reacts badly or tells me I've hurt their feelings I feel terrible and try to immediately remedy it.

It has been hard to sit on my hands during this political and legal process and not acknowledge that I care. I want to get it right and I want to make it right.

I was beyond embarrassed to hear that what I thought were welcomed and well-intentioned hugs were perceived as creepy and lecherous. I didn't know. As soon as I did know, I have been – and am, so sorry.

I will confess that there were times that, when hearing that I had offended someone with a boorish comment or that- what I intended as a simple hug turned into someone believing that I had crossed some line, I was sorry but, I also reacted defensively and thought to myself that some people are just too sensitive.

It has taken me time to understand, that - I - have been insensitive, and it is unfair to expect everyone to react to things the way I might react. If I'm going to be a comedian, I have to understand and be sensitive to my audience, not blame them when my jokes fall flat.

I now know that comments intended to be hospitable, harmlessly flirtatious or outrageous –and above all intended to be humorous, weren't at all humorous and caused others to believe I did not value who they are as individuals. I've taken all of this very hard because those who know me well, know that under all of the clowning – the schtick I put on– I care a great deal.

Nor was this reaction limited to how *women* reacted to my behavior. During this investigative process, I learned that I not only offended women; one complaint was even from a man!

I learned that a crass and offensive comment I made in jest at an after-hours event to a legislative candidate-- in response to a political prediction-- was perceived as sexual harassment which I never would have imagined. My sarcastic response related to buggery. Repeating my response now, during the day, in front of my colleagues, including women, is evidence enough that I should have never said it. It's a little rough. This candidate interpreted my remarks as serious, not sarcastic, for which I am embarrassed and deeply regretful. I look forward to apologizing personally.

It is important that you all know that while my actions have unintentionally offended some, I have never attempted to kiss anyone, made obscene gestures at a woman, nor sought a tryst or sexual relationship. It may seem inconsistent with my attempts at humor, but I have lived my life as someone who absolutely reveres and respects women. I have been blessed to be married for 41 years to an incredible woman, to whom I have remained devoted.

I was brought up to be a gentleman who will hold the door, pull out the chair, stand when a woman leaves the table or lend her my jacket when she is cold.

However, I now am acutely aware that not everyone understood my attempts at humor and resented that I did not show the respect and value each individual deserves. That is one of the things that bothers me the most.

I am sorry for the distraction and strain that this matter and the subsequent investigation have caused all of you. That was not my intent when I asked for the investigation. I don't want to go one more day without apologizing and honoring all of you by not only saying I'm sorry, but by doing better. This has been a painful process for all. Hopefully to those I hurt, you feel empowered for speaking up. Your courage has already had a profound impact on the way I relate to others. I am sorry.

I also want to tell all of you that I am still your friend and I still want to hear from you. I especially want to hear if I'm doing something wrong. I wish that the people who came forward months or years later had said something immediately at the time so that I could have apologized and made improvements right away. But, I understand why they didn't. I hope that while I strive to be better, you all help me along the way if you see things I can improve. It is time to repair and begin to heal. I want to get this right.

It can be tough to teach old dogs new tricks, but this old dog can and will do better. I look forward to personally listening and expressing my remorse once the investigation is over - to the extent those I have offended are interested. I am sorry.

Thank you.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Donald M. Shooter, 10 Plaintiff, 11 v. 12 State of Arizona, et al., 13 Defendants. 14	No. CV-19-01671-PHX-DWL **ORDER**

15 Pending before the Court are motions to dismiss by Defendants Kirk Adams
16 ("Adams") (Doc. 12), J.D. Mesnard ("Mesnard") (Doc. 16), and the State of Arizona ("the
17 State") (Docs. 13, 21).[1] For the reasons that follow, the Court will grant these motions
18 with respect to Plaintiff Don Shooter's ("Shooter") § 1983 claim and will remand Shooter's
19 remaining state-law claims to state court.

20 **BACKGROUND**

21 I. Factual Background

22 On February 1, 2018, the Arizona House of Representatives voted 56-3 to expel one
23 of its members, Shooter, following the release of a report addressing allegations of sexual
24 harassment and other inappropriate conduct by him. In this lawsuit, Shooter contends his
25 expulsion was the result of a conspiracy between the Speaker of the Arizona House of
26 Representatives (Mesnard), the Arizona Governor's Chief of Staff (Adams), the State, and
27

28 [1] Adams, Mesnard, and the State will be referred to collectively in this order as "Defendants."

certain non-parties to suppress his attempts to expose corruption in the State's use of no-bid contracts. The facts alleged by Shooter, which the Court assumes to be true for purposes of the pending motions, are as follows.

Shooter alleges he "began to discover questionable practices related to State expenditures on technology" when he was the Chairman of the Senate Appropriations Committee. (Doc. 1-3 at 7 ¶ 6.)[2] Shooter further alleges he "found a concerted effort at the Department of Administration to direct work to specific, high priced, out-of-state companies by avoiding competition at the expense of Arizona workers and employers, and to the detriment of Arizona taxpayers." (*Id.* at 9 ¶ 17.)

To combat this purportedly shady dealing, Shooter introduced SB 1434—legislation that would address these concerns. (*Id.* at 10 ¶¶ 19-20.) The bill, however, was vetoed. (*Id.* at 10 ¶ 23.) Shooter pressed forward, reintroducing the bill in the next session. (*Id.* at 11 ¶ 24.) Representatives from the Governor's Office informed him the bill would once again be vetoed. (*Id.*) Nevertheless, Shooter continued his efforts to get the bill passed. (*Id.* ¶ 27.)

Shooter alleges his efforts coincided with harassment by Defendants. For example, Shooter contends he was "surveilled and followed by a private investigator." (*Id.* ¶ 29.) Also, each time Shooter would voice objections to Adams, who was the Governor's Chief of Staff, "a local television reporter would show up at the legislature with a camera man and aggressively follow and film Mr. Shooter, then run a story derisive of Mr. Shooter." (*Id.* at 12 ¶ 32.)

On November 1, 2017, Shooter told Adams "that he planned to use his subpoena power, granted to him as Chair of the House Appropriations Committee, to gain additional insight into the irregularities in the procurement process at the start of the next legislative session unless there was some movement to address the continued improper use of expensive, no bid contracts." (*Id.* at 13-14 ¶ 41.) In an effort to dissuade Shooter from

[2] Shooter began serving in the Arizona Senate in 2010 and switched to the Arizona House of Representatives in 2016.

these plans, Adams is alleged to have directed Representative Michelle Ugenti-Rita ("Ugenti-Rita") "to misconstrue[ ] [her] past friendship with . . . Shooter, as the basis for allegations of past sexual harassment by . . . Shooter." (*Id.* at 16 ¶¶ 55, 57.) Ugenti-Rita made these statements in a media interview on November 7, 2017. (*Id.* ¶ 54.)

After Ugenti-Rita's interview, the Speaker of the House of Representatives—Mesnard—is alleged to have "began the process, in coordination with Adams and another member of the Governor's Office, of inhibiting and discrediting . . . Shooter." (*Id.* ¶ 58.) Among other things, Mesnard pressured Shooter to resign. (*Id.* ¶ 60.)

Shooter didn't resign, instead asking for a complete investigation into the allegations against him. (*Id.* at 17 ¶ 62.) Shooter also asked the House to investigate allegations against Ugenti-Rita. (*Id.* ¶ 63.) In response, Mesnard appointed "a hand-selected committee of *his staff* to investigate the allegations" against Shooter and Ugenti-Rita. (*Id.* at 18 ¶ 68, italics in complaint.) Then, the hand-selected committee hired the law firm of Sherman & Howard to conduct the investigation into Shooter and Ugenti-Rita. (*Id.* at 19 ¶ 72.) This, Shooter alleges, was "the first time in the Arizona Legislature's history" that a "special investigation team" was appointed, rather than an Ethics or Special Committee being convened. (*Id.* at 27 ¶ 120.)

Shooter alleges that Mesnard gave preferential treatment to Ugenti-Rita throughout the investigation. For example, Mesnard suspended Shooter from his position as Chairman of the House Appropriations Committee (*id.* at 18 ¶ 69) but didn't suspend Ugenti-Rita from her position as Chair of the House Ways and Means Committee (*id.* at 19 ¶ 76). Additionally, Mesnard repeatedly asked Shooter to resign but didn't ask Ugenti-Rita to resign. (*Id.* at 19-20 ¶¶ 77-78.) Further, Mesnard agreed to pay a portion of the attorneys' fees incurred by Shooter, Ugenti-Rita, and Representative Rebecca Rios ("Rios") resulting from ethics investigations[3] but "immediately requested . . . Shooter not accept the offer." (*Id.* at 20-21 ¶¶ 82, 83.) Mesnard also paid Ugenti-Rita's attorney twenty-five percent

[3] An ethics complaint had been filed against Rios, making her the third legislator under investigation. (Doc. 1-3 at 20-21 ¶ 82.)

more than he paid Shooter's or Rios's attorneys. (*Id.* at 21 ¶ 84.) Finally, Mesnard unilaterally created a "zero-tolerance" policy related to sexual harassment, which he applied to Shooter but not to Ugenti-Rita or Rios. (*Id.* at 22 ¶ 92.)

Sherman & Howard ultimately issued a report determining that some of the allegations against Shooter were true. (*Id.* at 32 ¶ 136.) In contrast, the report concluded there was "no credible evidence" that Ugenti-Rita had "violated the Policy." (*Id.* ¶ 137.) Sixty-five of the seventy-five pages were dedicated to the investigation of the allegations against Shooter, while only one-and-a-half pages concerned the allegations against Ugenti-Rita. (*Id.* ¶¶ 135, 137.) Also, the report released to the public omitted "evidence of sexual misconduct by Ugenti-Rita [that] was far more egregious than any allegation against . . . Shooter," yet Ugenti-Rita was never disciplined. (*Id.* at 32-33 ¶¶ 139, 141.)

Four days after the report was disseminated to House members, the House voted to expel Shooter. (*Id.* at 28-29 ¶ 123.) Shooter had been told "he was entitled to five days to provide a written response to the investigative report," so the accelerated vote meant he wasn't given "the opportunity to meaningfully defend himself in a hearing before his peers." (*Id.*)

Shooter alleges that each of the actions by Mesnard and Adams was "undertaken to prevent . . . Shooter from issuing subpoenas and thereby making evident, high-level corruption." (*Id.* at 31 ¶ 134.)

II. Procedural Background

On January 29, 2019, Shooter filed this lawsuit in the Maricopa County Superior Court. (Doc. 1-3 at 5-46.) The complaint asserts four causes of action: (1) violation of Shooter's due process and equal protection rights, asserted through 42 U.S.C. § 1983; (2) defamation and aiding and abetting, and conspiracy to commit defamation; (3) false light invasion of privacy and aiding and abetting, and conspiracy to commit false light invasion of privacy; and (4) wrongful termination. (*Id.* at 42-45.)[4]

[4] The spouses of Adams and Mesnard are named as defendants in the complaint for the sole purpose of preserving claims against their respective marital communities.

On March 11, 2019, Adams removed the case to this Court with the consent of the State. (Doc. 1.)

On March 18, 2019, Adams filed a motion to dismiss for failure to state a claim. (Doc. 12.)

On March 18, 2019, the State joined the motion filed by Adams. (Doc. 13.)

On March 29, 2019, Mesnard filed a motion to dismiss for failure to state a claim. (Doc. 16.)

On April 19, 2019, the State joined the motion filed by Mesnard. (Doc. 21.)

On June 5, 2019, the Court heard oral argument.

LEGAL STANDARD

"[T]o survive a motion to dismiss, a party must allege 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *In re Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1144 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A]ll well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party." *Id.* at 1144-45 (citation omitted). However, the court need not accept legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 679-80. The court also may dismiss due to "a lack of a cognizable legal theory." *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015) (citation omitted).

DISCUSSION

I. Federal Claim: § 1983 Violation

The complaint asserts only one federal cause of action—a claim under 42 U.S.C. § 1983 premised on the allegation that Defendants, while acting under color of state law, "deprived Shooter of his rights to due process and equal protection." (Doc. 1-3 at 42-43 ¶¶ 179-185.) The complaint explains: "The actions taken to expel . . . Shooter deprived him of a protected liberty interest . . . . Shooter lost his seat and was defamed at the same

time. An individual who is terminated by the government has a protected liberty interest that is compensable if that individual is libeled at the same time." (*Id.* at 43 ¶ 184.) The complaint specifically alleges that Shooter was entitled to the following processes: (1) a hearing (*id.* at 39 ¶ 168); (2) the "right to examine his accusers and confront the witnesses against him" (*id.* at 38 ¶ 162); (3) "the protections of the traditional Ethics Committee," rather than the special investigation team composed of Mesnard's staff (*id.* ¶ 164); and (4) access to "the complete investigative file including the investigators' notes describing the testimony of material witnesses" (*id.* ¶ 165).[5]

A. **Motions To Dismiss**

Adams moves to dismiss Shooter's § 1983 claim on the following grounds: (1) Shooter's challenge to his expulsion from the House raises a nonjusticiable political question; (2) to the extent Shooter's complaint challenges any actions taken in the House, those claims are barred by the doctrine of absolute legislative immunity; (3) Shooter's claims are barred by qualified immunity because Shooter hasn't demonstrated that Adams violated "a clearly established, particularized constitutional right"; and (4) Shooter hasn't plausibly alleged that Adams violated any of Shooter's rights. (Doc. 12.)

Similarly, Mesnard moves to dismiss Shooter's § 1983 claim because: (1) Mesnard, as a legislator, is absolutely immune from suit for damages arising from his official conduct; (2) Shooter doesn't state a claim that his due process or equal protection rights were violated; and (3) to the extent Shooter uses § 1983 to assert state constitutional rights, § 1983 isn't the proper mechanism to do so. (Doc. 16.) Additionally, Mesnard "join[s] in the arguments of Co-Defendants Kirk and Janae Adam's Motion to Dismiss." (*Id.* at 1.)

The State joins in the arguments presented by Adams and Mesnard (Docs. 13, 21) and additionally seeks dismissal of the § 1983 claim because the State isn't a "person"

[5] In contrast, the complaint doesn't elaborate on Shooter's equal protection theory. Additionally, Shooter focused solely on his due process theory in his response to Defendants' motions and at oral argument. Thus, the Court considers his equal protection claim abandoned. Moreover, Shooter's overarching theory is that he was targeted due to his efforts to expose wasteful state spending, not due to his membership in a protected class.

1 within the meaning of § 1983 (Doc. 13 at 2).

2 B. **Analysis**

3 As an initial matter, Shooter's § 1983 claim against the State must be dismissed.
4 "Section 1983 provides a cause of action against any 'person' who, under color of law,
5 deprives any other person of rights, privileges, or immunities secured by the Constitution
6 or laws of the United States." *Ulrich v. City & Cty. of San Francisco*, 308 F.3d 968, 983
7 (9th Cir. 2002). The State isn't a "person" within the meaning of § 1983. *Will v. Michigan*
8 *Dep't of State Police*, 491 U.S. 58, 64 (1989) ("For the reasons that follow, we reaffirm . . .
9 that a State is not a person within the meaning of § 1983."); *Hale v. State of Ariz.*, 993 F.2d
10 1387, 1398 (9th Cir. 1993) ("[A] state is not 'person' within the meaning of § 1983.");
11 *Jenkins v. Washington*, 46 F. Supp. 3d 1110, 1115 (W.D. Wash. 2014) ("[A] state is not a
12 'person' for § 1983 purposes regardless of the nature of relief sought.").

13 As for Adams and Mesnard, the Court could possibly find in their favor for several
14 reasons. However, the clearest and narrowest path forward is qualified immunity.
15 "Qualified immunity shields federal and state officials from money damages unless a
16 plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right,
17 and (2) that the right was 'clearly established' at the time of the challenged conduct."
18 *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A government official's conduct violates
19 "clearly established" law when "'[t]he contours of [a] right [are] sufficiently clear' that
20 every 'reasonable official would have understood that what he is doing violates that right.'"
21 *Id.* at 741 (citation omitted). Although there need not be a "case directly on point,"
22 "existing precedent must have placed the statutory or constitutional question beyond
23 debate." *Id.* In other words, the case law must "have been earlier developed in such a
24 concrete and factually defined context to make it obvious to all reasonable government
25 actors, in the defendant's place, that what he is doing violates federal law." *Shafer v. Cty.*
26 *of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017).

27 "Once the defense of qualified immunity is raised by the defendant, the plaintiff
28 bears the burden of showing that the rights allegedly violated were 'clearly established.'"

LSO, Ltd. v. Stroh, 205 F.3d 1146, 1157 (9th Cir. 2000). *See also Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991) ("The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct.") (citation omitted). "If that burden is satisfied, the defendant must prove that his conduct was 'reasonable.'" *Stroh*, 205 F.3d at 1157 (citation omitted).

Here, both Adams and Mesnard have raised qualified immunity as a defense. Thus, Shooter bears the burden of showing that Defendants violated "clearly established" law.

Shooter utterly fails to carry this burden. Indeed, in response to Adams's argument that he didn't violate "clearly established" law, Shooter merely "incorporate[d] . . . by reference" the case law cited in a different section of Shooter's response brief. (Doc. 15 at 11.) Yet those cases were cited by Shooter to address whether a challenge to a legislative body's expulsion of a member presents a justiciable controversy. (*Id.*) The issue of justiciability is entirely different from the issue of whether, and to what extent, the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply in this context.

For example, the cross-referenced section of Shooter's brief cites *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). There, Leonard A. Sweeney—a former member of the Pennsylvania House of Representatives—challenged his expulsion from the House on due process grounds. *Id.* at 700. Notably, Sweeney was afforded much less process before his expulsion than Shooter was afforded here. The Pennsylvania House didn't, for example, commission a law firm to conduct an investigation—it simply notified Sweeney by telegram that his "future status" was in doubt, then held a vote nine days later (which Sweeney didn't attend) during which Sweeney's colleagues voted 176-1 to expel him. *Id.* at 700-02. In the ensuing lawsuit, Sweeney contended he possessed a property interest in his House seat and was deprived of that interest without due process of law. *Id.* at 712-13. The defendants, in turn, argued Sweeney's expulsion wasn't reviewable under the Pennsylvania Constitution's Speech or Debate Clause and the political question doctrine. *Id.* at 703. Although the Supreme Court of Pennsylvania rejected those justiciability arguments, *id.* at 703-12, it ruled against Sweeney on the merits, *id.* at 712-13. Specifically,

1 the court held: "Even assuming Sweeney's interest is entitled to procedural protections, we
2 are convinced that his rights have not been violated . . . . Given the circumscribed nature
3 of a legislator's private interest in his elected office and the overriding need for the
4 Legislature to protect its integrity through the exercise of the expulsion power, it may be
5 that the requirement of a two-thirds vote to expel itself satisfies procedural due process."
6 *Id.* at 713. Here, the margin of the vote to expel Shooter—56 to 3—easily surpassed a two-
7 thirds threshold.[6] It is therefore difficult to understand how Shooter could view *Sweeney*
8 as a "clearly established" precedent that would have made it "obvious" to Adams and
9 Mesnard that the alleged conduct was illegal and unconstitutional. *Cf. Shafer,* 868 F.3d at
10 1117.[7]

11 Shooter also cites *Powell v. McCormick*, 395 U.S. 486 (1969). But there, the
12 Supreme Court merely determined that Adam Clayton Powell, Jr.'s *exclusion* from the
13 House of Representatives (not *expulsion*) presented a justiciable question. *Id.* at 516-50.
14 In doing so, the Court made clear that it was not resolving whether Powell's expulsion
15 would have withstood constitutional scrutiny (or would have even posed a justiciable
16 question): "[W]e will not speculate what the result might have been if Powell had been
17 seated and expulsion proceedings subsequently instituted." *Id.* at 508. Moreover, Powell
18 didn't argue that his due process or equal protection rights had been violated—the sole
19 basis for his challenge was that his exclusion violated Article I, Section 5 of the
20 Constitution. *Id.* at 550. This is the antithesis of the sort of concrete, factually analogous
21 ruling that is necessary to provide notice for qualified-immunity purposes.[8]

22 [6] Although Shooter's complaint doesn't provide the margin of his expulsion vote, the
23 Court may take judicial notice of this fact. *Lee v. City of Los Angeles*, 250 F.3d 668, 689
(9th Cir. 2001) ("[A] court may take judicial notice of 'matters of public record.'") (citation
24 omitted).

25 [7] Additionally, it is unclear whether a decision by a Pennsylvania state court could,
for qualified-immunity purposes, provide adequate notice to Arizona-based state officials
26 such as Adams and Mesnard. *Wilson v. City of Boston*, 421 F.3d 45, 56-57 (1st Cir. 2005)
(when determining whether the law was "clearly established" for qualified-immunity
27 purposes, courts may consider "Supreme Court precedent," "federal cases outside our own
circuit," and "state court decisions *of the state wherein the officers operated*") (citations
and internal quotation marks omitted) (emphasis added).

28 [8] Even *Powell*'s dicta is bad for Shooter. *Powell* contains language (similar to the
language in *Sweeney*) suggesting that, in a case involving a true legislative expulsion, the

1 Finally, Shooter cites *Montoya v. Law Enf't Merit Sys. Council*, 713 P.2d 309 (Ariz.
2 Ct. App. 1985). There, an officer trainee (Montoya) was discharged from his employment
3 "following two incidents involving 'suspicion' as to his 'honesty in the removal of certain
4 monies from the coffee fund.'" *Id.* at 309. In the ensuing lawsuit, Montoya argued his due
5 process rights had been violated. *Id.* at 310. On the one hand, the Arizona Court of Appeals
6 rejected Montoya's claim that he possessed a property interest in his employment,
7 concluding that no such interest arose because Montoya was an at-will employee. *Id.* On
8 the other hand, because charges of misconduct were included in Montoya's personnel file,
9 the court determined he possessed a cognizable liberty interest: "[T]he combination of
10 government defamation plus . . . the discharge of a government employee states a liberty
11 interest claim even if the discharge itself deprives the employee of no property interest
12 protected by the fifth or fourteenth amendments." *Id.* at 310-12. The court ultimately
13 concluded Montoya was entitled to a post-termination hearing to clear his name but left it
14 to the trial court to resolve the precise contours of the hearing. *Id.* at 312.
15 *Montoya* doesn't establish that Shooter's expulsion violated clearly established law.
16 *Montoya* concerned an employee's termination, not a legislator's expulsion. Additionally,
17 Shooter argues the procedures *preceding* his expulsion were inadequate. *Montoya*, on the
18 other hand, concerned the process Montoya should be given to clear his name *following*
19 his termination. The court didn't hold that the process provided to Montoya before his
20 termination was inadequate. Thus, Shooter's claims in this lawsuit find no support in
21 *Montoya*.[9]
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expulsion would be permissible if preceded by a vote supported by at least two-thirds of the members of the legislative body. *Id.* at 548 ("Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two thirds."). Similarly, Justice Douglas stated in his concurring opinion in *Powell* that "if this were an expulsion case I would think that no justiciable controversy would be presented, the vote of the House being two-thirds or more." *Id.* at 553. Again, such a vote occurred before Shooter was expelled.

[9] In the cross-referenced section of his brief, Shooter also cited *Mecham v. Gordon*, 751 P.2d 957 (Ariz. 1988), *Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267 (Ariz. 2012), and *Baker v. Carr*, 369 US 186 (1962). The Court won't address these cases in depth because Shooter merely cited them in passing. In short, none of these cases

Although it "is often beneficial" to begin the qualified-immunity analysis by addressing whether a statutory or constitutional right has been violated, district courts are vested with discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Additionally, "a longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Camreta v. Greene*, 563 U.S. 692, 705 (2011) (citations omitted). Given these principles, it is unnecessary to decide, under the first prong of the qualified-immunity test, whether Shooter's constitutional rights were actually violated. Instead, Adams and Mesnard are entitled to dismissal under the second prong of the qualified-immunity test because Shooter hasn't identified any clearly-established law supporting his claim.

Notably, when Shooter was asked during oral argument to identify the best, most factually-analogous case establishing that the expulsion proceedings in this case were unconstitutional, Shooter demurred and instead urged the Court to consider "the facts" alleged in the complaint. This is not how qualified immunity works. *Cf. Sjurset v. Button*, 810 F.3d 609, 615 (9th Cir. 2015) ("If indeed the [defendants] did not violate clearly established law, then we can determine that qualified immunity is appropriate and may thus dispose of the case without undertaking an analysis of whether a constitutional violation occurred in the first instance.").[10]

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concerned a legislator's due process rights in an expulsion proceeding. Moreover, in *Brewer*, which involved a challenge to the removal of Chairperson Mathis from the Arizona Independent Redistricting Commission, the Arizona Supreme Court declined to resolve whether this removal "violat[ed] Mathis's due process rights," instead limiting its holding to a determination that the removal effort violated state law—specifically, "Article 4, Part 2, Section 1(10) of the Arizona Constitution." 275 P.3d at 1275, 1278. Accordingly, these cases fail to demonstrate that Defendants violated "clearly established" federal law in Shooter's expulsion proceedings.

[10] *Monserrate v. N.Y. Senate*, 599 F.3d 148 (2d Cir. 2010), which Shooter did not cite, further supports this outcome. *Monseratte* involved a constitutional challenge to the New York Senate's decision to expel a senator who'd been accused of domestic violence. *Id.* at 152-53. The district court rejected a request for injunctive relief and the Second Circuit affirmed, holding, *inter alia*, that the challengers had failed to establish a likelihood of success on their due process and equal protection claims. *Id.* at 154. The court reached this conclusion even though the senator alleged he "was not given copies of the materials

II. State Claims

Remaining before the Court are Shooter's state-law claims: Count 2 (defamation); Count 3 (false light invasion of privacy); and Count 4 (wrongful termination).

In most instances, when "all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *see also* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a [pendent state-law claim] if . . . the district court has dismissed all claims over which it has original jurisdiction.").

Here, although Defendants would prefer for the Court to retain jurisdiction over the case, and then dismiss the state-law claims against them, so they can clear their names, the Court concludes the *Cohill* factors weigh against retaining jurisdiction over the state-law claims. First, because the case is only a few months old and no trial date has been set, there will be minimal duplication of effort caused by a remand. Defendants argue the infirmity of Shooter's state-law claims is obvious (and, thus, it won't take many judicial resources to dispose of those claims), but this misapprehends the nature of the judicial economy factor. If Defendants are correct about the weakness of the state-law claims, a state-court judge should be able to quickly address them upon remand, using no more resources than would be consumed by this Court. *See, e.g., Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1255-56 (6th Cir. 1996) (recognizing that "[a]fter a 12(b)(6) dismissal, there is a strong presumption in favor of dismissing supplemental claims" and explaining this presumption exists in part because the "same written materials [concerning the state-law claims] could be submitted to a state judge for his decision, with only minimal rewriting");

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considered by the Select Committee,'" "was not able to cross-examine the two witnesses" who were interviewed, and most of the "meetings of the Select Committee were held in executive session, closed to the public." *Id.* at 159 (internal quotation marks omitted). If anything, *Monseratte* suggests the process preceding Shooter's expulsion also complied with due process. At a minimum, *Monseratte* would not have "ma[d]e it obvious" to Adams and Mesnard that the process followed in this case "violates federal law." *Shafer,* 868 F.3d at 1117.

Gregory v. Inc. Village of Ctr. Island, 2016 WL 4033171, *9 (W.D.N.Y. 2016) (granting 12(b)(6) motion to dismiss federal claims but declining to resolve the dismissal arguments contained in the same motion pertaining to state-law claims and instead remanding those claims to state court).

Second, it appears the Maricopa County Superior Court is at least as convenient a forum as this Court. Defendants and their counsel are based in and around Phoenix.

Third, although Defendants may have a legitimate interest in the speedy vindication of their names and reputation, a countervailing "fairness" consideration is that Shooter filed this case in Maricopa County Superior Court. It was Adams (with the State's consent) who chose to remove it based on federal question jurisdiction. Because there is no longer a federal question to be considered, Shooter's choice of forum should be entitled to some weight. *Cf. Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1222 (9th Cir. 2011) (noting "the strong presumption in favor of a domestic plaintiff's choice of forum").

Finally, considerations of federalism and comity are best served by allowing the Arizona state courts to address state-law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."); *see also Roundtree v. Atl. Dev. & Inv.*, 2009 WL 2132697, *1-3 (D. Ariz. 2009) (dismissing federal claim and then declining to exercise supplemental jurisdiction over remaining state-law claims: "The Court is mindful that the exercise of supplemental jurisdiction may serve the values of judicial economy and convenience . . . but these values are outweighed by the interests of comity and federalism."); *Floyd v. Watkins*, 2015 WL 5056036, *6 (D. Or. 2015) ("The Court closely examined the sole federal law claim [under § 1983] and resolved it in favor of Officer Watkins. State court is a convenient forum for the parties, and declining to exercise supplemental jurisdiction respects the values of federalism and comity."). As another court put it, in a case involving similar procedural circumstances:

While it is true that the case was properly removed to this Court, the federal

> claims which constituted the basis for removal have now been dismissed. Some of the defendants argue that the Court should decide their several motions to dismiss prior to remand. But decision of the issues presented by those defense motions would be dispositive of the state causes of action. The real question now presented is whether, having dismissed the federal claims, this Court should proceed, on the basis of its pendent jurisdiction, to decide the plethora of state law issues contained in the complaint. While the cases cited by the defendants indicate that this Court has the power to hear and dispose of the case notwithstanding the dismissal of the federal claims, the Supreme Court's message is clear. "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

McGann v. Mungo, 578 F. Supp. 1413, 1416 (D.S.C. 1982) (citation omitted). Thus, the Court will decline to exercise jurisdiction over the remaining state-law claims and remand them to the Maricopa County Superior Court.

Accordingly, **IT IS ORDERED** that:

(1) Adams's motion to dismiss (Doc. 12) is **granted in part**;

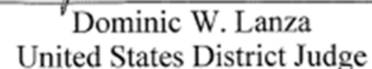
(2) Mesnard's motion to dismiss (Doc. 16) is **granted in part**;

(3) The State's joinders (Docs. 13, 21) are **granted in part**;

(4) Count 1 of the complaint is **dismissed with prejudice**; and

(5) The Clerk of Court shall **remand** this case to the Maricopa County Superior Court and then **terminate** this action.

Dated this 7th day of June, 2019.



Dominic W. Lanza
United States District Judge

United States District Court

District of Arizona

Office of the Clerk

Brian D. Karth
District Court Executive / Clerk Of Court
Sandra Day O'Connor U. S. Courthouse, Suite 130
401 West Washington Street, SPC 1
Phoenix, Arizona 85003-2118

Michael S. O'Brien
Chief Deputy Clerk
Evo A. DeConcini U.S. Courthouse
405 W. Congress, Suite 1500
Tucson, Arizona 85701-5010

Debra D. Lucas
Chief Deputy Clerk
Sandra Day O'Connor U. S. Courthouse, Suite 130
401 West Washington Street, SPC 1
Phoenix, Arizona 85003-2118

June 7, 2019

Clerk's Office
Maricopa County Superior Court
201 W Jefferson St
Phoenix, AZ 85003

ATTN: **Civil File Counter**

RE: **REMAND TO MARICOPA COUNTY SUPERIOR COURT**

District Court Case Number: CV-19-01671-PHX-DWL

Superior Court Case Number: CV2019-050782

Dear Clerk of Court:

Enclosed is a certified copy of the Order entered in this Court on June 7, 2019, remanding the above case to Maricopa County Superior Court for the State of Arizona.

Sincerely,

BRIAN D. KARTH, DCE/CLERK OF COURT

s/ D. Draper
Deputy Clerk

cc: All Counsel of Record

PLEASE ACKNOWLEDGE RECEIPT OF THIS DOCUMENT AND RETURN IN THE ENVELOPE PROVIDED

Received By: ______________________________ Dated: ______________

Clerk of the Superior Court
*** Electronically Filed ***
12/24/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-050782 12/20/2019

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
A. Wood
Deputy

DONALD M SHOOTER

v.

STATE OF ARIZONA, et al.

THOMAS C HORNE

REBECCA BANES

DANIEL P QUIGLEY
STEPHEN W TULLY
JUDGE CAMPAGNOLO

MINUTE ENTRY GRANTING MOTIONS TO DISMISS

On November 18, 2019, this Court entered a Minute Entry converting the Motions to Dismiss to a Rule 56 proceeding, based on the inclusion in both Motions to Dismiss of a copy of the Notice of Claim, which the Court deemed to be an extraneous matter. In that same Minute Entry, the Court set a status conference for November 25, 2019 to determine if further discovery or briefing was necessary. At the hearing on November 25, 2019, both Movants withdrew the Notice of Claim issue from their respective Motions. The Court then re-converted the matter back to a Rule 12 proceeding, because the extraneous matter was no longer to be considered by the Court. To allow the parties to file any additional briefing, the Court took this matter under advisement on December 19, 2019.

The Court has reviewed and considered the Defendants Kirk and Janae Adams' Motion to Dismiss, the Response and Reply thereto, Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss, the Response and Reply thereto, the State of Arizona's Joinder in the Motions to Dismiss, and the applicable law.

The Court has also reviewed and considered the following additional briefing, as ordered by the Court: Plaintiff's Supplemental Opposition to Defendants' Motion to Dismiss, the Adams'

Defendants' Response thereto, the Mesnard Defendants' Reply thereto, and the State of Arizona's Joinder in the Adams Defendants' Response and the Mesnard Defendants' Reply.

The Court has also considered Plaintiff's Notice of Motion and the attachments thereto, in which Plaintiff seeks to file an amended complaint as a matter of course under Rule 15(a)(1)(B) of the Rules of Civil Procedure, the Adams Defendants' and the Mesnard Defendants' Response to Plaintiff's Notice of Motion, and the State of Arizona's Joinder in the Adams Defendants' and the Mesnard Defendants' Response to Plaintiff's Notice of Motion.

The Court finds that oral arguments would not significantly assist the Court in ruling on the Motions or the Notice of Motion. *See* Maricopa County Local Rule 3.2(d).

I. Extraneous Matters

As discussed in the November 18, 2019 Minute Entry, both Defendants attached exhibits to their Motions to Dismiss. In considering a motion to dismiss for failure to state a claim, if the trial court considers matters outside the pleadings (extraneous matters), it must treat the motion as a Rule 56 motion for summary judgment, and allow the non-movant a reasonable opportunity to present all pertinent material in response. Rule 12(d), ARIZ. R. CIV. P.; *Strategic Development and Construction, Inc. v. 7th and Roosevelt Partners, LLC*, 224 Ariz. 60, ¶1 (App. 2010). Matters of public record or matters that are central to a complaint are not considered "extraneous matters." *Id.* at ¶¶13 & 14.

One of Plaintiff's contentions is that the matter should be re-converted to a Rule 56 proceeding, if the Court determines to consider Exhibit 2 to the Adams' Motion, the Sherman and Howard investigation report, based solely on his contention that it is not a public record. The Court deems Exhibits 1 and 2 to the Adams' Motion to be 1) public records of the Arizona House of Representatives and/or 2) central to the Complaint.

Even if Exhibit 2 was not ultimately determined to be a public record, it is clearly central to the Complaint. The Court of Appeals has stated that when a complaint relies on a document, the plaintiff is on notice of the contents of the document. *Strategic Development and Construction, Inc. v. 7th and Roosevelt Partners, LLC*, 224 Ariz. at ¶14. In such a case, the application of the rule converting a 12(b)(6) proceeding to a Rule 56 proceeding is not served when the motion to dismiss cites a document that is central to the complaint. *Id*. Because of such notice, the need for a chance to refute evidence in a Rule 56 proceeding is greatly diminished. *Id*. Even though the contract had been attached to the Complaint in the *Strategic Development* case, the Court of Appeals cited approvingly to a Third Circuit case that held that Rule 56 treatment was not required when a 12(b)(6) response attached an undisputedly authentic copy of the contract that was the subject of the complaint, **even though the contract was not attached to the complaint**. [emphasis added].

Id. (*citing approvingly to* *Pension Benefit Guaranty Corp. v. White Consolidated Industry, Inc.*, 998 F.2d 1192, 1196–97 (3d Cir. 1993). In the instant case, the investigative report was discussed front and center in the Complaint, and Exhibit 2 to the Adams' Motion will be properly considered by the Court in this Rule 12(b)(6) proceeding.

Exhibit 1 to the Mesnards' Motion is a public record of the United States District Court and/or is central to the Complaint. These matters are non-extraneous, and the Court will consider them. Exhibit 3 to the Adams' Motion and Exhibit 2 to the Mesnards' Motion are copies of Plaintiff's Notice of Claim, which, while extraneous, have been withdrawn by Defendants. The Court will not consider those two exhibits for purposes of the 12(b)(6) Motions.

II. Plaintiff's Motion to File Amended Complaint as a Matter of Course

Plaintiff seeks to file an amended complaint as a matter of course under Rule 15(a)(1)(B) of the Rules of Civil procedure. The Court will rule on this motion as a matter of course without the necessity for a reply to the Motion. The Court finds that Plaintiff is not entitled as a matter of law to file an amended complaint as a matter of course.

Rule 15(a)(1)(B) allows a party to file an amended complaint no later than 21 days after a responsive pleading is served, or if a Rule 12(b) motion is filed, no later than the date on which a response to the motion is due, whichever is earlier. In this case, the responsive pleadings were the Defendants' Motions to Dismiss, both of which were filed on September 23, 2019. The Responses to the Motions to Dismiss were filed on November 1, 2019. Plaintiff did not file a motion for leave to file an amended complaint as a matter of course within either of the deadlines provided in Rule 15(a)(1)(B).

Plaintiff's mere request in his Response to be granted leave to file an amended complaint if the Motions to Dismiss were granted does not suffice to meet the requirements of Rule 15. Aside from the request contained in the Response, no proposed amended complaint was filed or attached to Plaintiff's Response. If the inclusion of such a request without the filing of an amended complaint was presumed to satisfy the deadlines in Rule 15, then that would swallow the Rule and render it completely ineffective. The Court will not make such a presumption.

The fact that Plaintiff filed a pleading entitled "supplemental" opposition to the motions to dismiss on December 11, 2019, does not somehow resurrect the Rule 15 time period. The motion to amend the complaint as a matter of course is untimely. If Plaintiff wanted to attempt to properly amend his complaint, he should have abided by the procedures in Rules 15(a)(2) and 7.1(a).

Because there is no pending valid motion to amend the complaint, the Court must proceed with deciding the Rule 12(b)(6) motions. The end result of this Ruling will grant leave to Plaintiff

to amend his complaint, such that the filing of a separate motion to amend the complaint will no longer be necessary. It is also necessary for the Court to rule on the Motions to Dismiss, so that Plaintiff will be on notice as to what will or will not be allowed to be pled in a proposed amended complaint.

III. Rule 8 and Rule 12(b)(6)

As a general policy matter, Rule 12(b)(6) motions are not favored under Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). The court assumes the truth of plaintiff's factual allegations when analyzing a complaint for failure to state a claim upon which relief can be granted. *Hogan v. Washington Mutual Bank, N.A.*, 230 Ariz. 584, ¶7 (2012). Arizona follows a notice pleading standard. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012). Rule 8 of the Arizona Rules of Civil Procedure provides that a plaintiff must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a complaint is to give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved. *Cullen v. Auto-Owners Insurance Co*., 218 Ariz. 417, ¶7 (2008).

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa,* 230 Ariz. 352, ¶46 (2012). Instead, the narrow question presented by a Rule 12(b)(6) motion is whether facts alleged in a complaint are sufficient to warrant allowing a plaintiff to attempt to prove his or her case. *Id.*

However, a complaint that states only legal conclusions, without supporting factual allegations, does not comply with Rule 8's notice pleading standard. *Cullen v. Auto-Owners Insurance Co*., 218 Ariz. 417, ¶7 (2008). A Court cannot accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 389 (App. 2005). Dismissal is permitted only when a plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fidelity Security Life Insurance. Co. v. State Department of Insurance,* 191 Ariz. 222, ¶4 (1998).

IV. Procedural Background

Because Count One of the Complaint alleged a violation of 42 U.S.C. §1983, Defendants Adams and Mesnard removed the case to federal court on March 11, 2019 based on federal question jurisdiction. On motions to dismiss, the United States District Court in CV-19-01671-PHX-DWL, entered a ruling on June 11, 2019, dismissing Count One, and remanding the case to the Arizona Superior Court, because the remaining Counts were based solely on State law.

V. Plaintiff's Complaint

Plaintiff's Complaint alleged four causes of action. As discussed above, Count One was dismissed in federal court.

Count Two alleged Defamation, and Aiding and Abetting, and Conspiracy to Commit Defamation. Count Three alleged False Light Invasion of Privacy, and Aiding and Abetting, and Conspiracy to Commit False Light Invasion of Privacy. Count Four alleged Wrongful Termination.

The District Court's recitation of the factual allegations of the Complaint was thorough. Rather than repeat those factual allegations, the Court incorporates herein the section entitled "Factual Background" in the District Court's Order of June 11, 2019, which is attached as Exhibit 1 to the Mesnards' Motion to Dismiss.

The Complaint arises out of a February 1, 2018 vote by the Arizona House of Representatives expelling Plaintiff from the House for conduct determined to be dishonorable and unbecoming of one of its members. The House voted 56-3 to expel Plaintiff. None of the parties dispute that the expulsion vote of Plaintiff was allowed by Art. 4, Part 2, Section 11 of the Arizona Constitution. Plaintiff's Complaint does not seek to set aside the expulsion vote.

Rather, Plaintiff is seeking damages against the individual defendants in their individual capacities and/or as agents for the State of Arizona. Although not listed as a cause of action, the Complaint's Prayer also seeks declaratory relief that the individual defendants violated Plaintiff's constitutional rights to freedom of speech, equal protection and due process.

VI. Defendants' Contentions

The Adams Defendants and the Mesnard Defendants joined in each other's Motion to Dismiss. The Adams Defendants contended that the Complaint should be dismissed for the following reasons:

1. The Complaint violated Rule 8 of the Rules of Civil Procedure;
2. The Complaint raised non-justiciable political questions as to Plaintiff's expulsion;
3. The Complaint failed to state any claim for relief against Defendant Adams; and
4. Plaintiff is prohibited as a matter of law from asserting a claim of false light invasion of privacy.

The Mesnard Defendants contended that the Complaint should be dismissed for the following reasons:

1. Mr. Mesnard is immune from a claim of defamation arising out of his acts as Speaker of the House, and particularly in regard to the creation and publication of the investigative report;
2. The Complaint failed to state a claim of defamation against Mr. Mesnard;
3. Plaintiff is prohibited as a matter of law from asserting a claim of false light invasion of privacy; and
4. Plaintiff cannot state a claim for wrongful termination

VII. Discussion

A. Rule 8 Violation

Defendants basically argue that Rule 8 requires a short and plain statement, and the Complaint is too long, containing 41 pages and nine exhibits. The Court is aware of the case law cited by Defendants on this issue, and finds it not to be applicable to this case. That line of cases, most of which comes from the federal courts, generally finds Rule 8 violations when the allegations, often lengthy, are confusing, illegible, conflicting or unintelligible. None of those cases resulted in dismissal simply because of the page length of the complaint. The Complaint contains factual allegations that certainly put the Defendants on notice of Plaintiff's alleged complaints. Whether or not those allegations are sufficient to state a claim for relief is more of a Rule 12(b)(6) issue than a Rule 8 issue.

The Court finds that the Complaint did not violate Rule 8's requirement of a "short and plain statement."

B. Political Question

Article 3 of the Arizona Constitution provides:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Under separation-of-powers principles, a non-justiciable political question is presented when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Arizona Independent Redistricting Commission v. Brewer*, 229 Ariz. 347, ¶17 (2012), *quoting*

Nixon v. United States, 506 U.S. 224, 228 (1993).

Art. 4, Part 2, Section 8 of the Arizona Constitution provides: "Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and determine its own rules of procedure."

Art. 4, Part 2, Section 11, hereinafter referred to as the "Expulsion Provision," reads as follows: "Each house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds of its members, expel any member."

The Arizona Constitution gives the power of expulsion of one of its members to the House of Representatives and the Senate, whichever is applicable. The Arizona Constitution does not give the power of expulsion to the judiciary. There are no judicially discoverable and manageable standards to resolve a House procedure to expel a member. Although stated in the context of an impeachment proceeding under a different section of the Arizona Constitution, the Arizona Supreme Court stated that a removal from office is not an act within the judicial power. *Mecham v. Gordon*, 156 Ariz. 297, 301-2 (1988). It is clear that Section 11 of the Arizona Constitution demonstrates a contextual commitment that expelling a member of the House is within the power of the Legislature, and is not within the power of the Judiciary.

Plaintiff relied on the holding in *Brewer*, which permitted judicial intervention in the removal of a member of the Arizona Independent Redistricting Commission by the Governor. That case is instructive, but after a full reading, does not support Plaintiff's position. In *Brewer*, the Governor had removed a member of the Arizona Independent Redistricting Commission under Art. 4, Part 2, Section 1(10) of the Constitution. That section allows the Governor, with the consent of two-thirds of the Senate, to remove a member of the Commission for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." The argument was made in *Brewer* that, akin to impeachment, the removal of a commission member was a non-justiciable political question. The Supreme Court's analysis and comparison of the impeachment provision with the commissioner removal provision provides guidance in this case.

The Supreme Court noted that the impeachment provision in the Constitution provided that the Legislature is entrusted with the sole responsibility to impeach. *Brewer*, 229 Ariz. 347 at ¶21. The Court also held that impeachment has historically been a legislative process, not a judicial one. *Id*. at ¶24. In contrast, the Court found that the Redistricting Commission was created to separate it from the political process of redistricting. The Court further held that the Governor had no involvement in the redistricting process, except for his removal power. *Id*. at ¶25. For these reasons, the Supreme Court held that the process under Section 1(10) was not a political question. The Court held that the grounds for removal in Section 1(10) were subject to legal principles that provided manageable standards to resolve the dispute. *Id*. at ¶¶27-35.

The expulsion provision of the Arizona Constitution is akin to the impeachment provision, rather than the provision on the removal of a redistricting commissioner. The power to expel a member of the House or Senate has historically been a legislative process. This is strengthened by the United States Supreme Court's opinion in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, Representative Adam Clayton Powell, an African-American, had been duly elected to Congress, but the U.S. House of Representatives voted by a two-thirds majority to "exclude" him from membership in the House on the grounds that he was not "qualified" to serve as a Representative. The House based its decision on Art. I, Section 5, clause 2 of the United States Constitution, which is the federal expulsion clause. Art. I, Section 5, clause 2 reads, similarly to the Arizona Constitution, as follows:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Although Plaintiff in the instant case appeared to argue otherwise, the United States Supreme Court did not appear to question that the House's power of expulsion for "disorderly behavior" was a legislative, not a judicial, function. *Powell v. McCormack*, 395 U.S. at 547-8. The holding of the case was that the federal expulsion clause did not include the power to "exclude" a member of the House based on his or her qualifications, because the federal constitution already contained the sole qualifications to be elected to Congress. *Id*.

The Complaint contends that the process followed by the Arizona House of Representatives, or by the House through its Speaker, deprived him of his rights to confront his accusers and examine the witnesses. However, in analogizing the Arizona Supreme Court's rationale regarding the impeachment provision, this Court finds that these rights are not available in a legislative decision to expel a member under the Arizona Constitution.

In *Mecham*, the Court held that an impeachment proceeding was not the equivalent of a criminal trial within the judicial system. *Mecham v. Gordon*, 156 Ariz. at 301. The Court held that in an impeachment proceeding, the Senate can impose no greater or lesser penalty than removal, and it can impose no criminal punishment. *Id*. at 302. The *Mecham* Court held that the constitutional provisions that a person shall not be deprived of life, liberty or property without due process do not protect the right to hold the office as governor. *Id*. at 302 (noting that impeachment does not deprive the governor of life or liberty, or property, because the position of Governor is not a property right). The Court noted that these are all rights provided to a criminal defendant, and that an impeachment is not a criminal trial. *Id*. at 303.

Because of this, the Supreme Court held that, even if it disagreed with the impeachment procedures imposed by the Senate, it had no power to require the Senate to adopt rules of criminal

procedure. *Id*. Clearly, a person in an impeachment trial may assert his 5th Amendment right to remain silent in an impeachment trial, but that invocation is based on the protection of his rights in a criminal trial. *Id*.

This Court finds that the same reasoning would apply to an expulsion proceeding under the Arizona Constitution. Under Section 11, the House can do no more than expel a member, and cannot impose criminal punishment. Therefore, it is clear that the expulsion of Plaintiff from the Arizona House of Representatives was a legislative decision under the Arizona Constitution, and any legal challenge to that decision is a non-justiciable political question.

C. Defamation Claim

The Adams Defendants contended that there are no allegations of defamation against Mr. Adams in the Complaint. The Mesnard Defendants asserted the same, and additionally alleged that Mr. Mesnard is immune from any civil action based on legislative immunity due to his role as the Speaker of the House during the relevant time period contained in the Complaint.

A defamation action compensates damage to reputation or good name caused by the publication of false information. *Godbehere v. Phoenix Newspapers, Inc*., 162 Ariz. 335, 341 (1989). To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation. *Id.* If the plaintiff is a public official or public figure, or if the matter is a public one, the plaintiff must prove actual malice to be successful. *Id*. at 342. Actual malice requires that the publisher acted with knowledge of the falseness or with reckless disregard of the truth. *Id*. at 342-3 (1989).

1. Kirk Adams

After a thorough review of the Complaint, the Court is unable to find any specific allegations of defamation against Mr. Adams. There are allegations of tangential activities that may have been committed by Mr. Adams. The Complaint fails to identify the act or acts of defamation allegedly committed by Mr. Adams. There are no allegations that Mr. Adams was involved in the publication of any allegedly defamatory information.

All of the allegations against Mr. Adams amount to nothing more than innuendo, speculation, irrelevance to the causes of action, or outright guessing. While the Court must accept the allegations in the Complaint as true, the Court need not do so when the allegations are unsupported by any well-pled facts to support a cause of action for defamation.

As stated above, a Court cannot accept as true allegations consisting of conclusions of law,

inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Arizona,* 211 Ariz. 386, 389 (App. 2005).

2. Javan "JD" Mesnard

Similarly, as to Mr. Mesnard, the complaint fails to allege any acts of defamation, except as discussed below regarding the investigative report. Except for the investigative report, the allegations that could relate to a defamation claim are as conclusory as those against Mr. Adams, with no well-pled factual support. Again, the allegations are based on innuendo and speculation.

The only factual allegations that could pertain to a defamation action are in regard to Mr. Mesnard's involvement as the Speaker of the House, which largely addressed the investigative report on Plaintiff, which was conducted by an independent law firm, the issuance of the investigative report, and the disclosure of the report to the media. Based on the allegations in the Complaint, such actions are entitled to legislative immunity as a matter of law.

When members of Congress are acting within their legitimate legislative sphere, the Speech or Debate Clause serves as an absolute bar to criminal prosecution or civil liability. *Gravel v. United States,* 408 U.S. 606, 624 (1972). The United States Supreme Court has held that common law legislative immunity similar to that embodied in the Speech or Debate Clause exists for state legislators acting in a legislative capacity. *Arizona Independent Redistricting Commission v. Fields*, 206 Ariz. 130, ¶16 (App. 2003). Arizona has codified this common law immunity in its Constitution. *Id*. at ¶29. Therefore, a legislator may invoke the legislative privilege to shield from inquiry the acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator. *Id*. at ¶30.

An absolute legislative privilege applies to legislators performing a legislative function "*although the defamatory matter has no relation to a legitimate object of legislative concern.*" *Sanchez v. Coxon*, 175 Ariz. 93, 97 (1993) [emphasis in original]. It is the occasion of the speech, not the content, that provides the privilege. *Id*.

Further, whether or not a legislator's decision to take some action may or may not have had ulterior motives, other than a legislative purpose, that action or decision is protected by absolute legislative immunity. *See Carlos v. Santos*, 123 F.3d 61, 66 (2d Cir. 1997). In *Carlos*, the Second Circuit held that a consultant's report initiated upon a legislator's inquiry had the same absolute legislative immunity. *Id*. Additionally, the mere release of a report to the media is a legitimate legislative activity protected by the Speech or Debate Clause of the U.S. Constitution. *Green v. DeCamp*, 612 F.2d 368, 372 (8th Cir. 1980). Because the U.S. Constitution's Speech or

Debate Clause is akin to the same protection in Arizona, the Court finds the Second and Eighth Circuits' rulings to be persuasive.

For the foregoing reasons, the Court finds that the cause of action for defamation as to Mr. Adams and Mr. Mesnard does not state a claim for relief. Based on the allegations in the Complaint, Plaintiff would not be entitled to relief under a defamation claim under any interpretation of the facts susceptible to proof. Additionally and alternatively, the cause of action for defamation against Mr. Mesnard does not state a claim for relief based on his absolute legislative immunity.

D. False Light Invasion of Privacy

Based on the same conclusory allegations discussed above, Plaintiff has failed to state a claim for relief as to the tort of false light invasion of privacy. Further, based on the allegations in the Complaint, Plaintiff is unable to pursue such a claim as a matter of law.

The right of privacy does not exist where the plaintiff is a public officer or public figure, and the information is of a public nature. *Godbehere v. Phoenix Newspapers, Inc*., 162 Ariz. 335, 343 (1989). The allegations of the Complaint confirm that Plaintiff was a public official and/or a public figure during the relevant time period. The issues raised in the Complaint were of a public nature. Therefore, there can be no false light invasion of privacy action for matters involving official acts or duties of public officers. *Id*.

A public official has a right to sue under this tort if the publication presents the public official's private life in a false light. *Id*. In such a case, however, the public official must prove actual malice to be successful. *Id*. Actual malice requires that the publisher acted with knowledge of the falseness or with reckless disregard of the truth. *Id*. at 342-3 (1989).

Plaintiff's Responses to the Motions argued that the Complaint alleged privacy invasions of his private life. The Complaint, however, only pertains to Plaintiff's role as a Representative and his alleged acts conducted while he was a legislator. If there were alleged privacy invasions of his private life, there are insufficient allegations of such that would meet a Rule 12(b)(6) analysis.

E. Aiding and Abetting

The causes of action against Mr. Adams and Mr. Mesnard for aiding and abetting and conspiracy to commit defamation and false light invasion of privacy must fail, in light of the Court's Ruling that Plaintiff has failed to state a claim for relief for both torts. In a cause of action for aiding and abetting, the complainant must allege that (1) the primary tortfeasor has committed

a tort causing injury to the plaintiff; (2) the defendant knew the primary tortfeasor breached a duty; (3) the defendant substantially assisted or encouraged the primary tortfeasor in the breach; and (4) a causal relationship exists between the assistance or encouragement and the breach. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, ¶44 (App. 2008).

The Complaint failed to state a claim for relief as to either tort, and failed to state a claim for relief that either Defendant had knowledge of any alleged defamation or invasion of privacy committed by the other.

F. Wrongful Termination

The Complaint alleges that Plaintiff was wrongfully terminated from his position as a Representative. All of the cases cited by Plaintiff in support of this claim pertained to wrongful termination of employees by employers. None of those are applicable to this situation. Neither Mr. Adams nor Mr. Mesnard was Plaintiff's employer. Plaintiff was not the employee of either Defendant. Neither Defendant "terminated" Plaintiff. Plaintiff was expelled from the House by a vote of 56-3 pursuant to Art. 4, Part 2, Section 11, which vote is considerably higher than the necessary two-thirds vote for expulsion. The Court has already determined that Plaintiff cannot challenge the action of the House in expelling him.

As mentioned above, Plaintiff has no "property" interest in his seat in the House of Representatives. As the Court stated in *Mecham*, a person does not have a property interest in public office. *Mecham v. Gordon*, 156 Ariz. at 302. The Court stated:

> [P]ublic offices are public ... trusts, and the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right, it has been said, is not the right of the incumbent to the place, but of the people to the officer. * * * The incumbent has no vested right in the office which he holds.

Id., citing to *Ahearn v. Bailey,* 104 Ariz. 250, 254 (1969).

The Court finds that Plaintiff is not entitled to assert a cause of action for wrongful termination as a matter of law, based on the allegations in the Complaint.

VIII. Conclusion

For the reasons stated above, the Court finds that the Complaint fails to state a claim for relief on all of the causes of action contained therein. In his Responses, Plaintiff requested leave

to amend the Complaint. Defendants objected to the request, arguing that the deficiencies in the Complaint cannot be amended.

Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects. *Dube v. Likins,* 216 Ariz. 406, ¶24 (App. 2007); *Wigglesworth v. Mauldin,* 195 Ariz. 432, 439 (App. 1999). The Court finds that the request contained in the Response is sufficient to properly make the request, without the need to file a separate motion for leave to amend. *Cf. Blumenthal v. Teets*, 155 Ariz. 123, 131 (App. 1997)(trial court did not err by denying plaintiff the opportunity to amend months after the motion to dismiss had been denied, even though he had requested leave to amend in a one-sentence request in his response to motion to dismiss). The Court does not know if an amended complaint will cure any of the defects, but Plaintiff should be given the chance to do so.

IT IS ORDERED that Plaintiff's Notice of Motion, seeking the filing of an amended complaint as a matter of course under Rule 15(a)(1)(B) is denied.

IT IS FURTHER ORDERED that Plaintiff's request to re-convert this matter to a Rule 56 proceeding is denied.

IT IS FURTHER ORDERED that Defendants' Motions to Dismiss are granted.

IT IS FURTHER ORDERED that the actual dismissal of this case will be held in abeyance to allow Plaintiff to file an amended Complaint to attempt to cure the deficiencies in the original Complaint.

IT IS FURTHER ORDERED that Plaintiff shall file an amended Complaint no later than January 17, 2020 that attempts to cure the deficiencies in the original Complaint. Failure to file an amended Complaint by January 20, 2020 will result in a dismissal of this case without further notice.

IT IS FURTHER ORDERED that Defendants' time to file an answer or a further responsive pleading is extended to 20 days after their respective receipts of service of an amended Complaint.

NEWS RELEASE

Arizona House of Representatives
Speaker of the House J.D. Mesnard (R-17)
1700 West Washington • Phoenix, Arizona • 85007-2844

Thursday, February 1, 2018
FOR IMMEDIATE RELEASE

Speaker Mesnard Releases Statement on Letter from Representative Shooter, Announces Expulsion Resolution

STATE CAPITOL, PHOENIX – Speaker of the House J.D. Mesnard (R-17) today released the following statement regarding Representative Shooter's continuation and escalation of his improper conduct, even after Speaker Mesnard's warning:

"The outside investigators, who Rep. Shooter praised on Tuesday, have thoroughly examined every allegation made, including the allegation referenced in Rep. Shooter's letter. After addressing issues of privacy and relevancy, they included their findings in the report."

"I've spoken with the individual referenced by Rep. Shooter, and the individual has stated that the letter does not reflect the individual's reaction to the report. Rep. Shooter's letter is nothing more than an effort to use the individual as a pawn – despite repeated requests from the individual's attorney that Rep. Shooter not do anything to jeopardize the individual's anonymity. He's not standing up for the victim but rather is further victimizing the individual."

"Rep. Shooter's letter represents a clear act of retaliation and intimidation, and yet another violation of the House's harassment policy, so I will be moving to expel him from the House of Representatives immediately."

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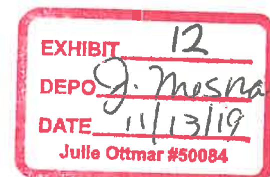
CONTACT:
Matthew Specht
Director of Communications
House Majority Staff
602-926-5518
mspecht@azleg.gov



Clerk of the Superior Court
*** Electronically Filed ***
11/18/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-050782 11/15/2019

HONORABLE THEODORE CAMPAGNOLO

CLERK OF THE COURT
A. Wood
Deputy

DONALD M SHOOTER THOMAS C HORNE

v.

STATE OF ARIZONA, et al. GEORGE MICHAEL TRYON

DANIEL P QUIGLEY
STEPHEN W TULLY
JUDGE CAMPAGNOLO

MINUTE ENTRY

MINUTE ENTRY CONVERTING MOTIONS TO DISMISS
TO MOTIONS FOR SUMMARY JUDGMENT

The Court has received Defendants Kirk and Janae Adams' Motion to Dismiss, and Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss. For the reasons stated below and pursuant to Rule 12(d), ARIZ. R. CIV. P., the Motions to Dismiss are being converted to motions for summary judgment.

Both Defendants attached exhibits to their respective Motions to Dismiss. In considering a motion to dismiss for failure to state a claim, if the trial court considers matters outside the pleadings (extraneous matters), it must treat the motion as a Rule 56 motion for summary judgment, and allow the parties a reasonable opportunity to present all pertinent material to the motion. Rule 12(d), ARIZ. R. CIV. P.; *Strategic Development and Construction, Inc. v. 7th and Roosevelt Partners, LLC*, 224 Ariz. 60, ¶1 (App. 2010). Matters of public record or matters that

are central to a complaint are not considered "extraneous matters." *Strategic Development and Construction, Inc.* at ¶¶13 & 14.

Exhibits 1 and 2 to Adams' Motion may or may not be considered as public records of the Arizona House of Representatives. Exhibit 1 to Mesnards' Motion may or may not be considered as a public record of the United States District Court. However, the Court finds that Exhibit 3 to Adams' Motion and Exhibit 2 to Mesnards' Motion are copies of Plaintiff's Notice of Claim, which Notice is neither a public record nor central to the Complaint. *See Jones v. Cochise County*, 218 Ariz. 372, ¶7 (App. 2008)(affirming the trial court's conversion of a motion to dismiss to a motion for summary judgment, because a notice of claim is a document outside the pleadings).

Referring to documents attached to a complaint are not extraneous matters. *Id.* at ¶10. However, none of the exhibits attached to the Motions were attached to the Complaint.

Because at least one of the exhibits from each Motion, and possibly the other exhibits, are extraneous matters, the Court believes it is appropriate to convert this matter to a Rule 56 proceeding, and allow the parties a reasonable opportunity to present all pertinent material to the Motions, pursuant to Rule 12(d).

IT IS ORDERED that Defendants Kirk and Janae Adams' Motion to Dismiss, and Defendants Javan "J.D." and Holly Mesnard's Motion to Dismiss are converted to Motions for Summary Judgment.

IT IS FURTHER ORDERED that a telephonic status conference to discuss whether the parties will request additional time for a reasonable opportunity to present all pertinent material to the Motions is set on **November 25, 2019 at 8:45 a.m.** **(15 minutes allotted).** Counsel for Defendants Adams shall initiate the telephonic conference by first arranging the presence of all other counsel on the conference call and by calling this division at: **(602) 372-0537 no later than 5 minutes** before the scheduled time. **The parties and counsel shall not be permitted to participate in conferences via cell phones or speakerphone.**

****Counsel please review the information below****

Becoming familiar with the Court's requirements is crucial; failure to comply with any of the requirements can and will delay any resolution to the issue.

Counsel are encouraged to visit Judge Campagnolo's online profile for information on the Court's expectations regarding motion practices and requirements, discovery disputes, and

hearing/trial procedures at the following website:
http://www.superiorcourt.maricopa.gov/JudicialBiographies/judges/profile.asp?jdgID=327&jdgUSID=12118