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IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA,)	
)	Arizona Supreme Court
Plaintiff/Petitioner/)	No. CV-13-0056 PR
Appellant/Petitioner)	
)	
vs.)	Court of Appeals: Division 1
)	No. 1 CA-SA 12-0211
THE HONORABLE MYRA)	
HARRIS, Commissioner of the)	Maricopa County Superior Court No.
Superior Court of the State of)	LC 2011-100433-001 DT
Arizona, in and for the County)	
of Maricopa,)	
)	
Respondent/Commissioner,)	
)	<i>Amicus Curiae</i> IN SUPPORT OF
HRACH SHILGEVORKYAN,)	PETITION FOR REVIEW FILED
)	BY REAL PARTY IN INTEREST
Real Party in Interest.)	
)	
)	
)	

The Arizona Attorneys for Criminal Justice submits this *Amicus Curiae* Brief in support of the Petition for Review filed by the Real Party in Interest. Rules 16 and 23 of the Ariz. R. of Civ. App. P. The Court should exercise its discretionary jurisdiction and grant the Petition as it relates to DUI trials in this State. This Brief is based upon the following:

ARGUMENTS

I. UNDER THE STATE'S PROPOSED STATUTORY INTERPETATION OF A.R.S. 28-1381(A)(3), ALL CITIZEN'S OF ARIZONA CURRENTLY DRIVING ARE GUILTY OF DUI BECAUSE WE ALL HAVE A METABOLITE IN OUR BODIES THAT WOULD BE PROHIBITED. ADOPTING SUCH A STATUTORY INTERPRETATION WOULD RESULT IN A VIOLATION OF FUNDAMENTAL EQUAL PROTECTION RIGHTS EVEN UNDER RATIONAL BASIS SCUTINY.

At the crux of this debate is whether the overall purpose of the A.R.S. 28-1381(a)(3) is rationally related to a flat ban of all metabolites that may result from THC.¹ The State has taken the position that, despite the singular language of the word metabolite, courts should interpret this language to mean **all metabolites**. Here, it has been established at the trial court that THC metabolized into Hydroxy-THC. At a latter time after the potential for impairment ended, the Hydroxy-THC then metabolized in Carboxy-THC. Under the State's theory -

why stop what we deem illegal there? Under the State's argument, **all metabolites** that originate from THC would violate the statute. It is when we follow the State's logic past the first three metabolites, that the absurdity of the end result becomes self-evident.

A. A.R.S. 28-1381(3) Is Ambiguous

The statutory analysis A.R.S. 28-1381(a)(3) should at the outset address whether the law's language is ambiguous. The debate bringing this case to Arizona's Supreme Court evidences the fact that the statute at issue is ambiguous. Ambiguity exists if there is uncertainty about the meaning or interpretation of a statute's terms, *i.e.*, **whether there is more than one rational or reasonable interpretation of the statute.** *Hayes*, 178 Ariz. at 268, 872 P.2d at 672. Here, at the Superior Court level the statute was interpreted differently than our Court of Appeals. Plainly the metabolite provision of the statute meets the criteria for statutory ambiguity.

B. The General Legislative Intent Of The Statute Is Firmly Established – Public Safety.

After a determination of a statute's ambiguity has been made, Arizona precedent provides: "...we may remove doubt about the statute by resorting to

¹ Moreover, the State's interpretation would also create a flat ban on "metabolites" of all drugs listed within 13-3401.

statutory interpretation to determine the legislature's intent. *Bentley v. Bldg. Our Future*, 217 Ariz. 265, 270, 172 P.3d 860, 865 (Ct. App. 2007). In making this determination, courts are to consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose. *See Id.*

Here, the Court of Appeals correctly documented the overall legislative purposes this law:

This statutory prohibition “was enacted as part of Arizona's comprehensive law regulating drivers under the influence of intoxicating liquor or drugs (“DUI”) and **designed to protect the public by reducing the terrible toll of life and limb on our roads.**” Phillips, 178 Ariz. at 371, 873 P.2d at 709

State ex rel. Montgomery v. Harris ex rel. Cnty. of Maricopa, 232 Ariz. 76, 301 P.3d 580, 582 (Ct. App. 2013)

At issue is here is the precise intent of the (a)(3) portion of the statute. The record is devoid of any specific legislative history regarding the exact intention behind the singular metabolite section. As a result, the analysis it left with the overall purpose of public safety.

C. The State’s Application A.R.S. § 1–214 To the Word Metabolite Is Contrary To Any Rational Relationship To The Legislative Intent Of Public Safety.

While A.R.S. § 1-214(B) permits interpretation of “[w]ords in the singular number [to] include the plural”, it does not dictate this be done blindly. On the contrary, our courts have held this statute is to be used in order to effectuate legislative intent. *Estate of McGill ex rel. McGill v. Albrecht*, 203 Ariz. 525, 529, ¶ 11, 57 P.3d 384, 388 (2002).

The issue then arises: does criminalizing driving with any and all metabolites that originate from a drug listed in A.R.S. 13-3401, rationally relate to the overall purpose of public safety? Looking to any basic treatise on toxicology helps answer this query. For example, Casareti and Doull’s, *Toxicology The Basic Science of Poisons*, shows Loratidine (a drug type prohibited by A.R.S. 13-3401) eventually metabolizes to carbon dioxide. Since we are all carbon based life forms, with carbon dioxide in our systems, everyone driving in Arizona is currently violating the statute under the State’s interpretation.

In any case involving statutory interpretation we begin with the text of the statute. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation. *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). *Ambiguity exists if there is uncertainty about the*

meaning or interpretation of a statute's terms. *State v. Sweet*, 143 Ariz. 266, 269, 693 P.2d 921, 924 (1985). In such cases courts may resolve doubt by resorting to statutory interpretation. *Sweet*, 143 Ariz. at 269, 693 P.2d at 924 (1985). If possible, of course, we try to determine and give effect to the legislature's intent. *See, e.g., Devenir Assoc. v. City of Phoenix*, 169 Ariz. 500, 503, 821 P.2d 161, 164 (1991); *Calvert v. Farmers Ins. Co.*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985). In pursuing this goal, we consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose. *Wyatt v. Wehmuller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991); *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990).

In addition, the *Rule of Lenity* dictates that any doubt about statutory construction be resolved in favor of a defendant. *Fell*, 203 Ariz. at 189, ¶ 10, 52 P.3d at 221. But the rule of lenity, like the *expressio unius maxim*, applies only when a statute is ambiguous. *See id.*; *State v. Calderon*, 171 Ariz. 12, 14, 827 P.2d 473, 475 (App.1991); *State v. Story*, 206 Ariz. 47, 51, 75 P.3d 137, 141 (Ct. App. 2003)

II. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE LEGISLATURE COULD HAVE RATIONALLY

**CONCLUDED THAT DRIVING WITH A PROSCRIBED DRUG
IN ONE'S SYSTEM NECESSITATED A FLAT BAN ON
DRIVING**

The Court of Appeals found *State v. Phillips*, 178 Ariz. 368, 873 P.2d 706 (App.Div.1,1994) dispositive. This Court correctly noted that the Phillips said "the legislature could have rationally determined that the absence of a reliable indicator of impairment necessitated a flat ban on driving with any proscribed drugs in one's system." *Id.* at 372, 710. However, this Court did not quote the preceding paragraph which is necessary to understand that quote's context, especially in light of the facts in this appeal:

The expert toxicologist's testimony established that the use of illicit drugs can affect a person's cognitive skills and impair judgment, and that the effects of withdrawal can result in lethargy and mental depression. He also stated that, unlike the blood alcohol concentration test used to measure alcohol impairment, there is no useful indicator of impairment from such drugs because they are fundamentally different from alcohol. Essentially, there can be no meaningful quantification because of the dangers inherent in the drugs themselves and in the lack of potency predictability. The defendant has not presented any evidence to the contrary. *Id.* (emphasis added).

Unlike the case in *Phillips*, Appellant has produced expert testimony that is diametrically opposed to what the expert testified to in that case. Given these differing factual circumstances, this Court has a case in front of it that is quite

distinguishable from *Phillips*, and therefore that case should not govern the disposition of Appellant's overbreadth claim.

First, it is unclear exactly what metabolite was found in the Defendant's blood in *Phillips* that led to the appeal. However, in this case we know it was METABOLITE. That is actually a grandparent of the active component in marijuana, the one that causes impairment. In essence, the metabolite found in Appellant's blood was a metabolite of a metabolite.

As the Court stated, *Phillips* stands for the proposition that the legislature had a goal of removing impaired drivers from the road, and therefore a flat ban of driving for anyone who has any metabolite that could cause impairment was necessary. A.R.S. § 28-1381(A)(3) prohibits driving for a time period significantly longer than the time the drug would affect driving, especially given the metabolite found in this case. While impairment need not be a statutory element, there must be a logical connection between the prohibited activity (driving with a metabolite) and driving impairment. In this sense, A.R.S. § 28-1381(A)(3) prohibits otherwise innocent activity: it casts a wide net that is just as likely to snare the innocent (those upon whom the effects of usage have long since passed) as the guilty. The statute seeks to remove and deter impaired driving but all too easily applies to

those whose driving ability was in no danger of being impaired. This leads to irrationality, especially in this case, making the statute unconstitutionally overbroad.

III. THE COURT ERRED IN DETERMINING THAT HAMMONDS WAS CONTROLLING AND IS PRECEDENT FOR APPELLANT'S EQUAL PROTECTION CLAIM

In addressing Appellant's equal protection challenge, this Court solely relied on *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601 (1998). This was inappropriate because the decision in *Hammonds* was based on an overbreadth challenge under the equal protection clause, not a challenge based on treating two similarly situated classes of people differently (as Appellant contends). Therefore, the reasoning of *Hammonds* and this Court's reliance upon it wholly ignores the crux of Appellant's claim.

Arizona treats two similarly situated classes of people differently under A.R.S. 28-1381(A)(3). In this case, there are two similarly situated groups of people that are treated quite differently under the law. Both ingest marijuana (or some other legal substance) at some point (resulting in marijuana metabolites being found in their body for up to two weeks post ingestion), and both are determined to be driving unimpaired. One group, however, is found guilty of DUI under A.R.S. §

28-1381(A)(3) and one is not. Therefore, the State must have a rational basis, related to a legitimate government purpose, for creating this bifurcation.

Those who are similarly situated to appellant and acquitted of A.R.S. § 28-1381(A)(3) are those who fall under the "safe harbor provision" of our DUI laws. This provides that "[a] person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section. A.R.S. § 28-1381(D). At the time of appellant's arrest, marijuana was available by prescription from licensed medical practitioners in 13 states, four of which border Arizona. (Washington, Oregon, Hawaii, Michigan, Nevada, Rhode Island, Alaska, California, Colorado, Montana, New Mexico, Vermont, and Maine). Since appellant's arrest, three more states² and the District of Columbia have legalized marijuana for medical use, as long as the patient receives a prescription from a licensed medical practitioner (those states being Arizona, Delaware, New Jersey, and the District of Columbia).

It is not rational, with the stated legitimate interest of removing all impaired drivers from the roads, to further that interest by having the state create two similarly situated groups, yet treat those two groups very differently, with extreme

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And unlike 1998, when *Hammonds* was decided, marijuana is now widely available by prescription in the state of Arizona due to Proposition 203, passed in 2010 (although it did not take effect until April 2011).

consequences for one and not the other. One group (of which appellant is a member) is prohibited from operating a motor vehicle on the roads of Arizona with marijuana metabolites in their system who are unimpaired, and are guilty of DUI under A.R.S. § 28-1381(A)(3). The other group, however, is legally permitted to operate a motor vehicle on the roads of Arizona with marijuana metabolites in their system who are unimpaired, yet are not guilty of DUI under A.R.S. § 28-1381(A)(3) because of the A.R.S. § 28-1381(D). This is why the statute does not pass constitutional muster. Neither group is at risk of causing mayhem on our roads due to the presence of marijuana metabolites in their body, but one faces the degradation of a criminal conviction while the other does not.

The legislature has absolutely no interest in prosecuting drivers in Arizona for DUI who are unimpaired. That is, however, exactly what our legislature has done with the enactment of A.R.S. § 28-1381(A)(3). And they have done so in clear violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as Art. 2 § 13 of the Arizona Constitution.

IV. EQUAL PROTECTION AND DUE PROCESS

The Due Process Clause of the Fourteenth Amendment prohibits implementation of statutes that are over-broad.

A. The Legal Standard

In the case of *Seeley V. State*, 134 Ariz. 263, 655 p.2d 803 (App. 1982), our Court of Appeals discussed the overbreadth doctrine and stated:

Overbreadth deals with different Constitutional considerations. The doctrine is two pronged in application. First, it requires that the state have a valid reason for making the conduct illegal in the first place, that is, conduct cannot be made illegal at the whim of government, but rather a rational basis must exist for the state action. State ex rel Purcell v. Superior Court, 111 Ariz. 582, 535 P.2d 1299 (1975). Second, unless constitutionally protected conduct is involved, a defendant claiming overbreadth must have standing to claim the constitutional protection. United States v. Raines, 362 U.S. 17, 80 S. Ct. 519 (1960). This simply means that the factual setting in which the defendant's violation occurred, limits the scope of the inquiry as to whether the doctrine of overbreadth applies. State v. Duran, 118 Ariz. 239, 575 P.2d 1265 (App. 1978). (Thus, a defendant whose conduct is legally prohibited has no standing to complain that other types of conduct which could conceivably fall within the ambit of the statute lacks a rational basis for governmental prohibition. 134 Ariz. At 266-7

B. Standing.

The State refers to *State v. Phillips*, 178 Ariz. 368, 873 P.2d 706, (1994) as controlling precedent. While that case is distinguishable from the case at hand for many reasons, one of the most obvious, is the issue of standing.

“Standing” is a legal doctrine based on the “case -or-controversy” language in Art. III of the United States Constitution. That is, courts do not issue advisory opinions; if the issue must be decided to resolve the case , then, but only then, will the court properly invoke its power.

‘(T)he plaintiff generally must assert his own legal rights and interests , and cannot rest his claim to relief on the legal rights or interests of third parties.’ . . . The reason for this rule is twofold. The limitation ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,’ . . .and it assures the court that the issues before it will be concrete and sharply presented .

Secretary of State of Maryland v. Joseph H. Munson Co. , 467 U.S. 958 , 104 S.Ct. 2839, 2846 (1984). See also, State v. Tocco, supra; State v. Delk, 153 Ariz. 70, 71, 734 P.2d 612 (App. 1986); Salinas v. Kahn, 2 Ariz. App. 181, 193, 407 P.2d 120 (App. 1965).

In *Phillips, supra*, the Defendant was involved in an accident. At the scene the officer noted that Phillips smelled of alcohol, had slurred speech, and seemed **significantly impaired**. She stated that she had taken Percocet earlier in the day.

A blood test was conducted and methamphetamine, an active drug, not a metabolite, was determined to be present.

There was testimony, without contradiction, that methamphetamine is a central nervous system stimulant which acts to **impair** judgment and cognitive skills. The duration of its effects is generally from six to eight hours, and withdrawal symptoms last for days. There was no level above which people can be presumed impaired **and no level below which they can be presumed to be unimpaired.**

Phillips made no claim that she was a person who was not impaired by the use of this illicit drug. She then made no claim that her conduct was of a type the State could not regulate. Phillips therefore, had no standing to challenge the statute for any reason other than it's facial validity. *State v. Phillips, supra.*

The instant case deals with the presence, literally, of the metabolite of a metabolite. There is no evidence that marijuana, the grandparent of this substance, was ingested any time near the driving of vehicle. In fact, the evidence was that the Defendant had not smoked marijuana recently. There was virtually no evidence of impairment, let alone consistent with cannabis use. There was no evidence that any ingredient, that could be traced to a prohibited drug, was found in the Defendant's blood, where it could potentially cause impairment. The metabolite found was inactive.

The Defendant is charged simply with driving with a marijuana metabolite in his body. Unlike Phillips, he obviously has standing to raise the issue that A.R.S. § 28-1381(A)(3) is overbroad as applied to him. The issue, then, becomes: is A.R.S. § 28-1381(A)(3) overbroad when applied to a prosecution for driving with a marijuana metabolite in one's body.

C. Rational Basis

1. The Legal Standard. There must be a rational basis for the prohibition of driving while a metabolite of marijuana is in one's body for A.R.S. § 28-1381(3) to be valid. The rational basis is well recognized in the law.

[I]t requires that the state have a valid reason for making the conduct illegal in the first place, that is, conduct cannot be made illegal at the whim of government, but rather a rational basis must exist for the state action. *Selley v. State, supra* at 266-7.

In *Knapp v. Miller*, 165 Ariz. 527, 799 P.2d 686 (App. 1990) our Court of Appeals considered a challenge to A.R.S. § 28-694 and held:

To comply with due process requirements, a statute must be reasonably related to a legitimate state interest. 165 Ariz. At 530.

In *State v. Thompson*, 138 Ariz. 341, 674 P.2d 895 (App. 1984), the Court held: A statute is overbroad when its language, given its normal meaning, is so broad

that sanctions may apply to conduct which the state is not entitled to regulate. Thompson, 138 Ariz. 345. *See also, Matter of Appeal in Maricopa Cnty. Juvenile Action No. JS-5209 & No. JS-4963, 143 Ariz. 178, 186 (Ct. App. 1984).* (“The evil to be avoided by overbroad statutes is that the net may be so large that it snares the innocent as well as the guilty.”); and *Zwickler v. Koota*, 389 U.S. 252, 88 S.Ct. 391, 397 (1967)’ (“a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”)

Whether A.R.S. § 28-1381 (A)(3) meets that standard depends upon: (A) the underlying purpose for A.R.S. § 28-1381 (A)(3) and; (B) whether prohibiting the presence of the alleged metabolite at a time of driving is reasonably related to that purpose.

2. The Purpose of A.R.S. § 28-1381. The underlying purpose of A.R.S. § 28-1381 is the removal of impaired drives from our streets. Numerous sources make this obvious. First, the title of A.R.S. § 28-1381 is: “Driving or in actual physical control while under the influence of intoxicating liquor or drugs...” Second, the entire legislative scheme of Article 5 of Chapter 6 of Title 28 is aimed at impaired drivers. Third, the title for the felony classification is: “Aggravated

driving or actual physical control while under the influence of intoxicating liquor or drugs....” This phrase is repeated in subsections A and D of the felony statute , A.R.S. § 28- 1383.

Fourth, within Chapter 6 is a provision for an “ anti-driving under the influence fund, A.R.S. § 28-1387.02. Fifth, A.R.S. § 28-1381 (A)(3) was added by the legislature on June 28, 1990 via House Bill 2433. The title to H.B. /2433 provided in pertinent part:

prescribing that it is unlawful to drive or be in actual physical control of any vehicle under the influence of intoxicating liquor, any drug , a vapor releasing substance or any combination of intoxicating liquor, drugs, or vapor releasing substances...control of any vehicle while under the influence of drugs; prescribing an affirmative defense....

These three phrases refer to sections 1, 2, and 3 of A.R.S. § 28-1381 (A) respectively. Sixth, the very placement of subsection (A)(3) in title 28, the traffic code, indicates a desire to promote traffic safety, not just prohibit the use of illegal drugs. The latter is covered by the criminal code, Title 13. Seventh, the Arizona Supreme Court long ago recognized that removal of the impaired driver is the goal of A.R.S. § 28-692, now 28-1381 see, *Fuenning v. Superior Court, supra*. There a substantive due process challenge was raised to what was then A.R.S. § 28-1381(B) (driving while there is .08 per cent or more by weight of alcohol in the ... blood”). That statute did not require

proof of driving impairment; rather, the State was required to establish the presence of an alcohol level at the time of driving of .08 or more. Our Supreme Court, in answer to the substantive due process challenge, held:

We have previously remarked upon the compelling state interest in reducing the terrible toll of life and limb on our highways...Stringent laws such as that in question are designed to end the lethal combination of alcohol and automobile. The constitutional requirements are met and explained by the very scientific evidence which the public defenders amici present in the appendix to their brief...Keeping such drivers off the road is certainly necessary to the state's interest. We believe the end sought by the legislature is compelling and the method adopted is necessary. 139 Ariz. At 595.

Our Court of Appeals recognized the connection between the proscribed blood alcohol level of .10% and impairment when they considered the constitutionality of then sub-section B in their decision of *State v. Thompson*, 138 Ariz. 341, 345, 674 p.2d 895 (1983) ("It was enacted because of the potential harm from persons driving with .10% by weight of alcohol in their blood.") Ninth, in *Knapp v. Miller*, 165 Ariz. 527, 531, 799 P.2d 868 (1990) the Court of Appeals rejected a substantive due process challenge to the admin per se law (A.R.S. § 28-694) with the following language:

The legislature could reasonably conclude that a driver who registers a BAC of 0.10 at the time of a test administered after the driver's arrest for a section 28-692 violation presents sufficient

danger to the public to justify license suspension, subject to the protection provided by the hearing procedure.

3. Metabolite and Driving. A.R.S. § 28-1381(B) was upheld against over breath challenges because scientific evidence established that the prohibited act (having a BAC of .10% or more at the time of driving now .08) had a rational basis to the legislative goal (removing impaired drivers). The scientific evidence established that a person's driving ability was significantly impaired for most drivers far below the proscribed statutory limit of .08%. Thus, the legislative prohibition had a rational basis to its purpose.

The same is not true for A.R.S. § 28-1381 (A)(3) as applied in this case. The evidence established that the prohibited act (having the marijuana metabolite in question in one's body at the time of driving) does not have a rational basis to the legislative goal of removing impaired drivers. The metabolite in question will still remain in the body without there being an affect on the central nervous system. The presence of the metabolite does not even indicate with any precision when the marijuana was used. It is solely an indication that marijuana was used in the past.

Whether usage of marijuana is heavy or comparatively light , the non-active metabolite in question in this case will remain in the body for a significant period of time.

Thus, A.R.S. § 28-1381(A)(3) prohibits driving with a non-active metabolite from marijuana usage that can be present for a significantly longer period than the affects of the drug on the central nervous system. Without scientific examination of bodily substances, an individual would not know when the metabolite no longer exists in her body because there is no connection between impairment of body function and the metabolite's presence.

This statute is then, overbroad as applied to the Defendant. The legislation prohibits driving for a time period significantly longer than the time the drug would affect driving. Impairment need not be a statutory element, however, there must be a logical connection between the prohibited activity and driving impairment. A.R.S. § 28-1381(A)(3) prohibits otherwise innocent activity; it's net is just as likely to snare the innocent (those upon whom the affects of usage have long since passed) as the guilty. The statute seeks to remove and deter impaired driving but could all too easily be applied to one whose driving ability was in no danger of being impaired. Despite this fact, the State seeks to

prosecute the Defendant with a statute whose underlying purpose is the removal of impaired drivers.

Finally, the evidence cannot establish that the parent drug was ingested unlawfully. Since the metabolite in question remains in the body for between seven and thirty days there is no evidence that ingestion of marijuana even took place in Arizona. There is no evidence that the act occurred in a place where it was illegal. It is precisely the overuse and misused legislation, such as that involved here, that the Due Process clause of the Fourteenth Amendment of the United States Constitution as well as Article 2 §4 and §4 of the Arizona Constitution is designed to prevent.

RESPECTFULLY SUBMITTED this 23rd day of October, 2013

Original filed with the Clerk, Arizona Supreme Court by

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