

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 65)**

PERSONAL INFORMATION

1. Full Name: **Kathryn Hackett King**

2. Have you ever used or been known by any other name? **Yes**. If so, state name:
 - **Kate King**
 - **Kathryn King**
 - **Kathryn Marie Hackett**
 - **Kate Hackett**
 - **Kate Hackett King**

3. Office Address: **BurnsBarton PLC**
2201 East Camelback Road
Suite 360
Phoenix, Arizona 85016

4. How long have you lived in Arizona? What is your home zip code? **I have resided in Arizona my entire life, with the exception of four years when I was a student at Duke University in North Carolina (1999 to 2003). In addition, I spent one summer of college living and working as an intern in New York City, and one semester of law school living and working as an intern in Washington D.C. My home zip code is 85013.**

5. Identify the county you reside in and the years of your residency. **I reside in Maricopa County. I have lived in Maricopa County from 1980-1999 and 2006-present.**

Filing Date: April 9, 2021
Applicant Name: Kathryn Hackett King

6. If nominated, will you be 30 years old before taking office? yes no

If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? yes no

7. List your present and any former political party registrations and approximate dates of each: **I have been a registered Republican since I registered to vote in 1998.**

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender: **Female**

Race/Ethnicity: **I am Caucasian. I am also of Hispanic descent on my maternal grandmother's side.**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

- **Duke University, Durham, North Carolina – Bachelor of Arts in Political Science (2003)**
- **University of Arizona James E. Rogers College of Law, Tucson, Arizona – Juris Doctor (2006)**

10. List major and minor fields of study and extracurricular activities.

- **Duke University:**
 - **Major in Political Science and Minor in History.**
 - **Kappa Alpha Theta Sorority, Member and President.**
 - **Duke University Panhellenic Association, President's Council.**
 - **Newman Catholic Student Center, Student Aid and Advisor.**
 - **Summer Internship with ABC's Good Morning America (Finance Department).**
 - **Summer Internship with Betsey Bayless' campaign for Governor of Arizona.**
- **University of Arizona James E. Rogers College of Law:**
 - **Arizona Journal of International and Comparative Law, Note and Comment Editor.**

- **Student Bar Association, First Year Representative and Delegate-At-Large.**
 - **Phi Alpha Delta Law Fraternity.**
 - **Court Appointed Special Advocates (“CASA”) Support Council for Pima County, Board of Directors.**
 - **Class of 2006 Gift Committee.**
11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.
- **Duke University:**
 - **Duke University Academic Dean’s List (several semesters).**
 - **University of Arizona James E. Rogers College of Law:**
 - **University of Arizona James E. Rogers College of Law Academic Dean’s List (several semesters).**
 - **Recipient of Andrew Silverman Third-Year Student Community Service Award.**

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.
- **Supreme Court of Arizona (2006)**
 - **U.S. District Court, for the District of Arizona (2006)**
 - **Ninth Circuit Court of Appeals (2012)**
13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No**. If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No**. If so, explain any circumstances that may have hindered your performance.
14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
BurnsBarton PLC (Partner)	2017 to present	Phoenix, Arizona
Office of Governor Doug Ducey (Deputy General Counsel)	2015 to 2017	Phoenix, Arizona
Snell & Wilmer LLP (Associate Attorney)	2006-2007 2008-2015	Phoenix, Arizona
Arizona Supreme Court (Law Clerk, Justice Michael D. Ryan)	2007-2008	Phoenix, Arizona
Office of U.S. Senator Jon Kyl (Legal Fellow)	2005	Washington, D.C.
Snell & Wilmer LLP (Summer Associate)	2005	Phoenix, Arizona
U.S. District Court, District of Arizona (Summer Extern, Judge Earl Carroll)	2004	Phoenix, Arizona
Oregano's Pizza Bistro (Waitress)	2003	Phoenix, Arizona

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

My law partners and associates at BurnsBarton have included:

- C. Christine Burns
- David Barton
- Benjamin Naylor
- Alison Pulaski Carter
- Laura Freeman
- Katya Lancero
- Michael Guillian
- Alexandra Miller
- Sarah O'Keefe

While serving as Deputy General Counsel in the Governor's Office, I worked with General Counsel Michael T. Liburdi.

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

BurnsBarton, PLC:

Since joining BurnsBarton in 2017, I have practiced primarily in the area of labor and employment law. In that role, I represent clients in matters pending in state and federal courts, arbitration, and mediation. I also represent clients in matters pending before various state and federal administrative agencies, such as the Equal Employment Opportunity Commission (EEOC), Arizona Civil Rights Division (ACRD), Department of Labor (DOL), and National Labor Relations Board (NLRB).

My law practice is dedicated to representing private and public employers in labor/employment litigation and related civil and commercial litigation matters, as well as counseling employers on a wide variety of legal issues related to labor and employment laws and the workplace. This constitutes approximately 95% of my law practice, and includes issues of discrimination, harassment, retaliation, disability accommodations, drug testing, medical marijuana in the workplace, wrongful discharge, wage and hour laws, paid sick leave, leaves of absence, unfair labor practices, plant closures and layoffs, confidentiality and trade secrets, employment agreements, tort claims (e.g., defamation and infliction of emotional distress), breach of contract claims, restrictive covenants (e.g., non-competition and non-solicitation agreements), independent contractor classification issues, and other matters. I routinely provide advice to employers regarding how to comply with state and federal employment laws, oftentimes in very challenging and emotional workplace situations.

In addition, my labor and employment law practice includes (1) drafting policies, employee handbooks, and employment agreements to address the multitude of legal and practical issues pertaining to the employer-employee relationship, (2) conducting investigations into claims of discrimination, harassment, and other alleged workplace misconduct – a process that includes interviewing witnesses, reviewing documents, and making determinations based on the evidence presented, and (3) providing training to management and non-management staff regarding how to maintain a work environment free of unlawful conduct, such as discrimination or harassment. In my labor and employment law practice, I have also represented employees in reviewing and providing advice with respect to their employment agreements.

Furthermore, I have represented clients in other types of matters involving commercial disputes and other civil claims. This has included constitutional claims under the Equal Protection Clause of the U.S.

Constitution, other types of discrimination claims, and claims under other various federal/state statutes (e.g., civil claims under the Racketeer Influenced and Corrupt Organizations Act and Medicaid Act). This constitutes approximately 5% of my private law practice. I have also represented an individual seeking a pardon through the Arizona Board of Executive Clemency. This was less than 1% of my law practice.

Office of the Governor:

From 2015 to 2017, I served as Deputy General Counsel for the Office of Governor Doug Ducey. In that role, I assisted with pending litigation and other legal issues involving the Governor's Office and executive agencies. I also advised the Office of the Governor on the various constitutional, statutory, and other legal requirements of the office, such as executive orders, public records, legislative bills, judicial appointments, executive clemencies, and extraditions.

17. List other areas of law in which you have practiced.

I have practiced commercial and business litigation, including litigation involving claims for breach of contract, tortious interference with contractual relations, defamation, breach of fiduciary duty, unjust enrichment, breach of duty of good faith and fair dealing, trade secret misappropriation, and other commercial and business disputes.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

Not applicable.

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

While serving as a law clerk to Arizona Supreme Court Justice Michael D. Ryan, I assisted in researching and drafting Arizona Supreme Court opinions.

In my law practice, I routinely draft employment agreements, independent contractor agreements, restrictive covenant agreements, confidentiality and non-disclosure agreements, severance agreements, settlement agreements, and other contractual documents.

I previously served on the Arizona Civil Rights Advisory Board. In that role, I helped draft the initial version of a bill that sought to create a civil cause of action and remedy for victims of human trafficking (House Bill 2116, 2021 Legislative Session). House Bill 2116 passed unanimously out

of the Arizona House of Representatives and Arizona Senate, and was signed by the Governor in March 2021.

20. Have you practiced in adversary proceedings before administrative boards or commissions? **Yes.** If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

- **United States Equal Employment Opportunity Commission (responding to approximately 50 charges)**
- **Arizona Civil Rights Division, Office of the Arizona Attorney General (responding to approximately 10 charges)**
- **United States Department of Labor (responding to approximately 3-4 claims)**
- **United States National Labor Relations Board (responding to approximately 7-8 charges)**

b. The approximate number of these matters in which you appeared as:

Sole Counsel: **20**

Chief Counsel: **20**

Associate Counsel: **30-32**

21. Have you handled any matters that have been arbitrated or mediated? **Yes.** If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **2**

Chief Counsel: **4**

Associate Counsel: **10**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case.

1. **Valerie Lievanos v. LoLo's, Inc. dba LoLo's Chicken & Waffles (2017-2019)**
CV2017-093812
Superior Court of the State of Arizona, County of Maricopa

Counsel for Plaintiff Valerie Lievanos:

Kimberly Eckert
keckert@arizlaw.biz
480-456-4497

Counsel for Defendant LoLo's, Inc. dba LoLo's Chicken & Waffles:

C. Christine Burns
christine@burnsbarton.com
602-753-4500
David T. Barton
david@burnsbarton.com
602-753-4500
Kathryn Hackett King
kate@burnsbarton.com
602-753-4510

The Plaintiff in this case alleged several claims against her former employer, including claims for sexual harassment under the Arizona Civil Rights Act (“ACRA”), retaliation under the ACRA, wrongful termination under the Arizona Employment Protection Act (“AEPA”), and intentional infliction of emotional distress. Defendant denied all allegations. Defendant also asserted affirmative defenses under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Pursuant to the *Faragher/Ellerth* United States Supreme Court decisions, an employer is entitled to an affirmative defense to liability where it exercised reasonable care to prevent and correct promptly any harassing behavior, but where the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer. This was the first sexual harassment case I litigated after issues of sexual harassment in the workplace and elsewhere became a focus of national attention in 2017.

2. ***Mary Smith-Wallington v. United Parcel Service, Inc.*** (2019-2020)
Case No. 8:19-cv-00523-JSM-TGW
United States District Court, Middle District of Florida, Tampa
Division

Counsel for Plaintiff Mary Smith-Wallington:

Shaina Thorpe
shaina@thorpelaw.net
813-400-0229

Counsel for Defendant United Parcel Service, Inc.:

**Kathryn Hackett King (admitted *pro hac vice*)
kate@burnsbarton.com
602-753-4510**

**Chad Lang
clang@smgqlaw.com
305-377-1000**

In this case, the Plaintiff asserted claims against her former employer under Title VII of the Civil Rights Act, the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act, as well as under applicable state law. Plaintiff filed claims for discrimination on the basis of gender, disability, and age, alleging she was not re-hired into a position based on these protected classes. Defendant denied all allegations. This case involved a “regarded as disabled” claim under the ADA. The ADA defines persons with disabilities as individuals who have a physical or mental impairment that substantially limits one or more major life activities; but the definition also includes individuals who are “regarded as” having such an impairment (even if they do not actually have an impairment that rises to the level of a disability). While some cases in my law practice settle at an early stage of the litigation, this case required extensive written discovery, third-party subpoenas, and Plaintiff’s deposition. The case resolved shortly after I took Plaintiff’s deposition.

- 3. *Trent Cook v. Smith’s Food & Drug Centers, Inc. d/b/a Fry’s Food Stores; The Kroger Co.* (2019)
CV2019-006597
Superior Court of the State of Arizona, County of Maricopa**

Counsel for Plaintiff Trent Cook:

**Michael J. Petitti, Jr.
mjp@shieldspetitti.com
602-718-3330**

Counsel for Defendants Smith’s Food & Drug Centers, Inc. d/b/a Fry’s Food Stores; The Kroger Co.:

**Kathryn Hackett King
kate@burnsbarton.com
602-753-4510**

The Plaintiff in this case alleged that his former employer discriminated and retaliated against him in violation of the ADA.

Defendant denied all allegations. An issue in this case involved the interactive process that is required under state and federal disability statutes. The interactive process requires that an employer engage in a discussion with a disabled employee to determine whether reasonable accommodations could be provided that would allow the employee to perform his/her essential job functions. Thus, the interactive process is a conversation between the employer and the employee – where the parties share information about the nature of the disability and the employee’s restrictions that may impact his/her ability to perform essential job functions. Another issue in this case pertained to constructive discharge, which arises in state and federal lawsuits where a plaintiff claims he/she was subject to an adverse employment action even though he/she resigned from the job. Arizona has a specific statute on this subject, at A.R.S. § 23-1502, which outlines (1) how an employee may establish he/she has been constructively discharged, and (2) preconditions to the right of an employee to bring a constructive discharge claim against an employer. Generally speaking, my law practice often involves emotional situations for one or both parties. This case is an example of how professional interactions and a professional working relationship with opposing counsel can lead to the resolution of a case.

23. Have you represented clients in litigation in Federal or state trial courts? **Yes.** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **35**

State Courts of Record: **25**

Municipal/Justice Courts: **2**

The approximate percentage of those cases which have been:

Civil: **100%**

Criminal: **0%**

The approximate number of those cases in which you were:

Sole Counsel: **0**

Chief Counsel: **15**

Associate Counsel: **47**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: **15%**

You argued a motion described above **2%**

You made a contested court appearance (other than as set forth in the above response) **90%**

You negotiated a settlement: **35%**

The court rendered judgment after trial: **1%**

A jury rendered a verdict: **0%**

The number of cases you have taken to trial:

Limited jurisdiction court **0**

Superior court **2**

Federal district court **1**

Jury **0**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

24. Have you practiced in the Federal or state appellate courts? **Yes.** If so, state:

The approximate number of your appeals which have been:

Civil: **100%**

Criminal: **0%**

Other: **0%**

The approximate number of matters in which you appeared:

As counsel of record on the brief: **5**

I have also assisted in drafting three additional appellate briefs, although I was not counsel of record in those matters.

Personally in oral argument: 0

25. Have you served as a judicial law clerk or staff attorney to a court? **Yes.** If so, identify the court, judge, and the dates of service and describe your role.

In 2007-2008, I served as a law clerk to Arizona Supreme Court Justice Michael D. Ryan. In that role, I assisted Justice Ryan with respect to reviewing petitions for review, amicus briefs, other appellate briefs, and additional relevant materials; researching relevant constitutional provisions, statutes, case law, and regulations; and drafting memorandums and other documents to assist Justice Ryan with decisions on matters pending before the Arizona Supreme Court.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

1. ***Equal Employment Opportunity Commission v. Peabody Western Coal Company* (this case was pending from 2001-2014, but I became involved in approximately 2011)
United States District Court for the District of Arizona (Judge John Sedwick) (Case No. 2:01-cv-01050 JWS)
United States Court of Appeals, Ninth Circuit (Judges Susan Graber, William Fletcher, and Richard Paez) (Case No. 12-17780)**

Counsel for Equal Employment Opportunity Commission:

**Andrea Gail Baran
andrea.baran@eeoc.gov
800-669-4000**

**Christopher Robert Houk
chouk@houklawfirm
480-569-2377**

**James Driscoll-MacEachron
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602-661-0053**

Dontae Sylvertooth
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Lorraine Davis
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Susan Ruth Oxford
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Counsel for Defendant Peabody Western Coal Co.:

John F. Lomax, Jr.
jlomax@swlaw.com
602-382-6305

Kathryn Hackett King
kate@burnsbarton.com
602-753-4510

Counsel for Defendant Navajo Nation (Rule 19 Defendant):

Lisa M. Enfield
lenfield@comcast.net
505-501-8288

Paul Frye
505-296-9400
info@fryelaw.us

William Gregory Kelly
505-296-9400
info@fryelaw.us

Louis Denetsosie
928-551-3081

After a diligent search, I was unable to locate an email address.

Paul Spruhan
928-871-6210
pspruhan@nndoj.org

Counsel for Kevin K. Washburn; Sally Jewell, in her official capacity as Secretary of the Interior (Third-Party Defendants):

**Robert Dreher
202-772-0233**

After a diligent search, I was unable to locate a current work email address.

**Ethan G. Shenkman
202-942-5267
ethan.shenkman@arnoldporter.com**

**James Kilbourne
202-514-2701
jim.kilbourne@usdoj.gov**

**Kristofer Swanson
202-305-0248
kristofor.swanson@usdoj.gov**

This case involved two leases between Defendant Peabody Western Coal Company (“Peabody”) and the Navajo Nation that permitted Peabody to mine coal on Navajo Nation land. Each lease required Peabody to give preference in employment to “Navajo Indians.” Both leases received approval from the U.S. Department of the Interior. The EEOC sued Peabody, alleging Peabody’s implementation of the tribal hiring preference was national origin discrimination that violated Title VII of the Civil Rights Act of 1964. The EEOC alleged Peabody refused to hire non-Navajo Indians (specifically, one member of the Hopi Nation and one member of the Otoe Tribe) for positions in which they were qualified. The primary legal issue was whether Title VII prohibited the hiring preference in favor of Navajos that was in Peabody’s leases. The Ninth Circuit affirmed the District Court’s decision that the Navajo hiring preference is based on tribal affiliation, a political classification, as opposed to a classification based on national origin. Therefore, the Ninth Circuit held the Navajo hiring preference did not violate Title VII of the Civil Rights Act. As the Ninth Circuit noted in its opinion, “[t]he question before [the Ninth Circuit was] one of first impression.”

2. ***Cheryl Kelly v. Apollo Group, Inc.* (2012)
Maricopa County Superior Court (Judge David Palmer) (CV2012-094636)**

Counsel for Plaintiff Cheryl Kelly:

Robert Gregory
robert@gregorylawaz.com
602-373-0109

Counsel for Defendant Apollo Group, Inc.:

William Hayden
bhayden@swlaw.com
602-382-6329

Kathryn Hackett King
kate@burnsbarton.com
602-753-4510

The Plaintiff in this case asserted claims against Defendant under the Americans with Disabilities Act (“ADA”) and Family and Medical Leave Act (“FMLA”). Defendant denied all claims. This case involved questions pertaining to an employee’s obligation to communicate with the employer when she is seeking job accommodations and additional leave under the FMLA and ADA. Plaintiff’s claims were subject to mandatory arbitration. The parties participated in an arbitration hearing. Following that arbitration hearing, Plaintiff filed a Motion to Vacate the Arbitration Award in the Maricopa County Superior Court. An evidentiary hearing was held, which included the presentation of witness testimony and the introduction of documents into evidence. The Court denied Plaintiff’s Motion to Vacate the Arbitration Award and affirmed the arbitrator’s award denying Plaintiff’s claims, in accordance with the Federal and Arizona Arbitration Acts. This was the only time in my career where all of the following occurred: (i) I represented a client in an arbitration hearing, (ii) the arbitration award was challenged in the Superior Court, and (iii) I subsequently participated in an evidentiary hearing before a Superior Court judge where I presented testimony and other evidence supporting a decision to affirm an arbitration award.

3. *Michael Pierce v. Douglas A. Ducey* (this case was pending from 2016-2020, but I was involved in 2016-2017)
United States District Court for the District of Arizona (Judge Neil Wake) (No. CV-16-01538-PHX-NVW)

Counsel for Plaintiff:

Andrew Jacob
ajacob@grsm.com
602-794-2495

Counsel for Defendant*:

Honorable Michael T. Liburdi
Michael_Liburdi@azd.uscourts.gov
602-322-7655

Kathryn Hackett King
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602-753-4510

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Kevin Green
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Theodore B. Olson
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Matthew McGill
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202-887-3680

*** I identified counsel above who were representing Defendant at the time I worked in the Governor's Office. Other lawyers substituted in as counsel of record after my departure from the office.**

Plaintiff filed this lawsuit seeking an injunction prohibiting Arizona from implementing Proposition 123's changes to the Arizona Constitution. Plaintiff alleged the New Mexico-Arizona Enabling Act required congressional consent to changes to the Arizona Constitution impacting investment or distribution of assets in Arizona's land trust for public schools. I participated in this case when it was in the District Court of Arizona. The Ninth Circuit determined that Plaintiff lacked standing to challenge past or future changes to the distribution formula and the action was rendered moot by Congress's approval of the Arizona Constitution amendment.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

Not Applicable.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Not Applicable.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

In 2016, I was appointed to the Arizona Civil Rights Advisory Board (ACRAB). I served as Vice-Chair from 2019-2020, and my service on ACRAB concluded in 2020. ACRAB's role is to foster the elimination of discrimination, and it is authorized to educate Arizona citizens, conduct periodic surveys, and issue publications regarding the elimination of discrimination.

In 2020, I was appointed to the Arizona Board of Regents (ABOR). I currently serve as a Regent, and am a member of Finance, Capital and Resources Committee, Audit Committee, and Research and Health Sciences Committee. ABOR is the governing body of Arizona's public university system - Arizona State University, Northern Arizona University, and the University of Arizona.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No.** If so, give details, including dates.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable.** If not, explain your decision.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain.
33. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No.** If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.
37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No.** If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No.** If so, explain.

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to

allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.** If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable.**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

Approximately 6 years ago, I was contacted by the State Bar of Arizona. The contact related to the screening of a *pro se* plaintiff's complaint. I answered all questions in full and provided all requested information. I understand the State Bar immediately closed the matter, and I received no further contact.

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **None.**

44. List and describe any sanctions imposed upon you by any court. **None.**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No.** If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No.** If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No.** If so, state the

circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No.** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No.** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE
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50. Have you published or posted any legal or non-legal books or articles? **Yes.** If so, list with the citations and dates.
- ***Arizona House Bill Proposes to Void Confidentiality Agreements in Cases of Alleged Sexual Harassment or Assault***, BurnsBarton Blog (Dec. 2017)
 - ***Important Reminder about the Risk of Unexpected FMLA Liability***, Co-Author, Snell & Wilmer Workplace Word (Oct. 2014)
 - ***Acute Care Hospitals and Federal Contracts: The Saga Continues***, Co-Author, Snell & Wilmer Legal Alert (Aug. 2013)
 - ***Phoenix Now Prohibits Employers from Discriminating on the Basis of Sexual Orientation, Gender Identity or Expression, and Disability***, Co-Author, Snell & Wilmer Legal Alert (Mar. 2013)
 - ***OFCCP Lacks Jurisdiction over Florida Hospital Participating in TRICARE***, Co-Author, Snell & Wilmer Legal Alert (Oct. 2012)
 - ***OFCCP Rescinds Directive 293 Regarding Jurisdiction over Health Care Providers and Insurers***, Co-Author, Lexology.com, Association of Corporate Counsel Newsletter (Aug. 2012)
 - ***Enforceability and Interpretation of Agreements Prohibiting "Direct and Indirect" Solicitation of Health Care Employees***, Lexology.com, Association of Corporate Counsel Newsletter (July 2012)
 - ***OFCCP Rescinds Directive 293 Regarding Jurisdiction over Health Care Providers and Insurers***, Co-Author, Snell & Wilmer Legal Alert (April 2012)
 - ***Update – NLRB Postpones Effective Date for Posting Requirement***, Co-Author, Snell & Wilmer Legal Alert (Jan. 2012)
 - ***Office of Civil Rights to Conduct HIPAA Compliance Audit***, Co-Author,

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Applicant Name: Kathryn Hackett King

- Snell & Wilmer Legal Alert (Jan. 2012)
- *NLRB Final Rule Requires Notice Posting of Employees' Rights Under the NLRA*, AHHRA Newsletter (Sept. 2011)
- *Human Rights Litigation Under the Alien Tort Statute*, Co-Author, The Practical Litigator (May 2010)
- *The Employee Free Choice Act – What Employers Should Do Now*, Co-Author, Snell & Wilmer Under Construction (May 2009)
- *Does Foreign Accent Equal National Origin?*, The Practical Lawyer (Feb. 2008)
- *Groundrules For Returning Military Personnel to the Civilian Workforce*, Biz AZ (Jan./Feb. 2007)

When I practiced at Snell & Wilmer, I assisted other lawyers in drafting “Workplace Word” articles and other legal alert updates for clients of the law firm, for the purpose of updating clients on recent developments in the area of labor and employment law. I do not have available a list of all legal alert updates for which I may have contributed to in some way.

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain.
52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes.** If so, describe.

In my law practice, I have given presentations at bar association meetings, conferences, and continuing legal education seminars on the subjects of legal developments in the area of labor and employment law and the judicial appointment process in the State of Arizona.

53. List memberships and activities in professional organizations, including offices held and dates.
- Arizona Healthcare Human Resources Association (member for period of time while practicing at Snell & Wilmer)
 - Arizona Women Lawyers Association (member from 2007-2009; 2015-2017; 2020-2021)
 - The Federalist Society (member from 2017-Present)
 - Martha McSally Young Professionals Committee (2018)
 - Republican Lawyers Association for Arizona (member for period of time while practicing at Snell & Wilmer)
 - St. Thomas More Society (member for period of time while practicing at Snell & Wilmer)
 - State Bar of Arizona (member of the Executive Council, Employment and Labor Law Section from 2017-2020)
 - State Bar of Arizona (member of the CLE Committee for the Employment and Labor Law Section from 2012-2017)

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes.**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

I served on the Executive Council of the State Bar of Arizona's Employment and Labor Law Section from 2017 to 2020. From 2011 to 2017, I served on the Continuing Legal Education Committee of the State Bar of Arizona's Employment and Labor Law Section.

I have provided pro bono legal service through Community Legal Services' Volunteer Lawyers Program ("VLP"). In 2011, following my pro bono representation of a client in a matter pending before the Superior Court of Maricopa County, VLP awarded me the Consumer Litigator of the Year Award. I have also provided pro bono legal service to non-profit organizations in Arizona whose missions are dedicated to serving individuals who are homeless or living in poverty.

54. Describe the nature and dates of any relevant community or public service you have performed.

- **Arizona Board of Regents (Regent) (2020-present)**
- **Arizona Civil Rights Advisory Board (2016-2020) (Vice Chair - 2019-2020)**
- **Arizona Town Hall, Recorder (2010)**
- **Catholic Charities Community Services, Life Skills Trainer (2006-2008)**
- **Court Appointed Special Advocates ("CASA") Support Council for Pima County, Board of Directors (2004-2006).**
- **University of Arizona Law College Association Board of Directors (2009-2015)**
- **United States Ninth Circuit Civics Contest (volunteer judge in 2018 and 2020)**
- **Xavier College Preparatory, Class Agent (2013-present)**

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

- **Selected for inclusion in the Southwest Super Lawyers (Labor & Employment) (2021)**
- **Selected for inclusion in the Southwest Super Lawyers – Rising Stars Edition (Labor & Employment) (2013-2015)***
- **Recipient, Consumer Litigator of the Year Award, Volunteer Lawyers Program (2011)**

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- **St. Francis Xavier Elementary School, Best in Class (2011)**

*** For 2015, I received notice that I had been selected for inclusion in Southwest Super Lawyers, but I did not timely respond to correspondence from Southwest Super Lawyers because I was on maternity leave at the time. Therefore, my name did not end up appearing in the 2015 edition.**

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

- **Member of the Arizona Civil Rights Advisory Board (2016 to 2020).**
- **Regent, Arizona Board of Regents (2020 to present).**

Have you ever been removed or resigned from office before your term expired? I voluntarily resigned from the Arizona Civil Rights Advisory Board shortly after I was appointed to the Arizona Board of Regents in March 2020. If so, explain. I resigned this position due to the significant time commitment involved in my service as a Regent on the Arizona Board of Regents, in addition to my private law practice and family needs at the time.

Have you voted in all general elections held during the last 10 years? Yes. If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

My interests outside the practice of law primarily center around my family, especially my husband and two children, a 7-year-old son and 6-year-old daughter. My husband and I are both Arizona natives, and we have a large extended family in Arizona, with whom we enjoy spending time over the weekends. I also spend much of my free time at my children's baseball and soccer games, the Phoenix Children's Museum, the park, school activities, kids birthday parties, and other children and family events.

I am also passionate about higher education in Arizona, particularly as it relates to access to high-quality education, workforce development, and training students for the jobs of tomorrow, in fields such as technology, science, engineering, and research.

I am an avid sports fan, and I enjoy traveling with my family and exercising for my mental and physical health.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

I am a native Arizonan. I am a wife, mother of two children, daughter, sister, and aunt. In addition, I am currently a partner at a woman-owned law firm, BurnsBarton.

My father was a corporate and securities law attorney in Arizona. He began practicing law in Arizona in 1972 and was a brilliant attorney. He was always a loving father and devoted husband. Several people in the community have described him to me as a "true gentleman." When I was living at home, he would routinely say to me: "Kate, go out and help somebody today." My father was the primary reason I entered the field of law. Sadly, he was diagnosed with Alzheimer's disease several years ago. One evening, he walked almost a mile to my house at one o'clock in the morning and rang my doorbell. He was so confused when I opened the door, and I was devastated the disease had reached this point, but also relieved he was safe that evening. My family recently moved him into a long-term care facility - a move that was particularly challenging because it occurred in the middle of the COVID-19 pandemic. Alzheimer's is a devastating and tragic disease that sadly impacts too many people and their families. Watching his decline has been heartbreaking, but my family and my faith have been instrumental in providing me the strength to carry on.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

I have a diverse legal background. I have experience working in private practice at a large national law firm, as well as at a smaller labor and employment boutique law firm. I have also worked in all three branches of

government – the executive branch, the legislative branch, and the judiciary.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes.** If not, explain.

62. Attach a brief statement explaining why you are seeking this position.

See Exhibit A.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

See Exhibits B and C.

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than ten pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Not applicable.

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

Not applicable.

EXHIBIT A

Brief Statement Explaining Why I Am Seeking This Position

My initial interactions with the judicial system were not as a practicing lawyer. Instead, my first memory was in high school, when I wrote a letter to a Maricopa County Superior Court judge who was sentencing a criminal defendant who had driven impaired and crashed into my friend's vehicle, causing her death. I witnessed this accident from about 20 yards away, as I was just about to enter my own vehicle. My second memory was in law school, when I stood before a Federal judge and provided a victim impact statement during a criminal sentencing proceeding, as I had been the victim of a crime. These were emotionally-challenging experiences for me, but ultimately gave me insight, even from a very limited point of view, into the role and impact the judicial branch has on the lives of citizens each and every day.

Since becoming a practicing attorney, I continue to remember and reflect upon these experiences. I have had the opportunity to work in private practice – both at a large firm and currently, at a smaller, boutique litigation firm – where I have represented clients ranging from Fortune 500 companies, to small business owners, to a single mother in an employment lawsuit and arbitration hearing. In addition to my private law practice, I have now worked in all three branches of government – the executive branch, the legislative branch, and the judiciary.

My service and experience in all three branches of government have provided me with a direct understanding and appreciation of the separation of powers, the reasons for this division of power, and the role of the judiciary, as articulated by Alexander Hamilton in Federalist No. 78:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

These principles guide my efforts and desire to serve on the Arizona Supreme Court. Keeping these principles in mind, it would be an honor and a privilege to serve on the Arizona Supreme Court, a court where I previously served as a law clerk.

I have a passion for public service and the State of Arizona. To that end, I have had the fortune to serve under a Federal District Court of Arizona Judge, Arizona

Supreme Court Justice, United States Senator from the State of Arizona, and Governor of Arizona. And although I continue to maintain a busy private law practice, I currently serve as a Regent on the Arizona Board of Regents. I would be honored to continue serving the State of Arizona as a member of the Arizona Supreme Court.

EXHIBIT B

1 C. Christine Burns #017108
Kathryn Hackett King #024698
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5 *Attorneys for Defendant*

6 SUPERIOR COURT OF THE STATE OF ARIZONA
7 COUNTY OF MARICOPA

9 an unmarried man,
10 Plaintiff,
11 vs.
12 an Ohio
13 corporation,
14 Defendant.

NO.

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

15 Pursuant to Ariz.R.Civ.P. 56, (“ moves for
16 summary judgment on Plaintiff claims in the First Amended Complaint
17 (“FAC”) for: (1) wrongful termination under the Arizona Employment Protection Act
18 (“AEPA”) and (2) defamation. Plaintiff’s re-casting of his lawsuit in the FAC gives rise to
19 multiple state law defenses and affirmative defenses that are dispositive in this case. As
20 relevant to Plaintiff’s claims in the FAC, removed Plaintiff from the workplace
21 immediately after he engaged in extremely strange behavior at a meeting during which
22 multiple managers (all of whom completed drug and alcohol training) provided
23 written accounts of Plaintiff exhibiting behaviors consistent with impairment; these
24 accounts were later supported by a positive drug test result. Taking into account all of
25 these factors, reasonably concluded Plaintiff was impaired at work, in violation of its
26 policies and terminated his employment. Nothing in Arizona law prohibits employers
27 from terminating employees under such circumstances. This motion is supported by the
28

1 following Memorandum of Points and Authorities, Statement of Facts in Support
2 of Motion for Summary Judgment (“SOF”)¹, and the record in this case.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. PLAINTIFF’S AEPA CLAIM FAILS AS A MATTER OF LAW**

5 **A. Legal Standard**

6 Summary judgment is proper “if the moving party shows that there is no genuine
7 dispute as to any material fact and the moving party is entitled to judgment as a matter of
8 law.” Ariz.R.Civ.P. 56(a).

9 **B. Plaintiff Has Not Established All Elements of an AEPA Claim.**

10 Count One of Plaintiff’s FAC alleges a claim for “Unlawful Discrimination in
11 Violation of the AMMA (A.R.S. § 36-2801) and/or AEPA (A.R.S. § 23-1501).” *See*
12 FAC, p. 5. This Court has already ruled (in accordance with the Sept. 27, 2019 Under
13 Advisement Ruling) that no private right of action exists for a claim of unlawful
14 discrimination in violation of the Arizona Medical Marijuana Act (“AMMA”). *See* Dec. 9,
15 2019 Under Advisement Ruling, p.2, 4 (“denying in part *Plaintiff’s Motion for Leave to*
16 *File First Amended Complaint...* to the extent that Plaintiff seeks to assert an Unlawful
17 Discrimination Claim pursuant to the AMMA. Plaintiff will only be permitted to proceed
18 with a wrongful termination claim pursuant to the AEPA”). As the Court held, the AEPA
19 permits a claim for “wrongful termination,” but “does not create a claim for unlawful
20 discrimination.” *Id.* Thus, despite its title, Count One is interpreted as one for wrongful
21 termination under the AEPA.

22 The Arizona Legislature enacted the AEPA (A.R.S. § 23-1501) in 1996 “in
23 response to *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985).
24 *See* Employment Protection Act Ch. 140, § 1, para. A, 1996 Ariz. Sess. Laws 683, 684.
25 The AEPA spells out the public policy of this state and enumerates the four circumstances

26 _____
27 ¹ The facts of this case have been presented to the Court on multiple occasions, including in
28 first Motion for Summary Judgment and Plaintiff’s Motion to Amend. Accordingly, will not
reiterate a separate factual background section here; all undisputed material facts set forth in this
motion are contained in the SOF with appropriate record citations.

1 under which an employee may bring a wrongful termination action in Arizona.” *Galati v.*
2 *Am. W. Airlines*, 205 Ariz. 290, 292, 69 P.3d 1011, 1013 (Ct. App. 2003). “Under the
3 AEPA it is the public policy of Arizona that employment relationships are contractual in
4 nature and that, absent a contract complying with the requirements outlined in the AEPA,
5 an employment relationship is severable at the pleasure of either party.” *Id.*, n.3.

6 Significantly, “the EPA’s primary purpose was to circumscribe, not broaden, wrongful
7 termination claims based on alleged violations of public policy.” *Taylor v. Graham Cty.*
8 *Chamber of Commerce*, 201 Ariz. 184, 191, 33 P.3d 518, 525 (Ct. App. 2001). Indeed, the
9 “legislature’s stated intent in enacting § 23–1501 was to limit the circumstances in which
10 a terminated employee can sue an employer to those situations involving . . . an employer
11 violating the public policy of the state as enunciated in the state constitution and statutes.”
12 *Johnson v. Hispanic Broadcasters of Tucson*, 196 Ariz. 597, 599, 2 P.3d 687, 689 (Ct.
13 App. 2000). “The EPA, therefore, circumscribes when an employee can avoid the at-will
14 presumption and places the burden squarely on the employee to prove his...employment
15 relationship is not severable at will because it falls within one of the statutorily limited
16 circumstances.” *Taylor*, 201 Ariz. at 194, 33 P.3d at 528 (citing Rita Meiser, *DeMasse v.*
17 *ITT Corporation: A New Legal Landscape for Employee Handbooks?*, 36 Ariz. Att’y 22,
18 23 (Mar. 2000) (AEPA “shifted the burden from the employer to the employee to
19 demonstrate that a modification to the at will relationship exists”)).

20 As relevant here, the AEPA specifies, “The public policy of this state is that...[a]n
21 employee has a claim against an employer for termination of employment only if one or
22 more of the following circumstances have occurred: . . . (b) The employer has terminated
23 the employment relationship of an employee in violation of a statute of this state. . . . All
24 definitions and restrictions contained in the statute also apply to any civil action based on
25 a violation of the public policy arising out of the statute. If the statute does not provide a
26 remedy to an employee for the violation of the statute,² the employee shall have the right

27 _____
28 ² This Court has already held AMMA does not provide a remedy to an employee against an
employer for a violation of AMMA. See September 27, 2019 Under Advisement Ruling.

1 to bring a tort claim for wrongful termination in violation of the public policy set forth in
2 the statute.” A.R.S. § 23-1501(A)(3)(b) (emphasis added).

3 For Plaintiff’s AEPA claim, he alleges it is the public policy in AMMA that has
4 been violated. Arizona voters enacted AMMA by ballot initiative (Proposition 203) in
5 November 2010. *See State v. Gear*, 239 Ariz. 343, 344, 372 P.3d 287, 288 (2016); A.R.S.
6 § 36-2801, *et seq.* In Interrogatory No. 3, asked Plaintiff to “describe with
7 particularity the legal basis for the public policy you are asserting in this case – including
8 all legal authority supporting such public policy.” Plaintiff responded in relevant part:

9 The AMMA does not permit the termination of a valid medical marijuana
10 card-holder unless the employer can prove that the cardholder was impaired
during work hours or on work premises.

11 and others who have already been
12 disclosed, testified that fired for the positive urine test for
carboxy.³ This is impermissible and against public policy.

13 (SOF ¶ 74)

14 Thus, in this case, Plaintiff claims Arizona’s public policy, as articulated in
15 AMMA (1) requires an employer to prove an employee was actually impaired during
16 work hours or on work premises, and (2) prohibits the termination of an employee after a
17 positive urinalysis that tests for carboxy.⁴

18 Accordingly, Plaintiff’s AEPA claim must fail as a matter of law because he has
19 not established his employment was terminated “in violation of the public policy set forth
20 in the [AMMA] statute.” A.R.S. § 23-1501(A)(3)(b) (emphasis added); *see also Taylor*,
21 201 Ariz. at 187, 33 P.3d at 521 (“In interpreting statutes, we attempt to ascertain and give
22 effect to the legislature’s intent. We focus first on the statutory wording...”). In Arizona,

23 ³ This claim is false. and both testified their decision to terminate Plaintiff was based
24 on the observations of his impairment at work on April 10, 2017 (starting in the manager meeting
and continuing throughout the day) and ending with a positive drug test. (SOF ¶¶ 46-47). Also,
25 and did not testify was terminated solely because of a positive urinalysis
test for carboxy. (SOF ¶ 51).

26 ⁴ This Court previously stated the FAC “essentially alleges that the public policy of Arizona, as
27 codified in the AMMA, prohibits an employer from terminating the employment of an employee
‘as a result of [a] urinalysis showing only carboxy,’” noting “Plaintiff has alleged this very narrow
28 public policy, and that narrow allegation will guide the scope of the litigation and remaining
discovery.” *See* Dec. 9, 2019 Under Advisement Ruling, p.3-4.

1 “[t]he legislature [and voters] enunciate[] the public policy by its enactment” of the
2 statute; the “best indication of legislatively [or voter] enacted public policy and legislative
3 [or voter] intent is the language of the enactment itself.” *Farmers Ins. Co. of Ariz. v.*
4 *Young*, 195 Ariz. 22, 26, 985 P.2d 507, 511 (Ct. App. 1998).

5 i. **To the Extent There is a Public Policy Set Forth in AMMA, it is**
6 **Only to De-Criminalize Use and Possession and Prevent**
7 **Government-Imposed Action.**

8 The court’s role is to “construe ballot measures to effect the voters’ intent.” *Gear*,
9 239 Ariz. at 345, 372 P.3d at 289. Here, if there is a “public policy set forth in the
10 [AMMA] statute,” it is simply the intent to de-criminalize the proper use/possession of
11 medical marijuana and prevent government-imposed prosecution, penalties, or sanctions
12 for such proper use/possession of medical marijuana. As the Supreme Court has already
13 noted, AMMA “provides that a ‘qualifying patient’ diagnosed with a ‘debilitating medical
14 condition’ may obtain a registry card from the Arizona Department of Health Services
15 (‘DHS’), and thereby obtain immunity from prosecution for the acquisition, possession,
16 and use of medical marijuana under the statutory conditions.” *Id.* at 344, 372 P.3d at 288.

17 The Supreme Court’s interpretation of the purpose of the AMMA is consistent with
18 AMMA’s ballot materials presented to the voters, which included a preamble to AMMA.
19 The preamble stated, “State law should make a distinction between the medical and
20 nonmedical uses of marijuana. Hence, the purpose of this act is to protect patients with
21 debilitating medical conditions, as well as their physicians and providers, from arrest and
22 prosecution, criminal and other penalties and property forfeiture if such patients engage in
23 the medical use of marijuana.” (SOF ¶ 76) (emphasis added).⁵ Put simply, AMMA was
24 intended to allow – and to de-criminalize – “uses for marijuana in treating or alleviating
25 the pain, nausea and other symptoms associated with a variety of debilitating medical
26 conditions, including cancer, multiple sclerosis and HIV/AIDS.” *Id.* Notably, in
27 proposing AMMA to the voters, the preamble says nothing about employment. *Id.*

28 ⁵ See *Gear*, 239 Ariz. at 345, 372 P.3d at 289 (citing this “purpose” of AMMA in the voter
Publicity Pamphlet in a criminal case against a physician).

EXHIBIT C

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9 *Attorneys for Defendant*

6 SUPERIOR COURT OF THE STATE OF ARIZONA
7 COUNTY OF MARICOPA

9
10 Plaintiff,
11 vs.
12 LLC
13 LLC
14 Defendants.

NO.

DEFENDANT **LLC'S**
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT (ARIZ. R.
CIV. P. 12(b)(6))

(Honorable David Palmer)

15 Pursuant to Ariz.R.Civ.P. 12(b)(6), Defendant LLC (“
16 moves to dismiss Plaintiff Complaint (First Amended) (“Complaint” or
17 “Compl.”) against This Motion is supported by the following Memorandum of
18 Points and Authorities and the Court’s entire record herein.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 As set forth in Defendant LLC’s (“ Motion to
22 Dismiss, Plaintiff is an experienced, repeat *pro se* litigant who has filed and defended at
23 least 15 cases in state and federal courts throughout the country. (*See* Defendant
24 Motion to Dismiss, pp. 2-3). In addition, this lawsuit appears to be a state-law
25 spin-off of another lawsuit Plaintiff filed last year in the United States District Court
26 (District of Arizona); in that federal court case, motions to dismiss filed by all defendants
27 are currently pending before Judge Diane Humetewa. (*See id.*)
28

1 Here, in this Complaint, Plaintiff alleges four claims against his former employer
2 (1) two claims under the Arizona Employment Protection Act (“AEPA”),
3 A.R.S. § 23-1501 (Counts Two and Three); and (2) two claims for “wage theft” and
4 “extortion to commit wage theft” (Counts Four and Five). *See* Compl., p. 7. For the
5 reasons set forth in detail below, Plaintiff’s Complaint against should be
6 dismissed. First, Plaintiff has failed to state claims against for “wage theft” or
7 “extortion to commit wage theft,” in particular because the law does not permit a private
8 plaintiff to pursue criminal claims in a civil lawsuit. Second, with respect to the two
9 AEPA claims, Plaintiff has failed to allege sufficient “well-pled facts” to support his claim
10 that terminated his employment in retaliation for his alleged reports to
11

12 **II. ARGUMENT**

13 **A. Standard of Review.**

14 Under Rule 8 of the Arizona Rules of Civil Procedure, a pleading must contain a
15 “short and plain statement of the claim showing that the pleader is entitled to relief.” *Id.*
16 “If a pleading does not comply with Rule 8, an opposing party may move to dismiss the
17 action for ‘[f]ailure to state a claim upon which relief can be granted.’” *Cullen v. Auto-*
18 *Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) (*en banc*) (*citing* Ariz. R.
19 Civ. P. 12(b)(6)). “When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts
20 look only to the pleading itself and consider the well-pled factual allegations contained
21 therein.” *Cullen*, 218 Ariz. at 419. “Because Arizona courts evaluate a complaint’s well-
22 pled facts, mere conclusory statements are insufficient to state a claim upon which relief
23 can be granted.” *Id.*

24
25 ¹ Because this is not a commercial case, is not required to attach a good faith
26 consultation certificate with its Motion to Dismiss. Ariz. R. Civ. P. 8.1(e)(4). Nonetheless,
27 before filing this Motion to Dismiss, counsel for conferred with Plaintiff on
28 November 4 and 6, 2020 regarding deficiencies with respect to his claims against
Plaintiff did not thereafter seek to amend or dismiss his claims, but instead directed
to respond to the Complaint as written.

1 The AEPA spells out the public policy of this state and enumerates the four circumstances
2 under which an employee may bring a wrongful termination action in Arizona.” *Galati v.*
3 *Am. W. Airlines*, 205 Ariz. 290, 292, 69 P.3d 1011, 1013 (Ct. App. 2003). “Under the
4 AEPA it is the public policy of Arizona that employment relationships are contractual in
5 nature and that, absent a contract complying with the requirements outlined in the AEPA,
6 an employment relationship is severable at the pleasure of either party.” *Id.*, n.3.
7 Significantly, “the EPA’s primary purpose was to circumscribe, not broaden, wrongful
8 termination claims based on alleged violations of public policy.” *Taylor v. Graham Cty.*
9 *Chamber of Commerce*, 201 Ariz. 184, 191, 33 P.3d 518, 525 (Ct. App. 2001) (emphasis
10 added). “In enacting the EPA, the legislature expressly determined and declared the
11 ‘public policy’ in this particular area of the law.” *Id.* (citing 1996 Ariz. Sess. Laws, ch.
12 140, § 1(A), (C), (E); *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 276 n. 7, 947 P.2d 846,
13 850 n.7 (App. 1997), *review dismissed*, 191 Ariz. 297, 955 P.2d 534 (1998) (By enacting
14 the EPA, the legislature “defin[ed] the public policy of this state and limit[ed] the
15 situations in which an employee may bring a wrongful termination suit.”)). The AEPA
16 “circumscribes when an employee can avoid the at-will presumption and places the
17 burden squarely on the employee to prove his...employment relationship is not severable
18 at will because it falls within one of the statutorily limited circumstances.” *Taylor*, 201
19 Ariz. at 194, 33 P.3d at 528 (emphasis added) (citing Rita Meiser, *DeMasse v. ITT*
20 *Corporation: A New Legal Landscape for Employee Handbooks?*, 36 Ariz. Att’y 22, 23
21 (Mar. 2000) (AEPA “shifted the burden from the employer to the employee to
22 demonstrate that a modification to the at will relationship exists”)).

23 In the Complaint, Plaintiff claims he complained to about alleged
24 violations of statutes and he allegedly refused to participate in conduct that he claimed
25 violated statutes. Plaintiff alleges that subsequently terminated him. Thus, for
26 his AEPA claims, Plaintiff’s claims are based on timing of his termination and
27 knowledge of his reports:
28

- 1 • “Plaintiffs employment was terminated on 1/2/2020 **after** Plaintiff had
2 reasonably and repeatedly informed management....that
3 was in fact violating Arizona Statutes.” (Compl., p. 11, Statement
4 9).
- 5 • “The acts that terminated Plaintiff’s employment **knowing**
6 Plaintiff had provided evidence of crimes...” (Compl., p. 20,
7 Statement 53)
- 8 • “When terminated Plaintiffs employment in January 2. 2020
9 **after** he had filed an EEOC lawsuit...” (Compl., p. 20, Statement 54)
- 10 • “The act of terminating Plaintiff’s employment **knowing** he had
11 provided evidence of violations of Arizona Statutes...” (Compl.,
12 p. 20, Statement 55)
- 13 • “**Timing** of the termination of employment...” (Compl., p. 24, Statement
14 77)

15 But in order to establish a prima facie case of retaliatory discharge in violation of
16 the AEPA, it is Plaintiff’s burden to plead sufficient well-pled facts to support “a causal
17 connection between his protected activity and his discharge.” *Cox. v. Amerigas Propane,*
18 *Inc.*, 211 Fed. App’x 585 (9th Cir. 2006) (causation in an AEPA retaliatory discharge case
19 is “an essential element to [plaintiff’s] case for which he bore the burden of proof at
20 trial”). First, knowledge of any of his alleged reports does not constitute
21 causation. *See Sanchez v. Henderson*, 188 F.3d 740, 747 (7th Cir. 1999) (“We have
22 previously held that, as a matter of law, mere knowledge of the plaintiff’s protected
23 activity prior to an adverse employment action does not establish a retaliatory motive”).
24 Second, Plaintiff’s allegations regarding timing do not constitute causation. *See*
25 *McCauley v. Fry’s Food & Drug Stores, Inc.*, 2019 WL 5960074, *10-11 (D. Ariz. 2019)
26 (currently on appeal, 9th Cir. Case No. 19-17497) (dismissing plaintiff’s claim for
27 discrimination because the “allegation that ‘Fry’s fired [her] after losing her toe and
28 partial foot’ is a statement of temporal relationship, not of causation”). Put simply,