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21 UNITED STATES DISTRICT COURT

22 DISTRICT OF ARIZONA

23 Arizona Democratic Party, et al.,

24 Plaintiffs,

25 v.

26 Michele Reagan, et al.,

27 Defendants.

No. CV-16-01065-PHX-DLR

**BRIEF IN SUPPORT OF MOTION  
TO ADMIT EXHIBITS  
CONTAINING LEGISLATOR  
STATEMENTS**

28

1 Plaintiffs file this brief in support of the admission of several trial exhibits  
2 containing statements by Representative Michelle Ugenti-Rita, the sponsor of H.B. 2023.  
3 Each of these statements is probative of a central issue in this case—the intent with which  
4 H.B. 2023 was enacted. Plaintiffs moved for the admission of these exhibits at trial on  
5 October 12, 2017, and the Court deferred ruling on the admissibility until such time as  
6 Plaintiffs filed a brief in support of the motion.

7 Defendants have objected on hearsay grounds to the introduction of the evidence  
8 discussed in this motion. As set forth below, however, all of this evidence is admissible as  
9 non-hearsay and/or pursuant to an exception to the hearsay rule. This Court should  
10 therefore admit the evidence at issue.

#### 11 EVIDENCE AT ISSUE

12 Plaintiffs seek to introduce the following:

13 **Exhibits 47, 53, 54, 56.** These four exhibits contain chains of emails received by,  
14 and in some cases sent by, Representative Ugenti-Rita.

15 **Exhibits 87, 88.** These exhibits are a partial transcript and full video recording of a  
16 May 7, 2016 Arizona State Bar Election Law Continuing Legal Education Event at which  
17 Representative Ugenti-Rita was a panelist.

#### 18 ARGUMENT

##### 19 Exhibits 87 and 88.

20 These two exhibits are admissible under an exception to the rule against hearsay,  
21 or, in the alternative, for a non-hearsay purpose.

22 **Exhibits 87 and 88** are a transcript and a video recording of a May 7, 2016  
23 Arizona State Bar Election Law Continuing Legal Education Event at which  
24 Representative Ugenti-Rita was a panelist along with Senator Martin Quezada. Exhibit 87  
25 is a transcript of the portion of the event during which Representative Ugenti-Rita and  
26 Senator Quezada discussed H.B. 2023. Exhibit 88 is a full video recording of the entire  
27 event.  
28

1 Representative Ugenti-Rita’s statements during the CLE event are admissible as  
2 statements of a party opponent or the effective equivalent thereof. *See generally* Fed. R.  
3 Evid. 801(d)(2)(C). Although the named Defendants in this case are the Secretary of State  
4 and the Attorney General, these individuals are being sued in their official capacities, and  
5 the Supreme Court has explained that “[a] suit against a state officer in his official  
6 capacity is, of course, a suit against *the State*.” *Diamond v. Charles*, 476 U.S. 54, 57 n.2  
7 (1986) (emphasis added). Here, although Representative Ugenti-Rita and other members  
8 of the legislature are state officers, they are not formal parties to this litigation as a result  
9 of the operation of standing and immunity doctrines. Indeed, Plaintiffs lack the practical  
10 ability to sue the legislature for exercising state authority to intentionally discriminate on  
11 the basis of race. *Compare Hall v. La.*, No. 12-00657, 2015 WL 1475062, at \*4 (M.D. La.  
12 Mar. 31, 2015) (finding that the Secretary of State is a proper party for suit in a case  
13 involving claims that an apportionment system for city judges was discriminatory), *with*  
14 *Hall v. La.*, 974 F. Supp. 2d 944, 954-55 (M.D. La. 2013) (dismissing the legislature as a  
15 defendant because plaintiffs’ suit against it was barred under the Eleventh Amendment;  
16 the legislature had no enforcement power; and, in part, because of the legislature had  
17 absolute legislative immunity). *See generally Ex parte Young*, 209 U.S. 123, 157 (1908)  
18 (carving out an exception to Eleventh Amendment immunity by permitting suits against  
19 state officials in their official capacity in order to enjoin enforcement of an  
20 unconstitutional state statute). Because the legislators who supported the enactment of the  
21 challenged provisions—including Representative Ugenti-Rita—were exercising the  
22 authority of the State in doing so, the statements of such legislators in relation to the  
23 challenged provisions should be treated as party statements.

24 Treating Representative Ugenti-Rita’s statements as effectively those of a party  
25 opponent is particularly necessary given that the enacting *legislature’s* intent is the  
26 primary focus of the *Arlington Heights* analysis. Indeed, the Supreme Court held that  
27 “[t]he legislative or administrative history[,] ... especially ... contemporary statements by  
28 members of the decisionmaking body, minutes of its meetings, or reports,” is highly

1 relevant to the sensitive inquiry into circumstantial and direct evidence of intent. *See Vill.*  
2 *of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 268 (1977). It would  
3 make little sense for the Supreme Court to direct courts to consider “contemporary  
4 statements by members of the decisionmaking body”—which are, by definition, out-of-  
5 court statements made around the time of the challenged action—but to then forbid the  
6 admission of such statements as hearsay. And as the discussion below regarding Exhibit  
7 53 indicates, Representative Ugenti-Rita and her legislative counsel have been acting in a  
8 fashion that is comparable to party opponents in this particular litigation.

9         In the alternative, Exhibits 87 and 88 should be admitted under the residual  
10 exception to the hearsay rule. The residual exception allows into evidence a statement not  
11 specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees  
12 of trustworthiness, if the court finds: (A) the statement is offered as evidence of a material  
13 fact; (B) the statement is more probative on the point for which it is offered than any other  
14 evidence which the proponent can procure through reasonable efforts; and (C) the general  
15 purposes of these rules and the interests of justice will best be served by admission of the  
16 statement into evidence. *See United States v. Leal-Del Carmen*, 697 F.3d 964, 974 (9th  
17 Cir. 2012) (citing Fed. R. Evid. 807) (admitting videotaped statement of witness). Here,  
18 the requirements of the residual exception are easily met. Because a video exists of the  
19 statements at issue, there is no question that Representative Ugenti-Rita actually made the  
20 statements contained in Exhibits 87 and 88. Indeed, Representative Ugenti-Rita confirmed  
21 through her testimony that she had participated in the event and had made certain  
22 statements. 10/13/2017 Trial Tr. 1792:21-1796:21. Moreover, Representative Ugenti-  
23 Rita’s statements, including her response to a question about legislative intent where she  
24 articulated her unwillingness to “baby” voters, which were made to a public audience and  
25 in conversation with a fellow legislator who opposed H.B. 2023, are plainly material and  
26 highly probative of her intent in sponsoring and enacting the law.

27         Defendants argue that Exhibits 87 and 88 are inadmissible because a legislator  
28 lacks competence to testify about legislative intent in passing a law, and cite to the

1 Arizona Supreme Court's decision in *Arizona Citizens Clean Election Commission v.*  
2 *Brain*, 234 Ariz. 322, 325 (2014). Defendants are wrong, for two reasons. First, this action  
3 concerns federal law claims brought in federal court. The Federal Rules of Evidence, as  
4 well as the United States Supreme Court's analysis of discriminatory intent, governs  
5 whether particular evidence of discriminatory intent is admissible. *See* Fed. R. Evid.  
6 1101(a)-(b). Second, *Brain* is inapplicable. *Brain* concerned the application of the  
7 principles of statutory interpretation to determine the meaning of statutory text. It did not  
8 concern the application of the *Arlington Heights* factors to discern whether a legislature  
9 enacted a statute with impermissible discriminatory intent. *See* 234 Ariz. at 323. As this  
10 Court has found, the principal legislative sponsor's intent is relevant to whether the  
11 legislature acted with discriminatory intent. 10/12/2017 Trial Tr. 1473:4-12. Tellingly, at  
12 trial, Defendants did not object to Representative Ugenti-Rita's testimony (or the  
13 testimony of other legislators) regarding legislative intent on the grounds that such  
14 testimony was foreclosed by *Brain*.

15 Finally, Exhibits 87 and 88 are admissible for non-hearsay purposes. *United States*  
16 *v. Lan Thi Tran Nguyen*, 502 F. App'x 678, 681 (9th Cir. 2012) (statements admissible to  
17 show knowledge of statement or reasonable cause to believe statement); *United States v.*  
18 *Gadson*, 763 F.3d 1189, 1212 (9th Cir. 2014) (statements admissible to provide  
19 clarification and context for other statements). Exhibits 87 and 88 are admissible as  
20 evidence of Representative Ugenti-Rita's knowledge and beliefs regarding the  
21 justifications for the enactment of H.B. 2023 and the concerns raised by opponents of  
22 H.B. 2023, which are in turn relevant to the intent inquiry under *Arlington Heights*.  
23 Similarly, the portion of Exhibits 87 and 88 containing statements by participants other  
24 than Representative Ugenti-Riga are admissible for the non-hearsay purpose of providing  
25 context for her statements.

26 **Exhibits 47, 53, 54, 56.**

27 These four exhibits are all admissible for a non-hearsay purpose.  
28

1           **Exhibit 47** is an email from a news reporter sent early in the 2016 legislative  
2 session to Representative Ugenti-Rita containing a series of questions regarding H.B.  
3 2023. Among other questions, the reporter asks whether Representative Ugenti-Rita  
4 knows of any specific instances of ballot collectors throwing away ballots or any other  
5 misconduct, whether she had a response to the criticism that there is no evidence of voter  
6 fraud occurring in the state, and whether she had a response to the criticism that similar  
7 ballot collection legislation introduced in the prior legislative session was deliberate in its  
8 design to suppress Democratic voting efforts. Plaintiffs move to admit Exhibit 47 for the  
9 non-hearsay purpose of demonstrating Representative Ugenti-Rita’s knowledge of the  
10 criticisms raised by the reporter in the email, and to demonstrate that she had notice of the  
11 questions asked by the reporter. Representative Ugenti-Rita’s subsequent failure to  
12 respond to these criticisms and questions—not only to this particular reporter but also  
13 during the legislative debate over H.B. 2023 as a whole—is probative of whether the  
14 justifications offered for H.B. 2023 are tenuous or pretextual, which is in turn relevant to  
15 discriminatory intent, the totality of the circumstances inquiry under Section 2, and the  
16 weightiness of state interests under the *Anderson-Burdick* test.

17           **Exhibit 53** is an email chain between Representative Ugenti-Rita, counsel to the  
18 Secretary of State, and the General Counsel to the Arizona House of Representatives  
19 discussing the instant litigation. The General Counsel to the House of Representatives  
20 forwarded to Representative Ugenti-Rita an earlier email chain in order to “bring [her] up  
21 to speed on the status of the case.” That email chain contained a discussion of the  
22 litigation between counsel to the Secretary of State and the General Counsel, in which the  
23 General Counsel indicated that Representative Ugenti-Rita had asked to speak to the  
24 General Counsel about the case, and that the General Counsel wanted to share “some of  
25 [his] thoughts about the case with [counsel to the Secretary of State] if we can do so  
26 without creating any discoverable information.” Representative Ugenti-Rita subsequently  
27 forwarded the entire email chain to a non-governmental email account of a third party.  
28 Plaintiffs move to admit Exhibit 53 for the non-hearsay purpose of demonstrating

1 Representative Ugenti-Rita's knowledge of communications between counsel to the  
2 Secretary of State and the General Counsel regarding the instant litigation, and the  
3 General Counsel's stated desire to offer "thoughts about the case ... if we can do so  
4 without creating any discoverable information." These facts are relevant to Defendants'  
5 claim that Representative Ugenti-Rita is not acting in a fashion that is comparable to a  
6 party opponent in this litigation.

7 **Exhibit 54** is an email chain between Representative Ugenti-Rita, legislative staff,  
8 and other legislators regarding the scheduling of a stakeholder meeting for H.B. 2023.  
9 This email is a continuation of the email chain contained in Exhibit 55, which was  
10 admitted by the Court for a non-hearsay purpose. 10/13/2017 Trial Tr. 1766:8-11. Exhibit  
11 54 is admissible for the non-hearsay purpose of providing further context to  
12 Representative Ugenti-Rita's trial testimony regarding the participants and content of the  
13 stakeholder meeting.

14 **Exhibit 56** is an email chain between legislative staff and a lobbyist for special  
15 taxing districts regarding H.B. 2023's exemption for special taxing districts. This email  
16 was sent to both Representative Ugenti-Rita and Eric Spencer, the Election Director for  
17 the Secretary of State. Plaintiffs move to admit Exhibit 56 for the non-hearsay purpose of  
18 demonstrating Representative Ugenti-Rita's knowledge of the lobbyist's requests for  
19 changes to the bill and the legislature's response regarding the same. Exhibit 56 is also  
20 admissible for the non-hearsay purpose of providing further context to Representative  
21 Ugenti-Rita's testimony regarding her amendment to H.B. 2023 exempting special taxing  
22 districts. 10/13/2017 Trial Tr. 1805:18-1808:2. Such knowledge and context is probative  
23 of whether the justifications offered for H.B. 2023 were tenuous or pretextual, whether the  
24 legislature was responsive to minority concerns, and whether there were procedural or  
25 substantive deviations in the series of events leading up to enactment. These are in turn  
26 relevant to discriminatory intent, the totality of the circumstances inquiry under Section 2,  
27 and the weightiness of state interests under the *Anderson-Burdick* test.

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**CONCLUSION**

For the reasons set forth above, the Court should admit evidence addressed in this brief.

Dated: October 17, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2017, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and a Notice of Electronic Filing was transmitted to counsel of record.

s/ Michelle DePass

## General Information

<b>Court</b>	United States District Court for the District of Arizona; United States District Court for the District of Arizona
<b>Federal Nature of Suit</b>	Civil Rights - Voting[441]
<b>Docket Number</b>	2:16-cv-01065
<b>Status</b>	CLOSED