

The Honorable Warren Petersen
President, Arizona State Senate
1700 West Washington Street, Room 205
Phoenix, AZ 85007
wpetersen@azleg.gov

The Honorable Ben Toma
Speaker, Arizona House of Representatives
1700 West Washington Street, Room 223
Phoenix, AZ 85007
btoma@azleg.gov

Dear President Petersen and Speaker Toma:

I write to call your attention to Secretary of State Adrian Fontes' apparent misuse of official resources to promote Proposition 140, which has preliminarily qualified for placement on the November ballot, subject to ongoing litigation proceedings.

Arizona law strictly prohibits state officials from using public assets for any activity or communication "supporting or opposing a ballot measure . . . in any manner that is not impartial or neutral," Ariz. Rev. Stat. § 16-192(A), (H)(2). As the Attorney General's Office has recognized, inquiries into potential violations of Section 16-192 (and parallel statutes governing county and municipal officials) "will necessarily involve a fact-specific, case-by-case evaluation" that is not confined to an isolated examination of the disputed communication or activity itself but also encompasses the surrounding context and circumstances. *See* Att'y Gen. Op. I15-002 (R15-002) at 11, 17. The goal is to implement the "Legislature's legitimate purpose of deterring the misuse of public funds." *Id.* at 9. While a presumption of permissibility may generally attach to "routine communications" from public agencies, "that presumption may be rebutted by evidence that the communication meaningfully deviated from the routine in a manner that objectively indicated it had the purpose of influencing an election in violation of the statutory prohibitions." *Id.* at 15. This analysis demands "careful consideration of such factors as the style, tenor and timing of the publication." Att'y Gen. Op. I00-020 (R00-27) at 2. Indeed "[t]he importance of context in this objective analysis cannot be overstated." Att'y Gen. Op. I15-002 at 17.

Secretary Fontes is directly and closely affiliated with "[Save Democracy Arizona](#)," a private special interest group that openly and actively supports Proposition 140, and is even featured on the organization's website as a "technical advisor" and "team member." Secretary Fontes' personal endorsement of Proposition 140 is lawful; the use of his office to promote its legal or political fortunes is not. Although the Secretary of State historically has been a neutral and nominal party in litigation concerning the legal sufficiency of ballot measures, Secretary Fontes abruptly abandoned that tradition and took the extraordinary step of filing a brief in the Arizona Supreme Court that directly assisted the committee sponsoring Proposition 140. Urging the court to reverse its own recent rulings, Secretary Fontes argued that any votes cast for Proposition 140 must be given effect, even if a court ultimately finds that it lacked enough valid petition signatures to qualify for the ballot. *See* [Smith v. Fontes, Ariz. Sup. Ct. No. CV-24-0199-SA \(Sept. 6, 2024\)](#).

What's more, Secretary Fontes' brief appears to have been improperly filed in violation of a Supreme Court order, which authorized further briefing only from Proposition 140's challengers—presumably on the premise that the Secretary is or should be a purely nominal party. Additionally, it is my understanding that Secretary Fontes' office has acknowledged coordinating and collaborating with Proposition 140's sponsors on litigation strategy.

This direct advocacy for Proposition 140 cannot be rationalized as applying a newfound generally applicable policy of counting votes even for defective ballot items. Merely a week before he filed his brief in the Arizona Supreme Court, Secretary Fontes insisted to the Superior Court that it must **nullify** votes cast for a (Republican) legislative candidate if it is found that he did not lawfully qualify for the ballot. *See Kirkland v. Way*, Maricopa County Superior Court No. CV2024-022463 (Aug. 29, 2024).

These circumstances supply strong reason to believe that Secretary Fontes has used his own office's and the Attorney General's office's personnel and resources to advance Proposition 140's qualification for the ballot in a "manner that is not impartial or neutral." *See also* Att'y Gen. Op. I15-002 at 7 (noting that the prohibition "generally applies to the use of a public employee's time during normal working hours, as that time is a public resource that has value"). While public officers of course can participate in litigation in the ordinary course of their duties, the selective use of litigation tools to assist or undermine specific ballot measures (or candidates) violates A.R.S. § 16-192. *See* Ariz. Att'y. Gen. Op. I18-011 at 2 (school district could permissibly send cease and desist letter to candidate who used its logo if "the District has a content-neutral and uniformly-applied policy of issuing [similar] cease and desist orders" and "the cease and desist letter is written in terms that impartially and neutrally apply that policy"). As noted above, the Secretary's insertion of his office into the Proposition 140 litigation departs from the office's longstanding policy of neutrality in such disputes. And any argument that the Secretary's office now neutrally and uniformly favors the tabulation of votes even if the candidate or measure never lawfully qualified for the ballot is refuted by Secretary Fontes' adoption of the polar opposite position in a different case just days earlier. The only apparent pattern in Secretary Fontes' litigation positions is his own political and partisan preferences. This is precisely the type of selective use of public resources to boost favored political causes that A.R.S. § 16-192 exists to prevent.

I accordingly respectfully request that your offices initiate an investigation, and pursue all appropriate actions for penalties and restitution owed to Arizona taxpayers. *See* A.R.S. § 16-192(D), (E).

Thank you for your attention to this important matter.

Respectfully,

Scot Mussi
President, Arizona Free Enterprise Club