



April 16, 2018

Hand Delivered

Javan "J.D." Mesnard
Individually and as
Speaker of the Arizona House of Representatives
1700 W Washington St, Phoenix, AZ 85007

Kirk Adams
Individually and as
Chief of Staff, Gov. Doug Ducey
1700 W Washington Street
Phoenix, AZ 85007

Mark Brnovich
Arizona Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004-2926

Re: Notice of claim by Donald Shooter pursuant to A.R.S. §12-821.01

Dear Sirs:

This Firm has been engaged on behalf of Donald M. Shooter, once a duly-elected Member of the Arizona House of Representatives serving the people of Arizona, and in particular the citizens of Legislative District 13. The citizens of Legislative District 13 most recently sent Representative Shooter to the Arizona House beginning in the 2017 legislative session. Prior to election to the House, Representative Shooter enjoyed a distinguished career in the Arizona Senate, where he served from 2011-2016. The purpose of this letter is to serve a notice of claim on you and on the state of Arizona pursuant to A.R.S. §12-821.01.

FACTUAL PREDICATE TO CLAIMS

Removal of Mr. Shooter In Violation Of His Rights

Mr. Shooter was removed from the Arizona House on or about February 1, 2018, by a vote of the House. At the time of that vote, orchestrated by Speaker Mesnard and in coordination with members of Governor Ducey's staff, the House failed to abide by its own rules, failed to acknowledge well-established protocol, and applied an illegitimate standard retroactively to Representative Shooter. The standard Speaker Mesnard applied in the investigation and subsequent vote was vastly different than the standard applied to the other House members under investigation at the same time for purported violations: Representative Michelle Ugenti-Rita and Representative Rebecca Rios.

In so doing, the House (and the Speaker individually) breached not only House rules and procedural and parliamentary norms, but also Representative Shooter's Due Process rights, as well as the rights granted to him under Arizona statutes and the Arizona and Federal Constitutions. These breaches give rise to Mr. Shooter's causes of action against the State of Arizona and are detailed herein, as required by A.R.S §12-821.01 and the dictates set forth in *Vasquez v. State*, 220 Ariz. 304, 308, ¶9, 206 P.3d 753, 757 (App. 2008). Nothing in this Notice is intended to, or may be read to, waive any and all rights Mr. Shooter retains against the individual actors who, acting alone and/or in concert, caused additional harm to him for which he expressly reserves the right to seek redress.

To many, it may appear that the February vote to remove Representative Shooter was held at the conclusion of a full investigation conducted into the claims. It would likely surprise those who believe this (including many of the very same members who voted to remove Representative Shooter) that they were by design denied access to the full report and that the version they were provided was intentionally devoid of material facts that are supportive and exculpatory of Mr. Shooter. The report was heavily redacted and members and the public were provided only a fraction of the materials actually obtained and known by the appointed Special Counsel which authored the report. It can be reasonably asked, "How and why did this happen?"

The "how" is plain to see, as this preordained result was brought about by the actions of the Speaker, in collaboration with the Governor's Office. The methods include forsaking the Legislature's long established customs and practices; flatly violating established rules of the House; and then applying new, prejudicial House policies that have never been adopted to only one of three members under investigation at the same time. All of this was done to ensure only one possible result: the removal of Representative Shooter to prevent him from his efforts to understand and highlight serious issues of malfeasance in state government contracts.

The deeper and unanswered question is WHY? The evidence shows that Don Shooter was ousted not for discriminatory conduct but because after several years of discreetly yet repeatedly raising concerns to no avail, he escalated his efforts to stop questionable procurement practices and wasteful spending in state government. He would not back off and made clear to the Governor's Office and the Speaker that he would soon be issuing subpoenas.

Donald Shooter Begins His Investigations Into Rigged Bids and Wasteful Spending

Like Don Shooter's historic exit from the House, his arrival at the Legislature was also historic. He agreed to run after neighbors in Yuma asked him to enter the race for Arizona Senate- against a two term incumbent- and after the filing deadline had already passed to add his name to the ballot. Don Shooter was the first and remains the only write-in candidate in Arizona history to win a seat in the state Senate. He was elected to serve Legislative District 13 in the 2011 legislative session and almost immediately began fulfilling one of his most important campaign promises, performing a thorough analysis of the use (and mis-use) of State funds. His priority was especially timely because when he arrived, the state faced a nearly billion dollar budget deficit.

Among other legislative priorities, Senator Shooter believed that by streamlining and automating business processes with technology, those efficiencies could free up dollars and stave off some cuts. His willingness to consider a variety of solutions to the state budget earned him the respect of members in both parties and was the basis for another historic first for Senator Shooter. He remains the only Senator ever appointed to Chair the Appropriations Committee while in a first term in office. He received the appointment in his second year of his first term. In his position as Chairman of the Appropriations Committee, he had keen insight into the expenditure of state funds and began to discover questionable practices related to state expenditures on technology.

For example, Senator Shooter learned of a significant investment in Hewlett Packard for the Arizona Department of Administration data center, initiated and led by Aaron Sandeen, the former Arizona State CIO. Senator Shooter was told that this purchase was undertaken at the same time that Mr. Sandeen was purportedly serving as a member on a Hewlett Packard National Advisory Board.

Another example communicated to Senator Shooter was relayed to him by the former Arizona Director of the Department of Environmental Quality ("DEQ") Henry Darwin. Mr. Darwin told Senator Shooter and another witness that Mr. Sandeen, when serving as CIO for the State, required DEQ to select a vendor the agency did not want to use, at a cost of an additional two million dollars to DEQ, a vendor which Mr. Darwin alleged, then became a client shortly after Sandeen stopped working for the state. These incidents naturally troubled Senator Shooter.

Another area of concern to Senator Shooter was the state's use of "Competition not Practicable" or "Sole Source" contracts. These are contracts where the State does not engage in a competitive bidding process, but rather chooses a vendor, and often, because there is no competition, allows that vendor to dictate many of the contract terms including price and service level agreements. One example of such a no-bid contract uncovered by Senator Shooter was for "general cloud services" or cloud data storage, which the state entered into with Amazon Web Services ("AWS") in March 2017 (and remains in effect as of this filing). Sole Source, defined in A.R.S. §41-2536, allows the State to award a contract without competition only if the director of the Department of Administration determines in writing that there is only one source for the required product or service. That same statute requires that sole source procurement "shall be avoided, except when no reasonable alternative sources exist." That is clearly not the case with regard to cloud based data storage. "General cloud services" are provided by numerous companies including those based in Arizona, employing Arizona workers.

What Senator Shooter found was the rampant and widespread use of no-bid contracts to obtain technology products and services. This was surprising to him because there were plenty of qualified vendors and ample opportunity to allow competition between large out-of-state multinational behemoths as well as for Arizona businesses that wanted the opportunity to compete. Yet, curiously, there was often little or no effort to level the playing field. Instead, Senator Shooter found a concerted effort at the Department of Administration to direct work to specific out-of-state companies at the expense of Arizona workers and employers, and to the detriment of Arizona taxpayers. Senator Shooter's proposed solution was simply to permit qualified vendors the opportunity to fairly compete.

Shooter Addresses Concerns Over Wasteful Government Spending

In 2016 then-Senator Shooter introduced SB 1434, with the goal of encouraging state agencies to migrate to the private sector cloud and save money on data storage. In preparing this bill, Senator Shooter met with representatives from Amazon, Dell, and Google, all recognized leaders in cloud data services. The bill included an oversight provision which mandated that when a state agency intends to invest in an IT project and the cost is anticipated to exceed \$2.5 million, at least two bids must be requested prior to entering into a contract. Agencies did not have to obtain two bids, just request them. Throughout the 2016 Legislative Session, Senator Shooter worked with representatives of the Governor's Office and the Governor's Deputy Chief of Operations as well as the state's Chief Information Officer (CIO) to modify and refine the bill. Through the course of these revisions, SB 1434 was amended to require the state Department of Administration (DOA) to report to JLBC how many bids were received, after a large technology purchase had been made. DOA was to also to report the rationale for the bid that was chosen. Despite being assured that he had addressed every issue of concern to the Governor's staff and the clear benefit to Arizona taxpayers, that bill was promptly vetoed by the Governor. Mr. Shooter introduced the bill again the next session and despite attempts to work with the State CIO, was told by representatives of the Governor's Office that it would again be vetoed. Mr. Shooter was frustrated that he could not find common ground with the Governor's Office to create consistent transparency and competition.

Despite the setback, Senator Shooter was undeterred in his quest to bring to light and resolve Arizona's faulty procurement process and prevent further negative impact on the State budget and taxpayers. He continued his efforts despite harassment. These incidents of harassment occurred consistently, within days of directly communicating objections relating to uncompetitive procurement practices to the Governor's Chief of Staff Kirk Adams. For example, in the midst of the Legislative Session, and only five days after informing the Governor's Chief of Staff Kirk Adams and other high-level Governor staff members that he would not tolerate the state entering into and maintaining multi-million dollar contracts without competition, Mr. Shooter was followed by a private investigator on his way home from a softball game. Senator Shooter sought intervention from the Arizona Department of Public Safety out of concern for his and his family's well-being. DPS identified the private investigator and made contact with him who then referred DPS to speak with his attorney. Exhibit 1. Each time that Mr. Shooter voiced his objections to the Governor's Chief of Staff Kirk Adams, within days, Dennis Welch, a local television reporter would show up at the Legislature with a camera man and aggressively follow and film Mr. Shooter, then run a story derisive of Mr. Shooter. The timing was so consistent, that Mr. Shooter suspected collaboration between Mr. Welch and Mr. Adams. Exhibit 2.

In the summer of 2017, in his capacity as Chairman of the Joint Legislative Budget Committee (JLBC), Mr. Shooter worked with his committee to prevent additional delays to the AZ Department of Administration's purchase of software that would enable robust auditing of procurement services. Mr. Shooter was told by the Arizona Department of Administration's director at the time, Craig Brown, that permitting the state's conversion from its current procurement software vendor, Periscope to an alternative procurement software vendor called Valuea, via a new contract which had been competitively bid, would stop some of the current, questionable and problematic practices at the

Department. The existing procurement software company, Periscope, lost its contract with the state following Mr. Shooter's efforts in the committee he chaired (JLBC). Periscope was represented by Axiom, a lobbying firm which subcontracted lobbying duties with Brian Townsend, who, had recently worked for Kirk Adams in the Governor's Office and was Representative Michelle Ugenti-Rita's fiancé. The state's transition from Periscope, the existing software procurement company Brian represented, to another company, ended a multi-year, multi-million dollar important and lucrative contract for Periscope. Almost immediately thereafter, Brian Townsend's representation of Periscope was terminated. See, Exhibit 3.

Just as Mr. Shooter escalated his efforts, the retaliation he endured also escalated following a private meeting that took place November 2, 2017. In the meeting between Mr. Shooter and Kirk Adams, the Chief of Staff to Governor Ducey, then-Representative Shooter indicated that he planned to use his subpoena power, granted to him as Chair of the House Appropriations Committee, to gain further insight into the irregularities in the procurement process at the start of the next Legislative Session, though, he explained, he'd much prefer the Governor's Office to "clean-up their own house". This was Mr. Shooter's twentieth and final attempt to push the Governor's Office to address blatant procurement process deficiencies without having to issue subpoenas and conduct hearings. If it was not clear before, it certainly was in that meeting, Mr. Shooter was never going to stop his efforts to bring state procurement, and the procurement no-bid process to light and obtain systemic reforms to require competition.

Early efforts to Discredit Representative Shooter

In early November, 2017, five days after Shooter's meeting with Kirk Adams, Dennis Welch interviewed Representative Michelle Ugenti-Rita with the hope of misconstruing her past friendship with Representative Shooter, and using their past history as the basis for a claim against Representative Shooter. At that time, it was not clear what shape this claim would take, or how it would further the attempts to reign in, or at least discredit, Representative Shooter. Remember, Brian Townsend was not only Michelle Ugenti-Rita's fiancé but was Kirk Adams' former Senior Policy Adviser when Adams was Speaker of the House.

It is now apparent that these actions were taken in a further and escalated attempt to dissuade Representative Shooter from his effort to bring fair dealing and transparency to the state procurement processes. Soon after Representative Ugenti-Rita's interview, the Speaker began the process, in coordination with the Governor's Office, of inhibiting and discrediting Representative Shooter. Within days of Representative Ugenti-Rita's allegations, the Speaker began pressuring Representative Shooter to resign and abandon the voters of District 13. The Speaker's requests for resignation made clear that he was not an impartial arbiter. Though troubling, Mr. Shooter believed that once complete, the investigative report would be turned over to the Ethics Committee whose members had not publicly or privately weighed in. Due process ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 240 (1980).

Representative Shooter Asks For An Ethics Investigation

Believing that he had nothing to hide, and in furtherance of his priority of transparency in government, on November 8, 2017 Representative Shooter asked for a complete investigation into the allegations against him. At the same time, Representative Shooter asked the House to investigate allegations that had surfaced concerning malfeasance and other bad acts by Representative Ugenti-Rita. Representative Shooter alleged violations of House policy by Representative Ugenti-Rita including attempts to kiss, requests for sex, exposing her genitalia in person to a young female staffer and by "sexting" the staffer graphic "selfies". Mr. Shooter alleged that Representative Ugenti-Rita also carried on an affair with another subordinate House staff member. He requested the House complete a thorough investigation into those allegations, as well as any allegations against him.

Instead of the normal method of investigation by the House Ethics Committee, the Speaker appointed a hand-selected committee *of his staff* to investigate the allegations regarding its two Members, Shooter and Ugenti-Rita. The Speaker then suspended Representative Shooter from his position as chairman of the House Appropriations Committee. In a news release Speaker Mesnard indicated that he had suspended Representative Shooter from his responsibilities as Chairman of the House Appropriations Committee. That press release went on to state "I don't believe he [Shooter] can properly fulfill his obligations as Chairman of the House Appropriations Committee until the investigation is concluded." The desired effect of this reprisal was to immediately eliminate Mr. Shooter's authority to issue subpoenas.

On or about November 15, 2017, that House investigative team, comprised only of staff members selected by the Speaker, retained the private law firm of Sherman and Howard as Special Counsel to conduct an investigation. This step in itself is out of the ordinary.

The Speaker obviously did not believe that the mere fact of being under investigation was grounds for stripping a legislative member of his or her position as Chair. That was apparent in the way he treated Representative Ugenti-Rita throughout the process. Despite the fact that at this same time Representative Ugenti-Rita was subject to the House Special Counsel's investigation, and despite the fact that she was serving as chair of the House Ways and Means Committee, Speaker Mesnard did not see fit to suspend Representative Ugenti-Rita from her position as Chair of her committee. It is difficult to see why an investigation against one Member - albeit one charged with overseeing appropriations and budgeting (and a vocal opponent of favoritism and corruption in procurement) - was sufficient grounds to remove that member as a Chair, while that same investigation against another Member - albeit one who had not been involved in investigating prior questionable expenditures by the State - was allowed to remain.

Further demonstrating the disparate treatment applied throughout the investigation, Speaker Mesnard indicated that he felt that making any pre-determinations before the investigation was complete would be premature. *See* November 10, 2017 comments by Speaker Mesnard to Arizona Capitol Times, distributed widely through the "news notes" email service. Yet, privately and repeatedly, Speaker Mesnard requested to Mr. Shooter that Mr. Shooter resign. Despite the fact that the Speaker indicated it would be premature to reach any conclusions, he clearly had decided that the investigation was

sufficient to taint Representative Shooter's ability to serve as a committee chair. He further decided that the investigation was not sufficiently impactful to taint Representative Ugenti-Rita in any way, and she was allowed to continue as chair of her committee.

The disparate and preferential treatment of Representative Ugenti-Rita was consistent throughout the investigation. Another example related to the Speaker's decision to pay a capped amount of the attorneys' fees for the three legislators under investigation (soon after claims against Representatives Ugenti and Shooter occurred, an ethics complaint was filed against Representative Rebecca Rios). The Speaker contacted Representative Shooter and informed him of his decision then immediately requested Representative Shooter not accept the offer. All three legislators submitted bills from their attorneys which were paid, and notably, the Speaker paid 25% more to the attorney representing Representative Ugenti-Rita than Mr. Shooter's or Ms. Rios's.

Representative Shooter Responds To His Wrongful Ouster

Representative Shooter attempted to redress this disparate treatment on his own. He even went so far as to hire counsel Daniel Pasternak to attempt to return him to his chairmanship. Mr. Pasternak contacted the investigator, Craig Morgan, via letter dated January 4, 2018 (*See Exhibit 4*, attached) to urge that Representative Shooter be returned to his position as committee chair. It is important to note that at that time Representative Shooter was again attempting to ensure that there was no disparate treatment, as he encouraged the Speaker to leave both Ugenti-Rita and Shooter in their positions as chair of the respective committees. The Speaker's official reply was one word "No" with no explanation or substantiation. A response that was both disrespectful and telling.

The House Changes The Rules

The House has long had a policy, or policies, regarding equal treatment in the workplace. In fact, the Arizona Constitution prohibits disorderly conduct by Members of the House. *See Ariz. Const. Art. IV, pt. 2 §11*. However, it was only in recent months, in response to growing public awareness of, and pressure against, sexual discrimination, that the Speaker implemented a formal, and substantially more restrictive policy which only applied to staff. The House Rules did not permit the application of this new policy on elected members. To date, this policy has never been voted on and therefore has never been adopted by the elected members of the House. The Speaker did not have the authority and violated the House Rules when he unilaterally created a separate standard that he applied to only one of three members accused and investigated- in the same month by the same independent investigator- for misconduct.

This is the policy under which Speaker Mesnard and his Special Counsel considered the allegations against Representative Shooter. This policy (which Special Counsel refers to in its report as "the Policy") was implemented by the Speaker for use for staff and not elected members **in November, 2017**. In other words, the Policy was released and adopted for staff members around the time of the beginning of the investigation into Representative Shooter, and just prior to the urging by Speaker Mesnard that Representative Shooter voluntarily resign his seat, sparing the Speaker the time and trouble (not to mention uncertainty) of seeking his removal. Of course, the Speaker was well aware that

he would not be able to single-handedly remove Representative Shooter unless the Speaker could convince Representative Shooter to resign. The Speaker knew he would need the votes of other members to carry out that removal which is why he instructed the independent investigator to utilize a “zero tolerance” standard to be applied only to allegations against Mr. Shooter but not the other two elected members also under investigation.

Since the founding of Arizona as a state, serious allegations of misconduct against a member, by tradition as well as parliamentary and procedural norms, have dictated that they were handled by a committee of elected peers such as a “Special Committee” or an Ethics Committee –without exception. Put another way, no Legislature in the history of Arizona, has considered the expulsion of a member without engaging a special or ethics committee consisting of elected members, and providing basic elements of fair disciplinary processes. In fact, we cannot find even one expulsion of an elected member by a state legislature *in the history of the United States* that occurred, prior to Representative Shooter’s, without the involvement of a chamber’s special committee (known throughout history and the country by a variety of names such as the “Select Committee”, “Conduct Committee”, “Ethics Committee” “Standards & Official Conduct” and “Special Privilege & Election Committee) *consisting of elected members*, and not members of hand-picked staff who are under the employ of the Speaker, as was the case in Mr. Shooter’s expulsion.

In fact, there is evidence to believe that had the House Ethics Committee considered the allegations against Mr. Shooter, the standard by which the allegations against him would have been measured would have been considerably different and therefore the outcome would have been completely different. Such was the outcome for Representative Rebecca Rios who was alleged to have engaged in sexual relations with a young House staff member in the basement of the House which ultimately led to the staffer’s dismissal from his employment. Despite direct information provided in a briefing during the transition from the previous Speaker to the current Speaker and also known first-hand by another member of House leadership, the complaint was dismissed. The dismissal letter cites a lack of first-hand knowledge by the member making the complaint as well as a finding that the issue does not amount to a violation of law, rule or policy. See Complaint Exhibit 5 and Dismissal, Exhibit 6.

Expulsion from a state legislature without due process is an important and ripe issue for Arizona’s Courts. It is telling that just a little over a month after the Arizona Speaker bypassed long established procedural and parliamentary norms for a fair disciplinary process and Representative Shooter became the first state legislator in the United States to be expelled without the matter considered by an ethics or special committee of his peers, Colorado followed suit and expelled a lawmaker also without first providing the protections required for due process.

To be clear, it is the Constitutional right of every state legislature and Congress to expel an elected member of its chamber. But it is also clear, that such a vote cannot and must not occur without the elected member afforded some due process. Those two principles are not in conflict and are, in fact, complementary. “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978).” It is a fundamental American principle, embraced to distinguish our system of justice from a monarchy. At its core, due process is notice and an opportunity to be heard by an impartial tribunal.

Procedural rules “minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, supra, 407 U.S. 67, 81 (1972).

A.R.S. §38-519 establishes an Ethics Committee for each legislative body, comprised of five Members appointed (in the House) by the Speaker. That committee is to investigate complaints and charges against members of the House, and “if necessary report the results of the investigation to [its house] with recommendations for further action. “*See* A.R.S. §38-519 (D). This Committee (and prior to its formation at the Arizona Legislature, the “Special Committee”) has in Arizona presided over every serious allegation of misconduct by a member, including after legislators (during AZScam in 1991) were videotaped accepting and, in one case even counting the money for, bribes and whose bank accounts had already been confiscated in a separate, yet related civil racketeering lawsuit. Even they were afforded the opportunity for a hearing which Mr. Shooter was deprived of.

- *See* how Senator Carolyn Walker was treated in 1991. As described by the Arizona Capitol Times in a retrospective article printed 9/19/2011: “The ethics trial format [for Walker and Higuera] was fairly simple and was set to feature opening arguments from opposing sides, the presentation of witnesses and documents, cross-examinations and follow-up questions from the special prosecutor. Committee members were allowed to question witnesses”.
- *See*, Jesus “Chuy” Higuera (1991): Mr. Higuera resigned during the House Ethics Committee investigation. The House Ethics Committee investigation was conducted simultaneously with the Senate Ethics Committee investigation into Senator Carolyn Walker.
- *See* Sue Laybe (1991). Ms. Laybe resigned on the third day of her House Ethics Committee hearing into her role in “AZScam”.
- *See* Senator Scott Bundgaard (2012). The Ethics Committee investigator, (Mr. Mike Liburdi, who currently serves in the Governor’s Office) recommended expulsion. Mr. Bundgaard resigned, following witness testimony, a few hours after the start of the committee hearing/trial.
- *See* Representative Daniel Patterson (2012). The Ethics Committee’s Investigative Report made clear “the Chairman [of Ethics] shall review and distribute a copy of each complaint and supporting documentation to all Members of the Committee and to the Member who is the subject of the complaint. The Member who is the subject of the complaint shall have the opportunity to respond to the complaint in writing”. After the House Ethics Committee recommended expulsion, Mr. Patterson resigned.

As affirmed by the National Council of State Legislatures (NCSL) which extensively tracks state legislatures, in “Inside the Legislative Process”, a nationally-recognized publication and research tool which collects responses to comprehensive surveys of legislative clerks and secretaries of all 50 state legislatures, “Modern court cases establish that a legislator who is subject to disciplinary proceedings

has the right to due process". See, <http://www.ncsl.org/documents/legismgt/ILP/96Tab6Pt1.pdf> (Last visited 4/12/18).

For the first time in the Arizona Legislature's history, rather than convene the Ethics (or Special) Committee to investigate conduct complaints against members Representative Shooter and Representative Ugenti-Rita, the Speaker appointed a "special investigation team" consisting only of his staff and not of elected members/peers as is customary. The team promptly hired Sherman & Howard as Special Counsel. As Special Counsel was quick to point out, the Speaker has discretion to run the House. See Rules of the House of Representatives of the State of Arizona, Rule 4(F). Similarly, the House of Representatives may discipline and/or expel a member with a vote of at least two thirds of its members.

However, the Speaker does not have the authority to:

- Unilaterally create a new sexual harassment policy for elected members without a vote of the elected members;
- Direct that a new, unauthorized policy and standard be applied **retroactively** on any elected member;
- Direct the use of two distinct and inconsistent policy standards simultaneously to elected members under investigation;
- Cause the independent investigators' report to **omit material and exculpatory testimony and evidence** relating to independently corroborated, serious allegations of misconduct by Mr. Shooter's accuser;
- Compel the members of the House to vote for its first expulsion in 70 years only four days after the release of the investigators' report without providing Mr. Shooter the opportunity to respond in writing. Mr. Shooter was assured both orally and in writing that he was entitled to five days to provide a written response to the investigative report findings. (See Exhibit 7). For the Speaker to instead declare that in only four days after the release of the report that he would offer a motion for censure (then offered the motion to expel) is evidence of his unambiguous intention to preclude Mr. Shooter from the opportunity to raise these issues until after he had been expelled.

It is important to again note that the Policy, commonly referred to as a "zero tolerance policy" was released *and effective November, 2017* and **only applies to staff, not legislative members**. For it to apply to legislative members, a vote approving the policy by the membership would have been required. Yet no such vote ever took place. The Special Counsel was directed to and applied new illegitimate rules ex post facto, to form conclusions about violations of these new unauthorized rules. Additionally, no explanation has been given for considering alleged conduct from years ago, most which was alleged to have occurred while Mr. Shooter was serving in the Senate, using rules only recently adopted for staff members, and never authorized for elected members of the House.

The use of the unauthorized policy standard combined with the exclusion of exculpatory evidence not only was unjust but directly resulted in the conclusions by Special Counsel that Mr. Shooter's conduct created a hostile work environment which was the core rationale used to justify his expulsion. However, if the appropriate standard was used: employment law, Mr. Shooter would have been found to have been offensive and uncouth on separate occasions with separate individuals, but not to have created a hostile work environment.

In an Op-Ed discussing calls for the resignations of two elected members of the Missouri Legislature following highly offensive statements issued by each member on social media, Dave Roland in the St. Louis Dispatch, 9/6/2017 said this:

However ill-considered and offensive the statements might have been, they neither violated any laws nor disrupted legislative proceedings . . . The Constitution's protections for free speech do not permit a government entity to penalize citizens — even members of the Legislature — solely because they made a statement that others found to be offensive. (see, http://www.stltoday.com/opinion/columnists/legislature-should-not-expel-members-for-offensive-remarks/article_704c7cbe-5540-5efc-96d5-062d56c3c02c.html) (last visited 4/12/18).

Without due process, Mr. Shooter's peer legislators were denied the time and opportunity to objectively evaluate the facts, evidence and appropriate standards nor hear Mr. Shooter's responses and rebuttals.

These breaches of specific House Rules and violations of parliamentary and procedural norms desecrated the basic rights owed to Mr. Shooter, as an American, and as a duly-elected Legislative member of the House of Representatives and the people of his legislative district who elected him to represent their interests. With major water policy changes proposed by the Governor looming large during this legislative session, the loss of Yuma's seasoned and influential legislative representation was especially detrimental to the interests of Shooter's legislative district 13.

At first, it was unclear why the Speaker would not allow the investigation to be conducted under the purview of the Ethics Committee. The Speaker has not explained the decision to seek outside counsel or attempted to justify the \$200,000 price tag that the taxpayers were asked to bear in what could have been a simple ethics investigation by Members of the House against its own Members. Unfortunately, given the Speaker's numerous and flagrant breaches of duty and of trust to his members, as described above, the Speaker must have believed the ends justified the means in Mr. Shooter's case. These extraordinary measures were to prevent Representative Shooter from issuing subpoenas and thereby making evident, suspected high-level corruption.

Special Counsel's Report was Substantially Modified

The report contains voluminous discussion regarding various allegations against Representative Shooter. In fact, some 65 pages of the 75 pages of the investigative report focused on investigations into Mr. Shooter, including interviews with numerous witnesses who are identified by name and in some

instances, where their allegations were found to be demonstrably false. In fact, a majority of the claims against Mr. Shooter were found not to constitute sexual harassment even under the Speaker's strict "zero tolerance" standard. By contrast, the report contains only a page and a half directed to allegations against Representative Ugenti-Rita and concludes, without facts or analysis, that there is "no credible evidence" that she violated the Policy.

Still, Mr. Shooter has first-hand knowledge of a victim of Representative Ugenti-Rita's harassment who met with the independent investigators and provided physical evidence as well as contemporaneous witnesses who also came forward to describe sexual misconduct far more egregious than any allegation against Mr. Shooter. The Speaker caused that victim's experiences to be excluded from the publicly released version of the report. There was no attempt to discipline or otherwise censure Representative Ugenti-Rita, as the Speaker's objective was only to remove the burr under the Governor's saddle that Representative Shooter had become due to his attempts to uncover evidence of steering, no-bid contracts and other non-competitive procurement processes.

The Results of Special Counsel's Report Are Delivered Only To The Speaker

Though it is known that the Speaker received a copy of the report at least nine days prior to it being presented to Mr. Shooter and the media a few hours later, it not clear when Special Counsel completed a draft report, and how the Speaker or the special investigation team directed that the report not contain the testimony or evidence against Representative Ugenti-Rita. What is clear is that when the Special Counsel completed this investigation, the results were not immediately made public and the direct testimony of a victim of sexual harassment by Representative Ugenti-Rita and supporting witness testimony were inexplicably missing from the version of the report that was released to Mr. Shooter and the public.

When the Speaker finally permitted Mr. Shooter supervised access, though without permission for a phone or pen or paper, to the Mesnard version of the "independent" report (hours before it was released to the public), there were numerous references in the report to interviews with anonymous "Interviewees" and references to notes, photos, and other evidence that was not provided to Representative Shooter. This decision to omit material as well as exculpatory witness testimony and evidence and to restrict such information had a deleterious impact on Representative Shooter's ability to respond to the charges and to challenge the credibility of his main accuser, and fellow accused, Representative Ugenti-Rita. Subsequent events show that the Speaker has no intention to release the full report that was paid for by the taxpayers of Arizona.

Considerable information was not available to the general public, or to members of the House of Representatives, at the time that it was released nor available at the time of the Speaker's motion and the House vote to remove Representative Shooter from elected office.

The Speaker's insistence on blocking access to the information obtained by the independent investigator has prompted a challenge by the Arizona Republic for access to the public records. The Republic's challenge is especially ironic since one of the interviews that was withheld in the Special Counsel's report was with the former publisher of the Republic, who was interviewed along with the

paper's counsel, David Bodney. Mr. Bodney is the same lawyer who brought the challenge. After that challenge and a month after the vote to expel Mr. Shooter, Speaker Mesnard released an additional 340 pages of material, related solely to the investigation of Mr. Shooter and nothing related to claims against Representative Ugenti-Rita (on March 16, 2018).

In an incredible example of arrogance, this is a prime example of shutting the barn door after the horse has gone, because the purpose of the report was to provide House membership with grounds for discipline of Representative Shooter and Representative Ugenti and potentially Representative Rios. Any additional information, including exculpatory information or information that would shed light on the conduct of others investigated by the Special Counsel's office was kept private until such time as the House had already voted to remove Representative Shooter with refusals by the Speaker continuing to prevent full disclosure.

Even more recently, Members of the House continue to press the Speaker for a release of the full report and all testimony. On March 26, 2018, Representative Todd Clodfelter (R-Tucson) called for the release of the complete investigative record within 24 hours. Representative Clodfelter was quoted in a letter to Members, that the full investigative file includes evidence of "allegations of repeated, illegal sexual harassment by representatives other than Representative Shooter." That effort was rebuffed by the Speaker on false technical, procedural grounds.

According to published media reports, Representative Clodfelter brought this motion to respond to questions from his constituents, including concerns that the House is "involved in some sort of cover-up". See <https://www.azcentral.com/story/news/politics/arizona/2018/03/26/lawmakers-push-vote-release-don-shooter-harassment-investigation-records/459361002/> (last visited 4/12/18).

ADDITIONAL LEGAL BASES OF THE CLAIMS

There is no question that the Supreme Court can and will intervene when other branches of state government act improperly. In the case of *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012), the Court found the governor did not have the power to remove a member of the Independent Redistricting Commission. In doing so, the Court made some applicable observations:

"The gubernatorial removal power derives from the Constitution, not statute. That fact, however, does not alter or lessen a court's power to review whether removal of an independent commissioner meets constitutional requirements" (229 Ariz. at 354, 275 P.3d at 1274)

"well-established legal principles exist to guide us in determining whether the Governor's removal of Mathis meets constitutional requirements, without 'substituting our subjective judgment' on facts or on the nature and severity of Mathis's alleged wrongs." (229 Ariz. at 354, 275 P.3d at 1274).

"The requirement of two-thirds Senate concurrence is a significant check on the governor's removal power and poses a potentially formidable hurdle to curb abuse of

executive discretion. *353 **1273 But the absence in Section 1(10) of the other procedural and substantive safeguards found in Article 8 distinguishes the Senate's role under Section 1(10) from its role in an impeachment." (229 Ariz. at 352–53, 275 P.3d at 1272–73).

"To determine whether a branch of state government has exceeded the powers granted by the Arizona Constitution requires that we construe the language of the constitution and declare what the constitution requires. The interpretation of the laws is the proper and peculiar province of the courts and a constitution is and must be regarded by the judges as fundamental law. It is emphatically the province and duty of the judicial department to say what the law is." (229 Ariz. at 355, 275 P.3d at 1275)(internal cites and punctuation omitted).

Mr. Shooter has been damaged by the actions and inactions of Speaker Mesnard, the House of Representatives, the Governor's office and others. He has suffered violations of his Constitutional rights and has been the victim of common law torts. His constitutional rights under both the United States and Arizona constitutions have been violated. These violations have vitiated his right to due process, equal protection, and his right to confront and cross examine his accusers.

The Arizona violations include due process violations arising under the Arizona Constitution. See Arizona Constitution article 2 § 4. Representative Shooter was discriminated against when Speaker Mesnard unilaterally and without authority applied a "zero tolerance" policy against Mr. Shooter that had never been adopted by the House or its Members.

In January of this year, the Congressional Research Service published "Expulsion of Members from Congress: Legal Authority and Historical Practice". The authors note that there are very few court decisions on the use of the Constitution's Expulsion Clause. In lieu of specific judicial guidance, the Congressional Research Service asserts that there is strong legal precedent to look to historical instances of the exercise of its power to interpret and guide the proper uses and constraints of the Expulsion Clause. <https://fas.org/sgp/crs/misc/R45078.pdf> (last visited 4/12/18). In *United States v. Ballin*, 144 U.S. 1, 5 (1892) the Supreme Court held that, while the House's rulemaking power was broad, in exercising that power, the House "may not by its rules ignore constitutional restraints or violate fundamental rights. It would seem that the same limit may be applicable to the expulsion power.

Speaker Mesnard knew he violated House Rules when submitting an illegitimate, never adopted policy as the standard to be applied retroactively on one elected member, as evidenced by the fact that after Mr. Shooter's expulsion he began then abandoned the process of seeking to have the members of the House of Representatives approve a Code of Conduct.

It is important to note that the allegations against Representative Shooter were made prior to Speaker Mesnard purporting to adopt new rules. The allegations detailed in the Special Counsel's report date back as far as 2013. It is a violation of Representative Shooter's Constitutional rights for the

Speaker, and the House as a whole, to apply to his actions in 2013, rules which were not even enacted, nor purported to be enacted, until the same month allegations are made to the media, in November 2017.

The same factual predicate outlined above is evidence that the House, and Speaker Mesnard in particular, acted in concert to violate Representative Shooter's due process rights and to deny him the privileges and immunities granted to him as a citizen of both Arizona and the United States.

The people of Legislative District 13 have a right to be represented at the Arizona Legislature by the individual they have chosen and this right must be acknowledged by affording their elected member the right to due process prior to expulsion. The expulsion of Mr. Shooter occurred only months before the voters of his legislative district would have made their own determination had not the Speaker pushed members of the House to substitute the judgment of Legislative District 13 voters with their own and without all relevant facts.

Representative Shooter's right to due process includes the Constitutional right to examine his accusers and confront the witnesses against him. Although the expulsion of Representative Shooter is not a judicial proceeding, the clear intent of the House vote to expel him was to deprive him of his seat in the House of Representatives. As the Supreme Court said in *Greene v. McElroy*, 360 U.S. 474, 496—497 (1959):

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion.

The entire removal process was undertaken without the protections of the traditional Ethics Committee or any of the rights the Courts find so important. At a bare minimum Representative Shooter should have been provided access to the complete investigative file including the investigators' notes so that he could properly mount a defense to the allegations raised against him. He should, at the very least, have access to that information in order to question the bias, interest, and motive of his accusers. He was denied that right by Speaker Mesnard's decision to release only the redacted 82 page report.

Speaker Mesnard is aware of the shortcomings of the released report, as is evidenced by his subsequent release of an additional 340 pages of investigative material. As Representative Clodfelter has already pointed out, this information was not available to the Members at the time that they were asked to vote on the expulsion of Representative Shooter. The calculated and willful withholding of

exculpatory evidence forms the basis of Representative Shooter's claim for violation of his Constitutional rights in this context.

In addition, the actors, described herein, were acting, singularly or in concert, under color of state law, at least in part. Pursuant to 42 USC §1983 the coordination and actions taken and taken in concert by the Speaker, Chief of Staff Kirk Adams, and others involved in the Shooter investigation constitute a violation of federal law. Section 1983 provides that no person acting under color of state law may act to deprive another of the rights and privileges granted to them under the laws of either Arizona or the United States Constitution. The actions detailed herein are sufficient to establish a violation of 42 USC § 1983 and entitle Representative Shooter to both nominal damages and his actual damages in an amount to be proven at trial.

The actions taken to expel Representative Shooter deprived him of a protected liberty interest. Not only did he lose his seat but he was defamed at the same time. The Arizona Court of Appeals has previously found that an individual who is terminated by the government has a protected liberty interest that is compensable if that individual is libeled at the same time. *See Montoya v. Law Enforcement Merit System Counsel*, 148 Ariz. 108, 713 P.2d 309 (1985). The allegations and conclusions against Shooter based on a bogus policy and standard are defamatory and were publicly disseminated in the Special Counsel's report and repeated as fact in the media. This report includes salacious information which even the Special Counsel found was not relevant. For example, on a number of the charges the Special Counsel's report found that there was no credible evidence, and yet the House based its decision to expel Representative Shooter in part on the information contained in Special Counsel's report.

Mr. Shooter also has common law claims for false light invasion of privacy. The allegations presented in the Special Counsel's report, and the intentional suppression of exculpatory information (which was suppressed at the direction and discretion of Speaker Mesnard), places Representative Shooter in a false light.

What began as an attempt to silence an outspoken critic of corruption in state government contracts turned into an all-out character assassination. Representative Shooter is entitled to have his name cleared, and it appears from the Speaker's steadfast refusal to release information to the public or legislative members unless "required by subpoena" that the only way to compel transparency and the truth is through litigation. Mr. Shooter intends to vigorously defend his reputation, and to work to restore the damage caused by the actions described in this Notice of Claim.

SETTLEMENT

Mr. Shooter was denied review, first by a committee of his peers as well as the opportunity to fully respond to the investigative report in writing as was unequivocally required. The deprivation of these rights and others precluded him from raising the issues described. At the heart of this Notice of Claim and imminent lawsuit is his desire to serve the people of our state and those who elected him by making a genuine and systemic difference. At this point, this can only be accomplished in a court of law where the facts and the record can be carefully considered and understood. In order to gain access to the

evidence and present context for the facts and evidence in a court of law, he brings forward these civil claims.

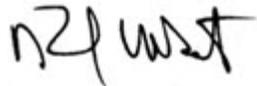
According to A.R.S. §12-821.01, he must suggest what would make him whole, in terms of compensation. Having lost his job and been branded nationally as a sexual predator, his greatest fear is that for all of this, he may not have made a dent in the corrupt culture at the Capitol and, in fact, his expulsion is now a cautionary tale that will keep others silent. The compensation Mr. Shooter seeks is for the evidence of the extraordinary actions by members of the Governor's Office, in coordination with his prime accuser Representative Michelle Ugenti-Rita and the Speaker of the House Javan Mesnard, be made public, including the circumstances and motivations behind the multi-million dollar technology, no-bid contracts.

Mr. Shooter is keenly aware of the potential cost to the taxpayers of Arizona, since it was his concern for the taxpayers that initially created this situation for which he was retaliated against. With that in mind, Mr. Shooter must balance his need to restore his good name and expose the brazen corruption in government contracts with financial compensation for the wrongs he has suffered at the hands of these state actors. The taking of his job and the destruction of his reputation and character is complete and understood nationwide.

To that end, Mr. Shooter requests the sum of \$1.3 million to resolve all claims he has as set forth above. Yet he believes justice can best be served by not settling but instead by giving access to all of the evidence and to make his case directly and publicly in a court of law. In his words, he is "just the boy to do it." Mr. Shooter has a compelling story to tell, backed up by the evidence. He looks forward to the process and his opportunity in a setting, that **this time**, will include his right to due process.

Very truly yours,

JABURG & WILK, P.C.



Kraig J. Marton

KJM:kmr

cc: Don Shooter

Exhibits:

1. DPS report documenting private investigator following Mr. Shooter
2. Mr. Shooter time-line of Dennis Welch stories + 20 attempts to communicate procurement issues
3. Brian Townsend's Periscope registration with the Arizona Secretary of State
4. Letter from Dan Pasternak to Speaker requesting Mr. Shooter be reinstated as chair
5. Copy of complaint against Representative Rebecca Rios
6. Copy of dismissal of complaint against Representative Rebecca Rios
7. Email from Craig Morgan to Dan Pasternak stating Mr. Shooter has five days to respond.
8. Binder Prepared by Mr. Shooter during his investigation into procurement issues.