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ARIZONA SUPREME COURT

HEATHER TURLEY, Plaintiff/Appellant, v. RICHARD COLWELL, et al., Defendants/Appellees, and MAKE ELECTIONS FAIR PAC, Real Party in Intertest/Appellee.	No. Maricopa County Superior Court Nos. CV2024-022057 **ARCAP 10(c) STATEMENT DESIGNATING THE CASE AS AN EXPEDITED ELECTION MATTER**

Pursuant to ARCAP 10(c), Plaintiff/Appellant Heather Turley hereby designates this appeal as an Expedited Election Matter, as it involves a challenge to a statewide initiative petition. The names and contact information of counsel for the parties involved in this appeal are as follows:

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An as-filed copy of Plaintiff/Appellant's Notice of Appeal is attached as Exhibit A. (An endorsed copy is not yet available.) A copy of the Superior Court's judgment from which Plaintiff/Appellant appeals is attached as Exhibit B.

RESPECTFULLY SUBMITTED this 21st day of August, 2024.

HERRERA ARELLANO LLP

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Exhibit A

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Attorneys for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

HEATHER TURLEY, a qualified elector,

Plaintiff,

v.

RICHARD COLWELL, in his capacity as Yuma County Recorder; STEPHEN RICHER, in his capacity as Maricopa County Recorder; LYDIA DURST, in her capacity as Mohave County Recorder; GABRIELLA CÁZARES-KELLY, in her capacity as Pima County Recorder; DANA LEWIS, in her capacity as Pinal County Recorder; and ADRIAN FONTES, in his capacity as Arizona Secretary of State,

Defendants,

and

MAKE ELECTIONS FAIR PAC, a political committee,

Real Party in Interest.

No. CV2024-022057

NOTICE OF APPEAL

(Assigned to the Hon. John R. Hannah Jr.)

Notice is hereby given that Plaintiff appeals to the Arizona Supreme Court from the judgment entered in this case on the 21st day of August, 2024.

Dated: August 21, 2024

Respectfully submitted,

/s/ Daniel A. Arellano

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2024, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Maricopa County, for filing using the AZTurboCourt system. I further certify that a copy of the foregoing is being sent via email this same date to:

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/s/ Daniel A. Arellano

Exhibit B

Clerk of the Superior Court
*** Filed ***
August 21, 2024 3:08 p.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2024022057 08/20/2024

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

HEATHER TURLEY

ROY HERRERA
DANIEL A ARELLANO
JANE W AHERN
AUSTIN TYLER MARSHALL

v.

RICHARD COLWELL, ET AL.

WILLIAM J KEREKES
JACK O'CONNOR III
JASON W MITCHELL
RYAN ESPLIN
SCOTT M JOHNSON
KARA MARIE KARLSON
KAREN HARTMAN-TELLEZ
TRAVIS C HUNT
JOSHUA J MESSER
MARY R O'GRADY

DOCKET CV TX
JUDGE HANNAH

TRIAL MINUTE ENTRY
DAY ONE (1)

Prior to the commencement of trial plaintiff's exhibits 4 through 23 and defendant/real party in interest, Make Elections Fair PAC's exhibits 1 through 3 are marked for identification.

East Court Building – Courtroom 811

1:37 p.m. This is the time set for an Election Challenge Trial. Plaintiff, Heather Turley, is present virtually and represented by counsel, Daniel A. Arellano, Jane W. Ahern, and Austin T. Marshall, who appear in person. Defendant, Richard Colwell, in his capacity as Yuma County Recorder, is represented by counsel, William J. Kerekes, who appears in person. Defendant, Stephen Richer, in his capacity as Maricopa County Recorder, is represented by counsel, Jack O'Connor III, who appears in person. Defendant, Lydia Durst, in her capacity as Mohave County Recorder, is represented by counsel, Jason W. Mitchell and Ryan Esplin, who appear virtually. Defendant, Gabriella Cazares-Kelly, in her capacity as Pima County Recorder, is neither present nor represented by counsel. Dana Lewis, in her capacity as Pinal County Recorder, is present virtually and is represented by counsel, Scott M. Johnson, who appears virtually. Pinal County Chief Registrar, Nicole Gillespie, is also present virtually. Defendant, Adrian Fontes, in his capacity as Arizona Secretary of State, is represented by counsel, Kara Marie Karlson and Karen Hartman-Telles, who appear in person. Make Elections Fair PAC, as the Real Party in Interest, is represented by counsel, Travis C. Hunt, Joshua J. Messer, and Mary R. O'Grady, who appear in person.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding trial schedule.

On the legal issues, the parties agree to hear from Make Elections Fair PAC, as the Real Party in Interest, first and then a response from the plaintiff, on each separate issue before the Court.

Argument is presented.

Make Elections Fair PAC makes an oral Motion to Exclude the Testimony of Robyn Poquette.

IT IS ORDERED Make Elections Fair PAC's Motion to Exclude Testimony of Robyn Poquette is denied.

Make Elections Fair PAC makes an objection to the exhibits being offered to support the Robyn Poquette's testimony.

The Court notes Make Elections Fair PAC's standing objection.

2:55 p.m. The Court stands at recess.

3:06 p.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Defendant Make Elections Fair PAC invokes the Rule of Exclusion of Witnesses.

Zack Alcyone is sworn and testifies virtually.

Over objection of Make Elections Fair PAC, plaintiff's exhibits 8-14 are received in evidence for purposes of this hearing only.

The witness is excused.

Robyn Poquette is sworn and testifies.

The witness is excused.

Counsel inform the Court that the deposition of Ms. Turley will be submitted as an exhibit, and they will forgo taking her testimony at trial today.

Kory Langhofer is sworn and testifies virtually.

The witness is excused.

Plaintiff's exhibits 15-21 are received in evidence.

Over objection of Make Elections Fair PAC, plaintiff's exhibits 5-7 are received in evidence.

Closing arguments.

For the reasons as stated on the record,

IT IS ORDERED taking this matter under advisement.

5:07 p.m. Trial concludes.

LATER:

The Court has considered all of the evidence presented at the hearing, in the context of the record in both this case and *Smith v. Fontes*, Maricopa County Superior Court CV2024-019846.

Plaintiff Heather Turley petitions for injunctive relief that would keep the "Make Elections Fair" initiative off of the 2024 general election ballot. The Court finds that the legal doctrine of claim preclusion and the equitable doctrine of laches bar the plaintiff's claim. The statutes she relies on to distinguish her claim from the plaintiff's claim in *Smith* do not authorize the relief she requests.

IT IS THEREFORE ORDERED the plaintiff's petition is denied.

In *Smith v. Fontes*, the plaintiffs sought to enjoin the Secretary of State from placing this same initiative on the ballot, under the authority of A.R.S. section 19-122(C), on the ground that the real party in interest Make Elections Fair PAC had failed to collect enough valid signatures to qualify the proposal for the ballot. The plaintiffs argued, among other things, that "approximately 43,000 signatures" should not count toward the required total because they are "duplicates." Judgment in CV2024-019846 dated August 15, 2024 (Docket No. 55) at 3. On the morning of August 15, 2024, after three days of trial, Judge Moskowitz denied the petition and directed the Secretary of State to certify the measure for the ballot. *Id.* In the course of his ruling Judge Moskowitz expressly found that the plaintiff's evidence of duplicate signatures was inadmissible under the Arizona Rules of Evidence; and, even if the evidence was admissible, it did not prove the invalidity of the signatures at issue by "clear and convincing evidence" as required under Arizona law. *Id.* at 5-6.

This case was filed on the afternoon of August 15, two hours after the entry of judgment in *Smith v. Fontes*. The plaintiff, Heather Turley, testified that a friend and political confidante named April Smith had recruited her to serve as plaintiff. Ms. Smith and Ms. Turley had collaborated, several weeks earlier, on a statement opposing the "Make Elections Fair" initiative for the Secretary of State's ballot information pamphlet. When contacted by Ms. Smith for this case, Ms. Turley signed the papers without any independent investigation.

Claim preclusion applies when a "court of competent jurisdiction" previously rendered "judgment on the merits" "and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action. *Peterson v. Newton*, 232 Ariz. 593, ¶ 5 (App. 2013). "To successfully assert the defense of claim preclusion, a party must prove: '(1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits." *Id.* (citation omitted). All three elements are met here.

There is unquestionably "identity or privity between parties in the two suits," namely Ms. Turley and the *Smith v. Fontes* plaintiffs. Ms. Turley's friend Ms. Smith, and Ms. Smith's employer, the Free Enterprise Club, were both plaintiffs in the prior case. The lawyers who previously represented Ms. Smith now represent Ms. Turley. The Free Enterprise Club and another PAC are paying both the lawyers and their signature review company, Signafide.

Signafide's co-founder, Mr. Langhofer, testified candidly that the company regards the work in the two cases as a single engagement that has been ongoing since before the filing of the first case. He could not even say how much Signafide has been paid for this case, because the company's invoices do not distinguish between the two cases.

The plaintiff argues that any citizen can contest the validity of an initiative. That is so, but it misses the point. The question is whether one citizen can bring a validity challenge that another citizen has already brought and lost. That could be a difficult issue in some circumstances, but here it is not. Privity exists when there is "a substantial identity of interests" and a "working or functional relationship" by which the interests of the non-party are "presented and protected" by the party. *Donald v. Eng*, 1 CA-CV 20-0230, 2021 WL 1594205 at *5 ¶ 29 (Ariz. Ct. App., Aprr.22, 2021) (citation omitted). That test is easily met here.

On the question whether the claims in different cases are "identical," Arizona courts apply the "same evidence" test. *Phoenix. Newspapers, Inc. v. Arizona Department of Corrections.*, 188 Ariz. 237, 240 (App. 1997). Under that test, a second cause of action is barred if it relies on the same facts and evidence as the initial action. *Id.* ("If no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred.").

"Relying on the same facts and evidence" is exactly what the plaintiff is doing here. Her evidence is a refined version of the signature comparison the plaintiffs in *Smith v. Fontes* presented to Judge Moskowitz. Her witnesses repeatedly described their signature review process and its results by comparison to the prior presentation. They testified that they no longer counted as duplicates some signatures that Make America Fair PAC contested in the prior case. To the testimony of Mr. Langhofer, the plaintiff here added the testimony of Zach Alcyone, another Signafide founder who focused on technical issues, and Robyn Poquette, a former Yuma County recorder who manually reviewed the paired signatures to assess whether they are in fact duplicative. By the plaintiff's own admission, these witnesses were called to address the evidence issues decided adversely to the plaintiff in the *Smith v. Fontes* ruling.

The evidence in *Smith v. Fontes* also included the County Recorder certifications. Judge Moskowitz had before him, and took into account, the determinations of the Recorders from twelve of Arizona's fifteen counties concerning the validity of the five percent random signature samples. *Id.* at 8.[1] He reduced the number of valid signatures by 6,458 on the ground that those signatures had been "invalidated by the County Recorders." Judgment in CV2024-019846 dated August 15,

[1] The stragglers that had not yet completed their signature reviews were Greenlee, Santa Cruz and Yavapai Counties. Judge Moskowitz did not wait for those certifications because the parties represented that they would not have changed the result. Judgment in CV2024-019846 dated August 15, 2024 (Docket No. 55) at 8.

2024 (Docket No. 55) at 8. The plaintiffs are satisfied with that aspect of Judge Moskowitz's decision, but not with his adverse ruling concerning disqualification of the duplicate signatures. They now want to relitigate the latter issue.

In an effort to avoid the "identical claim" problem, the plaintiff frames her complaint as a request pursuant to A.R.S. section 19-121.03(B) for judicial review of the certifications made by the County Recorders. Section 19-121.03(B) says that "any citizen may challenge in the Superior Court the certification made by a county recorder pursuant to section 19-121.02 within five calendar days of the receipt thereof by the Secretary of State." The certifications by the County Recorder defendants here – from Maricopa, Pima, Pinal, Yuma and Mohave Counties – were submitted within the statutory five-day period.

But the plaintiff's claim is not actually directed at the certifications. The plaintiff introduced the County Recorder certifications at the end of the hearing, as an afterthought. The witness who compared the signatures, Ms. Poquette, testified that she was not even given the County Recorder certifications. During a discussion of what relief exactly the plaintiff was asking for, plaintiff's counsel tipped his hand when he responded that the "simplest" approach would be for the Court to order the Secretary of State to reduce the total number of sampled signatures found valid by the number of signatures Signafide claimed to have identified as duplicates. That argument made manifest what was already clear: that this case is not really directed at the Recorders at all.

This case is in substance a contest of the "validity" of the Make Elections Fair initiative "based on … compliance with this chapter." *See* A.R.S. section 19-122(C). Although "any person" can bring such a contest, the rules against repetitive litigation still apply. In fact, section 19-122(C) includes an extra safeguard against multiplicitous or duplicitous election contests, in that the statute provides (emphasis added) "multiple actions … that contest the validity of an initiative … *shall be consolidated*." The plaintiff here tried to avoid consolidation, by waiting to file until after the dismissal of her friend's lawsuit, even though the Recorder certifications she now says were defective were before Judge Moskowitz and were accounted for by him in his decision. The law does not allow "keeping an ace in the hole" in that fashion.

The County Recorders were not even legally authorized to conduct the signature comparison in the manner that that the plaintiff advocates. The statutes lay out the process for verification of initiative and referendum petitions in meticulous detail. Under section 19-121.01(B), the Secretary must "select, at random, five percent of the total signatures eligible for verification by the country recorders of the counties in which the persons signing the petition claim to be qualified electors." Subsections (B) and (C) describe in detail the precise method by which the Secretary of State must select and identify the random sample signatures. With similar specificity, subsection (D) of section 19-121.01 directs the Secretary of State to "transmit a copy

of the front of each signature sheet on which a signature included in the random sample appears" to the appropriate County Recorder. Upon receipt of the petition sheets containing the sampled signatures, each County Recorder must determine "which signatures of individuals whose names were transmitted" by the Secretary of State "shall be disqualified for any of" the listed reasons. A.R.S. § 19-121.02(A). The County Recorder then "certifies" the result to the Secretary of State. A.R.S. § 19-121.02(B)-(C).

The Country Recorder defendants followed section 19-121.01(B) to the letter, by comparing the sampled signatures they had received from the Secretary of State with the other sampled signatures and disqualifying "all but one otherwise valid signature" of anyone who had "signed more than once." Had the Legislature intended for the Recorders' validation to look beyond the sampled signatures and compare them to the rest of the signatures on the petition sheets, they would have provided in section 19-121.01(B) for the Secretary of State to transmit all of the petition sheets to the Recorders. They did not. The plaintiff suggests that the Recorders could have sought out the petition sheets on their own initiative. That assumes the Recorders are at liberty to conduct a freelance investigation of signature validity, beyond what the statutes authorize. They are not.[2]

The Secretary of State, not the County Recorder, is ultimately responsible for verifying the signatures on initiative petitions. If the petitions contain duplicate signatures beyond the five percent sample, the Secretary of State can address that. If he fails to do so, section 19-122(C) provides a judicial remedy, including the opportunity to create a record with all the necessary evidence. *But that remedy can only be invoked once.* If the court challenge is unsuccessful, it cannot be renewed in a second case and re-presented with the benefit of what was learned the first time.

---

[2] Even if the Recorders had conducted the extra, unauthorized validation the plaintiff demands, it would not have yielded the result the plaintiff wants. Section 19-121.02(A)(8) says, "If a petitioner [sic] signed more than once, all but one otherwise valid signature shall be disqualified." But there is no way to know whether a signature outside the five percent sample is "valid" without conducting a full-blown review of that signature – yet another step beyond the Recorders' mandate that not even the Signafide review has taken. A faithful application of subsection (A)(8), then, requires the Recorders to count the known "valid signature" – the one in the five percent sample – for purposes of certification. The plaintiff's proposed alternative – that the alleged duplicate in the five percent sample is disqualified if the other signature was prior in time – is at odds with *Jones v. Respect the Will of the People*, 254 Ariz. 73, ¶¶ 45-48 (App. 2022). *Jones* squarely rejects the argument that "only the first signature obtained from a duplicate signer shall be counted." *Id.*, ¶47.

There was a final judgment on the merits of the plaintiff's claim in the previous litigation. That judgment is conclusive. The plaintiff cannot reopen it here. Her petition fails for that reason.

The petition also is barred by the equitable doctrine of laches. The plaintiff could have brought this case at any time after the submission of the Make Elections Fair initiative petitions. The plaintiff's lawyers and her signature reviewers knew about the "duplicate signatures" issue, and raised it, when they filed *Smith v. Fontes* on July 26. They knew exactly what the County Recorders were going to consider during the certification process, and exactly how they were going to apply the part of the statute that required them to disqualify "all but one valid signature," because the Recorders had always conducted the process and applied the statute *the same way* in past elections. The plaintiff nevertheless waited to file until a week before the August 22 ballot printing deadline, essentially for tactical advantage.

Here again, the plaintiff's citation to section 19-121.03(B) is gorilla dust thrown up to obscure the true nature of the claim. The plaintiff says she is challenging the certifications, and that she was therefore compelled to bring this action at the last moment, but her real argument is that the County Recorders have not been obeying the laws that govern the certification process. As such, the claim could have been brought as a mandamus action, pursuant to A.R.S. section 19-121.03(A), at the plaintiff's convenience. Instead, this order is literally being drafted overnight, leaving the Supreme Court one day to review it. That is fundamentally unfair to the proponents of the initiative, and to the people who signed the petitions to get it on the ballot. They deserve better.

Relatedly, the key evidence supporting the plaintiff's claim – Exhibits 22 and 23, the summaries of Ms. Poquette's work -- was not fully disclosed to the other parties until just before trial. Ms. Poquette did not prepare a report, but that might be tolerable in hurry-up election litigation that makes it difficult to apply the discovery rules. What is not tolerable is that the opposing parties had no time to review Ms. Poquette's individual signature comparisons, let alone retain their own expert to rebut them. Moreover, Mr. Langhofer's testimony revealed that the signature analysis continued to evolve right up to the hearing in this case. The same thing happened in the prior case, resulting in the exclusion of the (then) most recent iteration of the Signafide analysis. Judgment in CV2024-019846 dated August 15, 2024 (Docket No. 55) at 3. That iteration – Exhibit 4 in this case – has now been superseded. The real party in interest's objection to Exhibit 4 is therefore overruled; but the objections to Exhibits 22 and 23 are sustained on disclosure grounds.

This Court declines to reconsider Judge Moskowitz's evidence rulings, or his analysis of the factual merits of the plaintiff's claim. Those matters have been decided.

On the Court's own motion,

IT IS ORDERED disposing of Make Elections Fair PAC's exhibits 1-3, not offered or received in evidence.

Under A.R.S. § 19-118(F), a party must file a notice of appeal within five calendar days after entry of judgment. The Supreme Court may dismiss a belatedly prosecuted appeal, such as one filed on the last day of the statutory deadline. *See McClung v. Bennett*, 225 Ariz. 154, 235 P.3d 1037 (2010). Special procedural rules govern expedited appeals in election cases. Ariz. R. Civ. App. P. 10.

No other matters remain pending. The Court signs this minute entry as its final judgment consistent with Rule 54(c), Ariz.R.Civ.P.

/ s / JOHN HANNAH

JUDGE JOHN HANNAH
JUDICIAL OFFICER OF THE SUPERIOR COURT