SUPREME COURT OF ARIZONA

HEATHER TURLEY, Plaintiff/Appellant, v. RICHARD COLWELL, et al., Defendants/Appellees, MAKE ELECTIONS FAIR PAC, Real Party in Intertest/ Appellee.	Arizona Supreme Court No. CV-24-0197-AP/EL Maricopa County Superior Court Nos. CV2024-022057

PLAINTIFF/APPELLANT'S OPENING BRIEF

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INTRODUCTION

The issue in this appeal is whether, under claim preclusion, Plaintiff Heather Turley should be barred from timely challenging certain County Recorder certification reports under A.R.S. § 19-121.03(B) by virtue of an earlier action not alleging such a claim and to which she was not a party. (And the judgment in which has since been reversed by this Court.) The answer is plainly no. For similar reasons, the doctrine of laches does not apply, because Ms. Turley could not have challenged the County Recorder certification reports before they existed.

BACKGROUND

On August 12, 2024, the Secretary of State received a report detailing the Yuma County Recorder's review of the 5% sample of petition signatures the Make Elections Fair PAC ("the Committee") submitted in support of its initiative. The next day, on August 13, the Secretary of State received similar reports from the Maricopa and Mohave County Recorders. And the day after that, on August 14, the Secretary received the same report from the Pima and Pinal County Recorders.

On August 15, Plaintiff/Appellant Heather Turley sued to challenge these five reports, alleging that they contained 1,800 duplicate

signatures. She alleged these county certifications reports validated signatures that, as a matter of law, are invalid because they are duplicates of earlier-dated signatures outside of the 5% sample.

Heather Turley is a friend of April Smith, and they share political views. April Smith separately challenged the Committee's initiative with various circulator and signature objections and legal claims. Ms. Smith contacted Ms. Turley to ask if she would be willing to be a plaintiff in a suit challenging the county certification reports. Ms. Turley first learned of this possibility on August 14.

In anticipation of trial, Plaintiff retained an expert to evaluate the alleged duplicate signatures. The expert, former Yuma County Recorder Robin Stallworth Pouquette, reviewed each pair over the course of 20 hours, as displayed on a side-by-side comparison exhibit listing all the duplicate signatures next to their original signature. She testified to often referring to the underlying petition sheet when looking at a particular signature on the side-by-side comparison. Out of the 1,800 duplicate pairs, Ms. Pouquette concluded that only 26 were not duplicates. Ms. Pouquette logged her review in a spreadsheet indicating which signature pair she believed were duplicates and which were not.

The Superior Court held a trial on August 20. At trial, the Court heard testimony from three witnesses: Ms. Pouquette, Zack Alcyone, and Kory Langhofer, the latter two co-founders of Signafide, a signature petition review firm.

Ms. Pouquette testified to her experience as a County Recorder with reviewing petition and ballot signatures, and the training she received between 2010 and 2022 from the Secretary of State's office. She testified to her review process in this case, looking for objective matches between signature pairs (same name, same address) and similar signature and handwriting characteristics. She testified that as County Recorder she would use signature and handwriting comparison, in addition to looking to objective criteria, when evaluating duplicate signatures under A.R.S. § 19-121.02(A)(8). She testified that she could never conclude with 100% certainty that any signature was a duplicate, but also made clear that was not the standard her office employed as County Recorder.

Mr. Alcyone and Mr. Langhofer testified to the Signafide review process. Mr. Alcyone testified to his role in obtaining the petition sheets directly from the Secretary of State's office and uploading the sheets into their system. The *only* change Signafide made to the raw sheets was to

add blue sheet numbers to each, done automatically by Signafide software to prevent human error but spot checked after to ensure accuracy. Then once in the Signafide system, multiple people would look at each signature for issues and duplicate comparison.

Mr. Langhofer testified to assisting in creating the exhibits for trial. He testified that Plaintiff's principal exhibit listing the challenged duplicate signatures did not include any that the Secretary or County Recorders had previously disqualified. Mr. Langhofer testified to also calculating the number of signatures (either duplicate *or* original) invalidated by the Secretary or County Recorders, invalidated in other proceedings, deemed not duplicates in other proceedings, duplicates for which there could be some theoretical chance someone might have been tagged as a duplicate but was not a true duplicate (for example, if a signer had someone of the same name registered at the same residence), and the duplicates Ms. Pouquette deemed not duplicates. This number was 303. This left 1,497 challenged duplicate signatures for which both the duplicate and the original were not previously invalidated or deemed to not be duplicates. Mr. Langhofer testified that for Ms. Pouquette's review, Signafide provided her with the underlying petition sheets, the

side-by-side duplicate comparison exhibits, and the July 2024 voter file to aid in her evaluation.

Except for *one* duplicate pair for which Ms. Pouquette admitted she made a mistake by erroneously marking it as a duplicate, at no point did the Committee contest the remaining duplicates as not in fact being duplicates. At no point in the hearing did the Committee defend their signatures broadly as not duplicates. Not once could the Committee or Ms. Pouquette identify an instance in which the side-by-side exhibit page Ms. Pouquette looked at did not accurately reflect the underlying petition sheets.

On August 21, 2024, the trial court entered judgment against Plaintiff, ruling that her claim was barred under the doctrines of claim preclusion and laches. This timely appeal immediately followed.

ARGUMENT

I. Plaintiff stated a cause of action under A.R.S. § 19-121.03(B).

Plaintiff brought this action under A.R.S. § 19-121.03(B), which allows "[a]ny citizen" to "challenge in the superior court the certification made by a county recorder pursuant to § 19-121.02 within five calendar days of the receipt thereof by the secretary of state." She alleged that a

total of 1,800 signatures reviewed and validated in five county recorders' respective 5% sample sets under A.R.S. § 19-121.02 were later-in-time duplicates of earlier petition signatures and should therefore be invalidated from the samples. *See* Compl. & Compl. Ex. A. Most of the earlier petition signatures were outside the counties' 5% sample sets. But she did not seek to invalidate any signature outside the 5% sample; she sought invalidation only of the later-in-time signature within the counties' 5% sample sets that were counted as valid signatures in the counties' certification reports. *See* Compl. ¶ 28. This lawsuit's reference to the earlier-in-time signature outside the 5% sample is pertinent only for determining whether the later signature ***within*** the 5% sample was indeed a duplicate of the earlier signature outside the sample.

The Committee maintains that the County Recorders may not look to signatures outside the 5% sample to invalidate as duplicates those signatures within the sample. In other words, the Committee believes that County Recorders can invalidate duplicates only if the earlier ***and*** the subsequent signature are ***both*** included in the 5% sample. That is not what the statute says, nor would it make any sense.

The County Recorders receive from the Secretary of State copies of the front of petition sheets that include signatures elected for their verification as part of the random 5% sample. A.R.S. § 191.01(D). The County Recorders must then "determine which signatures of individuals whose names were transmitted shall be disqualified for any" of an enumerated list of reasons. A.R.S. § 19-121.02(A). As pertinent here, "[i]f a petitioner signed more than once, all but one otherwise valid signature ***shall*** be disqualified." A.R.S. § 19-121.02(A)(8) (emphasis added).

The statute does not say that the County Recorder must disqualify a duplicate signature only if a petitioner signed more than once within the 5% sample. Instead, if the person is one whose name has been transmitted to the County Recorder for review, the County Recorder shall disqualify the person's signature if the person "signed more than once," A.R.S. § 19-121.02(A)(8), regardless of where the earlier signature was within or outside the 5% sample.

True, the County Recorders may not invalidate signatures that are not transmitted for their review. *See* A.R.S. § 19-121.02(A) ("[T]he county recorder shall determine which signatures of individuals ***whose names were transmitted*** shall be disqualified . . . ." (emphasis added). But this

case never asked them to. It asked only that they ***reference*** out-of-sample signatures to determine whether a subsequent signature ***within*** their sample must be invalidated as a duplicate. For the same reason, it does not matter that the duplicate-signature statute "does not specify which signature must be invalidated," *Jones v. Respect the Will of the People*, 254 Ariz. 73, 84 ¶ 48 (App. 2022), because this action asks only that the County Recorders invalidate the duplicate signature within their respective 5% samples.

In determining whether "a petitioner signed more than once," the County Recorders are nowhere limited to consulting only those signatures transmitted to them by the Secretary of State. Imposing such a limit would require, in effect, that both the original ***and*** duplicate signature both be found within the 5% sample for the County Recorder to invalidate the duplicate. But the statute instead requires that the County Recorder disqualify the signature of a person whose name was transited to them if that person "signed more than once." A.R.S. § 19-121.02(A)(8). Full stop.

Limiting the County Recorders to referencing only those signatures selected for the 5% sample would also be inconsistent with the statutory

scheme as a whole. To start, the County Recorders receive from the Secretary copies of the front of any petition ***sheet*** "on which a signature included in the random sample appears." A.R.S. § 19-121.01(D). Those sheets also will display signatures not included in the random sample, and nothing prohibits the County Recorders from looking at them in conducting their review for duplicates.

The statute also contemplates myriad instances in which the County Recorders will consult records beyond the sheets provided by the Secretary of State in performing their review. For example, in determining whether a signer was a qualified elector at the time of signing the petition, A.R.S. § 19-121.02(A)(5), the County Recorders necessarily must consult their respective voter registration databases rather than the signature sheets transmitted by the Secretary. The same is true in comparing a voter's signature and handwriting on the petition against what appears in the person's voter registration file. A.R.S. § 19-121.02(A)(9).

Or consider the requirement that the Recorders disqualify any signatures "[i]f the person circulating the petition was a justice of the peace or a county recorder at the time the person circulated the petition."

A.R.S. § 19-121.02(A)(10). The front copies of signature sheets transmitted by the Secretary of State under A.R.S. § 19-121.01(D) would not include a list of all Justices of the Peace or County Recorders in each county, let alone across the state. To invalidate signatures collected by a Justice of the Peace or County Recorders, the Recorders necessarily would have to rely on information beyond what the Secretary of State provides. And it would be appropriate to supply that information in the course of a challenge under A.R.S. § 19-121.03(B), as this case seeks to do in identifying earlier signatures of which the ones in the random sample are a duplicate.

II. The claim preclusion doctrine does not apply.

The trial court held that claim preclusion barred this suit based on a ***different*** lawsuit, brought by ***different*** plaintiffs, and involving a ***different*** cause of action. That was error.

Claim preclusion (formerly known as res judicata) requires "(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." *In*

re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source, 212 Ariz. 64, 70 ¶ 14 (2006). None of the elements are met.

First, there is no identity of claims. "For an action to be barred, it must be based on the same cause of action asserted in the prior proceeding." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240 (App. 1997). It does not matter that the two suits arose out of the same "occurrence," because Arizona applies the "same evidence" test for claim preclusion: the second action is barred only "[i]f no additional evidence is needed to prevail in the second action than that needed in the first." *Id.* at 240. As long as there are some additional facts at issue in the second action, claim preclusion does not apply under the same evidence test. *Id.* at 241.

In *Phoenix Newspapers*, the newspapers challenged the same prison visitation policies in two cases: the first alleged that the policies "unconstitutionally discriminate against media representatives by denying them visitation privileges afforded members of the general public." *Id.* at 239. The second alleged that the policies violated the Arizona Constitution "by granting privileges to certain citizens and classes of citizens while denying those privileges to the general public."

Id. at 240. The Court of Appeals held that, under the same evidence test, the second suit was not barred because "[t]he Newspapers assert a new theory in their second action, supported by some additional facts," even though they arose from the same occurrence (the denial of media access to prisoners." *Id.* at 241.

This case, too, involves at least "some additional facts." At issue in this litigation are the county certification reports that did not yet exist when the *Smith* suit was filed and which the *Smith* plaintiffs did not challenge in that litigation. Even assuming that the 1,800 duplicate signatures constitute the same "occurrence" as with the duplicate signatures at issue in the *Smith* litigation, the additional fact of the challenged county certification reports means that the Committee cannot satisfy Arizona's same evidence test. *See id.* (noting that under the same evidence test, "an action on an open or stated account is not barred by a prior action on a promissory note, even though both actions are based on the same debt").

But even if Arizona applied the more restrictive "transactional" test, claim preclusion would still not apply. Under the Restatement

(Second) of Judgements, which applies the transactional test, claim preclusion will not apply if:

> The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim.

Restatement (Second) of Judgments § 26(1)(c). This occurs where "it may appear from a consideration of the entire statutory scheme that litigation, which on ordinary analysis might be considered objectionable as repetitive, is here intended to be permitted." *Id.* cmt. e.

Here, the statutory scheme contemplates distinct causes of action for challenging initiative signatures. A.R.S. § 19-122(C) broadly provides that "[a]ny person may contest the validity of an initiative or referendum" and imposes no statutory deadline for bringing such a suit. *See Kromko v. Superior Court*, 168 Ariz. 51, 57 (1991). But A.R.S. § 19-121.03(B), by contrast, provides that "[a]ny citizen may challenge in the superior court the certification made by a county recorder pursuant to § 19-121.02 within five days of the receipt thereof by the secretary of state." While an validity claim under A.R.S. § 19-122(C) challenges the overall validity of the petition, § 19-121.03(B) "authorizes any citizen to challenge the county recorders' certifications, which, if successful, would change the

validity rate." *Leach v. Reagan*, 245 Ariz. 430, 441 ¶ 54 (2018). The two causes of action are not exclusive of one another. *See id.* at 442 ¶ 56 ("Nothing suggests that § 19-121.03(B) precludes" a challenge under § 19-122(C)).

Second, there is no longer a final judgment on the merits in the previous litigation. This Court's August 21, 2024 Decision Order in the *Smith* case reversed the trial court's judgment in that action and remanded for further review of the evidence. Unless and until the trial court enters new judgment following remand, there is no longer a final judgment on the merits of the *Smith* litigation.

Third, there is no identity or privity between the parties in the two suits. The Plaintiff here, Heather Turley, was not a party to the *Smith* litigation. That she and Ms. Smith are friends and share common political goals is woefully insufficient to establish identity or privity. As this Court has recognized, privity "is not a result of parties having similar objectives in an action but of the *relationship* of the parties to the action and the *commonality* of their interests." *Hall v. Lalli*, 194 Ariz. 54, 58 ¶ 12 (1999). In *Hall*, the Court rejected the view that a child is not in privity ***even with his mother*** in the context of a paternity action against

the same putative father. *Id.* at 61–62. And A.R.S. § 19-121.03(B) allows "any citizen" to challenge a County Recorder's certification. That two citizens—each entitled to bring her cause of action as she sees fit—know each other and happen to be friends is nowhere near enough to establish privity. (If it were, certainly the child-parent relationship would have been enough for privity in *Hall*.) Nor do any Arizona cases support a finding of privity simply due to common counsel or consultants, as the trial court did here.

III. The laches doctrine does not apply.

The superior court held that Ms. Turley could have (and should have) filed suit as early as July 26, when the *Smith* plaintiffs filed their suit. The court could arrive at that conclusion only if it conflated the two cases as one, which was error for the reasons discussed above.

"Laches will generally bar a claim when the delay [in filing suit] is unreasonable and results in prejudice to the opposing party." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (2009). "[I]n determining whether the delay was unreasonable, "we examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge." *Id.*

The Secretary received the first of the county reports on August 12. Ms. Turley learned about possibly being a plaintiff in this action on August 14. The Superior Court and the Committee have stated any challenge to the county reports should have came in July—before the reports were created and before anyone could know if they would ultimately include any offending signatures. *See* Judgment at 8 ("The plaintiff could have brought this case at any time after the submission of the Make Elections Fair initiative petitions.").

This is error for two reasons. First, requiring plaintiffs to challenge county certification reports before they are created, when no one knows that they will say about a given signature, would create severe ripeness problems. *Winkle v. City of Tucson*, 190 Ariz. 413, 416 (1997) ("The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur."). The Superior Court found *plaintiff's counsel* "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." Judgment at 8. This is to say nothing about the plaintiff, Ms. Turley, and her knowledge. And even if a plaintiff or their counsel knows the statutory process for signature verification worked, *no one* knows if a report will include invalid signatures until it is issued.

Second, but related to the first, there is nothing unreasonable about when Ms. Turley filed her complaint—after the reports were created, within the five-day statutory period, and within a day of becoming aware of these specific issues and possibly being a plaintiff. The Superior Court found she *could* have brought the suit earlier (as in, before the reports existed), but this is not enough for laches. *See Prutch. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 14 (App. 2013) ("Here, the trial court erroneously granted dismissal based on laches because it did not find that [plaintiff] had acted unreasonably.").

Further, there is no prejudice. *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 559 ¶ 9 ("But even had the delay been unreasonable, delay alone will not satisfy the test for laches."). The Superior Court concluded "[t]he plaintiff nevertheless waited to file until a week before the August 22 ballot printing deadline, essentially for tactical advantage." Plaintiff filed soon after she learned about these issues, and

three days after the first challenged report was generated. That this year's ballot printing deadline was the following week was outside of her control and not some calculated plot. Though rushed, these proceedings have been fully litigated by each side and within the timelines expressly contemplated by statute.

IV. The duplicate signatures must be deducted from the total signatures the county recorders found valid.

The trial court improperly excluded the summary of Ms. Pouquette's findings on disclosure grounds. Plaintiff disclosed Ms. Pouquette as an expert not required to provide a written report on Friday, August 16. *See* Ariz. R. Civ. P. 26.1(d)(2) (requiring written expert report only in Tier 3 cases or on order of the court). The Committee noticed Ms. Pouquette's deposition that same day, and Plaintiff did not object. Plaintiff's counsel provided the Committee's counsel with the spreadsheet summarizing the results of Ms. Pouquette's review on Monday, August 19, shortly after having received the spreadsheet himself. The Committee deposed Ms. Pouquette later that day (as had been previously scheduled) and had ample opportunity to ask her about the spreadsheet.

No party has filed a responsive pleading that would otherwise trigger Rule 26.1's disclosure obligations or the right to discovery. *See* Ariz. R. Civ. P. 26(f)(1), 26.1(f)(1). Notwithstanding the technical inapplicability of the ordinary disclosure obligations or the absence of a court order to any other effect, the Committee has received every kind of disclosure feasible within the circumstances—receiving even a formal expert disclosure statement and taking ***two*** depositions before trial. Excluding the findings for lack of disclosure was an abuse of discretion.

Granting relief in this case reduces the Committee's validity rate from 76.35% to 70.99%, as demonstrated below:

		Current	**After This Case**
County Reports Invalidations		6,616	8,113
Signatures in the Random Sample	÷	27,969	27,969
Invalidity Rate		23.65%	29.01%
Validity Rate		76.35%	70.99%

And application of the correct validity rate disqualifies the initiative from the statewide ballot, as demonstrated below:

Item		Number
Deemed Eligible for Validation by Secretary of State		559,379
Invalidated by Trial Court in CV2024-019846	-	16,705
Invalidated by County Reports as a result of this case	-	8,113
Overlap Trial Court and County Report Invalidations	+	606
Adjusted Total		535,167
Adjusted Total from Previous Line		535,167
Validity Rate	x	70.99%
Final Number of Valid Signatures		379,915
Final Number of Valid Signatures from Previous Line		379,915
Minimum Valid Signatures for Ballot Access	-	383,923
Shortfall if Duplicates Are Excluded		-4,008

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of August, 2024.

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