IN THE SUPREME COURT

STATE OF ARIZONA

SCOT MUSSI, *et al.*, Plaintiffs/Appellants/ Cross-Appellees, v. KATIE HOBBS, in her capacity as the Secretary of State of Arizona, Defendant/Appellee, and ARIZONANS FOR FREE AND FAIR ELECTIONS (ADRC ACTION), a political committee, Real Party in Interest/Appellee/ Cross-Appellant.	No. CV-22-0207-AP/EL Maricopa County Superior Court No. CV2022-009391

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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The trial court's judgment embraces three consequential errors of law that this Court should reverse. First, it abrogated A.R.S. § 19-118(B)'s mandate that paid and out-of-state-circulators must support ***each*** registration with a sworn and notarized affidavit. Second, it excused circulators from providing on their registrations a full and strictly compliant "residence address," A.R.S. § 19-118(B)(1), unless a challenger can adduce individualized proof that the omission of a relevant unit number hindered contact with the circulator—a formulation that is irreconcilable with this Court's longstanding conception of the "strict compliance" standard. Third, it extended the same misapplication of the strict compliance standard to circulator registrations that disclosed an incomplete address for service of process.[1]

The plain text of A.R.S. § 19-118(B)—as refracted through the mandates of strict construction and strict compliance, *id*. § 19-102.01(A)—extinguishes all three rulings. That provision prescribes (in a numbered list, no less) five distinct attributes of a strictly compliant registration. It follows that when a circulator submits a new registration for a new petition effort, that registration must contain **all five** elements. Application of the statutory language—particularly given the Secretary's refusal to expand the online Circulator Portal's functionality for affidavit uploads—may engender "harsh consequences," *Fid. Nat'l Title Co. v. Town of Marana*, 220 Ariz. 247, 250, ¶ 14 (App.

[1] These three issues correspond to Objection Nos. 3, 4(a)-(b), and 6(a), as addressed in the judgment.

2009). But "the right of the people to exercise the legislative prerogative is, and must be, subject to reasonable regulation of the initiative process," *Stanwitz v. Reagan*, 245 Ariz. 344, 351, ¶ 29 (2018), which the courts are duty-bound to strictly enforce—even (or especially) when elections officials will not.

Similarly, this Court has always maintained that, when a statute demands a particular disclosure, strict compliance requires the information in its full, complete and accurate form. *See McKenna v. Soto*, 250 Ariz. 469, 472, ¶ 14 (2021). The facial omission of any element—including the relevant unit number of a residence or service of process location within a multi-unit structure, *see* A.R.S. § 19-118(B)(1), (B)(4)—renders the item of information not strictly compliant ***as a matter of law***, regardless of whether it induced actual confusion. The trial court's conclusion otherwise was in error.

STATEMENT OF THE ISSUES

1. Has a paid or out-of-state circulator strictly complied with A.R.S. § 19-118(B) if s/he did not support a registration for this Initiative Petition with a sworn and notarized affidavit, but rather relied on an affidavit submitted in connection with a separate registration at an earlier time?

2. Has a circulator who resides in a multiunit structure provided a strictly compliant "residence address," A.R.S. § 19-118(B)(1), if s/he omitted the relevant unit number?

3. Has a circulator who failed to identify on his or her registration the relevant suite number in a multiunit commercial building provided a strictly compliant address for service or process, as required by A.R.S. § 19-118(B)(4)?

STANDARD OF REVIEW

The legal sufficiency of circulator registrations that are not supported by a contemporaneous notarized affidavit or that disclose only a partial residence or service of process address are questions of law that this Court reviews *de novo*. *Leach v. Reagan*, 245 Ariz. 430, 438, ¶ 33 (2018) ["*Leach I*"].

ARGUMENT

I. <u>Registrations Are Invalid If The Circulator Did Not Certify the Information Under Oath Before a Notary Public</u>

A valid circulator registration has five components. The first four are contained in a form that is submitted electronically through the Secretary of State's Circulator Portal disclosing the (i) circulator's name and contact information; (ii) "the initiative or referendum petition on which the circulator will gather signatures"; (iii) a statement consenting to the jurisdiction of Arizona courts in any petition-related litigation; and (iv) "the address of the committee in this state for which the circulator gathering signatures and at which the circulator will accept service of process." A.R.S. § 19-118(B)(1)-(4).

The fifth component is "[a]n affidavit from the registered circulator that is signed by the circulator before a notary public," which confirms that the circulator is eligible to

collect signatures and that "all of the information provided [in the registration] is correct to the best of [the circulator's] knowledge." *Id.* § 19-118(B)(5). Circulators can upload the completed certification to the Secretary of State's website as a supplement to the electronic registration form. *See* Sec'y of State, 2019 ELECTIONS PROCEDURES MANUAL (Dec. 2019) [hereafter, the "EPM"] at p. 252. The legal sufficiency of a circulator registration is conditioned upon its strict compliance with the provisions of A.R.S. § 19-118, which, in turn, must be strictly construed. *See* A.R.S. § 19-102.01(A).

Certain circulators of the petition in support of the so-called "Free and Fair Elections Act" (the "Initiative Petition") circumvented the notarized affidavit requirement by supporting their electronic registration forms for this Initiative Petition with an affidavit that they had executed in connection with a ***different*** registration (often, years or many months beforehand) that contained ***different*** information. These registrations are legally insufficient because the circulator failed to strictly comply with the statutory directive that he swear to, in the presence of notary public, the accuracy of the information contained in ***this*** registration.

Arizonans for Free and Fair Elections (the "Committee") maintains that (1) a circulator who has registered once need not separately register for other petition campaigns; (2) even if a circulator must re-register for each petition campaign, the subsequent registrations need not be supported by a notarized affidavit; and/or (3)

circulators were entitled to rely on the Secretary's Circulator Portal design, which limits affidavit uploads. Each of these theories dissipates under scrutiny.

A. The Unambiguous Statutory Text Requires That Circulators Register for Each Petition They Circulate

Any given circulator registration is intrinsically specific to the measure identified in the registration. When construing statutory provisions, courts assess specific words "in context" and "look to the statute as a whole." *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017). This Court always has oriented its exegesis of Section 19-118 toward "the goal of effecting legislative intent," *Leach I*, 245 Ariz. at 438, ¶ 33, and does so by honoring "the controlling language of the statute," *Sherrill v. City of Peoria*, 189 Ariz. 537, 540 (1997).

Read collectively, the provisions of Section 19-118(B) instruct that a registration necessarily is specific to a given ballot measure. Indeed, the Secreatary's registration form states prominently that "**EACH CIRCULATOR MAY REGISTER FOR ONLY ONE CANDIDATE OR PETITION SERIAL NUMBER PER FORM. REGISTRATION FOR ADDITIONAL CANDIDATES OR PETITIONS MUST BE SUBMITTED ON A SEPARATE FORM**" Sec'y of State, ARIZONA PETITION CIRCULATOR TRAINING GUIDE (rev. June 2022) at A2, *available at* https://azsos.gov/sites/default/files/2022_petition_circulator_training_guide_final.pdf [emphasis in original]. In other words, ***each*** measure requires a ***separate*** registration.

If registrations were wholly specific to individual circulators and transcended specific petition drives, subsections (B)(2) and (B)(4) would be superfluous; there would be no discernible utility in requiring circulators to identify "***the*** initiative or referendum petition on which the circulator will gather signatures" [emphasis added], and there would be even less sense in mandating disclosure of "the address of the committee in this state for which the circulator is gathering signatures and at which the circulator will accept service of process." *See Arizonans for Second Chances, Pub. Safety & Rehabilitation v. Hobbs*, 249 Ariz. 396, 406, ¶ 28 (2020) ("[W]e give meaning to 'each word, phrase, and sentence'"). Subsection (A)'s directive that "[t]he committee that is circulating the petition shall collect and submit the completed registration applications to the secretary" further fortifies the interpretive inference that each registration is anchored to the particular measure denominated in the registration.

Apprehending registrations as measure-specific likewise comports with "the legislature's plain intent: circulators must be available for court proceedings if the signatures they gather are challenged." *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 19 (2021) ["*Leach II*"]. A concrete example illuminates the incoherence afflicting a contrary conclusion. On November 23, 2019 circulator Nicholas Covington registered for the then-pending initiative called "Stop Surprise Billing."[2] If it were true that circulators must

[2] *See* Exhibit 312 at 20; *see also Hernandez v. Frohmiller*, 68 Ariz. 242, 258 (1949) ("The Supreme Court may take judicial notice of the records of the secretary of state.") .

register on only one occasion, Mr. Covington need never have submitted a new registration for this Initiative Petition. A corollary, however, is that the Appellants could have validly subpoenaed Mr. Covington in ***this*** litigation by serving the Stop Surprise Billing committee—an entity that has no evident legal or operational relationship whatsoever to the Committee or Initiative Petition here. *See* A.R.S. § 19-118(B)(4).

Fidelity to the statutory text subsists in "discern[ing] literal meaning in context." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 40 (2012). The only interpretation of Section 19-118(B) that both infuses each element with an independent purpose and imparts symmetry and coherence to the statute as a whole is that each paid or non-resident circulator must register separately for ***each*** petition campaign s/he joins.

B. A Notarization Necessarily Is Unique to a Specific Registration

Because a given registration is tethered to the specific petition designated, new registrations for additional measures must strictly comply with every element of Section 19-118(B). Although it seemingly agreed that circulators must register anew for each ballot measure, the trial court "conclude[d] that the Legislature intended not to require new circulator affidavits for each new petition." Ruling at 7. The trial court's understanding of subsection (B)(5)'s relationship to the rest of Section 19-118(B) seems susceptible to two (equally unavailing) interpretations.

The first is that the trial court construed Section 19-118(B) as categorically exempting subsequent registrations from the affidavit requirement in subsection (B)(5). But this collides with the statute's plain text, which does not differentiate the constitutive elements of a compliant circulator registration. There is no textual indication whatsoever that the affidavit requirement in subsection (B)(5) is severable from the other provisions of Section 19-118(B). The notion that subsequent circulator registrations must strictly comply with subsections (B)(1) through (B)(4)—but not subsection (B)(5)—is not only unmoored from the statutory language, but affirmatively undermines the Legislature's objective of ensuring that every circulator registration is sworn and notarized. *See* 2019 Ariz. Laws ch. 315, § 3.

The second possible justification for the trial court's conclusion is that the affidavit accompanying a circulator's initial registration somehow preemptively and prospectively embraces all future registrations. But that analysis is not viable, either. An individual cannot validly execute a notarized affidavit that swears in advance to the accuracy of facts that do not yet exist. The hallmark of an affidavit—the jurat completed by the notary public—is not some exercise in rote formalism; it denotes a solemn and significant legal act. The jurat "certifies that a signer . . . has made in the notary's presence a voluntary signature and has taken an oath or affirmation vouching for the truthfulness ***of the signed document***." A.R.S. § 41-311(5) [emphasis added].

A notarial certificate is linked permanently and invariably to a specific document. A signer executing an affidavit is not avowing to the truthfulness of a generic placeholder that can be repurposed repeatedly in the future to suit the needs of the moment. Rather, she or he is swearing to the accuracy of a ***particular*** representation, made in a ***particular*** time and place, before a ***particular*** notary public who (unlike the Secretary's webform) meaningfully confirms the registrant's identity. *See* A.R.S. §§ 41-328(A) (prohibiting a notary from "perform[ing] a jurat on a document that is incomplete"); 41-313(C) (restricting notarization of detached documents).[3]

The same principle is engrained in the statutory regime governing individual petition signatures. A circulator cannot preemptively execute the affidavit printed on the back of a petition sheet ***prior*** to collecting the signatures affixed to the front of the sheet. *See* A.R.S. § 19-121.01(A)(1)(f), (A)(3)(c). The rationale undergirding this provision is the same one that precludes recycling affidavits appended to other circulator registrations in earlier election cycles: an individual cannot swear to the veracity of facts not yet in existence.

C. The Secretary's Design of the Circulator Portal Is Not Relevant to Whether the Challenged Registrations Strictly Comply with A.R.S. § 19-118

Although the Secretary has some discretion in structuring the mechanics of circulator registration, she cannot modify or abridge a statutory mandate by administrative

[3] This Brief references statutes in force when the Initiative Petition was in circulation.

fiat. As currently constructed, the online Circulator Portal permits circulators to electronically file new registrations and to electronically certify the accuracy of the averments contained therein, without submitting an updated notarized certification. But the Secretary's chosen design of the Circulator Portal cannot absolve the Committee or its circulators of their statutory responsibilities for at least three reasons.

First, if the Secretary wishes to exercise the limited ministerial discretion afforded to her by A.R.S. § 19-118(A), she must do so within the confines of the EPM, which the Governor and the Attorney General independently approve. *See* A.R.S. § 16-452. Nothing in the relevant provisions of the EPM, however, states or even insinuates that circulators are limited to a single affidavit. And even if the Secretary had wished to truncate subsection (B)(5)'s affidavit requirement in the EPM, "an EPM regulation that . . . contravenes an election statute's purpose does not have the force of law." *Leach II*, 250 Ariz. at 576, ¶ 21.

Second, even where the Committee and its circulators relied on the Secretary's system, their registrations remain legally insufficient. It was the Committee's and circulators' "responsibility to comply with the statutory requirements for filing a[n] [initiative] petition, and the receipt of erroneous advice, even from governmental officials responsible for administering the [initiative] process, does not excuse that responsibility." *Fid. Nat'l*, 220 Ariz. at 250, ¶ 14; *see also W. Devcor v. City of Scottsdale*, 168 Ariz. 426, 431 (1991) (error in Secretary's approved petition form was not a defense). If the

Committee had wanted to inoculate its petition from future challenges of this kind, it should have either submitted the necessary affidavits to the Secretary through means other than the Portal, or obtained a judicial declaration confirming the Secretary's statutory obligations.

Third, it is factually untrue that all circulators are unable to conjoin new electronic registrations with new affidavits. The Secretary has configured the Circulator Portal to allow multiple affidavit uploads by circulators who, like Nicholas Covington, first registered prior to September 29, 2021. Indeed, some 105 of the Initiative Petition's registered circulators (but not Mr. Covington) availed themselves of this easy opportunity to submit strictly compliant registrations. At the very least, the Court should disqualify signatures collected by circulators like Mr. Covington who could have, but did not, upload a second affidavit to the Portal. More broadly, there is no reason why any circulator could not have mailed, faxed, emailed or otherwise transmitted a new affidavit to the Secretary. Even if the latter declined to accept it, the circulators nevertheless would have discharged their statutory obligation.

In short, circulator registrations that were not accompanied by a notarized affidavit averring to the accuracy of ***that*** registration simply are not strictly compliant with A.R.S. § 19-118(B)(5).

II. A Residential Address Lacking the Applicable Unit Number Is Not Strictly Compliant With A.R.S. § 19-118(B)(1)

All circulator registrations must identify the circulator's "residence address." A.R.S. § 19-118(B)(1). If a circulator resides in a multiunit structure, strict compliance with this provision demands disclosure of the specific unit number in which the circulator dwells.

Recognizing that the initiative can be wielded to exert pervasive and effectively unalterable, *see* Ariz. Const. art. IV, pt. 1, § 1(6)(C), changes to state law, the Legislature—extending the rubric that courts have long applied to referendum efforts—has directed that "[c]onstitutional and statutory requirements for statewide initiative measures must be ***strictly construed*** and persons using the initiative process must ***strictly comply*** with those constitutional and statutory requirements." A.R.S. § 19-102.01(A) [emphases added].

This strict compliance standard necessitates punctilious and "nearly perfect" adherence to all applicable statutory and regulatory mandates; even slight deviations from prescribed standards compel invalidation of the affected signatures. *Arrett v. Bower*, 237 Ariz. 74, 81, ¶ 23 (App. 2015) (internal citation omitted)); *Homebuilders Ass'n of Cent. Ariz. v. City of Scottsdale*, 186 Ariz. 642, 648 (App. 1996) (noting that strict compliance standard extends to all "constitutional and statutory provisions, no matter how minor"). Its demands are not contingent upon the nature of the requirement, a qualitative assessment of its "importance," or the capacity of an error to induce deception or confusion. The analysis

is linear and straightforward, and reflects the imperative of uniformity and "bright-line rule[s]" in the ballot measure context. *Pioneer Trust Co. v. Pima County*, 168 Ariz. 61, 66 (1991). Any error, "no matter how minor," *Homebuilders Ass'n*, 186 Ariz. at 648, categorically disqualifies the affected petition sheets and signatures.

Every registration must disclose the circulator's "residence address." A.R.S. § 19-118(B)(1). Because many professional petition circulators are itinerants who maintain temporary residences outside their home states, the registration contains separate fields for the circulator's permanent residential address and any temporary address that he or she may have in Arizona.

When a controlling statute elicits a discrete item of information—such as a "residence address" or a "date"—strict compliance entails disclosing each constituent element ***in full***; the provision of partial or incomplete information is insufficient, even if the omitted component can be reasonably inferred or ascertained through extrinsic sources. *See McKenna*, 250 Ariz. at 472, ¶ 14. As the Court of Appeals has explained, "a complete address is one that contains all the following required address elements: the recipient's name, street and number, *including the apartment number,* city and state, and zip code." *Ruiz v. Lopez*, 225 Ariz. 217, 221, ¶ 14 (App. 2010) (emphasis in original); *see also* A.R.S. § 16-152(A)(3) (compliant voter registration record must contain "[t]he complete address of the registrant's actual place of residence, including street name and number, [and] ***apartment or space number*** . . . .") (emphasis added). Just as the provision of a street

name without a numbered address is legally insufficient, *see Whitman v. Moore*, 59 Ariz. 211, 228–29 (1942), *overruled in part on other grounds in Renck v. Superior Court*, 66 Ariz. 320 (1947) (requiring "residence number" even in substantial compliance context), the designation of merely a large apartment complex or hotel is inadequate. *See Ruiz*, 225 Ariz. at 220, 221 ¶¶ 11, 15 ("Appellee lived in a large apartment complex" so it could not be "assumed" that "the letter carrier or apartment manager would know [intended recipient] or be able to find her"). It follows that the "residence address" of a circulator residing in a multiunit structure must include the relevant unit number.

The trial court concluded that "a factual inquiry is required to determine whether the applicable unit number is necessary." Ruling at 8. To be clear, Appellants bear—and undisputedly have discharged—the burden of proving that a challenged address is, in fact, a multiunit structure. *Id.* The trial court, however, imputed to Appellants an additional onus of establishing that "an applicable unit number was necessary to ensure contact." *Id*. This analysis falters, however, for at least two reasons.

First, the trial court's formulation imports the attributes of substantial compliance review under a façade of strict compliance. The lodestar of a substantial compliance analysis is whether an error or omission will beget actual confusion or misapprehension. *See, e.g.*, *McKenna*, 250 Ariz. at 474, ¶ 27 (incomplete address was substantially compliant if Recorder could verify signer's voter registration status); *Feldmeier v. Watson*, 211 Ariz. 444, 449, ¶ 25 (2005) (substantial compliance queries whether, "[v]iewed as a whole," the

document "fulfill[s] the purpose underlying the . . . statutory requirements"). By contrast, in the strict compliance realm, the facial omission or misstatement of a required item of information is ***per se*** fatal, irrespective of whether it inflicted any articulable prejudice. *See Comm. for Preservation of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 250, ¶ 12 (App. 2006) (stapling measure description, rather than inserting it into sheet, was fatal error, even though it did not "hinder[] electors' ability to comprehend the petition"); *Arrett*, 237 Ariz. at 80, ¶ 20 (misprinting serial number was fatal "mistake"). A circulator who neglects to identify the applicable unit number of his residence has not supplied a "residence address" that strictly complies with A.R.S. § 19-118(B)(1).

Second, and relatedly, the trial court's approach is unworkable because it excises from the term "address" any objectively discernible legal parameters; what is and is not a compliant "address" can be determined only retrospectively based on individualized proof of attempted "contact." This construct reduces what had been a settled term of law into an *ad hoc* product of happenstance; what would otherwise be an insufficient address apparently would become adequate if, for example, a petition challenger happens to knock on the right apartment door or encounters a knowledgeable mailman or an accommodating bellhop. The trial court's reasoning also spawns numerous unanswered (and in some cases unanswerable) questions: what constitutes an attempt at contact? How many times and through what methods must a challenger try to reach a circulator? Is there any particular time window in which the outreach must occur? What is the determinant of a failed

"contact" attempt (*e.g.*, undeliverable mail?). Must the opponents of the Initiative Petition prove a failed contact, or must the proponents prove no practical impediments to contact? A return to the familiar contours of strict compliance obviates these intractable perplexities. A "residence address" must, as a matter of law, include the applicable unit number.

III. Registrations That Omit the Committee's Suite Number Are Not Strictly Compliant with A.R.S. § 19-118(B)(4)

Just as a "residence address" that lacks the relevant unit number is legally insufficient, a circulator registration must designate the Committee's "address" in full for service of process purposes. *See* A.R.S. § 19-118(B)(4). Its evolution illuminates the statute's meaning. Section 19-118(B)'s predecessor permitted a circulator to identify any address in Arizona—in any form—for service of process purposes. *See* A.R.S. § 19-118(B)(2) (2018); *Stanwitz*, 245 Ariz. at 351, ¶ 27. In 2019, however, the Legislature amended the statute to require that registered circulators must designate for service of process "[t]he address of the committee in this state for which the circulator is gathering signatures." 2019 Ariz. Laws ch. 315, § 3.

Here, it is undisputed that the Committee's address is 401 West Baseline Road, Suite 205 in Tempe. As discussed *supra*, a strictly compliant "address" must include, as a matter of law, the relevant suite or unit number. 401 West Baseline Road is the site of a large office complex that houses multiple business and commercial establishments. Even assuming that the Appellants could or would figure out the proper service address through

outside research, the controlling question remains whether the circulator registrations **on their face** comply strictly with Section 19-118(B)(4). To the extent they include an incomplete address, they do not. *See McKenna*, 250 Ariz. at 472, 473, ¶¶ 14, 16 (ability to infer missing information may suffice under substantial compliance standard, but does not satisfy strict compliance).

ATTORNEYS' FEES AND COSTS

Appellants request an award of reasonable attorneys' fees and costs, pursuant to A.R.S. § 19-118(F) and A.R.C.A.P. 21.

CONCLUSION

The Court should reverse the judgment of the trial court with respect to Objection Nos. 3, 4(a)-(b), and 6(a).

Given the number of legal issues in this case, it is infeasible to delineate the number of signatures (in)validated under all the possible combinations of objections. Once all objections are adjudiated, the parties will require several hours to perform calculations and agree on the final number of signatures affected. The Plaintiff-Appellants therefore request a ruling **no later than 12:00 p.m. on August 25, 2022** so that arithmetic issues can be resolved between the parties before the 5:00 p.m. ballot-printing deadline on August 25. Alternatively, the parties can upon request stipulate and submit in advance of a ruling the number of signatures that would be (in)validated under any specified combination(s) of objections.

RESPECTFULLY SUBMITTED on this 20th day of August, 2022.

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