IN THE SUPREME COURT OF ARIZONA

SCOT MUSSI, an individual; AIMEE YENTES, an individual; and ARIZONA FREE ENTERPRISE CLUB, a nonprofit corporation, Appellants, v. KATIE HOBBS, in her official capacity as the Secretary of State of Arizona, Appellee, and ARIZONANS FOR FREE AND FAIR ELECTIONS (ADRC ACTION), a political action committee, Real Party in Interest.	Supreme Court No. CV-22-0207-AP/EL Maricopa County Superior Court No. CV2022-009391

Brief of *Amici Curiae* Governor Doug Ducey, Senate President Karen Fann, and Speaker of the House Russell "Rusty" Bowers in Support of Appellants

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INTERESTS OF *AMICI CURIAE* [1]

Governor Ducey is the twenty-third Governor of Arizona. President Fann and Speaker Bowers are the leaders of the two houses of Arizona's Legislature. Their interest in this case relates to the plain meaning of a law that the Legislature adopted and Governor Ducey signed into law. *Amici* do not express any position on the policy wisdom of the initiative underlying this appeal. In fact, *Amici* have contemporaneously filed identical briefs in all three cases involving the same issue across various initiatives. Their interest and perspective relate to A.R.S. § 19-118 and the importance of giving effect to statutory text. Here, the statute requires that five items "shall" be included in a petition circulator's application. A.R.S. § 19-118(B). Some of the circulators in these cases failed to include one of the five items. As a result, their signature sheets must be disqualified. A.R.S. § 19-121.01(A).

INTRODUCTION

In 2018, the Court identified a loophole that allowed paid circulators to avoid filing the statutorily required application. *Leach v.*

[1] No counsel for any party authored this *Amicus* Brief in whole or part, and no person or entity other than *Amici* contributed to the cost of this brief.

Reagan, 245 Ariz. 430 (2018). The Legislature responded by enacting the current statute, which requires all out-of-state and paid circulators who desire to collect signatures for a given initiative to submit an application containing the circulator's name and address, the "initiative or referendum petition on which the circulator will gather signatures," consent to jurisdiction in Arizona, the committee that will accept service for a lawsuit challenging the initiative's qualification, and a notarized affidavit confirming the foregoing. A.R.S. § 19-118(B)(5). The text makes it clear that everything about the application is initiative-specific. That makes sense because the petition itself is also initiative-specific.

By allowing circulators to skip the notarized certification, the court below eviscerated Section 19-118. Without textual basis, it fractured the statute's list of the five elements that "shall" be included in a circulator's application and declared one of them unnecessary. In so doing, it ignored plain meaning, context, and purpose. It also avoided the rule 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).

The lower court's holding rests on the idea that circulators who once swore to the veracity of a *different* initiative petition are qualified for all *future* petitions—no matter how much time may have passed. As a logical matter, that is impossible. The initiative or referendum and the committee sponsoring it will change from campaign to campaign; in many cases, the circulator's address will also change. A circulator cannot possibly swear in advance to the truth of a future certification. As a matter of the separation of powers, the lower court's approach is even more upsetting. Section 19-118(B) reflects the Legislature's thoughtful response to a loophole that this Court identified in *Leach*. And just as the Court was not the correct body to close that loophole, it should not bend over backward to reopen it. The lower court's contrary approach implicates the separation of powers and the rule of law. This Court should reverse the decision below and enjoin the initiative's placement on the ballot.

ARGUMENT

The issue in this case is not new. The Court encountered the underlying problem of petition circulators who failed to provide an affidavit in *Leach*. That opinion recognized the need for a statutory fix,

but noted that providing one was the responsibility of the Legislature, which the Constitution charges with enacting "laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. Exercising that authority, the Legislature reorganized and improved the statutes governing circulator registration. The resulting laws make clear that paid circulators' applications must include all five elements in Section 19-118(B), including the sworn affidavit. The circulators in this case (and the companion cases) failed to do so, rendering their signature sheets invalid. A.R.S. §§ 19-118(A), 19-121.01(A).

Leach recognized a loophole in Section 19-118 that the Court construed to exclude circulators paid by the hour from the definition of "paid circulators." 245 Ariz. at 438 ¶ 34. Because the hourly workers were not "paid circulators," the affidavit requirement did not apply, and their petition sheets could not be declared unlawful for including an incorrect address for the sponsoring organization. *Id.* at 439 ¶ 41. While noting the "anomaly" in how the law defined paid circulators, the Court insisted that "[r]ewriting [the statute] was a task for the *legislature*, which it undertook the next legislative session." *Id.* at 439 ¶ 39

(emphasis added) (noting legislation adopted between the Court's original ruling and its later-issued opinion). That holding was a bitter pill for policymakers like *Amici*, who thought that they had already solved the problem. Nevertheless, the tripartite structure of government requires that legislative changes begin in the Legislature.

This case presents the other side of the equation. Now that the Legislature has amended Section 19-118, the courts should apply the statute "with the goal of effecting legislative intent." *Id.* at 438 ¶ 35. To that end, this Court "first consider[s] the statute's language because we expect it to be the best and most reliable index of a statute's meaning." *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996) (quotation omitted). If the text is unclear, the Court resolves it by "reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute's context, subject matter, historical background, effects and consequences . . . ." *Id.*

Applying that approach makes this an easy case. The affidavit is the final item in a list of things that the circulator application "shall" include. A.R.S. § 19-118(B). The entire framework—from the application requirement in subsection (A) to the application's content in subsection

(B)—speaks in terms of a specific initiative or referendum. Subsection (A), for example, assigns responsibility for submitting applications to "[t]he committee that is circulating the petition." A.R.S. § 19-118(A). It is not a combination of the committee now circulating a petition and whichever committee sponsored a circulator's first petition. And the statute does not provide an exception for circulators who have previously sworn to the content of an application for a different initiative.

Subsection (B) is even more explicit. It requires the application to identify "[t]he initiative or referendum petition on which the circulator will gather signatures." A.R.S. § 19-118(B)(2). It goes on to require the address of the sponsoring committee, at which the circulator will accept service. A.R.S. § 19-118(B)(4). Again, the statute does not in any way single out subparagraph (B)(5) as optional or waivable for circulators who have gathered signatures for a different petition in the past.

The affidavit exists to confirm the other facts required in part (B). When the circulator signs the affidavit, he swears under penalty of perjury that "all of the information provided is correct." A.R.S. § 19-118(B)(5). That "information" includes the initiative-specific facts detailed above. Because the facts covered by the affidavit include

important items that vary from initiative to initiative, the "context gleaned from neighboring provisions" confirms that the affidavit is a necessary part of each application. *Fann v. State*, 251 Ariz. 425, 439 ¶ 39 n.7 (2021). The structure of a statutory list also supports the conclusion that each element is required for a complete application. *See State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 245 ¶ 23 (2020) (explaining *noscitur a sociis* cannon, "which holds that words grouped in a list should be given related meanings" (quotation omitted)); *see also Powers v. Carpenter*, 203 Ariz. 116, 118 ¶ 10 (2002) (explaining corollary rule that excluding something from a list of similar items implies different treatment). Looking to context and structure confirms that an affidavit is a required element of an application under Section 19-118(B).

That outcome also makes sense as a matter of policy. The point of an affidavit is to confirm the truth of the information and to raise the stakes for persons who might be tempted to dissemble. And notarization is the only part of the circulator application that occurs in-person (as opposed to online), meaning that it is the only check on whether the person filing the application is who he says he is. Allowing paid circulators to use their prior affidavits undermines the policy goals

embodied in the statute. The lower court's alternative policy means that circulators need only swear to information regarding the first initiative for which they ever collect signatures—no matter how long ago that was; after that, voters have no assurance as to the identity of the circulator or the initiative's backers. That resurrects the problem in *Leach*: no one has sworn to the relevant details about the sponsoring organization for the current initiative. Yet the Court noted in *Leach* that the Legislature had solved precisely that problem in the subsequent session. 245 Ariz. at 439 ¶ 39. Appellees seek to un-solve it by offering judicial blinders that consider the affidavit requirement in isolation from its context and purpose.

The superior court broke with the conventions of statutory interpretation in adopting Appellees' approach. It placed a novel burden on the Legislature to make every subpart of Section 19-118(B) *expressly* applicable to every circulator application: "it could have said so expressly in the statute, but it did not do so." *Protect Our Arizona* Op. ¶ 30; *see also Mussi* Op. 6–7 (noting that the Legislature "could have" "expressly include[d] a temporal requirement"); *Leibsohn* Op. 6–7 (same). There are at least two problems with the lower court's approach.

First, the statute does, in fact, require that every item listed in its five subparts be included in a circulator's application. It states that "[t]he circulator registration application required by subsection A of this section shall require the following . . . ." A.R.S. § 19-118(B). The use of "shall" destroys any reasonable belief that what follows is optional. *Garcia v. Butler*, 251 Ariz. 191, 195 ¶ 15 (2021). And the statute says nothing about some subparts applying only to the circulator's first initiative. Combined with the strict construction and strict compliance requirement in Section 19-120.01(A), there can be no doubt that every application must include all five items.

Second, the lower court imposes an unprecedented burden on the Legislature to make everything explicit. That is not the law. "Rather than expecting (let alone demanding) perfection in drafting, we have routinely construed statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly." *Torres v. Lynch*, 578 U.S. 452, 472 (2016). Even if the lower court were correct that the Legislature could have added language specifying that the elements in subsection (B)(5) apply to *each* application, that step was not necessary. The best reading of the statute—indeed, the *only*

reasonable reading—already conveys that idea for the reasons summarized above. Requiring instead that the Legislature do everything it "could" to *expressly* foreclose alternative, implausible interpretations would make legislating impossible. It would also upset the relationship between the legislative and judicial branches by transforming judicial review into a game of "gotcha."

Appellee attempts to excuse certain circulators' failure to submit a complete application by appealing to the Secretary's design of a website for filing circulator applications. *Protect Our Arizona* Response Br. at 7; *Leibsohn* Response Br. at 9–10. As an initial matter, nothing the Secretary has done precludes compliance with the law. Moreover, the Secretary lacks any authority to change the terms of the statute. Ariz. Const. art. III. Agencies may adopt regulations only with legislative delegation. *Roberts v. State*, No. CV-21-0077-PR at *11 ¶ 34 (Ariz. July 8, 2022) ("A unilateral exercise of legislative power by an executive agency violates separation of powers."). Appellee identifies no delegation that would allow the Secretary to amend Section 19-118 *and* no regulation purporting to do so. In particular, the Election Procedures Manual ("EPM"), promulgated pursuant to A.R.S. § 16-452, does not

include an exemption from the mandatory elements of a circulator application. If it did, that exemption would be void for a number of reasons, including its flat departure from statute and the fact that the EPM's "regulation of petition circulators . . . fall[s] outside the mandates of § 16-452 and do[es] not have any other basis in statute." *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021).

The Legislature might empower an executive official to implement a statute, but statutory changes must occur through the Legislature itself. Thus, Appellee's attempts to confuse the case with references to the portal website are only a detour back to the legal question in this appeal: what does the statute say? Because the statute requires an affidavit as part of the application process, there is no room for contrary regulations.

Finally, Appellee's observations about the importance of the initiative misses the point. *E.g., Protect Our Arizona* Response Br. at 5; *Leibsohn* Response Br. at 7–8. Whether initiatives are important is not in dispute. The law at issue is a constitutional measure to regulate the initiative power, and it presents one of the easier statutory interpretation questions to reach the Court in recent memory. The Court should give

effect to the law because it is the law, even if it means that these initiatives will have to wait for another day. The petition-circulation industry is a sophisticated, well-funded business. It should have no trouble ensuring that paid circulators comply with the reasonable regulations in Section 19-118.

* * *

This case can and should be an example of how the branches of government interact with mutual respect. The Court in *Leach* recognized a loophole for paid circulators not to file the required affidavits before collecting signatures. In response, as the *Leach* opinion noted, the Legislature reformed the relevant statutes to ensure that all paid circulators "shall" include an affidavit as part of their applications. The initiative's backers in this case violated that rule and now seek to change the law to require an affidavit only for a circulator's first application—*i.e.*, an affidavit that attested to information about a different initiative with different sponsors at a different address for service of process. That rule appears nowhere in the text, structure, or purpose of the statute. To the contrary, the statutory language is clear that all five items in Section 19-118(B) "shall" be included.

CONCLUSION

The Court should reverse the decision below and apply the statutory requirement that petition circulator applications filed pursuant to Section 19-118(A) "shall" include all of the mandatory items listed in Section 19-118(B). Here, the circulators did not include the affidavit required in subparagraph (B)(5). As a result, their signature sheets are disqualified. A.R.S. § 19-121.01(A).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Amicus Brief complies with the Court's Order of August 19, 2022 in that the brief is double-spaced, employs a proportionately spaced typeface and the author's word count software program reports that this Brief consists of 2,473 words.

Dated this 22nd day of August, 2022.

By: */s/ Dominic E. Draye*

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CERTIFICATE OF SERVICE

I certify that the original of the foregoing **Brief of *Amici Curiae* Governor Doug Ducey, Senate President Karen Fann, and Speaker of the House Russell "Rusty" Bowers in Support of Appellants** was e-filed with the Clerk of the Arizona Supreme Court via AZTurboCourt on August 22, 2022, and that a copy was served via AZTurboCourt e-service and e-mail on this same date, as follows:

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