**ARIZONA SUPREME COURT**

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| SCOT MUSSI, an individual; AIMEE YENTES, an individual; and ARIZONA FREE ENTERPRISE CLUB, a nonprofit corporation,<br><br>Plaintiffs/Appellees,<br><br>v.<br><br>KATIE HOBBS, in her capacity as the Secretary of State of Arizona,<br><br>Defendant/Appellees,<br><br>And<br><br>ARIZONANS FOR FREE AND FAIR ELECTIONS (ADRC ACTION), a political committee,<br><br>Real Party in Interest/Appellant. | No. CV-22-0207-AP/EL<br><br>Maricopa County Superior Court<br>No. CV 2022-009391 |

# REAL PARTY IN INTEREST/APPELLANT'S ANSWERING BRIEF


James E. Barton II, 023888
Jacqueline Mendez Soto, 022597
**BARTON MENDEZ SOTO PLLC**
401 W. Baseline Road, Suite 205
Tempe, Arizona 85283
480-550-5165
*James@bartonmendezsoto.com*
*Jacqueline@bartonmendezsoto.com*
*Attorneys for*
*Real Party in Interest/Appellant*

Joshua D. Bendor, 031908
Joshua J. Messer, 035101
Travis C. Hunt, 035491
**OSBORN MALEDON, P.A.**
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012
602-640-9000
*jbendor@omlaw.com*
*jmesser@omlaw.com*
*thunt@omlaw.com*

Arizonans for Free and Fair Elections (ADRC Action) ("the Committee") submits this Answering Brief as directed by this Court's order dated August 19, 2022, urging the Court to reject Plaintiffs-Appellants' objections outlined in their Opening Brief.

Plaintiffs-Appellants raise three issues on appeal, and the Committee will address each one in turn, but none is well-taken and should be rejected by this Court.

## I. THE COURT MUST NOT INVALIDATE EVERY INITIATIVE CIRCULATED IN THE 2021-2022 ELECTION CYCLE BASED ON AN IMAGINED REQUIREMENT TO RE-REGISTER.

The first issue on appeal is whether A.R.S. § 19-118, when strictly construed, requires circulators to provide a new affidavit for each ballot measure petition that they circulate. Both trial court judges to have considered the question concluded correctly that the statute imposes no such requirement. The Court is now familiar with the futile efforts by Plaintiffs-Appellants, and the Amici that support them, to find a scrap of statutory text requiring a new registration with each campaign for which a circulator works. There is none. In this Answering Brief, the Committee brings to the Court's attention three alternative reasons to decline the invitation to invalidate every initiative petition circulated in the 2021-2022 election cycle. Nonetheless, the clearest reason, which has been more than adequately

briefed already, remains that the statute does not require what the Plaintiffs-Appellants wish it did.

**A. Laches**

The procedures challenged here have been in place since they were submitted by the Secretary and approved by the Attorney General and the Governor in 2019. Just as the statute does not require a new registration and a new affidavit with each new petition for which the circulator circulates, the EPM requires an *amended* registration but does not require a new affidavit, or a new circulator registration number. Plaintiffs-Appellants were free to challenge this process when it was adopted by the Secretary and approved by the Governor and the Attorney General. They chose instead to wait until the conclusion of petition-gathering campaigns to raise their complaints.

Plaintiffs-Appellants' delay in raising the challenge to this process is unreasonable. In *Arizona Libertarian Party v. Reagan*, the District of Arizona found it unreasonable for parties to wait until April 12, 2016 to challenge a new law that expanded the number of signatures required by a minority party seeking access to the ballot when the law had become effective the prior year on July 3, 2015. 189 F. Supp. 3d 920, 924 (D. Ariz. 2016). The prejudice to the Committee is overwhelming, as this objection was not raised until the Committee had already relied on the approved procedures and now is powerless to respond to the allegedly

deficient process promulgated by the Secretary. Laches provides an alternative basis for the Court to uphold the trial court's ruling.

**B. Undue Burden**

As numerous courts have noted, exercising direct democracy rights guaranteed in a state's constitution is exercising Free Speech. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Rejecting a circulator's work, that is, the circulator's Free Speech supporting the initiative, for failing to comply with an unstated requirement to re-register creates a barrier for the exercising of the circulator's and the Committee's right of Free Speech. State election laws that create such barriers to the political process are reviewed on a flexible framework known as the *Anderson-Burdick* test. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 432-33 (1992). Courts balance the burden imposed on the party seeking to exercise their First Amendment right against the state's interest that justifies the burden. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. Courts evaluate the "legitimacy and strength" of the state interest and whether it is necessary to burden the speaker's rights. *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564; *see also Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 408-09 ¶¶ 41-42 (2020) ("Ballot access restrictions implicate the right to vote and the related right to associate with others to advance shared political beliefs."); *AZ Petition Partners*, 253 Ariz. at ___ ¶ 19

("Circulators serve a crucial role in the petition process because they must 'express the petitioner's desire for political change' and 'discuss the merits of the proposed change.") (citations omitted).

In *AZ Petition Partners*, the state criminally charged a signature gathering company with 50 counts of violating A.R.S. § 19-118.01, which prohibits "pay[ing] or receiv[ing] money or anything of value based on the number of signatures collected on a statewide initiative or referendum petition." *AZ Petition Partners*, 253 Ariz. at ¶ 29. The court found that the statute could lead potential circulators to "decline to participate for fear of criminal prosecution," and that such a result "would significantly undermine First Amendment protection." *Id*. at ¶ 31.

In the instant case, the burden is more significant because it requires compliance with an unstated requirement. Compliance that was literally impossible in the 2021-2022 cycle as is inadvertently supported by the Amicus Brief from Direct Contact, which claims to have inferred the unstated requirement, but nonetheless was unable to comply with this imagined requirement. To be clear, this basis for upholding the trial court does not rest on the burden that would be created by requiring circulators to upload new affidavits. The burden is requiring circulators to upload a new affidavit, where nothing from the Secretary, the EPM, or the statute tells them to do so.

### C. Apply Relief Prospectively

Even if the Court were to accept the argument that, despite the language of the statute and the EPM, re-registration is required, the Court should not penalize the Committee for failing to do the impossible. As such, if the Court holds that multiple affidavits are required, it should make its decision prospective only. Because the Committee and its circulators were obligated to follow the procedure created by the Secretary and approved by the Governor and Attorney General, "retroactive application would produce substantially inequitable results." *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 45 (2010) (internal quotation marks and alterations omitted).

## II. SECTION 19-118 DOES NOT REQUIRE CIRCULATORS TO PROVIDE APARTMENT OR UNIT NUMBERS ON THEIR CIRCULATOR REGISTRATION FORMS

Plaintiffs-Appellants assert (at 12) that circulators must include on their registration forms a unit number if they reside in a multi-unit residential structure. The statute, however, merely requires the circulator's "residence address." A.R.S. § 19-118(B)(1). It does not provide any more specificity with which circulators are required to comply. Plaintiffs-Appellants are asking this Court to edit the statute's language by inserting words that the Legislature chose not to include. If the Legislature wanted to require something more than "residence address," it would have done so, just as it has done in the address requirements for petition signers in

A.R.S. § 19-101(A), which outlines the requirement for petition sheets to include a place for signers to provide their "actual address (street & no. and if no street address, describe residence location)." *See Lawrence v. Jones*, 199 Ariz. 446, 452-53 (App. 2001) (concluding "that if the legislature had wanted to include such a narrowly constructed definition of 'legal description,' it would have included it in Title 19 referendum provisions as it has done in other areas of the law"). Instead, in A.R.S. § 19-118(B), the Legislature merely required the circulator's "residence address." By failing to provide additional requirements or specifications on the circulators, the Legislature allowed some latitude for the circulators to fill in their address information.

Plaintiffs-Appellants' objection (in Objection No. 4) to the registration forms of certain circulators who included their addresses on the registration form but simply failed to include an apartment or unit number fails as a matter of law. The statute does not require the circulators to list their apartment number, and neither does the registration form, which, unlike many other forms, does not include a space specifically for an apartment or unit number. Moreover, Plaintiffs-Appellants have offered no proof, nor can they, that the addresses provided were insufficient to ensure the circulators could be contacted. Eliminating all of the signatures gathered by these circulators because they omitted an apartment number from their registration form would serve no point, and it would thwart the decision

of the voters who signed those petition sheets consistent with their rights under the constitution.

Furthermore, this Court has already analyzed the address question in another election-related context. In *McKenna v. Soto*, this Court was faced with what constituted an "actual residence address" for those signing petition sheets. 250 Ariz. 469, 474 ¶ 25 (2021). This Court concluded that all that was needed was "a street address and a city or town, or a street address and a zip code." *Id.* Notably absent is a requirement for anything more specific, such as an apartment or unit number.

Even under the requirements of "strict compliance," the address variations raised by Plaintiffs-Appellants do not justify the rejection of thousands of otherwise valid signatures. As outlined in the Committee' Opening Brief, the strict compliance standard does not require courts to (1) read into the statute requirements that do not exist, (2) reject anything short of perfect compliance, or (3) enforce requirements that serve no "substantial, independent role in assuring" the statute's stated purpose. *See Van Riper v. Threadgill*, 183 Ariz. 580, 584 (1995) (holding that strict compliance did not require reading a statutory maximum of 15 signatures on a petition sheet as a statutory minimum); *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5 (1972) (concluding that the failure to include specific words in the circulator's affidavit did not render them invalid under strict scrutiny,

but did affect the presumption of validity); *Forszt v. Rodriguez*, 212 Ariz. 263, 267 ¶ 17 (App. 2006). Instead, as Plaintiffs-Appellants admit (at 12) strict compliance requires "*nearly* perfect compliance with constitutional and statutory" mandates, *see Comm. for Preservation of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249 ¶ 6 (App. 2006) (emphasis added), which courts have applied to allow certain minor exceptions to statutory requirements so long as the statute's purposes are fulfilled. *See Leach v. Hobbs*, CV2020-007961, Order at 14 (Aug. 14, 2020) (holding that strict compliance with A.R.S. § 19-102.01 did not prevent circulator from changing his listed residence address); *Molera v. Reagan*, CV2018-010209, Minute Entry at 10-11 (Aug. 15, 2018) ("A third party accurately pre-marking the paid/volunteer line is not enough to render the petitions null and void even if strict compliance applies.").

Plaintiffs-Appellants stresses (at 13) "the imperative of uniformity and 'bright-line rule[s]' in the ballot measure context." The Committee agrees. But the Legislature did not provide a bright-line rule for apartment numbers in A.R.S. § 19-118. If strict compliance requires circulators to be uniform and follow the bright-line rules, then the Legislature must be explicit and clear about what it is requiring circulators to do. If the Legislature were to demand a circulator to include an apartment number – or risk having every petition signature that was gathered over the course of months or perhaps even two years be thrown out after

all of the signatures were turned in – then it needs to spell it out and not leave circulators to infer their intent or to be subject to the whims of political campaigns. The Legislature cannot be vague about its requirements and expect circulators to divine all of the little details that they meant to articulate.

Plaintiffs-Appellants point out (at 13) an example of the Legislature providing the kind of necessary detail that Plaintiffs-Appellants seem to think is found in A.R.S. § 19-118. In order to properly fill out a voter registration form, a potential registrant is instructed to provide "[t]he complete address of the registrant's actual place of residence, including street name and number, *apartment or space number*, city or town and zip code." A.R.S. § 16-152(A)(3) (emphasis added). This is in stark contrast to the circulator registration requirements in A.R.S. § 19-118(B)(1). There, the Legislature only required the circulator's "residence address." Clearly, the Legislature knows how to require a potential registrant to provide an apartment or space number, but it failed to do so for circulators.

After pointing out this statutory provision for voter registration and some case law that is not analyzing A.R.S. § 19-118(B)(1), Plaintiffs-Appellants assert (at 14) that it "follows" that residence address must mean "includ[ing] the relevant unit number." This concession that the plain language of A.R.S. § 19-118(B)(1) does not actually require circulators to provide a unit number forecloses Plaintiffs-

Appellants' attempt to throw out all of the signatures collected by these properly registered circulators.

If this Court were to conclude that a unit number is necessary for a registration form, the trial court struck the correct balance in requiring a challenger to demonstrate that the failure to include a unit number actually barred the challenger from contacting the circulator. [Ruling at 8] This factual inquiry into a particular circulator's residence address ensures that the statutory requirement is not used as a pawn in a political campaign but rather to uphold the integrity of the initiative process. *See Leach v. Hobbs*, 250 Ariz. 572, 577-78 ¶ 27 (2021) (reminding the courts that they "must remain vigilant to ensure that initiative challengers do not abuse the subpoena provision in § 19-118(E) by wielding it as a procedural sword to disqualify petition signatures rather than using it as a tool to advance the fact-finding process").

## III. SECTION 19-118 DOES NOT REQUIRE CIRCULATORS TO PROVIDE SUITE NUMBERS FOR THE COMMITTEE'S ADDRESS ON THEIR CIRCULATOR REGISTRATION FORMS

Plaintiffs-Appellants assert (at 16) that some circulators included an address for the Committee on their registration form that did not include the Committee's suite number. For the reasons noted above, A.R.S. § 19-118(B)(4) does not direct potential circulators to include a unit number on the address, and thus circulators cannot be found to have failed to strictly comply with a requirement that does not

appear in the statute. When the Legislature amended the address requirement to include the committee's address for service of process, it could have included a unit or space number, as it does for voter registration forms. But it failed to do so. This Court should not read into the statute a requirement that the Legislature knows how to articulate but chose not to include in A.R.S. § 19-118(B)(4).

Furthermore, the purpose of providing the Committee's address on the circulator registration form is to provide the location "at which the circulator will accept service of process related to disputes concerning circulation of that circulator's petitions." A.R.S. § 19-118(B)(4). It is undisputed that these challenged circulators noted that they would be collecting signatures for the Committee, and Plaintiffs-Appellants themselves disclosed the address for the Committee in the Complaint. Accordingly, the purpose of the statute has been fulfilled, regardless of any simple errors with the registration form. It is undisputed that Plaintiffs-Appellants can serve each of the circulators at the Committee's address.

A simple error in the Committee's address should not deem a circulator as improperly registered. As noted in the Committee's Opening Brief and as admitted by Plaintiffs-Appellants, strict compliance merely requires near perfection. *See Comm. for Preservation of Established Neighborhoods*, 213 Ariz. at 249 ¶ 6. As long as the statute's purpose can be fulfilled, such errors must not be grounds for

throwing out otherwise valid petition signatures.

Moreover, none of these challenged registrations is invalid. Section 19-118(B)(4) provides that a circulator must include on their registration form:

> 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 related to disputes concerning circulation of that circulator's petitions. Service of process is effected under this section by delivering a copy of the subpoena to that person individually, by leaving a copy of the subpoena with a person of suitable age or by mailing a copy of the subpoena to the committee by certified mail to the address provided.

The first sentence requires a ballot measure committee to accept service of process at the committee address. The second sentence also allows challengers to serve the circulator individually or by mailing a copy of the subpoena by certified mail. There is a certain logic in listing the committee address as the service address, but A.R.S. § 19-118 does not require it. It allows for the circulator to provide another address where the circulator can be served. That does not prevent the challengers from serving the circulator at the committee address, of course, but giving challengers another location to serve the circulator is simply not forbidden by statute.

As with the unit number for a circulator's address, if this Court were to conclude that a suite number for the Committee's address is necessary for a registration form, the trial court struck the correct balance in requiring a challenger

to demonstrate that the failure to include a suite number actually barred the challenger from contacting the circulator. [Ruling at 10] This factual inquiry into the ability to serve a circulator at the Committee's address ensures that the statutory requirement is not used as a pawn in a political campaign but rather to uphold the integrity of the initiative process. *See Leach*, 250 Ariz. at 577-78 ¶ 27.

## Conclusion

This Court should deny Plaintiffs-Appellants their requested relief. The trial court's ruling on the above described Objections should stand, and this Court should remand the matter to the trial court to determine whether Plaintiffs-Appellants have successfully challenged a sufficient number of signatures in this action to reduce the valid number of signatures submitted by the Committee to less than 237,645.

RESPECTFULLY SUBMITTED this 22nd day of August 2022.

BARTON MENDEZ SOTO PLLC

By: /s/ James E. Barton II
James E. Barton II
Jacqueline Mendez Soto
*Attorneys for Real Party in Interest*