

**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

PLAINTIFFS-APPELLANTS' RESPONSE TO *AMICUS* BRIEFS

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Response to Amicus Brief of the Government and Legislative Leadership

In hindsight, it is not surprising that the Governor did not previously object to the Secretary's "one affidavit for all time and purposes" theory of A.R.S. § 19-118. There was no opportunity for the Governor to do so because the Secretary never published her interpretation of the statute. It is not in the Elections Procedures Manual ("EPM"). Nor is it in any regulations enacted pursuant to Arizona's Administrative Procedures Act. It was only discovered by the happenstance of a series of public records requests in preparation for litigation concerning other issues. *See generally Mussi v. Hobbs*, Maricopa County Docket No. CV2021-016143, Verified Compl. ¶¶ 27-28 (Oct. 15, 2021) (describing then-pending public records requests for circulator affidavits). The first public disclosure of the Secretary's position was more than two years after her theory was implemented through the Circulator Portal, and only in response to litigation. *See Ariz. Free Enterprise Club v. Hobbs*, Maricopa County Docket Nos. CV2021-0111491 and -016143 (consolidated), Real Party in Interest's Motion for Partial Summary Judgment ex. E (Jan. 21, 2022) (declaration of K. Lorick). That is why the Governor did not object sooner.

The Secretary's theory apparently finds its origins (not necessarily as an intentional legal or policy decision) in the design of the online Circulator Portal, without public comment. According to the Secretary and Arizonans for Free and Fair Elections (the "Committee"), implementation of the Circulator Portal is enough to settle the issue for all circulators. But if government IT contractors can discreetly amend a statute by cutting

corners in their programming decisions, Schoolhouse Rock should immediately add a new verse to *How a Bill Becomes a Law*; that would be a consequential innovation in lawmaking, and procurement decisions will become more complicated and, ultimately, political.

The defense of “unfairness” misses the point in three ways. First, the flaw in the Circulator Portal was originally raised in public legal proceedings nearly a year ago—and more than three months before the Committee filed its serial number application and began gathering signatures. *Compare Mussi v. Hobbs*, Maricopa County Docket No. CV2021-016143, First Am. Compl. (Oct. 21, 2021); *with* Exhibit 303 (Committee’s serial number application filed Feb. 7, 2022). The Committee (which is sophisticated, well funded, and represented by competent and experienced legal counsel) and the Secretary chose to plod on. They moved forward without the necessary notarizations in hand, daring the judiciary to call their bluff after they ratcheted up costs and the stakes—eventually arguing that it would be unfair to apply the law to them after they have spent so much money and gathered so many signatures. The cries of unfairness skip over the inconvenient parts of this timeline, though, because they suggest a reckless disregard of well known legal risks.

Second, is it fair to Arizona voters that the Secretary of State has the power to undo the actions of the duly elected Legislature and Governor—a role to which she was never elected? Is it fair to Arizona voters that an unamendable law may be adopted without following the process we agreed to in advance? Is it fair to the plaintiffs (some of whom

were also plaintiffs in the earlier challenge to the Secretary's implementation of Section 19-118) that their legal arguments may be snuffed out merely because the Secretary failed to remedy design flaws in her website after the issue was brought to her attention? To the extent fairness is an issue in this case, it favors the party advocating adherence to the statutory framework.

Third, a significant portion of the circulators who failed to upload a new affidavit for the Committee's initiative **would have been permitted but failed** to upload a second affidavit. *See, e.g.*, Exhibit 312 at 20, 68 (Nicholas Covington and Yusuf Olowoeshin). So even if the details of the Secretary's web design were a valid defense, the circulators identified in Objection 3(b) (*i.e.*, a subdivision of Objection 3 that excludes circulators who were in fact unable to upload a new affidavit for this measure) cannot avail themselves of the argument.

Doctrinally, the answer is easy. This Court has already decided what to do in this situation: Individuals and political committees are responsible for ensuring their own statutory compliance. They cannot rely on forms prepared by or incorrect advice received from government officials. *See W. Devcor v. City of Scottsdale*, 168 Ariz. 426,431 (1991); *Fid. Nat'l Title Co. v. Town of Marana*, 220 Ariz. 247, 250, ¶ 14 (App. 2009); *Robson Ranch Mountains, L.L.C. v. Pinal County*, 203 Ariz. 120, 130, ¶ 38 (App. 2002) (reiterating that a petition "proponent may not rely with impunity" on elections' officials statements). This is particularly important when the government official who blesses a non-compliant

practice is politically allied with the petition sponsors. That approach would elevate the Secretary to a position that is senior to the Governor, the Legislature, and the judiciary—a regal role that is foreign to our system of government.

Give this background, the *amicus* brief from the Governor and legislative leadership rightly advocates for the preservation of their respective constitutional roles. Section 19-118 should be enforced as written, without regard for the time and funds gambled against a strict construction.

Response to *Amicus* Brief of Campaign Legal Center

To the extent Campaign Legal Center raises new legal issues and enlarges the scope of these proceedings, it requires no response. *See Ruiz v. Hull*, 191 Ariz. 441, 446 ¶ 15 (1998).

To the extent Campaign Legal Center re-argues issues raised by the Committee, the Plaintiffs-Appellants have already addressed the legal standard for claims that election regulations unduly burden constitutional rights—namely, that the analysis focuses on the burden of compliance and not the burden of a penalty for non-compliance—and the absence of record evidence to support those claims. *See* Plaintiffs-Appellants’ Answering Brief § 2. Those arguments will not be reiterated here.

Finally, it must be noted that Campaign Legal Center assumes the answer to an open issue. In the decades following application of the exacting scrutiny standard in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), lower federal courts have

conceptualized state regulations of the petition process to be—at least insofar as they implicate any federally protected activities—fundamentally ballot access regulations. Invoking the standard first articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992), these courts have held that while “severe” encumbrances on petition circulation trigger strict scrutiny, “reasonable, nondiscriminatory restrictions” are sustained by “the State’s important regulatory interests,” *id.*, 504 U.S. at 434. See *Miller v. Thurston*, 967 F.3d 727, 739 (8th Cir. 2020) (applying *Burdick* to Arkansas statute requiring in-person collection of petition signatures); see also *Thompson v. DeWine*, 976 F.3d 610, 615-16 (6th Cir. 2020); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 380 (6th Cir. 2008) (applying sliding scale *Anderson-Burdick* to Ohio statute restricting payments to petition circulators); *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006) (same); cf. *Miracle v. Hobbs*, 427 F. Supp. 3d 1150, 1156, 1162 (D. Ariz. 2019), *aff’d*, 808 Fed. Appx. 470 (9th Cir. 2020) (deferring decision on standard of review, but declining to enjoin Arizona’s “no show” circulator law, A.R.S. § 19-118(E), distinguishing “the laws at issue in *Buckley* [and other cases] because the laws at issue in those cases implicated the communicative message associated with the physical act of circulation *at the time of circulation*.”).

The First and Fourteenth Amendments impose minimal if any limitations on the non-communicative aspects of state ballot measure regulation. The most analogous case is from the Eighth Circuit, which offered the following analysis when a petition sponsor, like

Campaign Legal Center, challenged a notarization requirement under the First Amendment:

As to the in-person notarization requirement . . . , we fail to see how its enforcement affects the communication of ideas associated with the circulation of [the] petition. During the notarization process, neither the canvasser nor the notary are engaged in any exchange or communication of ideas. Or at least the plaintiffs have not shown they are. Although the requirement may make it more difficult to verify the signatures on the petition during a pandemic, this is not enough to implicate the First Amendment. *See [Dobrovolny v. Moore, 126 F.3d 1111, 1113 (8th Cir. 1997)]*. There must be some effect on the communication of ideas associated with petition circulation, and the plaintiffs have not shown the in-person notarization requirement has that effect. It is therefore not subject to First Amendment scrutiny, even as applied or enforced here.

Thurston, 967 F.3d at 738; *cf. Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011) (declining to apply strict scrutiny to state statutes prescribing criteria for invalidating ballot measure petition signatures, commenting that there is “no [federal] fundamental right to initiate legislation”); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–100 (10th Cir. 2006) (“The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not.”); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (“[T]he right to initiate legislation is a wholly state-created right, [and] we believe that the state may constitutionally place nondiscriminatory, content-neutral limitations on

the plaintiffs’ ability to initiate legislation.”); *Schmitt v. LaRose*, 933 F.3d 628, 643 (6th Cir. 2019) (Bush, J., concurring) (observing that statutes governing the procedures underlying initiatives and referenda may not implicate the First Amendment because they “do not regulate a citizen’s ability to advocate for a proposed initiative or regulate any speech surrounding the issue” or “an individual’s ability to appear on the ballot”).

Animating these authorities is a recognition that subjecting all circulator regulations to heightened scrutiny entirely subsumes the *Anderson-Burdick* framework into the exacting scrutiny echelon. *See, e.g., Pest Comm. v. Miller*, 626 F.3d 1097, 1108 (9th Cir. 2010) (holding that lower court did not err in applying the “flexible” *Burdick* balancing test to statute requiring petition sponsors to describe the effects of the proposed measure on their petition sheets). And given the significant caselaw in this area, it is simply inappropriate to assume, as Campaign Legal Center does, that exacting scrutiny applies to all circulator regulations.

For its part, the U.S. Supreme Court has not yet confronted the interplay between the “exacting scrutiny” rubric that controls pure “disclosure” requirements and the more lenient standard of review that encompasses ballot access mandates, although its recent pronouncements signal significant deference to States’ judgments in structuring their internal lawmaking processes. *See Reclaim Idaho v. Little*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., with Alito, Gorsuch, and Kavanaugh, J.J., concurring) (acknowledging circuit split concerning the standard of review governing ballot measure regulations, but

adding that “[e]ven assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by” the state’s “important regulatory interests”); *John Doe No. 1 v. Reed*, 561 U.S. 186, 212–13 (2010) (Sotomayor, J., with Stevens and Ginsburg, J.J., concurring), (“Regulations of this nature . . . stand ‘a step removed from the communicative aspect of petitioning,’ and the ability of States to impose them can scarcely be doubted.” (citing *Buckley*, 525 U.S. at 215 (O’Connor, J., concurring in judgment in part and dissenting in part))).

RESPECTFULLY SUBMITTED on this 22nd day of August, 2022.

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