ARIZONA SUPREME COURT

SCOTT MUSSI, et al., Plaintiffs/Appellants/ Cross- Appellees, v. KATIE HOBBS, in her official 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.	Arizona Supreme Court No. CV-22-0207-AP/EL Maricopa County Superior Court No. CV2022-009391

REAL PARTY IN INTEREST RESPONSE TO AMICUS BRIEFS

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

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 Response to the Amicus Briefs. The briefs submitted earlier today include one brief submitted in other cases before the Court concerning the procedure for registering circulators in the Election Procedures Manual and as administered by the Secretary of State, a brief from the Campaign Legal Center ("CLC") addressing the constitutional concerns implicated by construing the law to place an undue burden on Arizonans' state-guaranteed right to initiative and their state and federally guaranteed right to free expression, and a brief from the Chamber of Commerce opposing direct democracy on the grounds that it is tainted with out-of-state influence. Rather than repeating the response provided in CV-22-203-AP/EL to the Legislative Amici's brief, this Response will address the implications of the CLC brief in light of the Legislative Amici's Brief.

Briefs of Campaign Legal Center and the Legislative Amici

The CLC is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is open and fair for all voters. Former Republican Chairman of the Federal Election Commission Trevor Potter founded the organization in 2002 to defend the landmark McCain-Feingold campaign finance law and has now established itself as a leading election law nonprofit. CLC's brief notes the adverse impact created if the Court were to permit signatures to be removed by requirements that are not found in statute, whether registration requirements,

specification of unit numbers, or consistency between the registration information and the petition sheet information. Each of these burdens political speech by limiting the number of voices who will carry the message–for fear that the process is overwhelming and ultimately ineffectual–and directly limiting the impact of the expression by disqualifying lawful signatures that have been gathered. (at 6-7)

CLC's brief points out the serious constitutional issues at hand as outlined in *Molera II*:

> In *Molera II*, this Court recently applied this canon of constitutional avoidance to narrowly construe a petition circulation restriction to "minimize any First Amendment infringement on core political speech." 250 Ariz. at 25 ¶ 38; *see also KZPZ Broad., Inc. v. Black Canyon City Concerned Citizen*s, 199 Ariz. 30, 38 ¶ 27 (App. 2000) ("We broadly interpret the statutory scheme in a manner we believe supports the requirements of the Constitution. . . . We therefore conclude the statutory scheme could not constitutionally include a local residency requirement for referendum petition circulators and we interpret in a way that avoids an unconstitutional result.").

(at 12-13) Government regulation of the initiative process should be regarded with suspicion by the Court because the initiative process is itself a check on the power of the Legislature.

The Legislative Amici turn this thoughtful analysis on its head when they claim that if this Court were to require that limitations on free speech be, as a starting point, identified precisely, such a requirement would "impose[] an unprecedented burden on the Legislature to make everything explicit." (at 10) But

Arizona courts have always presumed "the legislature says what it means," and it is not the Court's job to transform what the Legislature says through statute into what they apparently meant to imply. *Doherty v. Leon*, 249 Ariz. 515, 520 ¶ 12 (App. 2020) ("[H]ad the legislature intended to limit presumption only to natural conception and not artificial insemination, it would have said so."). Indeed, the Legislature must say what it means or else its enactments will be struck down as unconstitutionally vague. *See, e.g., State v. Boyd*, 201 Ariz. 27, 31 ¶¶ 20-21 (App. 2001) (vacating criminal sentence because statute at issue was unconstitutionally vague).

At issue in this case are at least three examples of challenges, supported by officials within the government, attempting to disqualify signatures based on unstated requirements. These requirements are: re-registering, or uploading a new affidavit upon amending one's registration; including a unit number in addition to the residential address called for; and matching the residential address on the circulator's affidavit with that on the circulator's registration. The CLC brief rightly points out that such restrictions–particularly when circulators are asked to infer the requirements–must pass exacting constitutional scrutiny. (at 7) Neither the Plaintiffs-Appellants nor the Legislative Amici provide this Court with any solace that the constitutional concerns raised by their interpretation have been addressed.

Of course, as an initial matter, the intent of Legislative Amici as it relates to

A.R.S. § 19-118 is irrelevant. The "intent of some individual legislators . . . are not necessarily determinative of legislative intent." *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204 ¶ 13 (App. 2007). "The text of the statute, and not the private intent of the legislators, is the law. Only the text survived the complex process for proposing, amending, adopting, and obtaining the [executive's] signature . . . . It is easy to announce intents and hard to enact laws." *Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers, & Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154, 1158 (7th Cir. 1990). At bottom, "the Constitution gives legal effect to the Laws" the Legislature enacts, "not the objectives its Members aimed to achieve in voting for them." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex re. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment). Thus, it is the text of A.R.S. § 19-118 that matters. That text demonstrates that circulators are to register one time, with one affidavit, for one circulator registration number.

As for a justification or governmental interest served by these imagined requirements, it seems that the Legislative Amici assert that a complete registration for every petition a circulator seeks to circulate is necessary to ensure they are who they say they are. (at 8) This is not the case. When a circulator adds a petition to their registration, they are asked to "confirm the information they provided is correct under penalty of perjury." [Decl. of Kori Lorick ¶ 11] This operates in

tandem with the Legislature's chosen remedy for false circulator information, which is to allow "[a]ny person" to "challenge the lawful registration of circulators." A.R.S. § 19-118(F). And this is far less burdensome than requiring circulators to inuit a requirement to re-register or provide extra details on their registration.

As this entire case demonstrates, the Legislature has already provided a check on circulators they fear may be skirting registration requirements (and, importantly, there is no assertion here that any of the circulators provided false information). Thus, the Legislative Amici's fear that somehow not requiring multiple affidavits will lead to rampant abuse is unfounded—that potential problem is already addressed.

After recounting what they perceive as past flaws in the text of A.R.S. § 19-118, Legislative Amici devote most of their brief to arguing that an affidavit is required as part of a circulator's registration. Again, the Committee agrees with that point. But the Committee cannot agree with the ensuing arguments of Legislative Amici, which are not based on the statutory language.

The Legislative Amici argue (at 7) that because certain provisions "speak[] in terms of a specific initiative or referendum," this means that every time a circulator signs up to circulate for a new initiative, they have to submit updated information. To support this argument, they point to A.R.S. § 19-118(A), which

directs "the committee that is circulating the petition" to "collect and submit the completed registration applications to the secretary of state," and A.R.S. § 19-118(B)(2), which requires a circulator to provide "[t]he initiative or referendum petition on which the circulator will gather signatures." Yet just because a circulator must state the initiative they plan to work on when they initially register, it does not follow that for each ensuing initiative they should have to re-register.

The Court has before it responses to these amici in the CV-22-0203. The Committee adopts the arguments raised by the Committee in that case in addition to the points raised here.

Briefs of the Chamber of Commerce and Industry

The Chamber claims "[a] more recent threat to our initiative integrity is the influence borne by out-of-state special interests and the stupefying sums of money those interests impose on the Arizona ballot propositions." (at 3) First, this accusation hurled against the Committee is absurd. The Committee is an Arizona non-profit organization and each of its board members is an Arizona resident. (*See* https://ecorp.azcc.gov/BusinessSearch/BusinessInfo?entityNumber=23286669 (last visited 8/22/2022). The initiative addresses uniquely Arizona issues by organizers working in Arizona. The suggestion that Arizona residents attempting to restore their right to vote are suspicious "out-of-state special interests" is unfounded.

Second, the high cost of initiatives bemoaned by the Chamber (at 2) is

directly caused by the Chamber and its allies in the Legislature piling one restriction after another on Arizonans trying to exercise their constitutional right of initiative. In its brief, the Chamber points out that it now takes 230,000 signatures to qualify for the ballot, noting that as a 4400% increase from the state's founding. (at 1) However, because of the Legislature's onerous restrictions–which CLC's brief demonstrates are teetering on the verge of unconstitutionality–groups like the Committee need to gather nearly twice the minimum number of signatures to appear on the ballot.

Finally, the Chamber's brief is yet another that claims that Title 19 requires circulators to upload new affidavits but fails to point to a single word requiring this. The Chamber, the Legislative Amici, and the Plaintiffs-Appellants would like to prevent initiatives from making their way to the ballot. If they cannot block them with the legions of explicit restrictions on this constitutional power reserved for the electorate, they will attempt to block them with imagined, unstated restrictions. The Court should reject this effort to silence the over 400,000 Arizonans who supported placing the Arizona Fair Elections Act on the ballot, and let the voters decide, as the Arizona Constitution requires.

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