IN THE SUPREME COURT

STATE OF ARIZONA

SCOT MUSSI, an individual; AIMEE YENTES, an individual; and ARIZONA FREE ENTERPRISE CLUB, a non-profit corporation, Plaintiffs/Appellants /Cross-Appelles, 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

JOINT REPORT IN RESPONSE TO SUA SPONTE ORDER

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The parties jointly submit this report in response to the *sua sponte* order of August 22, 2022.

I. Status of County Recorder Certifications

The county recorder certifications were completed on August 22, 2022. There is ongoing litigation concerning the county certification reports. *See Mabry v. Hobbs*, Maricopa County Docket No. CV2022-010956, Verified Complaint (Aug. 22, 2022).

II. The Pending Litigation's Effect on Ballot Access

Based on current data and subject to the relevance issue discussed in Section IV below, the margin of victory or loss in this matter is unusually narrow. The parties have already chosen not to appeal the portions of Judge Mikitish's under advisement ruling that are unlikely to be outcome determinative, but each of the legal issues pending in this Court may be material. If outside events (*e.g.*, litigation concerning county recorder certifications) causes any of the issues pending in this appeal to become mathematically immaterial to the measure's qualification for the statewide ballot, the parties will promptly notify this Court of the issue's mootness.

III. Latest Deadline for a Final Judgment

A declaration from State Election Director Kori Lorick is attached as Exhibit A, indicating that Maricopa County has the earliest ballot-printing deadline in this election cycle (*i.e.*, August 25, 2022).

IV. Relevance of the County Recorder Certifications

The parties disagree as to whether the county recorder certifications are relevant in this case. Their respective positions are described in greater detail below.

a. Position of the Real Party in Interest

On July 31, 2022, after review, the Secretary of State removed 2,375 petition sheets and individual lines under A.R.S. § 19-121.01. She determined that 399,838 petition signatures were eligible for review by the county recorders.

The Secretary of State's certification under A.R.S. § 19-121.01 has never been challenged. Petitioners filed this lawsuit prior to her issuing the certificate and never amended their lawsuit to include a challenge to the certificate. Section 19-118 contemplates that a challenge to the actions of the Secretary could be a part of a lawsuit brought under that section. *See* A.R.S. § 19-118(E), (G). But that contemplated challenge never happened.

Instead, Petitioner "contest[s] the validity of [the] initiative … based on … compliance with [Title 19, Chapter 1]." A.R.S. § 19-122(C). To prevail on these claims Petitioner needs to demonstrate that the number of signatures disqualified is more than 203,780 to reduce the total valid under 237,645.

Petitioner cannot mix and match its challenge to compliance with the chapter with a challenge to the actions of the Secretary. In a case from several years ago, when trying to restore signatures removed by the Secretary, the proponents of the

Transportation Infrastructure Moving Arizona's Economy ("TIME") waited until the counting by the Secretary and the County Recorders was complete to challenge the total valid signatures. This Court rejected the tactic, explaining that "the time limitations of that statute cannot be circumvented by describing a suit as a challenge to the ultimate § 19-121.04 calculations." *Transportation Infrastructure Moving Arizona's Econ. v. Brewer*, 219 Ariz. 207, 212 ¶ 23 (2008).

The controlling statute for the challenge to the Secretary's decision to transmit petition sheets to the county–the challenge relevant here–is A.R.S. § 19-122(C). In *Kromko v. Superior Ct. In & For Cnty. of Maricopa*, the Court determined that the 10-day limit found in A.R.S. § 19-122(A) did not apply to challenges to the legal sufficiency of the ballot measure, but explained, "[w]e do not wish to imply, however, that challenges pursuant to § 19-122(C) may be filed at any time. An action to enjoin placing an initiative or referendum proposal on the ballot is equitable in nature and therefore may be subject to equitable defenses such as laches." 168 Ariz. 51, 57, 811 P.2d 12, 18 (1991) (citation omitted). Now that the Secretary has actually issued her certificate, and we are hours from the printing deadline, it is too late to challenge the Secretary's certificate.

b. Position of the Plaintiff-Appellants

The Secretary of State's dispositions of sheets and signatures are neither conclusive nor insulated from judicial review. To the contrary, Arizona has

authorized the broadest possible private right of action for initiative opponents: "Any person may contest the validity of an initiative or referendum." *See* A.R.S. § 19-122(C). The First Amended Complaint was brought under that very provision, less than one week after the Secretary's certification,[1] and indexed in detail all the defects that the Committee now curiously says were not raised in this case.

The core of the Committee's argument is against "mixing and matching" findings of invalidity from litigation and the review conducted by elections officials. But this Court has previously held that the statutory method for invalidating signatures must be followed, *see City of Flagstaff v. Mangum*, 164 Ariz. 395, 404-05 (1990), and Judge Mikitish has already rejected in this case the Committee's policy argument against a two-track review, *see* Ruling at 4. That is because there is no procedural bar to governmental and judicial reviews operating in parallel. In addition to Section 19-122(C)—which is inarguably premised on parallel reviews by the Secretary and the judiciary—statutes expressly contemplate a process for merging the two reviews at the end of the process. *See* A.R.S. § 19-118(G) (providing that the judicial disqualification of circulators whose signatures were

[1] The statute of limitations on claims against the Secretary in A.R.S. § 19-122(A) applies only to initiative *proponents*, not initiative *opponents*. *Kromko v. Superior Court*, 168 Ariz. 51, 55–56 (1991). And the Original Complaint in this case was brought before, not after, the Secretary's actions that the Committee now claims are immune from judicial review due to inaction on the part of the Plaintiff-Appellants.

included in the random sample does not require the re-generation of a new random sample for county recorders). It is impossible to derive from those statutes the principle that judicial review cannot operate alongside the review of government officials.[2]

Substantively, there is no cause for alarm either. The Plaintiff-Appellants have never argued that a signature invalidated by the Secretary can or should be re-invalidated (causing the Committee to lose two signatures when only one is defective), and took pains in the trial court to "net out" the signatures in its lawsuit with the signatures invalidated by the Secretary of State after the lawsuit was filed. The Plaintiff-Appellants further persuaded Judge Mikitish to retain jurisdiction over Objections 27-30 in this lawsuit, which overlap significantly with the county recorder certifications, to ensure there would be no "double counting" of invalid signatures between the litigation and the review of elections officials. This ensures that the final tabulation of invalid signatures will be substantively fair to the Committee.

The parallel tracks for judicial and election officials' review arise in statute

[2] More broadly, the county recorders are best positioned to determine voter registration rates because they have the complete voter file (not just a snapshot as of a given date), copies of the voters' authentic signatures, and specialized staff. Litigants may be well positioned to identify circulator registration defects, for example, and those findings can eventually be merged with the voter registration findings of county recorders to establish the overall validity rate—but forcing litigants to re-do voter registration checks that must by statute be conducted by the county recorders would reduce, not increase, confidence in the final disposition of petition challenges.

and have worked well for years. There is no cause to reimagine that process now.

In order to complete the litigation in this case before Maricopa County's ballot-printing deadline, the Court should issue before 12:00 p.m. on August 25, 2022 a ruling on each of the pending legal issues, with directions to the trial court to determine on August 25, 2022 the total number of signatures invalidated under the ruling based on the record evidence and the county recorder certifications. If remand is possible or expected, the Plaintiff-Appellants would respectfully request advance notice for planning and scheduling purposes.

DATED this 23rd day of August, 2022.

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