

**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

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANTS

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Counsel for Plaintiffs/Appellants/Cross-Appellees

This emergency appeal concerns the method for calculating the number of valid signatures in an initiative campaign. It must be decided today, ideally but not necessarily before 5:00.

I. Summary of the Dispute

The parties agree that, after applying the categories of signatures invalidated by this Court and the trial court, there are 303,621 signatures remaining before applying the county recorder certifications. The parties further agree that, to the extent the county recorder certifications “overlap” with the claims in this case, the county recorder certifications should be adjusted to avoid double-counting the number of invalid signatures. The parties **disagree** on the calculation method for merging the results of litigation with the county recorder certifications submitted pursuant to A.R.S. § 19-121.02.

More specifically, the issue is whether the county recorder certifications should be given effect to the extent they do **not** overlap with the claims in this lawsuit. The calculation method advocated by the Committee and adopted by the trial court **ignores** everything in the county recorder certifications that does not overlap with this lawsuit, effectively (a) rehabilitating (without any evidence) signatures that the counties found invalid and (b) circumventing another Superior Court judge’s rejection of the Committee’s attempt to rehabilitate such signatures with actual evidence. *See Exhibit A, Mabry v. Hobbs*, Maricopa Docket No. CV2022-010956, Judgment (Aug. 25, 2022) (rejecting the

Committee’s claims for insufficiency of evidence). The signatures at issue in the county recorder certifications¹ are as follows:

Signature does not match voter registration card / Not by signer	854 ²
Printed signature	184 ³
Invalid address	126 ⁴
Illegible	72 ⁵
Underage	4 ⁶
No signature	3 ⁷
<u>Sum of invalid random sample signatures at issue</u>	<u>1,243</u>

Each of the foregoing signatures was disqualified by the county recorder certifications and, as noted above, the Court has rejected the Committee’s evidence-based attempt to rehabilitate such signatures. *See* Exhibit A. Importantly, **none** of these categories overlaps with the issues in this case. The Committee has not argued otherwise.

¹ Available at <https://arizonasoslapr.sharepoint.com/sites/ArizonaSecretaryofState-2020CandidateNominationFilings/Initiatives/Forms/AllItems.aspx?ga=1&id=%2Fsites%2FArizonaSecretaryofState%2D2020CandidateNominationFilings%2FInitiatives%2F2022%20Initiatives%2FCounty%20Samples%2FCounty%20Certifications%2FI%2D16%2D2022&viewid=6a4d503c%2Dbfb8%2D4fcc%2D9826%2De7b140ff3cb2>. *Hernandez v. Frohmiller*, 68 Ariz. 242, 258 (1949) (“The Supreme Court may take judicial notice of the records of the secretary of state.”).

² The invalidations are from Cochise (11), Gila (1), Graham (2), Maricopa (505), Mohave (3), Pima (313), Pinal (2), Santa Cruz (2), Yavapai (5) and Yuma (10) Counties.

³ The invalidations are from Maricopa (182), Pinal (1), and Yuma (1) Counties.

⁴ The invalidations are from Maricopa (97) and Pima (29) Counties.

⁵ The invalidations are from Cochise (8), Coconino (3), Graham (1), Maricopa (9), Navajo (2), Pima (30), Pinal (11), Santa Cruz (1), Yavapai (1), and Yuma (6).

⁶ The invalidations are all from Maricopa County.

⁷ The invalidations are from Maricopa (2) and Yuma (1) Counties.

Because the foregoing categories comprise a significant portion of the entire random sample, ignoring such categories is a “but for” cause of the trial court’s finding of 2,281-signature margin of victory for the Committee. Which is to say, the foregoing categories are dispositive to the case.

II. Standard of Review

This appeal concerns a pure legal issue subject to *de novo* review. During this morning’s status conference with Judge Mikitish, the Committee conceded that it would not qualify for the ballot under the calculation method proposed by the Plaintiff-Appellants. The question is therefore of the proper method under A.R.S. § 19-121.04, and not the underlying numbers.

III. Two Calculation Methods

The correct calculation of the final number of valid signatures contained in initiative petition I-16-2022 is as follows:

Signatures eligible for verification:	399,838 ⁸
<u>Signatures invalidated by court rulings:</u>	<u>- 96,237⁹</u>
Signatures before applying random sample:	303,601

The validity rate from the random sample should be determined as follows:

⁸ See Secretary’s Certification of I-16-2022 (Aug. 25, 2022), *attached hereto* as Exhibit B.

⁹ This number is not in dispute. See Committee’s Brief Regarding Calculation Method (Aug. 25, 2022).

Signatures certified by the county recorders:	15,140 ¹⁰
<u>Signatures invalidated by the county recorders:</u>	<u>4,852</u>
Validity rate before overlap adjustment	75.73%

The adjustment to the random sample validity rate, to offset the overlap between the claims in this case and in the county recorder certifications, is as follows:

Overlapping date defects (Objs. 21(a)-(c)):	155
Overlapping missing address defects (Obj. 24(a)):	7
Overlapping P.O. box defects (Obj. 24(b)):	16
Overlapping missing printed name defects (Obj. 25):	2
Overlapping outside majority county defects (Obj. 26):	8
Overlapping pre-dates voter registration defects (Obj. 28):	85
Overlapping federal-only voter defects (Obj. 29):	60
<u>Overlapping duplicates defects (Obj. 31):</u>	<u>76</u>
Total overlap between objs. and random sample:	409
Adjusted valid signatures in random sample:	15,549
<u>Adjusted invalid signatures in random sample:</u>	<u>4,443</u>
Validity rate after overlap adjustment:	77.78%

The Committee approaches this problem very differently. Although they have not disputed the calculations offered above, they reject the method of offsetting only the “overlap” between this lawsuit and the county recorder certifications. Instead, they would **ignore** all the contents of the county recorder certifications that do **not** overlap with this case. That gets it exactly backwards. The goal is offset any “overlap” between the claims in this case and the county recorder certifications—not to ignore all non-overlapping

¹⁰ See Secretary’s Certification of I-16-2022 (Aug. 25, 2022). Note that the figures used in the table above include 12 signatures rehabilitated by Judge Blaney in a final judgment entered this morning. See Exhibit A.

portions. Under the Committee’s approach, the thousands of signatures for the measure that were collected from underage voters, that do not match the voters’ known signature, or that had invalid (*i.e.*, non-residential) addresses, etc.—which the Committee tried to rehabilitate but failed **due to the insufficiency of the Committee’s evidence**, *see* Exhibit A—are all credited towards the Committee **without any evidentiary showing**.

The Committee’s method short-circuits the statutory process provided in A.R.S. § 19-121.04. Specifically, it rejects the “parallel” tracks for review by elections officials and the judiciary contemplated in A.R.S. § 19-118(G) and -122(C), and limits claims to only issues raised in court—even if there is no longer any viable claim that the county recorder certifications were incorrect. *See Exhibit A*.

This Court has previously mandated rigorous adherence to the statutory random sample procedure. *City of Flagstaff v. Mangum*, 164 Ariz. 395, 404 (1990). There is no cause to overrule that holding now.

IV. Application of the Validity Rate to the Signature Eligible for Review

The statutory application of the random sample validity rate is not entirely intuitive, but A.R.S. § 19-121.04 requires the following order of operations:

Signatures before applying random sample:	303,601
<u>Minus adjusted no. of sigs. invalidated in sample:</u>	<u>- 4,432</u>
Difference	299,169
<u>Multiplied by the adjusted random sample validity rate:</u>	<u>77.78%</u>
Final number of valid signatures:	232,693
<u>Required number of valid signatures:</u>	<u>237,645</u>
Shortfall:	4,952

V. Conclusion

This Court should reverse the trial court and hold as a matter of law that, where the Superior Court has rejected the Committee’s evidence as insufficient to rehabilitate signatures invalidated in the county recorder certifications, the certifications should be given effect except to the extent necessary to offset signatures already invalidated through the litigation process.

RESPECTFULLY SUBMITTED on this 25th day of August, 2022.

STATECRAFT PLLC

By: /s/ Kory Langhofer
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Plaintiffs/Appellants

Exhibit A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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08/25/2022

HONORABLE SCOTT BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

MARIA TERESA MABRY, et al.

JAMES E BARTON II

v.

KATIE HOBBS, et al.

AMY BELL CHAN

JACQUELINE MENDEZ SOTO
KORY A LANGHOFER
THOMAS J. BASILE
NOAH T GABRIELSEN
CHRISTINE J ROBERTS
PAUL CORREA
JOSEPH J BRANCO
KAREN HARTMAN-TELLEZ
MARK D BYRNES
COLLEEN CONNOR
THOMAS M STOXEN
JOSEPH EUGENE LA RUE
JASON MOORE
LAURA ROUBICEK
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE BLANEY

JUDGMENT

The Court has reviewed and considered Plaintiffs' *First Amended Verified Complaint* and the arguments and credible evidence received at the August 24, 2022 evidentiary hearing.

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THE COURT FINDS AS FOLLOWS:

Plaintiffs Maria Teresa Mabry and Arizonans for Free and Fair Elections filed a Verified First Amended Complaint challenging the certifications made by Maricopa, Coconino, Cochise, Yavapai, Navajo, and Santa Cruz County Recorders to the petition signatures of the statewide initiative filed with the Secretary of State under serial number I-16-2022. Intervenor Arizonans for Fair Elections objected to the relief Plaintiffs sought.

The Court held an expedited evidentiary hearing on August 24, 2022 and resolved disputes over certain signatures based upon stipulation. Those stipulations and corresponding orders are contained in the Court's August 24, 2022 Minute Entry.

Plaintiffs ask the Court to compare the remaining disqualified signatures with the corresponding voter registration records and determine whether they match. The Court did not receive credible evidence at the evidentiary hearing to support such a review by the Court. It is not enough to simply argue that the county election official erred in finding that a signature did not match or that a signer was not registered on the date of signature. If a county election official finds that a signature on a petition was not valid, that finding "destroy[s] the presumption of validity...." *Clark v. Pima County*, 128 Ariz. 193, 195, 624 P.2d 871, 873 (1981) (*citing Whitman v. Moore*, 59 Ariz. 211, 225, 125 P.2d 445, 453 (1942)). The burden then falls on the party seeking to sustain the signature of proving through competent evidence that the signer "was qualified in all respects," and met "all the requirements in regard to residence, date of signing, verification and the like...." *Id.* The Court received credible testimony that a county lists only one reason for invalidation on the county's report, such as "signature mismatch." But the signature could have also been invalid for multiple additional reasons not listed on the report, such as "invalid address." This is why the proponent of the signature – here, Plaintiffs – must provide competent evidence establishing that a particular signer met all the requirements. *Id.* Plaintiffs have failed to do so.

The Court recognizes that this standard places a heavy burden upon the proponent of the signatures, particularly given the compressed timeframe in which this challenge had to be brought. Plaintiffs could possibly have met this burden through the submission of affidavits from the signers pursuant to Rule 807, Arizona Rules of Evidence.

Defendant Maricopa County provided credible, uncontroverted testimony regarding the signature review process used by Maricopa County election officials. According to Janine Petty, the Senior Director for Voter Registration for Maricopa County, Maricopa County election officials and staff go through extensive training for signature review before every election cycle, including a class on forensic handwriting analysis from a forensic handwriting professional. For

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example, officials are trained to magnify the signature on the petition and the multiple signatures for the voter in the County's database to look for identifying marks. The signature on the petition is compared to multiple signatures in the database, which accounts for slight differences in a voter's signature at different ages and also differences that arise from signing in a controlled environment versus signing a petition on a clipboard in a parking lot. The witness provided further credible testimony regarding training and procedures to determine if a signer was a registered voter on the date that he or she signed, whether the voter was initially registered but later cancelled (e.g. deceased or later convicted of a felony), and how to determine if the address listed on the petition is a valid address.

The witness further provided uncontroverted testimony that after the review was completed, the County conducted a second review before issuing the certification report. The witness credibly testified that she reviewed the report again before the hearing and the disputed signatures would still be rejected, even after the filing of the current lawsuit. Absent credible expert or lay testimony to the contrary, the Court declines to conduct yet another review of the disputed signatures. Plaintiff "does not meet its burden by just asking the judge to redo the work of county recorders." Hon. Randy Warner, *Arizonans for Second Chances, Rehabilitation and Public Safety v. Bingham*, Maricopa County Superior Court No. CV2020-009428, Minute Entry dated Aug. 20, 2020 at pg. 2.

THE COURT FINDS specifically that there is no credible evidence in the record establishing that the remaining disputed signatures were improperly disqualified, that the putative signers were "qualified in all respects," or that county officials refused or failed to perform their duties. There are undoubtedly signatures that were improperly disqualified by the counties, but Plaintiffs have not met their burden. *See, e.g. W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991). There are also undoubtedly signatures that should have been disqualified that were not. This is the nature of the review process; a process that was conducted by trained, presumably unbiased election officials.

IT IS THEREFORE ORDERED denying any requested relief that was not granted or stipulated on the record during the August 25, 2022 evidentiary hearing. *See* hearing Minute Entry, dated August 24, 2022.

IT IS FURTHER ORDERED all parties shall bear their own attorneys' fees and costs.

This minute entry disposes of all outstanding claims and issues in this case. Because no further matters remain pending, the Court signs this minute entry as a final judgment entered pursuant to Ariz. R. Civ. P. 54(c).

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Under A.R.S. § 19-118(F), a party must file a notice of appeal within five calendar days after entry of Judgment. The Supreme Court may dismiss a belatedly prosecuted appeal, such as one filed on the last day of the statutory deadline. See *McClung v. Bennett*, 225 Ariz. 154, 235 P.3d 1037 (2010). Special procedural rules govern expedited appeals in election cases. Ariz. R. Civ. App. P. 10.

/s/ HONORABLE SCOTT BLANEY

HONORABLE SCOTT BLANEY
JUDICIAL OFFICER OF THE SUPERIOR COURT

Exhibit B



KATIE HOBBS
SECRETARY OF STATE
State of Arizona

August 23, 2022

Governor Doug Ducey
Office of the Governor
1700 W. Washington Street
Phoenix, AZ 85007

Dear Governor Ducey,

You are hereby notified, pursuant to A.R.S. § 19-121.04(B), that initiative petition serial number I-16-2022, filed by Arizonans for Free & Fair Elections (ADRC Action), has met the signature requirements for placement on the November 8, 2022, General Election ballot. Subject to any court challenge that alters the enclosed results, the initiative will be assigned Proposition 210 in accordance with A.R.S. § 19-125.

Additionally, in accordance with Ariz. Const. art. IV, pt. 1 § 1(5), the initiative shall not go into effect unless approved by a majority of votes cast and upon proclamation by the Governor following the canvass of the 2022 General Election.

Enclosed are the final receipt and certification issued to the initiative committee.

Sincerely,

A handwritten signature in blue ink, appearing to read "Katie Hobbs", followed by a long horizontal line.

Katie Hobbs
Secretary of State

Enclosures

1700 West Washington Street, Floor 7
Phoenix, Arizona 85007-2808
Telephone (602) 542-4285 Fax (602) 542-1575
www.azsos.gov



KATIE HOBBS
SECRETARY OF STATE

August 23, 2022

Arizonans for Free & Fair Elections (ADRC Action)
401 West Baseline Road, Suite 205
Tempe, AZ
james@bartonmendezsoto.com

Re: Final Results of Secretary of State Review of Initiative I-16-2022

Dear ADRC Action,

The Secretary of State's Office has completed its final review in accordance with A.R.S. § 19.121.04(A) and issues the following findings:

- The Secretary of State's Office rejected 2,375 petition sheets containing 22,008 rejected petition signatures pursuant to A.R.S. § 19-121.01(A)(1). The Secretary of State's office rejected an additional 15,058¹ petition signatures pursuant to A.R.S. § 19-121.01(A)(2)-(3).
- The Secretary of State's Office determined the remaining petition sheets contained 399,838 eligible signatures pursuant to A.R.S. § 19-121.01(A)(6).
- The Secretary of State's Office conducted a 5% random sample of eligible signatures on July 31, 2022, pursuant to A.R.S. § 19-121.01(B)-(C) and selected 19,992 total signatures for County Recorder verification.
- The County Recorders reported the following results from the random sample pursuant to A.R.S. § 19-121.02(B):
 - Apache County found that 12 petition signers were qualified electors, and 4 petition signers were not qualified electors.
 - Cochise County found that 263 petition signers were qualified electors, and 47 petition signers were not qualified electors.
 - Coconino County found that 743 petition signers were qualified electors, and 90 petition signers were not qualified electors.
 - Gila County found that 21 petition signers were qualified electors, and 2 petition signers were not qualified electors.
 - Graham County found that 28 petition signers were qualified electors, and 6 petition signers were not qualified electors.

¹ One page contained a 16th signature that is counted in the reject total. Because 16th signatures are not considered eligible lines, this line is not reflected in the total eligible for review.

- Greenlee County found that 1 petition signer was a qualified elector, and 0 petition signers were not qualified electors.
 - La Paz County found that 0 petition signers were qualified electors, and 0 petition signers were not qualified electors.
 - Maricopa County found that 8,319 petition signers were qualified electors, and 3,392 petition signers were not qualified electors.
 - Mohave County found that 25 petition signers were qualified electors, and 6 petition signers were not qualified electors.
 - Navajo County found that 110 petition signers were qualified electors, and 36 petition signers were not qualified electors.
 - Pima County found that 4,135 petition signers were qualified electors, and 874 petition signers were not qualified electors.
 - Pinal County found that 496 petition signers were qualified electors, and 119 petition signers were not qualified electors.
 - Santa Cruz County found that 139 petition signers were qualified electors, and 54 petition signers were not qualified electors.
 - Yavapai County found that 219 petition signers were qualified electors, and 31 petition signers were not qualified electors.
 - Yuma County found that 617 petition signers were qualified electors, and 203 petition signers were not qualified electors.
- Per A.R.S. § 19-121.04(A)(2), the total number of signatures invalidated by the counties, 4,864 signatures, has also been subtracted from the total valid signatures, resulting in 394,974 signatures.
 - To qualify for the ballot, the County Recorders were required to validate at least 11,883 total signatures, with no higher than a 40.56% failure rate (or no lower than a 59.44% validity rate).
 - The County Recorders validated 15,128 signatures and disqualified 4,864 signatures, resulting in a 24.33% signature failure rate (or a 75.67% validity rate).
 - Pursuant to A.R.S. § 19-121.04(A), the estimated total number of valid signatures is 298,878, which exceeds the 237,645 minimum signatures required to qualify for the ballot under the Arizona Constitution.
 - The Secretary of State's Office has notified the Governor that a sufficient number of signatures have been filed and that the initiative will be placed on the 2022 General Election ballot in the manner provided by law.
 - The initiative has been assigned Proposition 210 in accordance with A.R.S. § 19-125. Please see the enclosed Certificate.

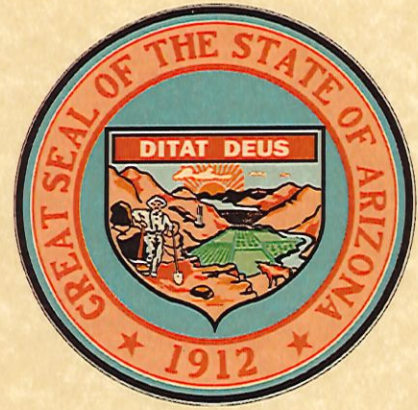
Very truly yours,

A handwritten signature in black ink that reads "Kori Lorick". The signature is written in a cursive style with a large, prominent "K" and "L".

Kori Lorick
State Elections Director
Arizona Secretary of State Katie Hobbs
klorick@azsos.gov
602.540.5562

State of Arizona

DEPARTMENT OF STATE
Office of the Secretary of State



Arizonans for Free & Fair Elections (ADRC Action)
401 West Baseline Road, Suite 205
Tempe, AZ
james@bartonmendezsoto.com

Having completed the requirements of A.R.S. § 19-121.04, I hereby certify that:

2,375 signature pages bearing 22,008 signatures for initiative petition serial number I-16-2022 have been refused for filing in this office as provided by law. A total of 15,058 signatures included on the remaining petition sheets were found to be ineligible. Of the total random sample of 19,992 signatures, a total of 4,864 signatures were invalidated by the county recorders resulting in a failure rate of 24.33%. The actual number of remaining signatures for such initiative petition number I-16-2022 are equal to or in excess of the minimum required by the constitution to place a measure on the General Election ballot. The number of valid signatures filed with this petition, based on the random sample, appears to be at least one hundred percent of the minimum required or through examination of each signature has been certified to be greater than the minimum required by the Arizona Constitution.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at the Capitol in Phoenix, this 23rd day of August 2022.

A handwritten signature in blue ink, appearing to read "Katie Hobbs".

KATIE HOBBS
Secretary of State