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

COMMITTEE'S SUPPLEMENTAL BRIEF

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In reversing itself today, the trial court has done something never done before in Arizona initiative practice and which is not authorized by statute. It has allowed initiative challengers to strike individual signatures under A.R.S. § 19-122(C), for any reason, AND allowed them to benefit from the invalidity rate calculated by the County Recorders' random sample that the challengers DID NOT include in this lawsuit. Even using the unprecedented and unfair methodology, the Committee falls less than 1,500 signatures short of the goal.

The trial court's amended decision is contrary to statute. By law, the counties' invalidity rate is applied ***only*** to the number of signatures found to be eligible by the Secretary of State pursuant to her review in A.R.S. 19-121.01(A). Specifically, the procedure for applying the counties' invalidity rate is set forth in 19-121.04(A). That statute provides that, after receiving the certification of each county recorder, "the secretary of state shall determine the total number of valid signatures by subtracting [the signatures and rate invalidated by the county] ***from the total number of eligible signatures determined pursuant to section 19-121.01, subsection A***." A.R.S. 19-121.04(A) (emphasis added). The statute provides no authority for the Secretary, or the court, to apply the county invalidity rate to a ***different number of eligible signatures than that determined pursuant to section 19-121.01(A)***, which is what the trial court erroneously did.

The contrary process, applied by the trial court and urged by the Plaintiffs, is to start with the eligible number determined by the Secretary pursuant to ARS 19-121.01(A); subtract signatures challenged by the Plaintiffs pursuant to 19-118 and 19-122; and then apply the county invalidity rate. But there is nothing in statute that authorizes such an approach. And election challenges are strictly statutory in nature. Accordingly, no court has the authority to order the relief that Plaintiffs seek.

Analysis

The controversy over how to count the total number of valid signatures in this case stems from a novel question regarding how signature challenges may be brought under Title 19 and whether a challenger can mix and match the various processes to obtain its preferred result, rather than remaining faithful to the statutory structure created by the Legislature. The case before the Court is unprecedented because the Plaintiffs-Appellants have neither challenged the Secretary of State's certification nor proven enough individual signatures are disqualified in order to remove the measure from the ballot. Instead, they seek to mix two processes together. The Court should not allow this and should affirm the trial court's judgment.

It is not new to challenge aspects of an initiative petition based on matters outside of the Secretary of State's purview. For example, in *Kromko v. Superior*

Ct. In & For Cnty. of Maricopa, for instance, challengers raised a concern about the initiative's short title. 168 Ariz. 51, 811 P.2d 18 (1991). Many other cases have done the same. Indeed, A.R.S. § 19-122(C) specifically provides for the type of action before the Court today. Petitioners may "contest the validity of [the] initiative … based on … compliance with [Title 19, Chapter 1]." And, under A.R.S. § 19-118(E), when a petitioner subpoenas circulators and they do not appear in court, all petitions circulated by that circulator are removed, specifically from the total used by the Secretary of State in A.R.S. § 19-121.01(A).

These objections for noncompliance with the chapter were not signature challenges. They were broad challenges to the structure of the initiative petition. That changed in 2018 when this Court considered the use of A.R.S. § 19-122(C) to challenge individual petition signatures. In that case, the challenger did not dispute the Secretary of State's certification but rather attacked the total number of valid signatures. No party requested and the courts did not apply any invalidity rate to the petition signatures under A.R.S. § 19-121.02 or § 19-121.04. Instead, this Court required the challengers to prove the signatures were invalid in a sufficient number to disqualify the measure from the ballot:

> The Committee submitted 480,707 signatures to the Secretary, which, if valid, far exceeded the 225,963 signatures required to place the Initiative on the ballot. The trial court invalidated 79,252 signatures for various reasons not at issue here, leaving 401,455 potentially valid signatures. To disqualify the Initiative from the ballot,

> therefore, Plaintiffs were required to prove by clear and convincing evidence that at least another 175,493 signatures were invalid (401,455 – 175,493 = 225,962).

Leach v. Reagan, 245 Ariz. 430, 437 ¶ 30, 430 P.3d 1241, 1248 (2018). Ultimately, the challengers in *Leach v. Reagan* fell short.

In the following election cycle, the same named plaintiff sought to block another initiative from the ballot by challenging individual petition signatures. Again, in *Leach v. Hobbs*, this same technique was employed but with a different result.

> The court appointed a special master who ultimately concluded that only 227,215 of the obtained signatures were valid. The trial court agreed and incorporated its rulings to disqualify another 5679 signatures—ultimately holding that the Committee had only gathered 221,536 of the requisite 237,645 valid signatures and was therefore approximately 16,000 signatures short of qualifying for the ballot.

Leach v. Hobbs, 250 Ariz. 572, 575, ¶ 12, 483 P.3d 194, 197 (2021). As in the earlier case, no invalidity rate was applied to the new total, but instead the challengers, based on the signatures they invalidated in front of the Court, and for the first time with the help of a Special Master, were successful in subtracting the challenged signatures from the total number of valid signatures.

Here, Plaintiffs-Appellants proved that 96,237 signatures were invalid. Applying the above calculation to the instant case (399,858 – 96,237 = 303,621) results in valid signatures well above the mandatory 237,645 signatures. ***Even***

adding in the categories that were supplemented using the County Recorders' reports, Objections 27 – 30, adding another 63,514 signatures to the total invalidated [8/26 Judgment at 3], they only challenged 159,751 signatures. That leaves the Committee, using the math always used in prior cases, with 240,107 valid signatures: more than the threshold. That should be the end of the Court's inquiry.

In contrast to the cases that involve challenges to individual petition signatures, the most relevant case using the challenge to the work of election officials is *Transportation Infrastructure Moving Arizona's Econ. v. Brewer*, 219 Ariz. 207 (2008) ("*TIME*"). In that case, it was the proponents of a proposed ballot measure who were in court trying to keep their measure on the ballot. They tried to rehabilitate signatures claiming the Secretary of State and the County Recorders made numerous errors in their analysis of the signatures. The lawsuit was styled as being a challenge to the determination made under A.R.S. § 19-121.04. But, this Court would not allow that, holding that the proponents could not circumvent the tight timelines in A.R.S. § 19-122 required for challenging each elected official's determinations. *TIME*, 219 Ariz. at 212 ¶ 23.

It makes sense that the Courts in *Leach v. Hobbs* and *Leach v. Reagan* did not apply any percentage calculation pursuant to A.R.S. § 19-121.04. The challenge brought in those cases was not to the Secretary of State's certification,

A.R.S. § 19-122, or the County Recorder certification, A.R.S. § 19-121.03. What is more, merging the two methods can result in significant duplicate counting as the Court seems to recognize in its previous order. Unlike *City of Flagstaff v. Mangum*, where the Court considered double counting of the signatures in the 5% sample that was required by the statute, 164 Ariz. 395, 404, 793 P.2d 548, 557 (1990), this case potentially double counts tens of thousands of signatures. For example, if the challengers had challenged the County Recorder certification for missing duplicated signatures, and brought the action under A.R.S. § 19-121.03, they would have increased the invalidate signatures within the sample by some amount. However, as it is, the number of signatures found to be duplicates exceeds the entire 5% sample: 20,014 compared to 19,992. It is impossible to determine if any of the signatures invalidated by application of the 5% sample for "NOT REGISTERED," for example, are also among the 20,014 signatures eliminated as duplicates because the signatures invalidated for being "NOT REGISTERED" are not individual signatures. They are a like number compared to the ratio of signatures removed.

Of course, if the law permitted opponents to both challenge any noncompliance with the chapter AND then apply the process described in A.R.S. § 19-121.04 that would create a difficult question for the Court. As it is, the law does allow for this unjustified mixing and matching of methodologies. The statute does

not allow these two mathematical operations to be combined. Indeed, to do so would "unreasonably hinder or restrict" the exercise of the initiative power under article 4, part 1, sections (1) and (2) of the Arizona Constitution. *Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 14 (2018), as amended (Nov. 27, 2018). If the Court finds any ambiguity, it should avoid interpreting the statutes to cause this result.

Relief Requested

Plaintiffs-Appellants today are asking the Court to affirm something that has never been done before: allow the removal of petition signatures for any reason—not challenging the specific certifications under A.R.S. §§ 19-121.01, -121.02—AND apply the invalidity rate from the County Recorders' review as determined by A.R.S. § 19-121.02.

The Court should make it clear that this is not allowed by Title 19. The trial court allowed the challengers to take advantage of the County Recorder reports to supplement certain factual findings—Objections 27 through 30 that the challengers did not prove—but they should not be able to do what no challenger has ever done, use the freewheeling procedure under challenging general Title 19 non-compliance AND apply the specific invalidity ratio process of the government official track, without ever challenging those certifications.

Here, the trial court committed a fatal error when it applied the County Recorders' invalidity rate to the total number of valid signatures that were the

result of the first round of the trial. That is, to the 303,621 valid signatures noted in the trial court's Amended Final Judgment. That number is the result of removing certain successfully challenged petition signatures. It is not the number of signatures used by the Secretary of State to create the random sample. By applying the County Recorders' invalidity rate to 303,621, the trial court could not account for any potential double counting. The invalidity rate is a creation of the random sample, which means that for every signature determined to be invalid by the County Recorders, a total of 20 unidentified signatures are removed. That is why the invalidity rate must be applied to the total number of signatures validated by the Secretary of State's office. It is the very basis of the calculation. That is the only way to ensure that signatures that were swept up in the random sample calculation are not also thrown out by the challengers' individual petition signatures. As a result of this potential for double counting, the Committee has set forth in multiple filings with the trial court and with this Court, the mathematically correct way to determine how many signatures may be deemed invalid under the categories put forth by Plaintiffs-Appellants. That methodology, which is consistent with the statutory scheme in Title 19, this Court's case law interpreting those provisions, and the complicated mathematical calculations required, is set forth flow.

The Committee respectfully requests that the Court restore the trial court's

original ruling that was consistent with Arizona law, and specifically find that:

> Following review by the Arizona Secretary of State, the Committee had 399,858 valid signatures.
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> During the course of this challenge, 96,237 signatures have been successfully challenged by Plaintiffs through the first appeal in this case and shall be removed from the total valid signatures, leaving the Committee with 303,621 valid signatures.
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> While the first appeal was pending, the Court held the record open for Plaintiffs' Objections 27-30 to allow it to be supplemented following the County Recorders' review of and findings from the 5% sample. The statutory basis of these removals is A.R.S. § 19-122(C), which permits the challengers to challenge signatures based on compliance with Title 19, Chapter 1, independent of the actions taken by the Secretary. The specific source of the numeric findings that follow is the County Recorder reports which detail the categories for which each signature was removed. The invalidity rate for each category is provided below along with the calculation. Applying the County Recorder reports to determine the number of signatures invalidated under the Objections pled by the challengers results in no signatures being removed by both the challengers and the County Recorders.
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> The 5% sample included 19,992 signatures reviewed by the County Recorders. The County Recorders invalidated signatures within the 5% sample for 23 different reasons, only some of which are applicable to Objections 27 through 30. The County Recorders found the following as it relates to Objections 27 through 30.
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> For Objection 27, which Plaintiffs describe as "Voter Not Registered", the Court considered two categories of removal from the County Recorders: "NOT REGISTERED" which accounted for 3,195 invalid

signatures and "SIGNATURE MISMATCH" which accounted for 843 invalid signatures. Thus, taken together, the County Recorders invalidated 4,038 signatures for voters not being registered. When divided by the sample of 19,992 it yields an invalidity rate of 20.20%. Multiplied by the remaining valid signatures, 303,621, it provides disqualification of an additional 61,326 signatures.

For Objection 28, which Plaintiffs describe as "Voter Signature Pre-Dates Voter's Registration", the Court used the total number of signatures disqualified by the County Recorders in the category "REGISTERED AFTER SIGNING". The total number was 82. This leads to an invalidity rate, using the same procedures described above, of 0.4%. When applied to 303,621 signatures remaining, it yields an additional 1,245 signatures invalidated.

For Objection 29, which Plaintiffs describe as "Voter Is Federal Only", the Court used the total number of signatures disqualified by the County Recorders in the category "FEDERAL ONLY". The total number is 60. This leads to an invalidity rate of 0.3% and invalidates an additional 911 signatures.

Objection 30, which Plaintiffs describe as "Voter Registration Was Canceled Before Voter Signed," is not a specific category under the County Recorder review; however, by its very nature, these signers are included among the "NOT REGISTERED" category under Objection 27.

Having thus considered all objections proven or stipulated, and modified by the Supreme Court's ruling, along with extrapolating from the County Recorders' reports for four of Plaintiff's Objections, the Court finds the Committee has 303,621 – 61,326 – 1245 – 911 = **240,139** valid signatures.

The above text is not from the trial court's order today, but provides greater detail to the order filed yesterday. The Committee requests that, based on the details provided above, the trial court's order from today be reversed and the Initiative be sent to the ballot.

RESPECTFULLY SUBMITTED this 26th day of August, 2022.

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