

**IN THE SUPREME COURT  
STATE OF ARIZONA**

SETH LEIBSOHN, an individual;  
CENTER FOR ARIZONA POLICY  
ACTION, a nonprofit corporation;  
ARIZONA FREE ENTERPRISE CLUB,  
a nonprofit corporation; GOLDWATER  
INSTITUTE FOR PUBLIC POLICY  
AND RESEARCH, a nonprofit  
corporation; and AMERICANS FOR  
PROSPERITY, a nonprofit corporation,

Plaintiffs/Appellants,

v.

KATIE HOBBS, in her capacity as the  
Secretary of State of Arizona,

Defendant/Appellee,

and

VOTERS' RIGHT TO KNOW, a political  
committee,

Real Party in  
Interest/Appellee.

No. CV-22-0204-AP/EL

Maricopa County Superior Court  
No. CV2022-009709

**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 in this matter are due on Thursday, August 25, 2022. To date, certifications have been received from seven counties comprising a small percentage of the statewide random sample.

**II. The Pending Litigation's Effect on Ballot Access**

Each of the legal issues pending before the Court, combined with the outstanding county recorder certifications, may be material to the measure's qualifications for the statewide ballot. The Plaintiff-Appellants and the Real Party in Interest are closely monitoring the county recorder certifications and will promptly notify the Court if one or more of the pending legal issues becomes moot (*i.e.*, if it is arithmetically impossible for a pending legal issue to affect the measure's qualifications for the ballot). That said, the parties expect that, absent significant anomalies in the county recorder certifications, the measure's qualifications will depend on *both* the county certifications and rulings on the pending legal issues (*i.e.*, external events are very unlikely to moot the issues in this case).

That said, in an attempt to respond as best as possible to the Court's order, the parties offer their best predictions (not stipulations or binding agreements) regarding the likely effects of the Court's potential rulings:

- A reversal of the trial court on Objection 1 (the affidavit issue) would probably disqualify the initiative from appearing on the ballot, unless that ruling were held not to apply to a substantial number of circulators based on the argument that it was impossible for them to upload multiple affidavits via the Circulator Portal.
- A reversal of the trial court on Objection 3(a) (the permanent unit number issue) only would probably not disqualify the initiative from appearing the ballot.
- The parties cannot predict whether a reversal of the trial court on both Objections 3(a)-(b) (the permanent and temporary unit number issues) would disqualify the initiative; the outcome would likely be very close and could depend on a few percentage points in the county certifications.

By offering these probabilistic predictions, the parties are not waiving any arguments or rights.

### **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).

The parties disagree as to whether the ballot-printing deadline is the deadline for this Court to enter final judgment. Their respective positions are stated below.

#### **a. Position of the Plaintiff-Appellants**

Arizona courts have consistently planned ballot access litigation to conclude before ballots are printed. This practice prudently arises from the need to avoid gratuitous expense, voter confusion, and ultimately a loss of jurisdiction when the matter becomes a political question. *See Renck v. Superior Ct. of Maricopa Cnty.*,

66 Ariz. 320, 324 (1947). While other jurisdictions may delay an initiative to the following general election while ballot access litigation is pending, Article IV, Pt. 1, § 1(10) of the Arizona Constitution appears to prohibit such delay here, making a final judgment by August 25, 2022 at 5:00 (when courts close) the only process that avoids unnecessary printing/mailing expense and undue voter confusion while preserving the jurisdiction of the courts. Moreover, extending litigation beyond the ballot-printing deadline would advantage the Real Party in Interest, which could raise and litigate new issues with an open-ended timeline, while the Plaintiff-Appellants were compelled by statute to plan, initiate, and complete litigation over their affirmative claims under the customary time constraints in such cases.

Although some language in *Renck* suggests that petition challenges could remain live after the ballots have been printed but before the election is held, current law does not appear to permit injunctive remedies after the ballot printing deadline. A.R.S. § 19-122(C) allows any person to “seek to enjoin the secretary of state or other officer from certifying or printing the official ballot for the election that will include the proposed initiative or referendum measure and to enjoin the certification or printing of the ballot.” There is no statutory right of action to enjoin the tabulation of votes on an initiative that previously was certified and printed on the ballot. *See generally Morales v. Archibald*, 246 Ariz. 398, 400-01, ¶¶ 11-13 (2019) (indicating that cause of action to challenge ballot measure or recall petition

is purely statutory).

In order to complete the litigation in this case before Maricopa County's ballot-printing deadline, the Court should either (a) issue before 5:00 on August 25, 2022 a ruling on each of the pending legal issues, with the total number of signatures invalidated under the ruling based on the uncontroverted record evidence cited in the appendix to the Opening Brief; or (b) 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 before 5:00 p.m. on August 25, 2022 the total number of signatures invalidated under the ruling based on the record evidence and the county recorder certifications.<sup>1</sup> If remand is possible or expected, the Plaintiff-Appellants would respectfully request advance notice to the trial court and counsel so that schedules may be planned accordingly.

**b. Position of the Real Party in Interest (Committee)**

The Committee agrees that it would be ideal to have a final decision in this matter by August 25, at 5:00 p.m. However, the Committee believes it is more important for this Court to have the time it needs to consider this appeal carefully and correctly; for the trial court to have adequate time to decide any factual issues on remand;<sup>2</sup> and for the parties to have the time allotted by statute to challenge any

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<sup>1</sup> The Committee argues in footnote 2 (for the first time in this case) that the random sample should be revisited if it includes signatures from disqualified circulators. The Legislature amended A.R.S. § 19-118(G) several years ago to avoid last-minute wrangling arising under that argument.

<sup>2</sup> In no case should this Court accept Appellants' suggestion to base a decision on the

county reports that may affect the outcome of the litigation. *See* A.R.S. § 19-121.03(B) (“Any citizen may challenge in the superior court the certification made by a county recorder pursuant to section 19-121.02 within five calendar days of the receipt thereof by the secretary of state.”).

To be clear, the Committee does not seek any undue delay, and it does not intend to raise and litigate issues on an open-ended timeline. The Committee hopes the Court will affirm the decision of the trial court, promptly ending this litigation. However, if it were necessary for the judicial process to continue a few days past August 25, Appellants would not be deprived of any remedy. Appellants have not sued any counties or county officials, so they cannot obtain an injunction to prevent any county from printing ballots containing the initiative. Thus, the passage of a county’s ballot printing deadline will not deprive Appellants of any remedy to which they could conceivably be entitled. Appellants would still have access to the remedy they have sought: an injunction prohibiting the Secretary from certifying the initiative for the ballot. *See* A.R.S. § 19-122(C). That remedy will remain available past August 25.

Appellants cite Article IV, Pt. 1, § 1(10) of the Arizona Constitution, but that

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spreadsheet in their Opening Brief appendix. This spreadsheet was not part of the record below, and no trier of fact has verified its accuracy. *See Schaefer v. Murphey*, 131 Ariz. 295, 299 (1982) (“As an appellate court, we are confined to reviewing only those matters contained in the record.”). In addition, to avoid double-counting, the trial court will need to ensure that any signatures disqualified as a result of Appellants’ objections have not already been disqualified as a result of the county certification process.

provision does not speak to when this Court must decide this appeal. Nor does it indicate that Appellants will lose the remedy of injunctive relief on the date that the first county begins printing ballots. A court cannot invalidate an initiative on technical grounds *after* it passes. *Searles v. Strauch*, 149 Ariz. 52, 54 (1985). But that “rule does not affect the availability of injunctive relief where the election has not yet been held.” *Id.* There is nothing to the contrary in *Morales v. Archibald*, 246 Ariz. 398 (2019), which simply holds that challenges to recall petitions are statutory in nature. *Id.* at 400-401, ¶¶ 11-13.

If it is necessary to extend the judicial process a few days beyond August 25, little to no harm will result. If the Committee ultimately prevails, there will be no harm done—the initiative will be printed on the ballot, per the templates the counties have prepared. If Appellants prevail, some ballots will be printed with a decertified initiative; that would be mildly unfortunate, but not a great harm. Of course, the best outcome would be for this case to be carefully, correctly, and fully decided by August 25 at 5:00 p.m. But the worst outcome would be for the judicial system to make the wrong substantive decision, or to deprive a party of important procedural or substantive rights, because of a rushed deadline. The Court should carefully decide this appeal, allow adequate time for the superior court to resolve any issues on remand, and not cut off any parties’ rights to challenge county certifications pursuant to A.R.S. § 19-121.03 if necessary.

DATED this 23rd day of August, 2022.

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