

**ARIZONA SUPREME COURT**

WENDY ROGERS, individually,

Plaintiff,

vs.

DAVID COOK, individually, PATTY HANSEN, in her official capacity as Coconino County Recorder, PATRICE HORSTMAN, in her official capacity as Coconino County Supervisor, JERONIMO VASQUEZ, in his official capacity as Coconino County Supervisor, ADAM HESS, in his official capacity as Coconino County Supervisor, JUDY BEGAY, in her official capacity as Coconino County Supervisor, LENA FOWLER, in her official capacity as Coconino County Supervisor, SADIE JO BINGHAM, in her official capacity as Gila County Recorder; STEVE CHRISTENSEN, in his official capacity as Gila County Supervisor; TIM R. HUMPHREY, in his official capacity as Gila County Supervisor; WOODY CLINE, in his official capacity as Gila County Supervisor, MICHAEL SAMPLE, in his official capacity as Navajo County Recorder, FERN BENALLY, in her official capacity as Navajo County Supervisor, ALBERTO L. PESHAKAI, in his official capacity as Navajo County Supervisor, DARYL SEYMORE, in his official capacity as Navajo County Supervisor, DAWNAFE WHITESINGER, in her official capacity as Navajo County Supervisor JASON WHITING, in his official capacity as Navajo County Supervisor, DANA LEWIS, in her official capacity as Pinal County Recorder, KEVIN CAVANAUGH, in his official capacity as Pinal County Supervisor, MIKE GOODMAN, in his official capacity as Pinal County Supervisor, STEPHEN Q. MILLER, in his official capacity as Pinal County Supervisor, JEFFREY McCLURE, in his official capacity as Pinal County Supervisor, JEFF SERDY, in his official capacity as Pinal County Supervisor, ADRIAN FONTES, in his official capacity as Arizona Secretary of State,

Defendants.

No. CV-24-0084-  
AP/EL

Maricopa County  
Superior Court Case  
No. CV2024-008715

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**PLAINTIFF-APPELLANT'S OPENING BRIEF**

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## **STATEMENT OF THE CASE**

### **Jurisdiction**

This Court has jurisdiction under A.R.S. § 16-351(A) and ARCAP 10.

### **Nature of the Case**

Wendy Rogers (“Plaintiff”) challenges David Cook’s (“Defendant Cook”) nomination petition sheets. Plaintiff sought an injunction preventing Defendant Cook’s name from appearing on the 2024 primary election ballot. Plaintiff’s claim is that Defendant Cook has an insufficient number of valid signatures to qualify for the Republican party nomination for State Senate, legislative district 7.

### **Proceedings Below**

Maricopa County Superior Court Judge John Blanchard (“the trial court”) presided below. Plaintiff filed her verified complaint on April 15, 2024. (Verified Compliant<sup>1</sup>). The Plaintiff also filed an application for an order to show cause. The Plaintiff filed a pretrial memorandum discussing facts and points of law, as did Defendant.

Trial occurred on April 23, 2024. The Court issued a minute entry the

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<sup>1</sup> Plaintiff does not have the benefit of the numbered index of record so she has just labeled documents by their titles. All such documents are in the record.

following day in favor of Defendant Cook, denying all relief sought by Plaintiff.

Plaintiff filed her Notice of Appeal on April 25, 2024.

### **STATEMENT OF FACTS**

Plaintiff Wendy Rogers is a qualified elector of Arizona legislative district 7. (Verified Complaint, ¶8.) Defendant David Cook is a candidate for the Republican party nomination for the office of State Senate, legislative district 7 (Verified Complaint at ¶1). The other Defendants are various public officials who are necessary nominal parties required by law to be named. (A.R.S. § 16-351(C); Verified Complaint at ¶¶10-12).

### **ISSUES PRESENTED FOR REVIEW**

There are three issues presented for review:

1. Did the trial court err in not invalidating 132 signatures collected out of district?
2. Did the trial court err in not invalidating 66 signatures on 12 petition sheets under *Brousseau v. Fitzgerald*, where at least one signature on each of 12 petition sheets were disqualified by the respective County and where Plaintiff presented evidence that these disqualified signatures clearly did not match the signatures on file for that elector, notwithstanding the circulator verification?

3. Did the trial court err in not crediting Plaintiff's argument that based on the evidence offered indicating that Circulator Wessel engaged in petition forgery, that the petition sheets he circulated should not be entitled to the presumption of validity?

### **STANDARD OF REVIEW**

This Court “defer[s] to the trial court's findings of fact unless they are clearly erroneous.” *Shooter v. Farmer*, 235 Ariz. 199, 200 (2014). However, the question of the interpretation and application of existing law is one that is reviewed de novo. *Moreno v. Jones*, 213 Ariz. 94, 98 (2006). Whether the trial court should have invalidated the 132 out of district signatures, whether the trial court should have invalidated an additional 66 signatures under *Brousseau*, whether the trial court was correct in seemingly requiring a witness who saw the forgery first-hand as a necessary element to prove fraud, and whether the trial court should have found that Circulator Wessel's petition sheets were not entitled to the presumption of validity are questions of law reviewed de novo. *Id.*

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## LEGAL ARGUMENT

### I. THE SIGNATURE COUNT AFTER THE COUNTY REPORTS

The trial court stated in ¶ 2 of its ruling:

The Candidate...collected 1,344 signatures. Following the review of the nomination petition signatures by Coconino, Gila, Navajo, and Pinal Counties, the Candidate has 792 valid signatures. The Counties rejected 563 signatures as invalid.

But 792 valid signatures is inaccurate, as 1,344 minus 563 is 781, not 792<sup>2</sup>.

The trial court also erred by failing to disqualify petition sheets gathered from voters in counties outside of legislative district 7. Legislative district 7 includes, in whole or part, just four counties—Coconino, Gila, Navajo and Pinal. But there were 132 signatures gathered from voters in Cochise, Greenlee, Graham, and Maricopa counties that should have been invalidated<sup>3</sup>. Defendant Cook claimed at trial that these signatures had already been invalidated by the various counties in their official reports. That is false. As

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<sup>2</sup> Defendant Cook offered no evidence or argument that any County-invalidated signatures were in fact valid.

<sup>3</sup> Even though petition sheet 1 was labeled as being collected in Apache County, it was reviewed by Gila County. These 10 signatures were invalidated in Gila County's Report, and are therefore not included in the 132 *additional* signatures that should be invalidated.

Plaintiff pointed out, **none** of these other signatures were reviewed by any county, as clearly shown by the four official County Reports.

A review of Cook's petition sheets<sup>4</sup> shows these signatures were collected from voters outside of the district:

- Petitions sheets 112-14 bore Maricopa County at the top of the petition sheet and were collected from Mesa residents.
- Petition sheet 136 bore Greenlee County and was collected from Clifton/Morenci area residents.
- Petitions sheets 137-48 bore Graham County and were collected from Safford area residents.
- Petition sheet 171 bore Cochise County and was collected from people in Bowie and Wilcox.

Gila County Recorder Sadie Jo Bingham confirmed that a county recorder cannot review out of district signatures because recorders do not have voter files for individuals registered outside of their county<sup>5</sup>. *See also* A.R.S. § 16-351(E)(the county recorder performs signature verifications for “qualified electors who are residents of that county”). Out of district signatures are invalid because even if registered, the voter does not reside in appropriate legislative district. *See* A.R.S. § 16-321(B)(“each signer... shall be ... a registered voter in the electoral district of the office the candidate is seeking”).

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<sup>4</sup> Trial Exhibit 1.

<sup>5</sup> Transcript 21: 2-9.

Based on the foregoing, the trial court erred in its calculation, and it should have found 649 presumptively valid signatures (781 minus 132), for an office that requires 595 valid signatures.

Based on the actual presumptively valid signatures, Plaintiff has two paths to prevail in her challenge. Under *Brousseau*, Plaintiff can prevail based on invalidation of entire petition sheets where one or more of the signatures had not been witnessed by the circulator, and thus the affidavit was false. *See infra* Section III. Plaintiff also prevails on the theory advanced in *Branch v. Dunn*, where, due to significant forgery by the circulator, the trial court invalidated *all* of the signatures collected by the circulator, notwithstanding some signatures may have been valid, a decision upheld by a panel of this Court. 2020 WL 9174966, at \*1 (Ariz. 2020). *See infra* Section IV.

## **II. EVIDENCE PRESENTED SHOWED THAT CIRCULATOR WESSEL COMMITTED PETITION FORGERY**

### **A. David Jones, petition sheet 89, line 1**

Jones testified that he moved to Yuma about eighteen months ago, but previously resided at 1414 E. 18<sup>th</sup> Avenue in Apache Junction (the residence listed on the petition circulated and verified by Wessel). Jones testified he did not sign any petitions for David Cook and would not have been found at his Apache Junction residence as he no longer resided there. When asked if the

signature on petition sheet 89 with his name next to it looked like his signature, he responded that his signature was “[n]othing like it”<sup>6</sup>.

**B. David King, petition sheet 96, line 3.**

King testified that he does not sign anything because he has a criminal conviction and cannot vote. King was unequivocal, stating he had not signed any petitions for David Cook:

[T]hat's not my signature, that's not my handwriting, and that's not my address”, as the street on the petition sheet was “Honda” rather than “Hondo”, the correct name<sup>7</sup>. Mr. King continued: “One hundred percent certainty, I did not sign that... I don't write my signature like that.

King concluded by stating that mistaking Hondo for Honda was a common mistake<sup>8</sup>.

**C. Judith Carey, petition sheet 96, line 2.**

Unlike other witnesses, Carey actually met Wessel, yet vehemently denied she signed David Cook’s petition. She described her encounter with Wessel as follows:

He had a broken down like red car that needed a paint job. He was shaking and I walked up and I said, I don't sign nothing, so just go away. And he goes, well -- and he just kept talking, but he was shaking, really nervous, like -- and I said, I'm not signing, I

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<sup>6</sup> Transcript 29:1 to 31:20.

<sup>7</sup> Transcript 26: 5-6, 17-18.

<sup>8</sup> Transcript 27:5.

only vote when it's voting time. That's it. Go away. And he put the clipboard in -- in front of him and he took a piece of paper and slid it down on the lines where you read your names where you sign. And he goes, just sign here, but I didn't see what he wanted me to sign. And I said, I'm not signing it. Go away<sup>9</sup>.

Carey subsequently confirmed again that she did not sign the petition sheet, and her signature on the petition sheet had been forged<sup>10</sup>.

**D. Kyle Brophy, petition sheet 62, line 7**

Brophy's name appeared along with his father's and his mother Gwena's. He testified that they live with him<sup>11</sup>. He further stated he would never have signed a petition for David Cook because he supports Wendy Rogers, and the same is true of his family<sup>12</sup>. There was "[z]ero percent chance<sup>13</sup>" of him signing for David Cook.

Brophy went on to state he did not sign the petition, and his father could not have signed the petition because his father was hospitalized at that time in the Phoenix area as part of a long hospitalization<sup>14</sup>. Brophy said it was not his signature next to the name Kyle Brophy<sup>15</sup>. He also said he was familiar with

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<sup>9</sup> Transcript, 65: 17-25, 66: 1-2

<sup>10</sup> Transcript, 68 generally.

<sup>11</sup> Transcript, 57:16.

<sup>12</sup> Transcript, 59:10-14.

<sup>13</sup> Transcript, 59: 17.

<sup>14</sup> Transcript, 61 generally.

<sup>15</sup> Transcript, 60 generally.

his father's signature and it was not his signature either, but that it contained his mother's signature. This was consistent with the Navajo County report, which invalidated John and Kyle Brophy's signatures on the basis that they did not match the voter file, but found that Gwena Brophy's signature matched and was valid<sup>16</sup>.

**E. Pinal County Deputy County Recorder Nicole Gillespie testifies that she “ha[s] never seen this many signatures that differed” and calls the signatures collected by Wessel “fraudulent signatures”**

Nicole Gillespie was emphatic about the fraud that she detected with regard to the signatures she had personally reviewed:

Q. In your experience, is that [signature mismatch invalidity rate] a high percentage, a low percentage, or about average percentage?

A. It is extremely high. In the five years I've been doing -- or six years, I'm sorry, I have never seen this many signatures that differed. My team was actually coming to me during the day, they couldn't believe it. They actually stated these are fraudulent signatures, and I couldn't agree more<sup>17</sup>.

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<sup>16</sup> Transcript, 73: 6-12. In addition, the trial court sustained an objection based on hearsay after Brophy had started to answer a question (and his answer was not stricken), and he testified that his mother was ill upon realizing that she had signed Cook's petition sheet. This is actually Brophy's observation, not hearsay. Transcript, 60 generally.

<sup>17</sup> Transcript, 86: 2-9.

Though Wessel did not collect all invalidated signatures in Pinal County due to signature mismatch, it was abundantly clear the fraud described by Gillespie involved the petition sheets attested to by Wessel:

Q. Based on your review, would your concerns with fraudulent signatures apply to the signature sheets circulated by Jason Wessel?

A. Yes.<sup>18</sup>

In addition, the Gila, Navajo, and Pinal County Recorders all testified that if any one signature on file for the purported elector matches the one on the petition, the signature counts<sup>19</sup>. The Coconino County Recorder did not invalidate any signatures based on a signature mismatch.

#### **F. Circulator Jason Wessel**

Circulator Wessel's testimony was largely self-serving denials of wrongdoing without any explanation as to how signatures that witnesses had sworn they did not sign ended up on the petition sheets that he certified he collected and witnessed. But he admitted three important points.

Wessel stated that he approached potential signers by introducing himself saying "I volunteer for the Republican Party."<sup>20</sup> Yet when cross-

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<sup>18</sup> Transcript, 90: 11-14.

<sup>19</sup> Transcript, 19: 3-10, 74: 18-21, 85: 10-15.

<sup>20</sup> Transcript 49: 12.

examined, Wessel admitted that he was a paid signature collector working for a candidate rather than any particular party.<sup>21</sup> He also went on to testify that he did not witness all the signatures he collected<sup>22</sup>:

And if I'm at somebody's house that has a bunch of people in there, or the head of the household is conservative, I stick them in there and shut the door and usually come back with a bunch of signatures. So sometimes I don't even see them wit -- I don't witness it happen...<sup>23</sup>

Finally, Wessel confirmed that he was driving a red car when he circulated petitions, buttressing Judith Carey's prior testimony<sup>24</sup>.

### **III. THE TRIAL COURT ERRED IN NOT INVALIDATING SIGNATURES ON PETITION SHEETS BEARING A FALSE CIRCULATOR AFFIDAVIT AS REQUIRED BY *BROUSSEAU***

One fraudulent signature on a petition sheet destroys the validity of the circulator affidavit, rendering all signatures collected on that sheet invalid. *See Brousseau v. Fitzgerald*, 138 Ariz. 453 (1984). The Plaintiff's trial memorandum demonstrated 66<sup>25</sup> signatures that should have been invalidated

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<sup>21</sup> Transcript 52: 20-21, 55 generally.

<sup>22</sup> Though this may be claimed to provide the circulator an "out" in the case of a criminal investigation.

<sup>23</sup> Transcript 51: 8-12.

<sup>24</sup> Transcript 65: 18; 79: 13-14.

<sup>25</sup> At trial Plaintiff argued that this was thirteen petition sheets that should be disqualified, resulting in an additional 71 signatures invalidated. It is actually 12 petition sheets that should be disqualified, resulting in 66 signatures. In the case of petition sheet 50, line 5, Navajo County found it was a valid signature and Plaintiff withdraws any challenge to petition sheet 50 as a

because those petition sheets were based on a false circulator affidavit. For each of these petition sheets, circulated by Wessel, the relevant County had already confirmed that at least one signature on the petition sheet did not match the signature on file with the County<sup>26</sup>. This was buttressed by testimony proffered by Brophy (sheet 62). Witnesses Gillespie, Jones, King, and Carey provided further testimonial support to the claim that Wessel engaged in petition forgery.

In her pretrial memorandum, Plaintiff also compared signatures from petition signatures circulated by Wessel to the electors' respective signatures in the actual county voter files, admitted as exhibits 7 and 8 at trial. These signatures do not match, as detailed in the Plaintiff's pretrial memorandum. Although comparison is cumbersome, as the actual voter signatures cannot be produced on publicly available documents and must be filed under seal, the signatures on the petition sheets do not match those in the voter file, as the counties found.

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whole. This difference of 5 signatures is immaterial.

<sup>26</sup> These are 47, line 9, 48 lines 9 and 10, 55, line 6, 60, line 5, 62, line 6 and 7, 66 line 7 (confirmed by Trial Exhibit 4, Navajo County report), and 117, line 1, 118, line 9, 119, line 7, 120 line 6, 122 lines 5 and 6, and 123, line 1 (confirmed by Trial Exhibit 3, Gila County report).

Defendant made no effort to prove that any of these signatures, or any of the other signatures on these 12 petition sheets, were valid.

Wessel offered self-serving testimony. But on the 129 signatures in total that Wessel collected that were invalidated due to a mismatched signature, Defendant Cook did not offer one single witness, nor did he point to a single signature in the relevant voter's file, to rebut the forgery assertion. At a minimum, the presumption of validity as to these petition sheets should have been negated, and it was incumbent on Defendant Cook to rehabilitate the signatures and sheets. He didn't even attempt to do so.

The trial court erred in failing to disqualify the 66 additional signatures on the petition sheets with an invalid circulator affidavit. Once these signatures are deemed invalid, Defendant Cook would be short of the number needed to appear on the ballot by 12 signatures:

Signatures submitted:	1,344
Invalidated by County Reports:	(563)
Out of District:	(132)
<i>Brousseau</i> Invalidations:	<u>(66)</u>
Total <i>Actually</i> Valid:	583
Total Signatures Needed:	595

Difference Needed v. Valid: (12)

#### **IV. THE TRIAL COURT ERRED IN NOT EXCLUDING ALL OF WESSEL'S PETITION SHEETS**

##### **A. The Trial Court Imposed an Improper Standard by Requiring "Direct Evidence"**

The trial court ruled that "[p]laintiff did not present any direct evidence that circulator Wessel forged signatures...".<sup>27</sup> Presumably "direct evidence" could only come in the form of an admission by the circulator (as happened in *Branch v. Dunn*), or testimony from a witness who saw Wessel forge signatures. But this is not the legal standard, and it imposes an impossible burden.

If a circulator is willing to forge signatures, he is likely willing to lie about doing so. Or he could invoke the Fifth Amendment, defeating any chance of an admission.

As for having a witness, people who commit felonies do not typically do so in the presence of witnesses who could testify against them. With some crimes, witnesses are unavoidable. But with petition forgery, one can avoid witnesses by simply forging the signatures in private. And merely seeing a circulator print information, even if the witness knew it was on a petition sheet,

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<sup>27</sup> Ruling, ¶ 8.

would not be useless in itself because circulators are allowed to fill in information for the signer for a candidate petition sheet. That is, merely witnessing a circulator writing on a petition sheet proves nothing.

Finally, this “standard” is not even imposed on criminal prosecutions under the requisite proof beyond a reasonable doubt. There is no requirement that there be a direct witness to a crime. Further, there would almost never be a witness to forgery, as that crime is easily committed away from potential witnesses.

**B. The Court should not reward petition forgery with the heads I win, tails I don’t lose result that the trial court credited**

Wessel collected a total of 506 signatures. 251 were invalidated by the Counties for various reasons, including 129 disqualifications because the signature on the petition sheet did not match the signature in the voter’s official file maintained by the respective County. Overall Wessel had an eye-popping 50% disqualification rate. Critically, if this Court agrees that *all* signatures collected by Wessel should be invalidated, Defendant Cook falls short of the required 595 signatures by any calculation.<sup>28</sup>

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<sup>28</sup> Even if the trial court were right that there were 792 valid signatures, that number included the 255 signatures of Wessel that the counties had not already invalidated, and none of the 132 out of district signatures were his. Removing Wessel’s remaining 255 signatures results in 537 valid signatures, even without removing the out of district signatures, far fewer than what Cook needs.

The trial court clearly credited the theory that because certain mismatched signatures had already been invalidated, that was sufficient. The problem with that is it creates a “heads I win, tails I don’t lose” situation in which there is little to lose by forging signatures. At worst, only detected forged signatures are tossed.

This Court has explained the importance of the Circulator and the circulator’s avowal as to the genuineness of the signatures he or she attests to:

The circulator's role is important—the person circulating a nomination petition is required to verify the status of petition signers. § 16–321 (“A circulator shall verify that ... in his belief each signer was a qualified elector who resides at the address given as the signer's residence on the date indicated ...”). “[S]tatutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law.

*Lohr v. Bolick*, 249 Ariz. 428, 433 (2020).

Arizona’s longstanding law is that “[t]he presumption is that petitions which are circulated, signed and filed are valid.” *Board of Sup'rs of Maricopa Cnty. v. Superior Court, Maricopa Cnty.*, 103 Ariz. 502, 504 (1968). But this presumption of validity rests is completely underpinned by the fact that someone actually attests to the validity of the signatures. If Wessel manifestly committed petition forgery, how can one afford the

signatures that he collected the presumption of validity based merely on affidavits executed by him? It is clear that a significant number of Wessel's circulator attestations are patently false. Wessel's word, the only thing underpinning the circulator affidavit, cannot be relied on.

This does not necessarily mean all signatures must ultimately be invalidated. The Defendant could have offered evidence that individual signatures were valid, yet he chose not to. Where there is significant evidence of petition forgery, it should be incumbent on the party seeking to have a signature counted by that circulator to offer evidence to rehabilitate those signatures. Defendant Cook made no such attempt to rehabilitate *any* individual signatures collected by Wessel.

#### **IV. CONCLUSION**

This Court should reverse the trial court and rule that Defendant Cook has an inadequate number of signatures to appear on the ballot.

**RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of May, 2024.

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BY: /s/ Timothy A. La Sota

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