ARIZONA SUPREME COURT

WENDY ROGERS, individually, Plaintiff/Appellant, v. DAVID COOK, individually, et al., Defendants/Appellees.	No. CV-24-0084-AP/EL Maricopa County Superior Court Case No. CV2024-008715

ANSWERING BRIEF OF DEFENDANT/APPELLEE DAVID COOK

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INTRODUCTION

This Court has long recognized that "nominating petitions that are 'circulated, signed and filed' are presumptively valid." *See*, *e.g.*, *Jenkins v. Hale*, 218 Ariz. 561, 562 ¶ 8 (2008) (citation omitted). After broadly challenging 1,033 of Defendant/Appellee David Cook's 1,344 nomination petition signatures, Plaintiff/Appellant Wendy Rogers failed to present evidence sufficient to overcome this presumption. Rogers now asks this Court to reweigh the evidence on appeal, but her request lacks merit.

Put simply, Rogers has not carried her burden to overturn the Superior Court's factual findings. The Coconino, Gila, Navajo, and Pinal County Recorders properly reviewed the signatures that Rogers challenged, but Cook still had more than the minimum needed for ballot access. And after trial, the Superior Court found that Cook had 792 valid signatures (more than the 595 minimum required for placement on the ballot in the district) and denied Rogers' request to enjoin Cook from being placed on the ballot.

Rogers now asks this Court to reverse that decision for improper reasons, alleging error in the fact that the Superior Court declined to invalidate 1) an additional 132 signatures, to which Rogers offered no

evidence of invalidity; and 2) entire petition sheets based on Rogers' unsubstantiated fraud claims.

ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in not invalidating an additional 132 signatures Rogers alleges were collected out of the district but to which Rogers presented no evidence of invalidity?
2. Did the Superior Court err in not invalidating all petition sheets that Rogers claims were fraudulent based on the invalidity of individual signatures?
3. Did the Superior Court err in finding insufficient evidence to invalidate all signatures collected by Circulator Wessel?

STANDARD OF REVIEW

A trial court's finding of fact should be left undisturbed unless clearly erroneous. *Shooter v. Farmer,* 235 Ariz. 199, 200 ¶ 4 (2014). A finding of fact is not clearly erroneous "if substantial evidence supports it, even in the presence of substantial conflicting evidence." *In re Est. of Pouser*, 193 Ariz. 574, 580 ¶ 18 (1999). Evidence is substantial if it "would permit a reasonable person to reach the trial court's result." *Id.* at 579 ¶ 13.

Further, on appeal, evidence must be viewed in the light most favorable to supporting the Superior Court's decision. *Johnson v. Johnson*, 131 Ariz. 38, 44 (1981). In applying this deferential standard, this Court must reject an invitation to reweigh the evidence and should affirm the Superior Court's decision where it is supported by the record.

ARGUMENT

The record supports the Superior Court's finding that Rogers failed to overcome the presumption of validity to which Cook's signatures are entitled. Indeed, Rogers failed to present evidence to prove that Cook submitted fewer than the 595 valid signatures required to appear on the ballot. This Court should not now reweigh evidence accepted by the Superior Court.

First, the Recorders of Coconino, Gila, Navajo, and Pinal Counties conducted a thorough review of the challenged signatures, invalidating any that were deficient on one or more of the bases listed in the Complaint. Rogers failed to present sufficient evidence to require the Superior Court to strike an additional 132 signatures after alleging they were out of district.

Then at trial, Rogers presented witnesses who testified that they did not themselves sign petitions sheets bearing their name; but none of these witnesses testified as to who wrote their name on the petition sheet. *See* RT. 27:4-6 (examination of David King); 31:3-5, 32:1-2 (examination of David Jones); 62:3-5 (examination of Kyle Brophy); 69:2-4; 70:3-9 (examination of Judith Carey). Meanwhile, the circulator whose signatures were questioned testified emphatically that he did not sign any voter's name. *See* RT. 51:16-24 (examination of Circulator David Wessel). Thus, Rogers failed to present evidence that any fraud was committed by the circulator who testified, much less that there was "knowing, willful, and systematic effort" to forge signatures as alleged in the Complaint. *See* Verified Complaint at 12.

The Superior Court properly relied on the reports of the four County Recorders and the testimony of the witnesses at trial to reach its finding that 792 signatures submitted by Cook were valid—nearly 200 signatures greater than the minimum required to appear on the ballot.

I. Rogers failed to present evidence that 132 additional signatures came from out-of-district voters.

Rogers makes a general allegation that certain signers of the Nomination Petition provided, or are registered to vote at, an address

that is outside of Legislative District 7. *See* Verified Complaint at 6. Upon initiation of this action, the relevant County Recorders reviewed the challenged petition signatures, including whether, and where, signers were registered to vote within their respective county.

The county's review of signatures, while thorough, is not exhaustive as to all signatures submitted, as the county recorder will perform signature verifications for "qualified electors *who are residents of that county*." A.R.S. § 16-351(E). Thus, a county will only review signatures as to residents of that county; and if a signature is accompanied by an address outside of the relevant county, that county will not review it.

If Rogers believed additional signatures fell outside jurisdictional review of the four counties in the district, the burden fell on her to establish the deficiency of each signature. *See Jenkins*, 218 Ariz. at 562–63 ¶ 8, (the burden is on the challenger to prove, by clear and convincing evidence, that a signer is not a qualified elector of the appropriate district)*; see also Blaine v. McSpadden*, 111 Ariz. 147, 149 (1974).

While the county recorder may invalidate signatures for reasons other than those specifically alleged in a challenger's complaint, **the Recorder is not obligated to search for defects** other than those

asserted by challenger. *See McKenna v. Soto,* 250 Ariz. 469, 474–75 ¶¶ 28–29 (2021). Rather, the burden is on Rogers to demonstrate the deficiency of each signature she claims fell outside of the district and outside the county's review.

At trial, Rogers had an opportunity to make her case as to the deficiency of the 132 signatures she claims were out of district. She could have presented evidence as to the county boundaries as they fall within the district, and identified each address that believed did not fall within it. **She did not do so.**

Rogers examined three witnesses from the Gila, Navajo, and Pinal county recorders offices and did not ask a single question about any individual signature she had challenged as being out of the district. *See* RT. 9 (Examination of Sadie Jo Bingham), 72 (examination of Michael Sample), 83 (examination of Nicole Gillespie). Rogers questioned the witness for the Gila County recorder's office, Sadie Jo Bingham, about the process of reviewing signatures from other counties *generally*, but did not challenge any individual signature Rogers claimed was out of the district. *See* RT. 20:14-25, 21:1-22. Instead, Rogers made a sweeping

assertion that 132 signatures were "out of district," but provided nothing to support that contention.

The superior court may rely only upon the information in the record before it in making its determination. *McKenna*, 250 Ariz. at 474 ¶ 28. And that is exactly what the Superior Court judge did in this case. It is not the responsibility of the Superior Court, and certainly not this Court, to look outside the record and make factual determinations in the first instance without evidence from the counties or the Rogers to support those findings.

II. Rogers failed to present evidence that merited invalidating entire petition sheets based on bare allegations of circulator fraud.

Rogers seeks to impose a remedy reserved only for clear cases of petition fraud to this, a case in which the evidence supports nothing more than the invalidation of individual signatures. Rogers cites *Brousseau v. Fitzgerald* for the proposition that "[o]ne fraudulent signature on a petition sheet destroys the validity of the circulator affidavit, rendering all signatures collected on that sheet invalid." *See* Opening Br. at 13. However, Rogers both misstates and misapplies this case.

In *Brousseau*, the Court found that petition sheets could be invalidated when the sheets had been circulated by 1) persons other than the individual certifying the petition; and 2) minors and unqualified electors. *Brousseau v. Fitzgerald*, 138 Ariz. 453, 456 (1984). There, plaintiffs successfully demonstrated by clear and convincing evidence that the circulators in question had signed their names on petition sheets which they themselves had not circulated, and that the petition sheets in question were in fact circulated by persons not qualified to do so, rendering those petition sheets fraudulent.

Here, Rogers demonstrated only that several individual signatures were invalid as not having been signed by the purported voter; but failed to present any evidence that this was the result of wrongdoing by the circulator himself. It is far from 'clear error' for the Superior Court judge to decline to apply the remedy of *Brousseau* to these facts, which did not merit it. *See Judgment* at 3, line 8.

III. Rogers' request for this Court to reweigh the evidence as to Circulator Wessel's credibility is inappropriate on appeal.

Rogers presented several witnesses at trial who testified that they did not sign petition sheet bearing their signature. However, ***none*** of the

witnesses testified to seeing, or having reason to believe, that their names had been signed by the circulator who collected them, Jason Wessel. *See* RT. 31:23-25, 32:1-2 (examination of David Jones) at 62:3-6 (examination of Kyle Brophy); 69:22-24, 70:7-9 (examination of Judith Carey). And critically, Wessel himself testified that he never engaged in any fraudulent conduct and never signed any voter's signature on the petition. *See* RT 51:16-24. The Superior Court credited this testimony. *See Judgment* at 3, line 13.

All told, the testimony of Rogers' witnesses demonstrated nothing more than the invalidity of the witnesses' purported signature; and in each instance, the corresponding signature had already been invalidated in the counties' review. *See* RT. 24:14-18, 27:14-21 (examination of David King), 31:23-25, 32:2-6 (examination of David Jones) at 62:3-6 (examination of Kyle Brophy); 69:22-24, 70:7-9 (examination of Judith Carey).

Further, Rogers challenges the Superior Court's finding that Rogers did not present direct evidence that circulator Wessel forged signatures. As Rogers interprets it, "'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." Opening Br. at 16. Rogers construes this as "an impossible burden." *Id.*

Rogers advances a drastic and disproportionate remedy. Under her argument, any individual voter can claim to not have signed a petition sheet with their name on it, and on that basis alone the circulator will be presumed to have committed wrongdoing, and all other signatures gathered by the circulator of that sheet will be invalidated. This is a far more preposterous conclusion, and one that flies in the face of well-settled Arizona law that signatures are presumptively valid. *See*, *e.g.*, *Jenkins*, 218 Ariz. at 562 ¶ 8.

In pursuing this argument, Rogers once again misapplies *Brousseau*. In that case, there was a direct connection established between the invalidated signature and demonstrated wrongdoing by the circulator (who was shown to have allowed unqualified individuals to circulate a petition, and then signed the petition, knowing that signatures had been fraudulently collected). *Brousseau*, 138 Ariz. at 454. No such demonstration of wrongdoing was made here, and therefore the application of such an extreme remedy would be inappropriate.

The Superior Court's finding of fact should be left undisturbed unless a finding was clearly erroneous. *Shooter*, 235 Ariz. at 200 ¶ 4. Here, the Superior Court made a determination based on the evidence presented, and the legal conclusions that could be reasonably drawn from that evidence. Thus, the findings and the Superior Court's resulting order should be left undisturbed on appeal.

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's judgment.

Respectfully submitted this 6th day of May, 2024.

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