SUPREME COURT OF ARIZONA

ROBERT BACKIE, an individual and a qualified elector of Congressional District 1

Plaintiff/Appellant,

v.

KIM GEORGE, *et al.*,

Defendants/Appellees.

Arizona Supreme Court
No. CV-24-0089-AP/EL

Maricopa County Superior Court
No. CV2024-008687

APPELLEE'S ANSWERING BRIEF

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<u>INTRODUCTION</u>

After being denied relief in the trial court below, Plaintiff/Appellee Robert Backie ("Plaintiff") asks this Court to take a tortured, fatalistic, and novel interpretation of Arizona's nominating petition laws to disenfranchise more than 1,000 qualified electors to prevent Defendant/Appellee Kim George ("Kim George") from appearing on the 2024 primary election ballot for the office of United States Representative in Congress, District No. 1.

There is no dispute that Kim George collected 2,807 signatures to run as a candidate for the office of United States Representative in Congress, District No. 1, which required just 1,742 valid signatures. *See* Joint Stipulation of Facts ("JSOF") ¶¶ 3, 5. In his Complaint, Plaintiff challenged 398 signatures, and 249 of those challenges were affirmed by Maricopa County. JSOF ¶¶ 6, 7. After the Maricopa County Report, Kim George has 2,558 presumptively valid signatures, giving her a cushion of 816 signatures. In order to knock Kim George off the ballot, Plaintiff asks this Court to overturn the trial court's holding and invalidate 1,057 presumptively valid signatures on a specious legal theory that is wholly unsupported by nearly a century of candidate petition cases. JSOF ¶¶ 58, 63.

At best, Plaintiff has identified a technical violation of the *Circulator Handbook*, yet he seeks the fatal remedy of having this Court invalidate more than 1,000 presumptively valid signatures to completely disqualify Kim George from 2024 Primary Election ballot. Not only is such a request unprecedented in candidate nominating petition challenges, it is nothing more than a legal "gotcha" to deny ballot access to a candidate that clearly has wide support to run for office. In fact, applying sections 16-315(D) and -321(D) to invalidate more than 1,000 presumptively valid signatures to deny Kim George ballot access implicates her First Amendment Rights. Because Plaintiff misapplies the law, this Court can affirm the trial court's holding without having to resolve constitutional questions raised by crediting Plaintiff's argument.

For the reasons set forth below, this Court should affirm the trial court's April 25, 2024 Under Advisement Ruling After Election Petition Challenge Hearing ("Order"), denying Plaintiff/Appellee Robert Backie ("Plaintiff") injunctive relief preventing Kim George's name from appearing on the 2024 primary election ballot for the office of United States Representative in Congress, District No. 1.

JURISDICTION

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

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that a non-resident circulator is "properly registered" after "signing up through the electronic Circulator Portal and obtaining a Circulator ID number"?
2. Did the trial court err in finding that the Challenged Circulators substantially complied with the statutory requirements for non-resident circulators?
3. Did the trial court err in finding that A.R.S. § 16-321(D) does not require registration of non-resident circulators to precede circulation?

STANDARD OF REVIEW

Challenges to the form or content of candidate nominating petitions are reviewed *de novo* as to "whether a petition substantially complies with the statutory requirements before denying access to a ballot." *Bee v. Day*, 218 Ariz. 505, 507 ¶8 (2008).

ARGUMENT

I. The Trial Court Correctly Found That A Non-Resident Circulator Is "Properly Registered" After Initially Signing Up Through the Circulator Portal

Subsection D of Section 16-315 states:

> Circulators who are not residents of this state must be registered as circulators with the secretary of state before circulating petitions. The secretary of state shall provide for a method of receiving service of process for those petition circulators who register pursuant to this subsection. The secretary of state shall establish in the instructions and procedures manual issued pursuant to § 16-452 a procedure for registering circulators and receiving service of process."

Subsection D of Section 16-315 first requires the non-resident circulator to register. Second, it requires the Secretary of State to provide a method of receiving service of process for non-resident circulators. Finally, the Secretary's procedures must be established in the Secretary's instructions and procedures manual (also known as the Elections Procedures Manual ("EPM")) to (1) register circulators and (2) receive service of process. By its very terms, the law suggests that registering and providing a method for service of process are two separate procedures, which is validated by the plain language of the EPM.

According to the EPM:

> Circulator registration must be conducted as prescribed by the Secretary of State through the electronic Circulator Portal (https://apps.azsos.gov/apps/election/circulatorportal/). A circulator registration is not complete until the Secretary of State confirms the registration in writing. A.R.S. § 19-118(A); A.R.S. § 19-205.01(A); A.R.S. § 16-452(A). Once a circulator is properly registered, the circulator must select in the Circulator Portal the petition(s) they will circulate (by serial number and/or candidate name).

JSOF ¶¶ 15-17; Joint Appendix ("APP-") at APP-0102.

Initially, although the EPM purports to direct circulators to the Circulator Portal to register "as prescribed by the Secretary of State[,]" it should be noted that neither the Circulator Portal (JSOF ¶ 15; APP-0102), nor the Circulator Guide (JSOF ¶ 22; APP-0106 to APP-0124) are established *in* the EPM, as required by Section 16-315(D). In fact, to promulgate the EPM, the Secretary must consult with "each county board of

supervisors or other officer in charge of elections" before prescribing the rules, which "shall be approved by the governor and the attorney general." A.R.S. § 16-452(A),(B). Critically, "[o]nce adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor." *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (Ariz., 2020). Because the contents of the Portal and Guide are not reviewed or approved by the Governor and Attorney General those provisions cannot have the same "force of law" without raising due process concerns.[1] Accordingly, to the extent that the EPM suggests there are additional registration procedures prescribed through the Circulator Portal, that instruction does not comply with Section 16-315's directive that the Secretary shall establish procedures *in* the EPM.

Nonetheless, the EPM next states the "circulator registration is not complete until the Secretary of State confirms the registration in writing." JSOF ¶ 16; APP-0102. This is consistent with the requirement in Section 16-315 that the circulator must register. In fact, Plaintiff concedes that all of the Challenged Circulators created an account on the Circulator Portal before circulating petitions for Kim George.[2] *See Id.* ¶¶ 42, 43, 45, 46, 48, 49, 51, 52, 54, 56. Furthermore, in order to create the account, the circulator must "[p]rovide the circulators full legal name…if their permanent address is outside of Arizona… the circulator will need to include… the temporary residential address in Arizona… [and] input the contact information." *Id.* ¶ 24; APP-0113. Once

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[1] "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U.S. 95, 97 (1948). Giving procedures outside of the EPM the force and effect of law fail to provide "adequate guidance to those who would be law-abiding[.]" Notably, both the Circulator Portal and Circulator Guide can be altered and republished at the Secretary's discretion, without notice; the EPM cannot.

[2] Challenged Circulators refers to John Lopez, Isabella Ramirez, Elijah Weltman, Christopher Humpries, and Caleb Okwaraji whom Plaintiff alleges did not "properly register as out-of-state circulators[.]" JSOF ¶ 58.

the account is created, a "Circulator Registration Confirmation Email" is sent to the circulator with the "circulator ID number… permanently assigned to the circulator[.]" *Id.* ¶¶ 24, 25; APP-0114 to -0115. Ergo, when the Secretary of State confirmed to the circulators in writing and provided a circulator ID, the Challenged Circulators were properly registered.

The next statement in the EPM crystalizes this, stating "once a circulator is *properly registered*" the circulator must then "select in the Candidate Portal the petition(s) they will circulate[.]" *Id.* ¶ 17; APP-0102. This matches the statutory requirement that non-residents must be "registered as circulators with the secretary of state" and also that the "secretary of state shall provide for a method of receiving service of process for those petition circulators who register[.]" A.R.S. § 16-315(D). In that second step of selecting the petition the circulator will circulate, the circulator provides his address for service of process. JSOF ¶ 28; APP-0116.

The trial court found the EPM language dispositive. Order at 2; APP-0004. Specifically, by the plain language of the EPM, selecting a specific petition the circulator will circulate comes *after* the circulator is considered properly registered. *Id.* The trial court added "[t]he portal likewise requires the circulator to obtain a Circulator ID number – that is, to 'properly register' -- *before* providing the information [listed on page on page 118 of the EPM (*see* JSOF ¶ 19; *see also* APP-0102).]" Order at 2; APP-0004. The trial court later explained that the detailed rules for petition circulators in the EPM "reflect the requirements of Title 19, governing initiatives and referenda, as opposed to the election laws in Title 16." *Id.* at 3; APP-0005. This is apparent on review of EPM's "Circulation Registration Procedures" where the only reference to title 16 is Section 16-452(A), the statutory provisions mandating the Secretary promulgate the EPM. APP-0102 to -0103. All other references are to Title 19, which governs initiatives and referendum. *Id.*

Plaintiff will argue that the trial court erred in its analysis, because, in Plaintiff's

opinion, signing up is an insufficient registration as the circulator has yet to provide an address for service of process, which could be different than the circulator's temporary residential address. Yet, the plain language of both Section 16-315 and the EPM suggests that registration and providing service of process are distinct requirements that can, and are in fact done, separately and successively. Solely relying on the Circulator Guide, Plaintiff argues that registration isn't complete until the circulator "Add[s] a Petition[.]" JSOF ¶ 26; APP-0116. However, the trial court rightly rejected Plaintiff's argument. In fact, the trial court was not at all persuaded the Secretary "intended to 'incorporate' the Circulator Handbook, or the details of the Circulator Portal, into the Election Procedures Manual" and instead "the cross-references in the EPM seems more a matter of convenience than substance." Order at 3; APP-0004. The trial court further reasoned that "review and approval of the Circulator Handbook by the Governor and the Attorney General would be a prerequisite to 'incorporation.'" *Id.*

In fact, Plaintiff's extra statutory requirements that require circulators to not only register with the Secretary of State, but *also* register for each individual candidate are contained not in the statutorily prescribed EPM, but in the Circulator Guide.[3] Further, Plaintiff assigns a fatal penalty for failure to strictly comply with the Circulator Guide – invalidating otherwise valid signatures. However, even assuming, *arguendo*, that the EPM itself was clear as day, that *all* signatures obtained before the circulator registered *for a*

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[3] Plaintiff inaccurately argues that the EPM likewise requires registration for each candidate. Not so. To the extent that the EPM suggests petitions could be invalidated for failing to individually register by specific petition, each statutory reference cites Title 19. *See generally*, APP-0101 to -0103. Title 19 deals with initiative and referendum petitions, that are not only subject to a strict scrutiny review, Title 19 specifically requires a "circulator registration application" that includes the "initiative or referendum petition on which the circulator will gather signatures." A.R.S. § 19-118(B)(2). Further, section 19-118(A) specifies that the "secretary of state shall disqualify all signatures collected by a circulator who fails to register pursuant to this subsection[.]" Title 16 contains no such language.

particular candidate are void, there is no statutory basis to support disqualification. Critically, this Court has made clear that procedures in the EPM that violate the statutory language or contravene its intent have no legal authority. *See McKenna v. Soto*, 481 P.3d 695, ¶ 20-21 (2021)(an EPM regulation that is not promulgated pursuant to scope articulated in A.R.S. § 16-452 does not have the force and effect of law, and are simply guidance); *see also Leach v. Hobbs*, 250 Ariz. 572, ¶ 21 (2021)("an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law"). Even if the Secretary has the authority to promulgate procedures as to *how* non-resident circulators register to circulate candidate nominating petitions, he is not authorized to engage in "rulemaking pertaining to candidate nomination petitions[,]" including reasons to reject petition sheets or signatures. *McKenna*, 481 P.3d. at 699, ¶ 20.

In fact, in *Lohr v. Bolick*, this Court declined to invalidate a candidate's E-Qual petition sheets where the candidate certified the E-Qual petition sheets using her post office box address, despite the Court invalidating her *paper* petitions where she used her post office box address as part of the circulator affidavit. 249 Ariz. 428, 434 ¶ 23 (2020). This Court found that "there is no statutory basis to challenge or invalidate" the E-Qual petitions, therefore those signatures "remained valid." *Id.*

The same logic and reasoning apply here. Although non-resident circulators are required to register with the Secretary of State before circulating petitions, there is no statutory requirement that circulators make candidate-specific registrations or even provide the service of process address while registering and before circulating. Accordingly, "there is no statutory basis to challenge or invalidate" the Challenged Circulators' petition sheets. The trial court properly found that the Challenged Circulators were properly registered when the circulators completed the sign-up process.

II. The Trial Court Correctly Found That The Challenged Circulators Substantially Complied With The Statutory Requirement To Register With The Secretary

Nominating petitions "that are circulated, signed, and filed are presumptively valid, and the challenges bears the burden to prove, by clear and convincing evidence, that the *signer* is not a qualified elector." *Jenkins v. Hale*, 218 Ariz. 561, 562, ¶ 8 (2008)(cleaned up)(emphasis added). Further, "a nomination petition need only substantially comply with the statutory requirements" absent clear legislative intent, strict compliance is not necessary. *McKenna*, 250 Ariz. at 471, ¶ 7 (2021). Before denying access to a ballot, the Court must find that the nominating petition failed to substantially comply with the statutory requirements. *Bee v. Day*, 218 Ariz. 505, 506 ¶ 8 (2008). In fact, petition sheets will not be invalidated based on a "mere irregularity" without a showing the irregularity was significant enough to confuse or mislead electors signing the petition. *Moreno v. Jones*, 213 Ariz. 94, 102 ¶ 42 (2006).

In contrast to the rigorous "strict compliance" rubric that governs exercises of the initiative, referendum and recall processes, *see* A.R.S. §§ 19-101.01, -102.01, -201.01, candidate nomination petitions need only "substantially comply with the statutory requirements." *Clark v. Munoz*, 235 Ariz. 201, 202, ¶ 6 (2014) (quoting *Dedolph v. McDermott*, 230 Ariz. 130, 131 ¶ 3 (2012)); *Sims Printing Co. v. Frohmiller*, 47 Ariz. 561, 567 (1936) ("If the candidate's nomination petition and his nomination papers *substantially* comply with the provisions of the law in form and substance, and are timely presented to the [filing officer], such candidate is entitled to have his name . . . printed upon the official ballot.").

In the nomination petition context, it is "the intent and purpose of the law, not the letter, that must control," and "purely technical departures from the nominating form" are not fatal. *Adams v. Bolin*, 77 Ariz. 316, 320, 322 (1954). The most important consideration for making a substantial compliance argument is, did the candidate (or in this case the circulator), substantially comply with the statutory purpose.

In *Lohr*, this Court analyzed the non-resident petition circulator requirements. In comparing the requirement for a circulator to provide a residential address to non-residents having to register, the Court found that "the address provided by any circulator, out-of-state or otherwise, is to ensure there can be ready and accurate service of process in the event of a petition challenge." *Lohr*, 249 Ariz. 428, 433, ¶ 22 (2020). In invalidating defendant's paper petition sheets, this Court found the defendant "did not substantially comply with § 16-315(B)" because her post office address was not sufficient to achieve the statutory purpose of providing an address for service of process in the event of a challenge. *Id.*

Plaintiff concedes that all but one of the Challenged Circulators provided an address for service of process specifically for Kim George on or before April 1, the final date to collect petition signatures, and the presumptive start of the statutory petition challenge period. JSOF ¶¶ 44, 47, 50, 53, 57.[4] Nonetheless, Plaintiff wants this Court to invalidate more than 1,000 signatures because the Challenged Circulators didn't "Add a Petition" before circulating Kim George's petitions as purportedly required by the Circulator Guide. *Id.* ¶¶ 27, 28; APP-0116 to -0117. But failing to strictly comply with a *non-statutory* provision contained in the Circulator Guide, is at best a "technical departure" and nearly one hundred years of case law in Arizona foreclose Plaintiff's tenuous argument. *See, e.g., Sims Printing Co.*, 47 Ariz. 561 (1936). The trial court was correct to find that the Challenged Circulators substantially complied as they

[4] Although Circulator Humphries never specifically registered for Kim George (JSOF ¶ 57), in the proceedings below the parties did not address if Humphries otherwise provided an address for service of process for any other candidate. Accordingly, whether or not he otherwise substantially complied with the law by providing a service of process for another candidate was not before the trial court. Lacking evidence of substantial compliance, Humphries petition sheets were invalidated "out of an abundance of caution[.]" Order at 3; APP-0005. Kim George does not now seek to rehabilitate Humphries' invalidated signatures, as that argument was waived in the proceedings below.

were not only registered, but ultimately provided an address for service of process prior to the statutory petition challenge period.

III. The Trial Court Did Err By Finding That Non-Resident Circulators Do Not Need To Register Before Circulating

In its Order, the trial court found that "section 16-321(D) does not require registration of non-resident circulators to precede circulation." Order at 2. While that statement is true, the Court overlooked the provisions contained in Section 16-315. Specifically, under "Party Nomination Requirements" (A.R.S. §§ 16-301 to -322):

> Circulators who are not residents of this state must be registered as circulators with the secretary of state *before* circulating petitions. The secretary of state shall provide for a method of receiving service of process for those petition circulators who register pursuant to this subsection. The secretary of state shall establish in the instructions and procedures manual issued pursuant to § 16-452 a procedure for registering circulators and receiving service of process.

A.R.S. § 16-315(D)(emphasis added). Similarly, the statutory requirements for "Nomination Other than by Primary" (A.R.S. §§ 16-341 to -344), contain a provision regarding the registration of non-resident circulators:

> A nomination petition for any candidate may be circulated by a person who is not a resident of this state but who is otherwise eligible to register to vote in this state if that person registers as a circulator with the secretary of state *before* circulating petitions.

A.R.S. § 16-341(G)(emphasis added). Both statutory provisions require non-residents to register *before* circulating petitions. The trial court erred by relying solely on Section 16-321.

Regardless, for the reasons stated *supra*, Section I, all of the Challenged Circulators registered before circulating petitions. Further, as discussed *supra*, Section II, all but one Challenged Circulators substantially complied with the intent of the law

"to ensure there can be ready and accurate service of process in the event of a petition challenge" by providing a service of process address specifically for Kim George prior to the statutory challenge period. *Lohr*, 249 Ariz. at 433 ¶ 22. The trial court properly denied Plaintiff relief as the statutory purpose was achieved; Challenged Circulators properly registered before circulating nominating petitions for Kim George and all (but possibly one) provided an address for service of process before the statutory petition challenge period commenced.

IV. Interpreting A.R.S. § 16-315(D) to Disqualify Over 1,000 Valid Signatures Would Violate Kim George's First Amendment Rights

Plaintiff's interpretation of section 16-315(D), if adopted by this Court, would create unconstitutional burdens on Kim George's First Amendment rights to political speech and association by severely constraining her right to ballot access. Although states can "require candidates for political office to demonstrate a 'significant modicum of support' before their names are included on the ballot[,]" states "do not have free rein to regulate the process… [and] [s]uch regulation must stay within the limits imposed by the Constitution—namely an individual's First Amendment rights to political speech and association." *Graham v. Tamburri*, 240 Ariz. 126, 130, ¶ 11 (2016). States must weigh the burden imposed against the state interest in promoting the restriction. *Id.* ¶ 12.

The State does have an interest in requiring non-resident circulators to provide an address for service of process in the event of a petition challenge. *See Lohr*, 249 Ariz. at 433, ¶ 22. That interest was achieved before the statutory challenge period. Requiring an address for service of process before circulating petitions, despite the circulator properly registering (including providing contact information (JSOF ¶ 24; *see also* APP-0059)), does not further the State's interest. Rather, imposing a draconian rule to prevent ballot access significantly infringes on Kim George's First Amendment rights. Affirming the Order of the trial court avoids placing the statute in constitutional doubt.

See State v. Arevalo, 249 Ariz. 370, 373 ¶ 9 (2020)(citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247–51 (2012) (the "constitutional-doubt" canon rests "upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature")).

CONCLUSION

One can appreciate why Plaintiff would want to swing at the fences to find *any* reason to disqualify his opponent; a three-way Primary to unseat an incumbent is an uphill battle. But Plaintiff's argument has neither statutory nor legal support. This Court should affirm the trial court's Order denying Plaintiff's request for an injunction preventing Kim George's name from appearing on the 2024 primary election ballot for the office of United States Representative in Congress, District No. 1.

RESPECTFULLY SUBMITTED this 2nd day of May, 2024.

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