**SUPREME COURT OF ARIZONA**

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| APRIL SMITH, et al.,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>ADRIAN FONTES, in his capacity as Arizona Secretary of State,<br>Defendant/Appellee,<br><br>MAKE ELECTIONS FAIR PAIC.<br><br>Real Party in Interest. | ) | Arizona Supreme Court<br>No CV-24-0199-SA<br><br><br><br>Maricopa County<br>Superior Court<br>Nos. CV2024-019846<br>CV2024-019880<br>(Consolidated) |

**BRIEF OF AMICUS CURIAE VOTER REFERENCE FOUNDATION AND ITS EXECUTIVE DIRECTOR, GINA SWOBODA**


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## SUMMARY

Amicus curiae Voter Reference Foundation is dedicated to ensuring transparent, accurate, and fair elections.[1] This brief addresses the Appellants right to have her initiative petition challenge fully litigated to ensure compliance with Arizona's Constitution and responds to misapplications of law contained in Real Party in Interest's Motion for Reconsideration.

## ARGUMENT

### A. Smith destroyed the petition's presumption of validity and the Committee has failed to revive it.

The Arizona Constitution states that fifteen percent of qualified voters "shall have the right to propose any amendment to the constitution." AZ Const. Art. 4 Pt. 1 § 1. When enough voters appear to have petitioned for a constitutional amendment to appear on the ballot, "any person" may challenge the apparent signatures. A.R.S. § 19-118(F)*; Renck v. Superior Court of Maricopa County*, 66 Ariz. 320, 324 (Ariz. 1947) (there "is no doubt that . . . any citizen has the right and power to question the legal sufficiency of an

[1] Voter Reference Foundation is a subsidiary of Restoring America's Elections, an issue advocacy organization whose interests include election integrity, provided financial resources for the preparation of this brief.

initiative petition."); *League of Arizona Cities and Towns v. Brewer*, 213 Ariz. 557, 560 (Ariz. 2006) (courts have the authority "to enjoin the placement of an initiative petition on the ballot if it is not legally sufficient.").

An initiative petition is not legally sufficient "if it is fraudulent or if the signatures are forged." *State v. Osborn*, 16 Ariz. 247, 250 (1914). Appellant April Smith (Smith) timely challenged many of the signatures produced by Real Party in Interest, Make Elections Fair PAC (the "Committee") based on fraud. If Smith's claims are true, the Committee failed to submit the constitutionally required number of eligible signatures to support the petition.

The Committee's Motion for Reconsideration demands that this Court place their constitutional amendment on the ballot without requiring them to prove they have the requisite number of elector signatures. They ask this Court to stop the Superior Court's signature review, and turn a blind eye to the serious issues already uncovered—including more than 38,000 duplicative signatures, 253 individuals who signed the petition over five times, and one individual who appears to have signed the petition 15 times. (Appellants' Opening Brief, p. 5-6, filed in case # CV-24-0190). The Committee wants this Court to decide that Smith no longer has the statutory

right to challenge the constitutional amendment because the lower court made an error in interpreting Arizona rules of evidence and there is no time for that court to now correct its mistake. In short, the Committee's argument is, 'we win because we ran out the clock.'

The Committee relies heavily on *Save Our Public Lands Coalition v. Stover*, 135 Ariz. 461, 464 (1983) for the mistaken principle that a petition's *validity* should be presumed and doubts resolved by putting the initiative on the ballot.

The presumption of validity only applies to signatures that have been verified by the county clerks through the statistical validation process required by statute. *Id. at 464.* That is not what Smith seeks to challenge here. She is challenging the Committees failure to submit the required number of valid signatures per the Arizona Constitution. The 38,000 duplicate signatures, viewed separately, may indeed meet the criteria of a valid signature. However, the statistical validation does not identify duplicates. *Save Our Public Lands* is distinguishable because there can be no presumption of validity as to duplicate signatures and Smith is not asking authorities to verify another random sample. The ballot measure in that case failed to meet the statutory threshold, the burden shifted to petitioners to demonstrate that

signatures were improperly removed, and the petitioner did so. *Id.* at 463. Here, Smith has provided credible evidence of massive fraud that suggests the legal threshold for the measure to appear on the ballot *has not* been met.

*Save Our Public Lands* does not stand for the proposition that this Court should look the other way when there is abundant evidence that a petition failed to meet the Constitutional threshold to appear on the ballot. Smith specifically identified the 38,000 fraudulent signatures in question, duplicates of other signatures already counted, and served the evidence on a silver platter with page numbers of the location in the petitions and pictures of them, amply showing that the petition failed to meet the constitutional threshold and should not appear on the ballot. *State v. Osborn*, 16 Ariz. 247, 250 143 P. 117, 118 (1914).

It is the duty of the challenger "not to make the signature void, but to destroy the presumption of validity." *Whitman v. Moore,* 59 Ariz. 211, 225 (Ariz. 1942) (overruled on other grounds). Smith destroyed the presumption of validity by properly providing evidence that over 38,000 signatures should not have been counted. The burden then shifted to the Committee to provide evidence "that the signer was qualified in all respects." *Id.*

It has been over five weeks since Smith presented her evidence to the lower court that over 38,000 duplicate signatures must be removed from the total count of signatures submitted to the state, yet in that time, the Committee has failed to produce any evidence that these alleged duplicate signatures are in fact valid and should be counted. (See Emergency Petition, p. 1).

**B. The Committee misapplies inapposite legal precedent.**

Throughout their Motion, the Committee misapplies this Court's prior orders to stretch them into a judicial doctrine that has never existed. No example is more glaring than their claim this Court's "Order is at odds with eight decades of the Court's precedents." *Motion* at p. 3. The two cases they cite involve challenges to the candidate nomination process, not challenges within the initiative process. *Motion* at p. 6 citing *Hunt v. Superior Ct.*, 64 Ariz. 325, 331 (1946), and *Rapier v. Superior Ct.*, 97 Ariz. 153, 155-56 (1964). The statutory process for challenging candidate nominations appears in a separate title of Arizona law than the statutory process for challenging the legal sufficiency of a ballot initiative. If a voter desires to challenge nomination petitions, they must follow A.R.S. § 16-351, but a voter who desires to challenge the legal sufficiency of a ballot initiative must follow

A.R.S. § 19-118. Thus, the Committee provides no legal support for its claim that the precedent for one binds the analysis of the other and it is wrong to assume it does.

The Committee further claims numerous cases stand for the proposition that Smith's challenge to their initiative must be dismissed because of the ballot printing deadline, but their cited cases all involved challenges dismissed because the challenger failed to mount a timely challenge. *See Transp. Infrastructure Moving Arizona's Economy v. Brewer*, 219 Ariz. 207 (Ariz. 2008); *Mathieu v. Mahoney*, 174 Ariz. 456 (Ariz. 1993); and *Harris v. Purcell*, 193 Ariz. 409 (Ariz. 1998)). These are not the facts here; Smith timely filed her Petition challenge within 10 days of the Secretary of State's deadline for the counties to verify 5% of the signatures submitted. (Make Elections Fair PAC's Answering Brief, p.5 – Consolidated Case, CV-24-0190).

Furthermore, the Committee's argument that the county printing deadline should serve as an absolute barrier to further judicial review is unsubstantiated. Notably, the county deadline cited is not mandated by

statute but rather represents administrative timelines set by individual counties, and which varies from county to county.[2]

Arizona statutes provide specific deadlines concerning ballots primarily to accommodate UOCAVA voters and early voting procedures, as outlined in A.R.S. §§ 16-543(a), 16-545(B)(1), and 16-503(A). These deadlines mandated by state law and outlined on the Arizona Secretary of State's Official Election Calendar are as follows: absentee ballots for UOCAVA voters must be transmitted by September 21, 2024; early ballots must be prepared by October 3, 2024; and general election day ballots must be ready for inspection by candidates by October 3, 2024. Counties then set their own administrative deadlines for printing to ensure compliance with these statutory requirements. However, these county-specific deadlines are not legally binding and do not limit the court's ability to address issues related to ballot procedures.

Maricopa County's administrative deadlines should not be used to restrict this Court's review of the County's acceptance of a massive number

[2] Available at: https://apps.azsos.gov/election/2024/2024_Election_Calendar.pdf

of duplicate signatures to qualify an initiative that may not meet the constitutional threshold.

### C. Public policy supports making sure the constitution is followed, not overlooking constitutional deficiencies when voters might support them.

The Committee's argument that the Order violates Arizona's public policy by threatening the stability and finality of election results is unpersuasive because it misapplies the principle established in *Donaghey v. Attorney Gen*. 120 Ariz. 93, 95 (1978). The strong public policy favoring stability and finality of election results, as recognized in *Donaghey*, is specifically concerned with the elections of *candidates* to office, where post-election challenges could undermine officeholders' ability to perform their duties without fear of retrospective invalidation.

The Committee argues that invalidating a measure due to procedural failures instead of constitutional merits would, somehow, be disenfranchisement. However, courts are fully empowered to test initiatives after they become law to see if they are constitutional. *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (Ariz. 1997). Just as the court decides a ballot measure is unconstitutional after passage—potentially going against voters' decisions in the ballot box—without disenfranchising voters, the right to

suffrage is not compromised by judicial review of ballot measures for procedural deficiencies that were timely challenged.

This Court is not the only court that has grappled with whether to allow a ballot initiative challenge to proceed after the ballots had been printed. The Nebraska Supreme Court determined that they had the authority to "direct the legal removal of the petition from the ballot even if we could not direct its physical removal." *Chaney v. Evnen*, 307 Neb. 512, 519 (Neb. 2020). While the court determined that it did not need to exercise that power it nonetheless acknowledged it had the power if needed. *Id.* at 525.

Other courts, including this one, have determined that doubts should be resolved in favor of leaving the initiative off the ballot. *See Ahrens v. Kerby*, 44 Ariz. 337, 350-351 (Ariz. 1934) (where this Court issued a temporary restraining order preventing the initiative from being placed on the ballot until the challenge was resolved); *Buckley v. Chilcutt*, 968 P.2d 112, 12 (Colo. 1998). Notably, in *Buckley*, the Colorado supreme court "reversed the district court's decision ordering the Secretary to certify the Medical Use of Marijuana initiative to the ballot in the 1998 general election." *Id.* The court determined that after a "line-by-line signature review" had been completed

and the petition "had been found sufficient" then the issue could be certified for "the ballot for the year 2000 election." *Id.*

## CONCLUSION

Voter Reference Foundation respectfully requests that this Court deny the Committee's Motion for Reconsideration and allow the lower court to expeditiously "examine the Objection 21 exhibits and determine whether the exhibits prove any duplicate signatures by clear and convincing evidence." (Mandate, Case No. CV-24-0190).

SUBMITTED this 6th day of September, 2024.

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