SUPREME COURT OF ARIZONA

APRIL SMITH, et al., Plaintiffs/Appellants, v. ADRIAN FONTES, in his capacity as Arizona Secretary of State, Defendant/Appellee, MAKE ELECTIONS FAIR PAC, Real Party in Interest.	)	Arizona Supreme Court No CV-24-0190-AP/EL Maricopa County Superior Court Nos. CV2024-019846 CV2024-019880 (Consolidated)

BRIEF OF AMICUS CURIAE VOTER REF 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 two errors made by the trial court that warrant a reversal of its order and remand for further proceedings.[2] *First*, the trial court erred by subjecting plaintiffs to a burden of proof that was higher than the applicable clear and convincing evidence standard. *Second*, the trial court erred when it excluded the plaintiff's evidence of the duplicate signatures.

ARGUMENT

A. The Trial Court Applied a Higher Standard of Proof Than Clear and Convincing Evidence

The trial court erred when it found that even if it admitted evidence showing the duplicate signatures the Plaintiffs challenge, Plaintiffs would not have satisfied their clear and convincing burden of proof. Ord. at 6; *Leach v. Reagan*, 245 Ariz. 430, 437 (2018). The clear and convincing evidence

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

[2] The Order is the trial Court's August 15, 2024 Trial Minute Entry, Day 4 (attached).

standard requires "that the 'thing to be proved is highly probable or *reasonably* certain.'" *Kent K. v. Bobby M.*, 210 Ariz. 279, 284–85 (2005) (*quoting Black's Law Dictionary* 577 (7th ed.1999)) (emphasis added); *State v. Renforth*, 155 Ariz. 385, 387(Ct. App. 1987); McCormick On Evid. § 340 at 959-60 (8th ed.). However, the clear and convincing evidence standard does not require proof that a fact is "certain" and "unambiguous," *State v. King*, 158 Ariz. 419 (1988), indisputable, without any doubt or reservations, or infallible:

> We share the aversion of North Carolina to a definitional requirement that the factfinder be certain. Among the common definitions of "certain" are "not to be doubted as a fact: indisputable" and "given to or marked by complete assurance and conviction, lack of doubt, reservation, suspicion, or wavering through or as if through infallible knowledge or perception...." *Webster's Third New International Dictionary of the English Language, Unabridged* (1976). . . .The error of defining clear and convincing evidence as "certain" was compounded in this case by further definition as "unambiguous." "Ambiguity" is "the condition of admitting of two or more meanings, of being understood in more than one way...." *Id.* Few things in law are unambiguous . . .

State v. Renforth, 155 Ariz. 385, 388 (Ct. App. 1987).

Plaintiffs reviewed "nearly 600,000 signatures on roughly 59,100 scanned petition sheets that [Make Elections Fair PAC] had submitted to the Secretary of State in support of its petition." Ord. at 2. This effort required "62,000-man hours, utilizing 1,200 workers at a cost of $1million[.]" *Id*. The

Plaintiffs offered into evidence 125 pages of exhibits showing side-by-side images of duplicate signatures. Ord. at 3-5. The images include a signature, a person's printed name, and their address, written by persons onto a signature gathering form. The images, of Make Elections Fair PAC's own signature records, indicate that approximately 40,000 signatures out of 559,379 were duplicates. Ord. at 3, 6.

Make Election Fair PAC did not challenge the authenticity of the images, which showed tens of thousands of instances in which a person with a certain name and living at a certain address signed the PAC's petition multiple times. Plaintiffs also verified that only one person with that name was registered at the given address. Plaintiffs further culled thousands of signatures from their list of challenged signatures to increase the weight of the evidence. Ord. at 3-4. This evidence satisfied the clear and convincing standard by showing it was highly probable the signatures were duplicates.

Nevertheless, the trial court concluded that "even if [the exhibits] were admissible, . . . they do not prove these objections by 'clear and convincing evidence.'" Ord. at 6. The trial court concluded the evidence "contain[ed] the reviewers' subjective conclusions or interferences drawn from reviewing the petition sheets and utilizing the voter information data," that "the process of

determining duplicates is not completely objective," and that "subjectivity was not completely weeded out." Ord. at 3. The trial court's chief example for its speculative concern over the 43,000 duplicates was that two different signatories sharing the same address might have "'nickname' duplicates" like "Alexandra Trusty and Alex Trusty." Ord. at 3.

The court erred because a total lack of subjectivity, or requiring complete objectivity, or the speculative possibility of some error or doubt, is the same as requiring certainty, no ambiguity, indisputability, no doubt or reservations, or infallibility—which is precisely what this Court has held in cases such as *State v. Renforth*, discussed *supra,* is more than the clear and convincing standard requires.

The trial court also concluded that "Neither Mr. Langhofer nor any of the Signafide reviewers hold any handwriting analysis or comparison certifications." Ord. at 5. In the 2020 election, 41.3% of voters, or over 161,000,000, cast their ballots by mail. *Election Administration And Voting Survey 2020 Comprehensive Report A Report*, U.S. Election Assistance Commission, available at Election Administration and Voting Survey 2020 Comprehensive Report (eac.gov). The signatures on these 161,000,000 ballot envelopes were not submitted to handwriting experts for a professional

forensic comparison. Just as election officials who check absentee ballot envelope signatures against voter registration records need not be professional handwriting experts, there is no rule requiring challengers to signature petitions to be handwriting experts, or that every challenge to a signature be submitted to a certified handwriting expert.

The information submitted to the court included a signature, but the signature was just one piece of information. The evidence, the authenticity of which was not in doubt, also included the person's printed name and address and the Plaintiffs verified that only one person with that name was registered at that address. An expert signature comparison was thus not necessary to meet the clear and convincing standard. (Even if the challenge had turned on a comparison of signatures, triers of fact are competent to compare handwriting. Ariz. R. Ev. 901(b)(3); *Johnson v Maehling*, 123 Ariz. 15, 20 (1979) (en banc)).

Given the sheer volume of signatures needed to qualify a ballot measure, the cost and time required to have a signature expert examine each challenged signature, regardless of the additional information establishing clear and convincing evidence of duplicates, would effectively mean

fraudulent signature gathering—especially when done at scale—could never be challenged.

The trial court also erred by holding that the Plaintiffs' burden was to somehow prove "how many signatures out of the roughly 43,000 [they] challenged did not involve a subjective and/or discretionary component as to whether the signatures were duplicates" and it was "not the Committee's burden to review the roughly 43,000 signatures challenged as being duplicate and try and find those that have a questionable subjective component."). Ord. at 5. Plaintiffs established it was highly probable the PAC's petitions included tens of thousands of duplicate signatures. The PAC could have submitted evidence using its peculiar knowledge to show that there were fewer duplicates—but they did not do so. *Molera v. Hobbs*, 250 Ariz. 13, 27, 474 P.3d 667, 681 (2020) ("The caselaw relied on by Challengers shifts the burden of coming forward with evidence, not the burden of proof, "[w]hen proof of a negative assertion lies 'peculiarly within the knowledge of the adverse party.'"") (quoting *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419 (Ct. App. 1990). Make Elections Fair PAC's circulators gathered each challenged signature in a face-to-face transaction with the signatories and had a quality control system to detect invalid signatures. Ord. at 5.

Accordingly, it had the peculiar knowledge as to whether its circulators gathered signatures from two or more people with the same name, living at the same address, *tens of thousands of times*.

The Court further erred by characterizing the issue as whether Make Elections Fair PAC had superior knowledge *of Plaintiffs' exhibit* to assess the subjectivity of Plaintiffs' duplicate determination, rather than whether Make Elections Fair PAC had superior knowledge *of the signatures they gathered* to determine whether the signatures were duplicates. Ord. at 5 ("The Committee does not have 'superior access' to this information. . . . The Committee did not prepare the summaries.").

The trial court thus erred by concluding that the Plaintiffs' evidence, if admitted, failed to satisfy Plaintiffs' clear and convincing burden of proof.

B. The Trial Court Erred by Excluding Plaintiff's Evidence

The trial court erred by not admitting Plaintiffs' images of duplicate signatures from the PAC's own voluminous records. Arizona Rule of Evidence 1006 provides:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, photographs, or videos that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at

> a reasonable time and place. And the court may order the proponent to produce them in court.

Ariz. R. Evid. 1006. In other words,

> "[a] witness may summarize the information contained in voluminous reports or records as long as the information contained in the documents would be admissible and the documents are made available to the opposing party for their inspection. Rule 1006 . . . authorizes the use of summaries when the contents of 'voluminous writings' cannot be conveniently examined in court."

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 267 (Ct. App. 2004) (quoting *Rayner v. Stauffer Chem. Co.*, 120 Ariz. 328, 333–34 (Ct. App.1978)).

Here, there is no question that Make Elections Fair PAC's petitions are admissible. Nor is there any dispute that the petitions were available to the Make Elections Fair PAC and the state. Indeed, the petitions *come from* the PAC and were filed with the state. Instead of forcing the trial court to comb through nearly 60,000 pages of signatures, the Plaintiffs reproduced images of only the petition signatures with which they took issue. The authenticity of these images is not in dispute.

It is not clear that the court was even correct in categorizing the captured signatures as "summary evidence." Previously, this Court has categorized as business records credit card purchase records that were

copied and pasted from a larger credit card statement. *State v. Parker*, 231 Ariz. 391, 401 (2013) ("mere reproductions of regularly kept database records . . . may qualify as business records.").

To exclude the reproduced signatures in this case, the court below relied on *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998), in which the Sixth Circuit affirmed the trial court's *admission* of summaries of forms that recorded audits of stamp sales by post office workers. *Id.* at 1113. The Sixth Circuit highlighted five elements for summary evidence. *Id.* at 1109-10. The trial court was concerned with only one element: that the summary be accurate and nonprejudicial. *Id.* at 1010; Order at 4.

No image of any signature (or printed name and address) was challenged as inauthentic/inaccurate. The trial court instead found the images were "annotated with conclusions or inferences drawn by the reviewers." Order at 4. But the annotations merely identified where in the overall record of petition signatures the captured signatures fell.[3]

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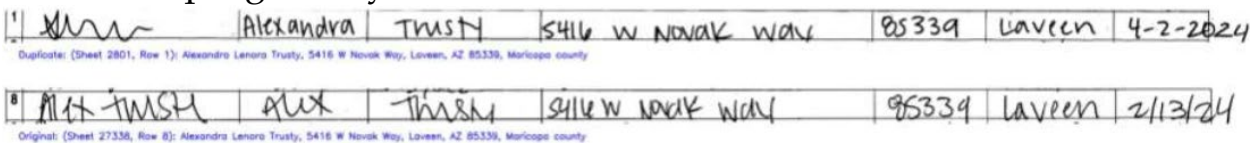
[3] The example given by the court was this:



The notations are in blue. The first states: "Duplicate: (Sheet 2801, Row 1): Alexandra Lenora Trusty, 5416 W Novak Way, Laveen, AZ 85339,

Additionally, the *Bray* decision concerned summaries presented to a jury. Notations citing the pages of the petitions from which the images were taken could not have prejudiced Make Elections Fair PAC in a matter adjudicated by a judge. Indeed, omitting this information would have been far more prejudicial.

CONCLUSION

Voter Ref Foundation respectfully requests that the court hold that the trial court erred and remand the case for reconsideration consistent with the clarified standards in this Court's order.

SUBMITTED this 18th day of August, 2024.

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Maricopa county." The second states: "Original: (Sheet 27338, Row 8): Alexandra Lenora Trusty, 5416 W Novak Way, Laveen, AZ 85339, Maricopa county."