

**ARIZONA SUPREME COURT**

APRIL SMITH et al., qualified electors,  
and

ARIZONA FREE ENTERPRISE CLUB,  
a non-profit corporation; SUSAN  
GARVEY, KATHLEEN LILES, and  
JOHN SHADEGG, qualified electors,

Plaintiffs/Appellants,

v.

STATE OF ARIZONA; ADRIAN  
FONTES, in his capacity as the  
Secretary of State of Arizona,

Defendant/Appellees,

and

MAKE ELECTIONS FAIR PAC, a  
political committee,

Real Party in Interest/Appellees.

Arizona Supreme Court  
No. CV-24-0222-AP/EL

Maricopa County  
Superior Court  
Case No. CV2024-019846  
No. CV2024-019880  
*(Consolidated)*

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**Brief of AFEC Plaintiffs/Appellants**

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## INTRODUCTION

The Superior Court’s decision on remand rests on a series of legal errors that flout governing legal standards and defy this Court’s binding precedents. The product of those errors is that a ballot initiative that concededly did not qualify for the ballot under this Court’s decision in *Mussi v. Hobbs*, 255 Ariz. 395 (2023) would now go to the voters for approval. That result is neither tenable nor tolerable.

This brief focuses on five reasons why that is so: (1) this case is not moot, (2) there are obvious rational bases for the putative “double counting,” (3) the modest penalty for invalid signatures under this Court’s longstanding formula does not violate our Constitution by unreasonably hindering ballot access, (4) it further does not violate the U.S. Constitution, as the Superior Court held without any reasoning or citation to even one federal precedent, and (5) the Superior Court erred in holding that it lacked equitable authority to issue the requested injunction.

This Court should reverse and enter an injunction barring counting of votes for Proposition 140.

## ARGUMENT

1. **Mootness.** The Superior Court held that “the underlying action [wa]s moot” as of “the August 23, 2024 ballot printing deadline.” Order at 5.<sup>1</sup> This was error.

“A case becomes moot only *when it is impossible for a court to grant any effectual relief whatever* to the prevailing party.” *Knox v. SEIU*, 567 U.S. 298, 307 (2012) (cleaned up) (emphasis added). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* at 307-08 (cleaned up).

Here “effectual relief” was—and *is*—still available in the form of an injunction against counting votes for the Proposition 140 and enjoining printing of it on ballots that have yet to be printed (*e.g.*, for early voting and election-day voting at vote centers). Such an injunction would provide the same essential relief as a pre-August-23 injunction directing the Secretary not to include Proposition 140 on the ballot. Either way, there will not be an official canvassed result for a proposition that was never lawfully supposed to be on the ballot to begin with—thus providing

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<sup>1</sup> That judgement is available at ROA 108—titled “ME: JUDGMENT/DECREE [09/18/2024]”— and is cited here as “Order.”

*complete* relief to the Plaintiffs here. The continued availability of complete relief—which is plainly an “effectual remedy”—readily precludes mootness. *Knox*, 567 U.S. at 307 (2012). The Superior Court gravely erred in holding otherwise.

To be sure, an injunction against the counting of ballots is a second-best remedy compared to not placing the proposition on the ballot in the first place. But here, such an injunction is the only available remedy because the Superior Court unnecessarily delayed, and repeatedly committed reversible error, in resolving this case. In particular, the Superior Court’s delay in addressing some of the material issues in this case would, under the Court’s “mootness” analysis, effectively insulate its decision from appellate review because there simply was no time left to correct its errors.

But that is not how either mootness or appellate review functions in our system. And the Superior Court’s presumption that its initial errors mooted all remaining challenges to Proposition 140 simply because its case management and refusal to reach critical issues left them unresolved before the ballot-printing deadline is not one that this Court can afford to indulge or tolerate.

But even if the Superior Court were correct that the delay occasioned by its errors had caused this action to become moot, this Court should simply waive that non-jurisdictional bar here. Our Constitution has “no counterpart to the ‘case or controversy’ requirement of the federal constitution”; doctrines such as standing and mootness are thus not jurisdictional restrictions on the authority of Arizona courts but rather merely “questions of prudential or judicial restraint.” *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6, (1985).

This Court accordingly “can waive the requirement of standing” or mootness. *Sears v. Hull*, 192 Ariz. 65, 71 (1998). It should do so here if this case would otherwise be moot, because the alternative is the potential permanent pollution of the Arizona Constitution by an initiative that did not qualify for ballot access under binding precedent.

**2. *Rational Basis for Penalty.*** The Superior Court’s decision rested heavily on its inability “to find any rational or other basis for ‘double counting’ invalid signatures.” Order at 6. But rationales for the putative double counting are obvious, straightforward, and simple. The challenged formula functions as both:

- 1) A modest penalty for submitting invalid signatures, on the common-sense assumption that the presence of signatures whose invalidity is proven fairly implies more invalid signatures that will evade detection; and
- 2) A corresponding incentive/deterrent for initiative promoters not to submit invalid signatures and police their own signature submissions.

Absent such an incentive/penalty, petition organizers have no reason not to submit invalid signatures—the *worst* that could happen is that the invalid signatures would be detected and omitted, leaving them *no worse off*. So why not take the chance on submitting likely invalid signatures when there is no consequence for doing so?

The modest penalty that this Court's longstanding formula establishes thus gives initiative proponents an incentive not to submit signatures of dubious validity and instead to pay attention as to whether their gathered signatures are valid.

By providing an incentive for initiative proponents not to submit invalid signatures, the penalty also serves to lessen the burden on County Recorders—which is another rationale basis for the rule. *See, e.g., Ariz.*

*Democratic Party v. Hobbs*, 18 F.4th 1179, 1190 (9th Cir. 2021) (holding that “the State’s interest in reducing administrative burdens” was “an important regulatory interest that may justify imposing a minimal burden on voters”).

The Superior Court’s reasoning that there was not even a “rational or other basis” for the formula is thus erroneous. Order at 6.

**3. *Burden on Ballot Access Under State Law.*** The Superior Court further erred in reasoning that the invalid-signature penalty “unreasonably hinder[ed] or restrict[ed] the Initiative.” Order at 6. But the penalty for invalid signatures here is *exceedingly* modest. The Superior Court found that it raised the applicable signature threshold “from ‘equal to 15%’ to 15.2%,” Order at 6—a *mere* 1.33% penalty. That is a *de minimis* amount, which is smaller than many rounding errors.

That miniscule penalty cannot satisfy the “unreasonably hinder or restrict the constitutional provision” standard that this Court set forth in *Stanwitz v. Reagan* for evaluating the constitutionality of statutes regulating initiatives. 245 Ariz. 344, 349-50 ¶¶19-21 (2018).

Indeed, the Superior Court effectively admitted to applying a *far*-more-stringent standard, reasoning that the challenged invalid-

signature penalty was unconstitutional because it was “*not essential* to maintaining the integrity of the process.” Order at 6. But this Court has *never* required that regulations of ballot access for initiatives be “essential” to be constitutional—only that they not “*unreasonably* hinder or restrict” ballot access. *Stanwitz*. 245 Ariz. at 348 ¶14 (emphasis added). The Superior Court’s “not essential” holding was patent error.

4. ***Federal Law.*** To bolster its untenable reasoning under Arizona law, the Superior Court gestured in the direction of federal law with a drive-by ruling that the invalid-signature penalty was “unconstitutional as applied under the *Arizona and United States Constitutions.*” Order at 7 (emphasis added). The Superior Court did not cite even a *single* federal court precedent for that conclusory holding, however. *Id.* at 1-7 (citing no federal decisions). And it is gravely wrong.

Under the U.S. Constitution, federal courts consider regulations that burden ballot access for initiatives under *Anderson-Burdick* doctrine. See *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012); *Pierce v. Jacobsen*, 44 F.4th 853, 860 (9th Cir. 2022). This Court too has applied *Anderson-Burdick* in this context, specifically citing *Angle. Arizonans for*

*Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 409-14 ¶¶41-66 (2020).<sup>2</sup>

Under the *Anderson-Burdick* framework, “[b]allot access restrictions” only trigger heightened scrutiny if “they *significantly* inhibit the ability of initiative proponents to place initiatives on the ballot.” *Angle*, 673 F.3d at 1133 (emphasis added). “This is similar to the standard” for candidate ballot access, which examines whether “‘reasonably diligent’ candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so.” *Id.* (quoting *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir.2008)).

Here, that standard is fatal for the Committee and the Superior Court’s holding. The challenged penalty—roughly 1.33%—is hardly a

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<sup>2</sup> To the extent that the Committee is attempting to assert freestanding claims under the First or Fourteenth Amendments outside of the *Anderson-Burdick* framework, that effort would be unavailing. All such claims “are folded into the *Anderson/Burdick* inquiry,” *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018), which is governed by “a single analytic framework”—*i.e.*, the *Anderson-Burdick* framework. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). *Accord Hobbs*, 18 F.4th at 1195; *Mazo v. New Jersey Sec’y of State*, 54 F.4th 124, 140 (3d Cir. 2022); *Richardson v. Texas Sec’y of State*, 978 F.3d 220, 233-34 (5th Cir. 2020); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir.1998).

significant burden. Indeed, the challenged formula here has been the law in Arizona since 1990. *City of Flagstaff v. Magnum*, 164 Ariz. 395, 404-05 (1990). And during that time, initiative proponents have managed to place initiatives on the ballot in *every* cycle except 2014—often *multiple* initiatives. See Table 1 *infra*. That is unsurprising given how *minute* the penalty is (roughly 1.33%).

Given the minuteness of the penalty and the basic truth that initiative proponents “can normally gain a place on the ballot” in Arizona, *Angle*, 673 F.3d at 1133—and indeed have done so nearly every election cycle—the Superior Court’s offhand holding that the challenged penalty violated the U.S. Constitution was erroneous. And the flippancy with which the Superior Court made that federal constitutional holding—neither citing a single federal case nor identifying the federal standard that it was purporting to apply—is revealing as to the depths of its errors here.

<b>Table 1: Number of Initiatives That Have Qualified for Ballot By Cycle</b>	
1990	<b>7</b> (Propositions 103, 104, 105, 200, 201, 202, 203) <sup>3</sup>
1992	<b>4</b> (Propositions 107, 108, 110, 200) <sup>4</sup>
1994	<b>3</b> (Propositions 103, 200, 201) <sup>5</sup>
1996	<b>5</b> (Propositions 102, 200, 201, 202, 203) <sup>6</sup>
1998	<b>5</b> (Propositions 105, 106, 200, 201, 202) <sup>7</sup>
2000	<b>7</b> (Propositions 106, 107, 108, 200, 202, 203, 204) <sup>8</sup>
2002	<b>4</b> (Propositions 200, 201, 202, 203) <sup>9</sup>
2004	<b>1</b> (Proposition 200) <sup>10</sup>
2006	<b>9</b> (Propositions 106, 107, 200, 201, 202, 203, 204, 205, 206) <sup>11</sup>
2008	<b>6</b> (Propositions 100, 101, 105, 200, 201, 202) <sup>12</sup>
2010	<b>1</b> (Proposition 203) <sup>13</sup>
2012	<b>2</b> (Propositions 121, 204) <sup>14</sup>
2014	<b>None</b>
2016	<b>2</b> (Propositions 205, 206) <sup>15</sup>
2018	<b>2</b> (Propositions 126, 127) <sup>16</sup>
2020	<b>2</b> (Propositions 207, 208) <sup>17</sup>
2022	<b>2</b> (Propositions 209, 201) <sup>18</sup>

<sup>3</sup><https://azmemory.azlibrary.gov/nodes/view/102834?type=all&lsk=b710d716d4634aa0cee207d66af6631c>

<sup>4</sup><https://azmemory.azlibrary.gov/nodes/view/102835?type=all&lsk=b710d716d4634aa0cee207d66af6631c>

<sup>5</sup><https://azmemory.azlibrary.gov/nodes/view/257012?type=all&lsk=b710d716d4634aa0cee207d66af6631c>

<sup>6</sup><https://azmemory.azlibrary.gov/nodes/view/102837?type=all&lsk=b710d716d4634aa0cee207d66af6631c>

<sup>7</sup><https://azmemory.azlibrary.gov/nodes/view/102838?type=all&lsk=b710d716d4634aa0cee207d66af6631c>

<sup>8</sup> <https://azmemory.azlibrary.gov/nodes/view/102839?type=all>

<sup>9</sup> <https://azmemory.azlibrary.gov/nodes/view/102840?type=all>

<sup>10</sup> <https://azmemory.azlibrary.gov/nodes/view/102841?type=all>

<sup>11</sup> <https://azmemory.azlibrary.gov/nodes/view/102842?type=all>

<sup>12</sup> <https://azmemory.azlibrary.gov/nodes/view/102843?type=all>

<sup>13</sup> <https://azmemory.azlibrary.gov/nodes/view/102844?type=all>

<sup>14</sup> <https://azmemory.azlibrary.gov/nodes/view/102846?type=all>

<sup>15</sup> <https://azmemory.azlibrary.gov/nodes/view/102848?type=all>

<sup>16</sup> <https://azmemory.azlibrary.gov/nodes/view/102851?type=all>

<sup>17</sup> <https://azmemory.azlibrary.gov/nodes/view/102852?type=all>

<sup>18</sup> <https://azmemory.azlibrary.gov/nodes/view/255614?type=all>

The lack of any federal constitutional violation here is underscored by the Committee’s expert’s admission that penalty is simply a “mathematical function,” which does not relate to the “subject matter of initiative or any particular viewpoint.” 9/18/24 Tr. at 54:18-24. *See, e.g., Dudum*, 640 F.3d at 1106 (The Ninth Circuit, applying *Anderson-Burdick*, has “repeatedly upheld as ‘not severe’ restrictions that are generally applicable, even-handed, [and] politically neutral.” (cleaned up)).

**5. *Equitable Discretion.*** Finally, the Superior Court erred in concluding that it “lack[ed] the [equitable] authority to grant the injunction requested by Plaintiffs.” Order at 7. The Superior Court reasoned that it lacked authority because “there [wa]s no Arizona law that expressly provides this Court with the authority to grant the Plaintiffs’ requested injunction other than this Court’s general equitable powers.” *Id.* at 6.

That approach is backwards. Courts are presumed to *retain* all traditional equitable authority to award appropriate relief *unless* those equitable powers are *specifically* displaced by statute. That is a *very high bar*. Absent a specific provision displacing equitable authority, the court

retains all equitable remedies available at common law. *See Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 515 (1967) (“[S]tatutes are not deemed to repeal the common law by implication unless the legislative intent to do so is clearly manifested.”); *Carrow Co. v. Lusby*, 167 Ariz. 18, 21, 804 P.2d 747, 750 (1990) (“Statutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated.”).

The U.S. Supreme Court’s decision in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) is particularly instructive. There, the statute at issue provided that “a permanent or temporary injunction, restraining order, or other order *shall be granted*” where a violation was established. *Id.* at 322 (emphasis added). But even though the statute *explicitly* used *mandatory* language that *still* did not suffice. Instead, the mandatory “shall be granted” language was not enough of an “unequivocal statement of its purpose” to “depart[] from the traditions of equity practice.” *Id.* at 329–30. Thus, the Court held that “if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.” *Id.* at 330.

Here is there is nothing remotely equivalent to the language in *Hecht* that could displace the Superior Court's traditional equitable powers. Instead, the Superior Court reasoned that the lack of explicit authorization meant that it lacked the equitable power to remedy a violation of state law. In doing so, it inverted the proper analysis: the Superior Court did not require explicit statutory authorization to exercise its traditional equitable authority. Instead, only *exceptionally clear* statutory language could have ousted the Superior Court of that authority. And nothing remotely of the sort exists here.

## CONCLUSION

This Court should reverse and enter an injunction precluding the counting of votes of the Initiative.

RESPECTFULLY SUBMITTED this 25th day of September 2024.

By: */s/ Andrew Gould* \_\_\_\_\_

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