SUPREME COURT OF ARIZONA

APRIL SMITH, et al.,

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.,

Defendants/Appellees,

MAKE ELECTIONS FAIR PAC,

Real Party in Interest.

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

Maricopa County
Superior Court
Nos. CV2024-019846
CV2024-019880
(Consolidated)

AMICUS CURIAE BRIEF OF THE ARIZONA ATTORNEY GENERAL IN SUPPORT OF NO PARTY

Hayleigh S. Crawford (No. 032326)
Nathan T. Arrowsmith (No. 031165)
Joshua G. Nomkin (No. 039213)
OFFICE OF THE ATTORNEY GENERAL
Firm State Bar No. 14000
2005 N. Central Ave.
Phoenix, AZ 85004-1592
(602) 542-3333
Hayleigh.Crawford@azag.gov
Nathan.Arrowsmith@azag.gov
Joshua.Nomkin@azag.gov
ACL@azag.gov

Attorneys for Amicus Curiae Arizona Attorney General Kristin K. Mayes

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INTRODUCTION

The Attorney General takes no position on the ultimate outcome of this case, but writes to offer additional perspective on two key issues: (1) whether an initiative appearing on the ballot may be deemed ineligible under A.R.S. § 19-121.04 after-the-fact, and (2) the constitutionality of A.R.S. § 19-121.04.

First, the Court should confirm that § 19-121.04 has no application after the ballot-printing deadline. That statute provides a short-hand process for determining whether an "initiative or referendum shall be placed on the ballot in the manner provided by law." A.R.S. § 19-121.04(B). If an initiative is placed on the ballot, then § 19-121.04 no longer applies. Both legally and practically, it is too late to interfere with the initiative's submission to the voters at that point. Permitting initiatives to be judicially withdrawn after they appear on a ballot interferes with core constitutional rights and risks the credibility of the electoral and judicial processes.

Second, if the Court reaches the constitutionality of § 19-121.04, it should find that the statute's signature-verification methodology is constitutional as applied to almost every case. Although the statute's methodology involves "double-counting" some invalid signatures, that double-counting typically makes no difference to an initiative's qualification

for the ballot. In those cases, the statute reasonably supplements the Constitution by providing an efficient means for determining whether enough Arizonans want it on the ballot.

In cases where the methodology's application increases the signature requirements beyond the constitutional threshold, however, the Constitution must prevail. The Constitution contains a bright-line rule: Fifteen percent of qualified electors have the right to propose a constitutional amendment. If verification errors prevent initiative proponents from establishing that fifteen percent of qualified Arizonans support a measure's placement on the ballot, the verification process is irreconcilable with the Constitution, even if the inaccuracies appear *de minimis*.

INTERESTS OF AMICUS CURIAE

The Attorney General files this as-of-right brief under ARCAP 16(b)(1)(B) because this case presents issues of statewide importance

regarding Arizonans' right to propose and vote on constitutional amendments by initiative.[1]

ARGUMENT

I. The Court should confirm that signature-verification challenges must be completed by the ballot-printing deadline.

A. A.R.S. § 19-121.04 has no application once an initiative appears on the ballot.

The Secretary of State and Committee have argued that this challenge is moot as of the ballot-printing deadline based on constitutional principles, longstanding precedent, and practical necessity. *See generally* Secretary's Response Regarding Remedy, *Smith v. Fontes*, No. CV-24-0199-SA (Sept. 6, 2024); Committee's Motion for Reconsideration, *Smith v. Fontes*, No. CV-24-0199-SA (Sept. 6, 2024). The Attorney General generally agrees

[1] Neither the State of Arizona nor the Attorney General is a party to this appeal. The State was a defendant in consolidated case no. CV2024-019880 (Maricopa Cnty. Super. Ct.). No. CV2024-019880 is over: The superior court denied plaintiffs' requested relief, and this Court affirmed, ordering the Initiative to be placed on the ballot. *See* Order, *Smith v. Fontes/Ariz. Free Enter. Club v. State*, No. CV-24-0184-AP/EL (Aug. 22, 2024). And in any event, consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Torosian v. Paulos*, 82 Ariz. 304, 316 (1957) (citation omitted).

with those points, and further observes that they are buttressed by the text, structure, and purpose of § 19-121.04 itself.

On its face, the statute's text does not allow for litigation about the status of the verification process after ballot printing. Because "we do not always require that each and every signature be certified as valid," *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431 (1991), § 19-121.04 requires a process for a "final determination of whether the initiative qualifies for the ballot," *Mussi v. Hobbs*, 255 Ariz. 395, 401 ¶ 30 (2023). It predicts the "number of valid signatures as projected from the random sample" and determines whether the number "appears to be" enough. A.R.S. § 19-121.04(B). This "screening process," *Transp. Infrastructure Moving Ariz.'s Econ. v. Brewer*, 219 Ariz. 207, 233 ¶ 22 (2008), culminates in a decision about whether "the initiative or referendum shall be placed on the ballot in the manner provided by law," A.R.S. § 19-121.04(B). Thus, the statute's process ends when ballots are printed.

This plain-text reading is consistent with the rationale of *Mussi*, which incorporated into § 19-121.04(A)'s verification process those "signatures adjudicated ineligible" in individual challenges. 255 Ariz. at 403 ¶ 42. In doing so, the Court observed that the purpose of individual

challenges is to ensure "only properly qualified initiatives are presented to the people"—the same purpose served by the § 19-121.04(A) process. *See id.* at 403 ¶ 43. In both cases, the purpose is to verify whether a measure has sufficient support to appear on the ballot. But once a measure is placed on a ballot, § 19-121.04's process—including any related *Mussi* challenges—is over.

Section 19-121.04(A) does not deal in certainties; its proxy process determines whether the number of signatures "appears to be" sufficient for an initiative's placement "on the ballot." A.R.S. § 19-121.04(B). "Undoubtedly, the legislature chose this method because the Secretary and the county recorders would struggle to verify every signature on multiple initiative efforts during an election cycle's compressed time frame." *Mussi*, 255 Ariz. at 406 ¶ 57 (Timmer, J., dissenting in part). This Court should not extend § 19-121.04 past its purpose as an approximation of whether an initiative has sufficient support to appear on the ballot. The Initiative will appear on the ballot, so the § 19-121.04 process *Mussi* described is over.

B. Permitting post-printing challenges under § 19-121.04 risks serious harm.

Section 19-121.04's process is a threshold before "the secretary of state shall submit [proposed amendments] to the vote of the people." Ariz. Const. art. XXI, § 1. After Arizonans vote on an initiative on their ballots, the process is without meaning. That is because the signature requirement's purpose is "to make certain that the subject matter of the petition is of interest to a sufficiently large segment of the electorate such as would entitle the measure to a place on the ballot and justify the expense of printing and publicity required for submission of it to a vote of the people." *Kromko v. Superior Court*, 168 Ariz. 51, 60–61 (1991) (cleaned up). Thus, "in case of doubt … there is less danger to the rights of the people in incurring this expense to the state than in delaying the electorate from promptly deciding whether they do or do not want the measure." *Renck v. Superior Court*, 66 Ariz. 320, 328 (1947).

Said another way, the danger posed by allowing an initiative that may lack sufficient support to go to the voters for decision is far less than the danger posed by permitting an initiative to appear on the ballot but later nullifying votes cast thereon because the initiative lacked qualifying

signatures. In the former scenario, the voters still have their say. If the initiative truly lacks sufficient support, the popular vote will reflect that. The only "harm" is the already incurred expense of ballot printing and publicity materials.

The latter scenario, in contrast, risks serious harm to fundamental constitutional rights and public perception of the judiciary and election integrity. If an initiative is deemed invalid for failing to satisfy § 19-121.04 *after* it appears on the ballot, citizens who voted on that initiative will have their votes discarded. That is disenfranchisement, plain and simple. To top it off, because doing so will require judicial intervention in some fashion, it risks creating a perception that the judiciary is interfering in elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."). The Court should decline to expose our democratic institutions and processes to these serious dangers.

II. A.R.S. § 19-121.04's application is constitutional in all but close cases.

If the Court reaches the constitutionality of A.R.S. § 19-121.04, it should conclude that the statute can be applied constitutionally in most cases.

A. The Constitution establishes a bright-line test for voter-initiated constitutional amendments, which is subject to reasonable regulation.

The Arizona Constitution reflects a "tradition of direct popular legislation" and establishes the people as a "source of legislation." *Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors*, 108 Ariz. 449, 451–52 (1972). Thus, "fifteen percent [of qualified electors] shall have the right to propose any amendment to the constitution." Ariz. Const. art. IV, pt. I, § 1; *see also id.* art. XXI, § 1 ("[A]ny elector or electors" can file "any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen percent of the total number of votes for all candidates for governor in the last preceding general election," and "the secretary of state shall submit such proposed amendment or amendments to the vote of the people at the next general election ….").

The right to initiate constitutional amendments "is subject to reasonable regulation." *Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 14 (2018). Thus, the legislature may adopt a law regulating the right so long as "the

legislation does not unreasonably hinder or restrict" that right and "reasonably supplements [its] constitutional purpose." *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 5 (1972).

On the other hand, narrowing the ambit of "an unambiguous constitutional definition," is an impermissible restriction. *State v. Roscoe*, 185 Ariz. 68, 71 (1996). Statutes "may not diminish clearly-expressed constitutional rights to correspond to our (or to the legislature's) perception of the people's intent." *Id.* at 73.

In short, the Legislature may pass legislation safeguarding the "right" of fifteen percent of the State's electors "to propose any amendment to the constitution," but it cannot diminish that right. Ariz. Const., art. IV, pt. I, § 1(2).

B. A.R.S. § 19-121.04 is a practical proxy for the constitutional requirement, and it does not infringe constitutional rights in most cases.

A.R.S. § 19-121.04 "provides the method for calculating the number of valid signatures to qualify an initiative for the ballot after … the certification of each county recorder." *Mussi*, 255 Ariz. at 402 ¶ 35 (cleaned up). That statute requires the Secretary to subtract from the "total number of eligible signatures":

1. All signatures that were removed pursuant to § 19-121.01, subsection A, paragraph 1.
2. All signatures that were found ineligible by the county recorders and that were not subtracted pursuant to paragraph 1 of this subsection.
3. After determining the percentage of all signatures found to be invalid in the random sample, a like percentage from those signatures remaining after the subtractions performed pursuant to paragraphs 1 and 2 of this subsection.

A.R.S. § 19-121.04(A).[2] This "random sample method" is the "yardstick" used to measure whether an initiative has gained sufficient support to appear on the ballot. *Save Our Pub. Lands Coal. v. Stover*, 135 Ariz. 461, 463 (1983).

There are practical reasons for the statute's method. This Court has recognized the possibility of "time pressures … such that the county recorders cannot verify every signature before the date the election ballots must reach the printers." *Id.* at 464. Thus, the Attorney General agrees with President Petersen and Speaker Toma that, in many cases, "[s]ection 19-121.04 reasonably supplements the constitutional purpose" of the initiative

[2] *Mussi* determined that step one includes challenges to "the registration of circulators pursuant to § 19-118(F)" and step two includes "signatures adjudicated ineligible due to challenges brought by individuals" pursuant to § 19-122(C). 255 Ariz. at 402–03 ¶¶ 36, 42.

process by providing an efficient method for signature verification. Petersen & Toma Br. at 6 (cleaned up).

But where errors in the required verification method create a "yardstick" that prevents initiatives that achieve support from fifteen percent of the State's electors from appearing on the ballot, the method "diminish[es] clearly-expressed constitutional rights." *Roscoe*, 185 Ariz. at 73. That is because "fifteen percent [of qualified electors] shall have the right to propose any amendment to the constitution." Ariz. Const. art. IV, pt. I, § 1(3).

Double-counting is one such verification-method problem. As this Court has recognized, "at least with respect to deducting signatures found invalid by county recorders and then using the same number as the numerator in determining the invalidity rate," § 19-121.04's methodology "seems to permit 'double counting' of invalid signatures." *Mussi*, 255 Ariz. at 404 ¶ 51; *see also City of Flagstaff v. Mangum*, 164 Ariz. 395, 404 (1990) (recognizing that the statute "will still result in a percentage of the invalid signatures in the random sample being deducted twice").

The parties have not identified a case in which the "double-deduction" "counting flaw" appears to have caused the difference between

an initiative appearing on the ballot or not. *See Mussi*, 255 Ariz. at 408 ¶ 67 (Timmer, J., dissenting in part). One possible explanation is that the double-deduction makes a difference only in close cases, and until 2011, § 19-121.04 required the "examination and verification of each signature filed" in such cases. *See* 2011 Ariz. Sess. Laws, ch. 332, § 26 (1st Reg. Sess.) (removing the requirement).

Ultimately, whether double-invalidation has previously required a signature count above the constitutional minimum is irrelevant. The question is whether double-counting has unreasonably hindered or restricted "the right of the people [to] initiate" the particular initiative at issue in a given case. *Turley v. Bolin*, 27 Ariz. App. 345, 349 (1976). If the statute's required double-counting is the sole cause of a proposed initiative's failure to clear the constitutional threshold, then the statute's application would be unconstitutional.[3]

The upshot is that the Attorney General agrees with President

[3] Furthermore, when § 19-121.04 cannot be used as a shorthand, the burden and expense of proving that the initiative should be disqualified must be borne by the challengers, not the taxpayers or the government. *See Leach v. Reagan*, 245 Ariz. 430, 437 ¶ 30 (2018).

Petersen and Speaker Toma's assertion that history suggests that the double-invalidation issue "cannot be said to unreasonably hinder the right to initiative" in the typical case. Petersen & Toma Br. at 10. But when the signature count is so close that double-invalidation makes the difference between an initiative appearing on the ballot or not, § 19-121.04 no longer has utility as a "yardstick" for the fifteen-percent constitutional requirement. Applying the statute "to disqualify signatures under these circumstances would unreasonably hinder or restrict the Committee's (and the people's) constitutionally guaranteed right to engage in the initiative process." *Leibsohn v. Hobbs*, 254 Ariz. 1, 8 ¶ 29 (2022).

CONCLUSION

Whatever outcome the Court reaches in this case, it should reaffirm that petition challenges using § 19-121.04's methodology must be completed by the start of the ballot-printing process. And to the extent the Court reaches the statute's constitutionality, it should acknowledge that its signature-verification methodology can be applied in a constitutional manner in all but the closest cases.

RESPECTFULLY SUBMITTED this 27th day of September, 2024.

KRISTIN K. MAYES, ARIZONA
ATTORNEY GENERAL

By /s/ Joshua G. Nomkin
Hayleigh S. Crawford
Nathan T. Arrowsmith
Joshua G. Nomkin
OFFICE OF THE ATTORNEY
GENERAL
2005 N. Central Ave.
Phoenix, Arizona 85004-1592

Attorneys for Amicus Curiae
Arizona Attorney General Kristin K. Mayes