

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

APRIL SMITH, NIRA LEE, and
JOSHUA DAVIDIAN, qualified
electors,

Plaintiffs/Appellants,

v.

ADRIAN FONTES, in his capacity as
the Secretary of State of Arizona, et al.,

Defendants/Appellees,

MAKE ELECTIONS FAIR PAC, a
political committee,

Real Party in Interest.

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

Maricopa County Superior Court
No. CV2024-019846 and CV2024-
019880 (consolidated)

BRIEF OF *AMICI CURIAE* KEN BENNETT AND HELEN PURCELL

FILED WITH THE CONSENT OF ALL PARTIES

Dated: September 27, 2024

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IDENTITY AND INTEREST OF AMICI CURIAE

Ken Bennett and Helen Purcell respectfully submit this brief as Amici Curiae in support of Real Party in Interest Make Elections Fair PAC.

Ken Bennett was the Arizona Secretary of State from 2009 to 2015. He also served in the Prescott City Council between 1985 and 1989, and was a member (and later President) of the Arizona State Board of Education from 1992 through 1998. In 1998, he was elected to the Arizona State Senate, where he served as the Senate President from 2003–2007. He was later re-elected to the Senate in 2022, where he currently represents Arizona’s 1st legislative district.

Helen Purcell served seven terms as the Maricopa County Recorder from 1989 through 2016. In that capacity, she was directly involved as a party in the landmark United States Supreme Court case *Purcell v. Gonzales*, as well as multiple Arizona Supreme Court cases involving Arizona’s election laws and procedures.

As former elected officials, Amici have decades of experience with election administration, and are highly familiar with the practical realities of running Arizona elections. Their expertise will help the Court understand the logistical uncertainty, frustration, and confusion that will result if election challenges are permitted to proceed after the ballot printing deadline. Amici are also interested in ensuring and promoting voter confidence, especially with respect to the effectiveness of their votes in the upcoming general election.

To be clear, however, Amici take no position on the merits of Plaintiffs’ challenge to the Make Elections Fair Arizona Act (“Prop 140”), nor on the underlying wisdom of the initiative from a policy perspective. Rather, Amici’s arguments are strictly limited to the legal and practical consequences that support the superior court’s mootness determination.

All parties consented to the filing of this brief. ARCAP 16(b)(1)(A). No party or its counsel authored this brief, in whole or part. ARCAP 16(a).

INTRODUCTION

In Arizona elections, timing is critical. Because of the web of strict deadlines and procedures, election officials have long understood that all pre-election disputes concerning a voter initiative’s validity must be resolved by the time the Arizona Secretary of State (the “Secretary”) prints the voter publicity pamphlet and county election officials print the final ballots. This hard stop is essential to effective election administration, as voters will have already begun the process of early voting.

Nevertheless, nearly five weeks after the ballot printing deadline, Plaintiffs request that this Court upend decades of precedent and invalidate Prop 140— notwithstanding that Prop 140 is on the ballot, Uniformed and Overseas Absentee Voting Act (“UOCAVA”) ballots were sent out on September 21, 2024, and early voting begins on October 9, 2024. This request is contrary to Arizona law, and should be rejected.

First, Plaintiffs’ action is moot. Courts have consistently upheld the principle that pre-election challenges must be resolved before the ballot printing deadline. And as of August 23, 2023, the Secretary has instructed county election officials to print the initiative on the official ballot. Thus, regardless of the underlying merits, this litigation must now come to an end and voters should be given the opportunity to decide whether to approve Prop 140.

Second, as a practical matter, invalidating Prop 140 after voting has already begun would result in electoral chaos and damage voter confidence in the efficacy of their votes. Accordingly, the Court should affirm the superior court’s decision.

ARGUMENT

I. Plaintiffs’ Challenge Became Moot After the Ballot Printing Deadline Passed.

For decades, the rule in Arizona has been simple: “to avoid the problem of mootness, actions must be brought in sufficient time to allow the court to *make a decision before absentee ballots must be printed.*” *Korte v. Bayless*, 199 Ariz. 173, 174 (2001) (emphasis added), *holding modified on other grounds by Molera v. Hobbs*, 250 Ariz. 13 (2020). However, “[i]f the time pressures are such that the county recorders cannot verify every signature before the date the election ballots must reach the printers, all doubts as to validity should be resolved in favor of sustaining the signatures, and the initiative should be placed on the ballot.” *Save Our Pub. Lands Coal. v. Stover*, 135 Ariz. 461, 464 (1983).

In other words, all pre-election disputes—regardless of the underlying merits—must be resolved before the ballot printing deadline. If an election contest is “not finally determined in time before the absentee balloting begins for the general election,” that contest is “moot and should be dismissed” *Rapier v. Super. Ct. of Greenlee Cnty.*, 97 Ariz. 153, 156 (1964); *see also Kromko v. Super. Ct. In & For Cnty. of Maricopa*, 168 Ariz. 51, 57 (1991) (“[D]isputes concerning election and petition matters must be initiated and heard in time to prepare the ballots for absentee voting to avoid rendering an action moot”).

For election administration, adhering to this hard deadline is critical. “In election matters, time is of the essence” *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998). Among other reasons, that is because “[e]lection cases generally are characterized by accelerated schedules because of statutory requirements and the imminence of the elections themselves.” *McDowell Mountain Ranch v. Vizcaino*, 190 Ariz. 1, 5 (1997); *cf. Miller v. Bd. of Supervisors of Pinal Cnty.*, 175 Ariz. 296, 301 n.1 (1993) (cautioning that “[i]n election years all courts must expect contests and challenges to nominating petitions” and that these matters should be handled “quickly and efficiently”).

Specifically, “when any elector or electors file with the [Secretary] any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen [percent],” the Secretary has a mandatory duty to

“submit such proposed amendment or amendments to the vote of the people at the next general election.” Ariz. Const. art. XXI, § 1. He must also “transmit to each clerk a certified copy of the official title, the descriptive title and the number of each measure and proposed amendment to the constitution to be voted on at the ensuing regular general election” at the same time he transmits a certified copy of each candidate’s name. A.R.S. § 19-125(A).

Likewise, election officials are also held to strict deadlines by which early ballots must be mailed out to voters. *See id.* § 16-543(A) (providing that UOCAVA ballots must be “transmitted no later than the forty-fifth day before the election”); *id.* § 16-545(B)(1) (requiring officer charged with duty of preparing ballots to “[p]repare the official early ballot and deliver a sufficient number to the recorder or other officer in charge of elections not later than the thirty-third day before the election”). Thus, the ballot printing deadline is carefully chosen to ensure that ballots are finalized sufficiently in advance of these statutory timelines.

In this general election cycle, that deadline has long since passed. Although no party unduly delayed in litigating this challenge to Prop 140 at the outset, as of August 23, 2023, county election officials have already printed the initiative on the official ballot. And as of September 21, 2024, election officials have transmitted early ballots to UOCAVA voters, and will be mailing early ballots to early voters on October 9, 2024. *See* 2023 Elections Procedures Manual, 2023–2024 Election

Calendar, at 29–30.¹ In other words, at this stage, the proverbial genie is out of the bottle. Thus, according to this Court’s precedent, because Prop 140 is on the ballot, the voters should decide its ultimate fate. *Stover*, 135 Ariz. at 464.

This conclusion is also supported by the very statute under which Plaintiffs originally sought to “prohibit[] the [Secretary] from certifying or printing any general election ballot that includes [Prop 140].” [Verified Compl., Prayer for Relief at E.] Under A.R.S. § 19-122(C), “[i]n addition to contesting the validity of an initiative or referendum, any person may seek to enjoin the secretary of state or other officer from *certifying or printing the official ballot* for the election that will include the proposed initiative or referendum measure and to *enjoin the certification or printing of the ballot*.” (Emphasis added).

Had the Legislature wished to extend litigation beyond this point, such as allowing plaintiffs to enjoin election results, it would have said so directly. *See State Farm Mut. Auto. Ins. Co. v. White*, 231 Ariz. 337, 341 ¶ 14 (App. 2013) (courts “will not read into a statute something which is not within the manifest intent of the legislature as indicated by the statute itself”). And because a “court may not enjoin an administrative board after the time the law imposes a mandatory duty upon it to perform the act,” *Hunt v. Super. Ct. In & For Navajo Cnty.*, 64 Ariz. 325, 329 (1946),

¹ Available at https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf.

it is simply too late for this Court to grant Plaintiffs' requested relief. This action is now moot.

II. Permitting Plaintiffs' Challenge to Proceed Past the Ballot Printing Deadline Would Result in Mass Voter Confusion.

In addition to this legal reality, Prop 140 is on the general election ballot that every full-ballot voter will receive. To nullify votes that are cast—as Plaintiffs have argued—would almost certainly cause electoral chaos. At this point, Arizona voters would already have received the publicity pamphlet, which contains a copy of the title and text of Prop 140, the form in which Prop 140 will appear on the ballot, its official and descriptive titles, the arguments for and against the initiative, and the legislative council analysis, among other things. *See* A.R.S. § 19-123(A)–(B) (requiring the Secretary to “post the publicity pamphlet on [his] website as soon as is practicable after the pamphlet is printed and [to] mail one copy of the publicity pamphlet to every household that contains a registered voter . . .”). UOCAVA voters have also already received their ballots, and other early voters are likely in the process of conducting their own research and considering whether the electoral changes proposed by Prop 140 should be adopted into state law.

Because Prop 140 is already on the ballot, it would be fundamentally unfair to permit voters to cast lawful ballots for or against the initiative, and then later prohibit election administrators from counting their votes *post hoc*. *Cf. Harris*, 193 Ariz. at 414 (“[I]n election disputes, [courts] consider fairness not only to those

challenging a ballot measure, but also to those devoting effort and funds to place a proposition on the ballot, and fairness to the thousands of citizens who signed petitions and collected the signatures.”); *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993) (similar).

Indeed, it is this fundamental notion of fairness—as well as the likelihood of voter frustration and confusion—that justified the United States Supreme Court’s reasoning in *Purcell*, which “discourages courts from creating or altering election rules close to elections to avoid voter confusion.” *Mi Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 985 (D. Ariz. 2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5(2006)); *Republican Nat’l Comm. v. Dem. Nat’l Comm.*, 140 S. Ct. 1205, 1206–77 (2020) (per curium); *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1031 (D. Ariz. 2022) (“[F]ederal courts should avoid changes in law that may cause voter confusion.”), *aff’d sub nom. Lake v. Fontes*, 83 F.4th 1199 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1395 (2024).

Although Plaintiffs’ request for relief does not directly implicate *Purcell*, its principles are instructive. Specifically, *Purcell* recognizes that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4. That is because “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* at 4–5. Indeed, the risk of voter confusion will only

increase “[a]s an election draws closer.” *Id.* at 5. And given the risk that “all electors who voted in the general election for this particular [initiative] could be disfranchised”—or, at a minimum, perceive that to be the case—it is simply unreasonable to subject voters to such confusion and frustration this close to an election. *See Rapier v. Super. Ct. of Greenlee Cnty.*, 97 Ariz. 153, 155 (1964).

Under the Arizona Constitution, the Secretary is also required to accurately publish the text of all initiative petitions in the publicity pamphlet. Ariz. Const. art. XXI, § 1; *see also* Ariz. Const. art. IV, Pt. 1 § 1(11); A.R.S. § 19-123(A) (providing the Secretary is required to prepare a publicity pamphlet when “ordered by the legislature, or by petition under the initiative and referendum provisions of the constitution, to submit to the people a measure or proposed amendment to the constitution”). This pre-election requirement is mandatory, and “is just as important as requiring the petition to be signed by a certain number of electors, and indeed, perhaps, more so.” *Kerby v. Griffin*, 48 Ariz. 434, 447, 454 (1936), *abrogated on other grounds by Fann v. State*, 251 Ariz. 425 (2021). To avoid inhibiting the Secretary’s ability to follow these requirements once an initiative is included in the pamphlet and sent to voters—as is the case with Prop 140—any dispute regarding an initiative’s constitutionality should at least be resolved before the earlier of publicity pamphlet publication or the ballot printing deadline to avoid voter confusion.

* * *

In sum, both legally and as a practical matter, the ballot printing deadline constitutes the end of Plaintiff's initiative challenge. No matter how meritorious, nothing permits Plaintiffs to inject significant confusion into the electoral process by calling into question votes that will have been lawfully cast. Accordingly, whether Prop 140 becomes the law of the land is now a question that should be left to the voters. *Ingram v. Shumway*, 164 Ariz. 514, 519 (1990) (“[E]lection, the ultimate weapon of democracy, is favored where any doubt exists.”).

CONCLUSION

For the foregoing reasons, this Court should affirm the superior court's decision and let the voters decide Prop 140.

RESPECTFULLY SUBMITTED this 27th day of September, 2024.

SNELL & WILMER L.L.P.

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