IN THE SUPREME COURT

STATE OF ARIZONA

SETH LEIBSOHN, *et al.*, Plaintiffs/Appellants, v. KATIE HOBBS, in her capacity as the Secretary of State of Arizona, Defendant/Appellee, and VOTERS' RIGHT TO KNOW, a political committee, Real Party in Interest/Appellee.	No. CV-22-0204-AP/EL Maricopa County Superior Court No. CV2022-009709

REPLY BRIEF OF APPELLANTS

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com
STATECRAFT
LAW · GOVERNMENT · CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
Counsel for Plaintiffs/Appellants

Appellants respectfully submit this Reply to the Answering Brief of Voters' Right to Know (the "Committee").

I. Each Circulator Registration for Each Ballot Measure Must Be Sworn and Notarized

A. The Statutory Text Forecloses the Committee's Concept of Unnotarized Partial or Updated Registrations

Must a paid or non-resident circulator of a statewide ballot measure petition register for each petition drive he or she joins? The Committee's answer to that question—upon which the sufficiency of the initiative petition in support of the "Voters' Right to Know Act" (the "Initiative Petition") pivots—is a resounding "sort of." The conception of A.R.S. § 19-118 that the Committee contrives—which envisages an initial sworn and notarized "full-blown registration," Comm. Br. at 12, coupled with a series of subsequent, unnotarized partial registrations—cannot survive any fair reading, let alone a strict construction, of the statutory text.

Arizona law requires that all circulators of statewide initiative petitions who are compensated for their services or who are not Arizona residents to register with the Secretary of State prior to obtaining signatures. "The committee that is circulating the petition shall collect and submit the completed registration applications," A.R.S. § 19-118(A), and a strictly compliant registration has five distinct facets. *Id.* § 19-118(B).

As the statutory structure—and subsections (B)(2) (requiring identification of the specific ballot measure) and (B)(4) (requiring disclosure of the sponsoring committee's

address) especially—imparts, each registration is premised on and conjoined to the specific petition drive denominated in the registration form. By yoking a registration to an identified committee that acts as the circulator's agent for service of process, the statutory regime ensures that circulators are "available for court proceedings if the signatures they gather are challenged." *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 19 (2021) ["*Leach II*"].

Recognizing this inevitability, the Committee parts ways with the trial judge in *Protect Our Arizona v. Hobbs*, CV-22-0203-AP/EL, who concluded that a single registration prospectively envelopes all future campaigns for which the circulator may work, even if that causes litigants relying on stale registrations to serve subpoenas on long-defunct committees associated with unrelated bygone initiative campaigns. The Committee prudently distances itself from that facially implausible construction, *see* Comm. Br. at 14 n.3, and seemingly acknowledges that paid and non-resident circulators must have registered (in some form) for ***this*** Initiative Petition specifically as a condition precedent to collecting signatures.

The Committee's position, however, appears to be that while previously registered circulators must register anew for this initiative, they need not submit a "full-blown registration application (affidavit included)." Comm. Br. at 12. The novel dichotomy excogitated by the Committee between initial "full-blown registrations" and later partial, amended or quasi registrations eludes any textual basis. The statute bespeaks one—and only one—concept of a "registration," and it includes all five elements enumerated in

Section 19-118(B). The notion that a circulator (or the Secretary) can assemble a cognizable registration by piecing together selected permutations of subsection (B)(1)-(B)(5) is not sustainable under any model of statutory interpretation, and certainly not the strict construction rubric that controls here. *See* A.R.S. § 19-102.01(A); *Leach II*, 250 Ariz. at 576, ¶ 20 (although Secretary could allow for circulators to de-register, the de-registrations had no legal effect on circulator's obligations). Stated another way, there is no such thing (legally speaking) as an amended, partial or "updated" registration consisting of something less than all five components of Section 19-118(B).

Struggling to unearth some textual sustenance for its theory, the Committee emphasizes that there are no "temporal requirements" for circulator registrations. *See* Comm. Br. at 15. Preliminary, Appellants have never contended that circulators are under a continuing obligation to, for example, update a telephone number or email address. Conversely, the Committee appears to concede that because registrations are measure-specific, a circulator's retention by a new ballot measure campaign necessitates some form of an additional registration. Rather, the Committee appears to be observing that the statutorily prescribed affidavit form makes no representations concerning the time period that it encompasses. *See* Comm. APP008. **That is incorrect**. The affidavit avers to the circulator's eligibility, which is contingent upon the absence of certain offenses within a discrete five-year look-back period. *See* A.R.S. § 19-118(D)(1). The relevant election

laws of which the circulator certifies understanding likewise evolve concomitantly with the launch of new ballot measure campaigns.

More broadly, a temporal reference point derives from the inherent attributes of the notarization. An affidavit confirms the veracity of facts set forth *in that specific document* and *at the moment in time* the affidavit is sworn and notarized. In other words, an affidavit accompanying a circulator registration verifies the contents of only that ***specific*** registration. Critically, even the Committee acknowledges that "the affidavit cannot logically attest to the accuracy of future updates to a circulator's registration," Comm. Br. at 14. A corollary, of course, is that the contents of the challenged circulators' ***subsequent*** registrations—including their eligibility and understanding of election laws—were not verified by an affidavit "signed . . . before a notary public," A.R.S. § 19-118(B)(5).[1] An unnotarized registration is not only facially non-compliant, but negates the Legislature's express objective of ensuring that all items of information in a registration are corroborated by a sworn, notarized affidavit. *See* 2019 Ariz. Laws ch. 315, § 3; *contrast Leach v. Reagan*, 245 Ariz. 430, 439, ¶ 41 (2018) ["*Leach I*"] (tolerating inaccuracies in

[1] Curiously, the Committee takes umbrage at the Appellants' characterization that the circulators' new registrations effectively "attached" an earlier affidavit supporting their initial registration. *See* Comm. Br. at 10 n.2. But that is precisely the arrangement the Circulator Portal facilitates. According to State Elections Director Kori Lorick, "update[s]" to a registration on the Portal are digitally (if not physically) complemented by "a notarized affidavit of eligibility . . . that is dated earlier, and in some cases, many months earlier." Lorick Decl. ¶ 13, Comm. APP017.

registrations because, under statute then in effect, registrations were not "made under oath").

At bottom, it apparently is undisputed that circulators must register for each ballot measure petition they carry. To square the proverbial circle, however, the Committee argues that previously registered circulators can discharge this obligation by submitting essentially a new, partial registration that includes the information required by subsections (B)(1) through (B)(4)—but not the notarized affidavit mandated by subsection (B)(5). This notion of an interstitial, quasi-registration is foreign to the text of A.R.S. § 19-118(B), which recognizes only one incarnation of a "registration": a submission that complies strictly with all five provisions. As is often the case in the ballot measure context, "present law is inflexible and dualistic on this point," and the Committee "cannot fault . . . [initiative] opponents for taking advantage of those rules." *Grosvenor Holdings v. City of Peoria*, 195 Ariz. 137, 141, ¶ 14–15 (App. 1999).

B. The Elections Procedures Manual Does Not and Could Not Permit Unnotarized Registrations

The Committee seeks refuge in the Secretary of State's edicts, which it proclaims carry "the force of law." Comm. Br. at 9. It is necessary, however, to disentangle several distinct legal precepts and documentary materials that the Committee melds to prop-up this argument.

First, the Secretary of State's office is not an independent fount of law. It is an axiom of constitutional government that "[t]he legislature has the exclusive power to declare what the law shall be.' In contrast, the executive branch's duty is to carry out the policies and purposes declared by the Legislature." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997) (citation omitted)). While the Secretary may—with the Governor's and Attorney General's consent—furnish interpretative elaborations in the official Elections Procedures Manual ("EPM"), "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach II*, 250 Ariz. at 576, ¶ 21. Similarly, the Committee's *ipse dixit* that "the process chosen by the Secretary to implement § 19-118 is presumed to comply with th[e] statute," Comm. Br. at 10, misstates the law. The case the Committee cites affirms a **factual** presumption that an agency is actually carrying out the duties assigned to it by the Legislature. *See Verdugo v. Ariz. Indus. Comm'n*, 108 Ariz. 44, 48 (1972). There is no "presumption" of any kind that attaches to an agency's interpretations of law. *See Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 561, ¶ 28 (2018) (statutory provisions categorically "prohibit[] courts from deferring to agencies' interpretations of law"). The attributes of legally sufficient circulator registrations are dictated by A.R.S. § 19-118, as construed by this Court—not by the Secretary.

Second, the EPM does not address the question now confronting the Court—*i.e.*, whether subsequent circulator registrations for new measures must be supported by a

notarized affidavit—***at all***. Tellingly, the Committee hardly references the EPM's text, relying heavily instead on a declaration from State Elections Director Kori Lorick. But there is no such thing as rulemaking by declaration. To the extent Ms. Lorick's submission describes, as a factual matter, the Circulator Portal's design, it is unobjectionable. But it is not a cognizable source of legal authority and is not probative of whether the portal's specifications align with A.R.S. § 19-118(B).

Nor can the EPM's contemplation of an online Circulator Portal salvage the Committee's argument. The EPM does not—and could not—subdelegate to the Secretary alone a statutory delegation vested jointly in the Secretary, Governor and Attorney General. The EPM permits the Secretary to ministerially implement provisions of the EPM itself; it does not license her to promulgate binding guidance outside the confines of A.R.S. § 16-452. *See Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020) (cautioning that "the Secretary must follow a specific procedure in promulgating election rules"). Simply put, if the plain text of A.R.S. § 19-118 mandates that each registration for each measure be supported by a notarized affidavit (and it does), this directive could never be validly abridged in the EPM—and certainly not via a government contractor's poor web design.

C. The Committee's Interpretation Would Vitiate the Legislature's Intent to Ensure All Registrations Are Sworn and Notarized

The commands of strict compliance are not contingent upon the perceived "fairness" of the outcomes they ordain, *see Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380,

384 (1992) (that strict application of the law "may make [petition] proponents' task more difficult does not provide a sufficient basis to excuse a failure to comply"), and the Committee relied on the Secretary's computer configuration choices at its peril, *see Robson Ranch Mountains, L.L.C. v. Pinal County*, 203 Ariz. 120, 130, ¶ 38 (App. 2002). To the extent "troubling . . . consequences," Comm. Br. at 15, may result, however, circulator Yusuff Olowoeshin is an odd choice to illustrate the Committee's argument. According to the Committee, his signatures are challenged because he "updated his address without uploading a new affidavit." *Id.* In fact, Mr. Olowoeshin initially registered (with an affidavit) as a circulator on June 11, 2021. He subsequently took affirmative steps to ***de-register***, and filed a series of new registrations (including for this Initiative Petition), without ever buttressing their contents with a notarized affidavit—although it was technologically feasible for him to do so because he first registered before September 29, 2021. *See* Exhibit 134 at 71; Exhibit 147 at 78; Comm. APP020. According to the Committee, this haphazard skein of submissions somehow constitutes strict compliance with A.R.S. § 19-118(B). If any party's interpretation can be said to derogate the Legislature's objectives in the service of distorting the statutory text, it is the Committee's.

II. A Unit Number Is a Necessary Element of a Complete Address

Where applicable, an apartment or unit number is an indispensable component of a "residence address," A.R.S. § 19-118(B)(1), and its omission from the registration form renders the registration not strictly compliant as a matter of law.

The Committee is correct that the term "residence address" it not defined in Title 19, but the Court of Appeals' formulation relies on the United States Postal Service's general rubric, and is logically sound. *See* U.S. Postal Service Pub. 28, *Postal Addressing Standards* § 213 (June 2020) ("Secondary address unit designators, such as APARTMENT or SUITE, are required to be printed on the mailpiece for address locations containing secondary unit designators"); *Ruiz v. Lopez*, 225 Ariz. 217, 221, ¶ 14 (App. 2010) ("complete address" must "includ[e] the apartment number"). The Committee struggles to articulate a cogent critique of *Ruiz*'s reasoning, other than to note that the case did not feature election laws. But even in this context, "address" traditionally denotes an apartment or unit number as an attribute of a full street address. *E.g.*, A.R.S. § 16-152(A)(3) (voter registration record must contain "[t]he complete address of the registrant's actual place of residence, including . . . apartment or space number"); *cf.* Ariz. Op. Atty. Gen. No. I87-145 (R87-171) (citing Section 16-152(A)(3) when analyzing requirements for recall petition signatures).[2]

Just as a street name without a numbered address is legally insufficient, *see Whitman v. Moore*, 59 Ariz. 211, 228–29 (1942) (requiring "residence number" even in substantial compliance context), the designation of merely a large apartment complex or hotel is an inadequate metric of location. *See Ruiz*, 225 Ariz. at 220, 221 ¶¶ 11, 15 (rejecting

[2] The Court did not resolve this question in *McKenna* for the simple reason that no party asked it to do so.

assumption that "the letter carrier or apartment manager would know [recipient] or be able to find her"). Notably, the Committee is unable to proffer any plausible rationale for why the legal "address" of someone who resides in a multiunit structure would ***not*** include a unit number.

The notion that a unit number must be disclosed "only if such number is necessary to ensure that the individual could be contacted or questioned," Ruling at 8, is unsustainable for at least three reasons.

First, this conditional "necessity" qualifier tempers a rule of strict compliance into a malleable inquiry better suited to the substantial compliance test. The premise of strict compliance is that the omission of any constitutive element of an informational item (for example, neglecting to specify a year when writing a date) renders it legally insufficient ***as a matter of law***. *See McKenna*, 250 Ariz. at 472, ¶ 16 (finding signatures were not strictly compliant because they "did not contain complete dates"). Whether or to what extent the error precipitated deception, confusion or other negative externalities is immaterial. *See Arrett v. Bower*, 237 Ariz. 74, 80, ¶ 20 (App. 2015) (failure to print correct serial number on petition was disqualifying, despite absence of evidence that serial number had been "hidden or obscured"); *Comm. for Preservation of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 250, ¶ 12 (App. 2006) (same result despite absence of evidence that misstep "hindered electors' ability to comprehend the petition"). In other words, if an address includes a unit number, the failure to specify it is fatal.

Second, the trial court's approach excises from the term "address" any objectively discernible legal parameters; what is and is not a compliant "address" can be determined only retrospectively based on individualized proof of failed attempts at "contact." This construct reduces what had been a settled term of law into an *ad hoc* product of happenstance; what would otherwise be an insufficient address apparently would become adequate if, for example, a petition challenger happens to knock on the right apartment door or encounters a knowledgeable mailman or helpful bellhop. The trial court's reasoning also spawns numerous unanswered questions: what constitutes an attempt at contact? How many times and through what methods must a challenger try to reach a circulator? Is there any particular time window in which the outreach must occur? What is the determinant of a failed "contact" attempt (*e.g.*, undeliverable mail)? The trial court's formulation also lacks an identifiable logical terminus. If a unit number can be omitted, why not the street number? A return to the familiar contours of strict compliance obviates these perplexities. A "residence address" must, as a matter of law, include the applicable unit number, and "it is not 'nit-picking' to require compliance" with this straightforward principle. *W. Devcor v. City of Scottsdale*, 168 Ariz. 426, 432 (1991).

Third, the trial court's holding inverts the burden of proof regime that controls even petition challenges governed by the substantial compliance standard. Customarily, when a petition proponent's misstatement or omission of required information is remediable, it is incumbent upon the proponent—not the challenger—to make the factual showing

necessary to rehabilitate the petition. *See McKenna*, 250 Ariz. at 474, ¶ 28 (trial court "may rely on the information in the record"—whether in the nature of extrinsic evidence or contextual evidence in the petitions—to restore the signatures); *Forszt v. Rodriguez*, 212 Ariz. 263, 268, ¶ 22 (App. 2006) (petition proponents could adduce "independent proof of proper compliance with the underlying statutory requirements").

Thus, even if the sufficiency of the challenged circulator registrations depended on factual questions of the circulator's "reachability" (and it does not), it was ***the Committee's*** burden to make the requisite showing. Although the Committee furnished evidence that the Committee could send parcels to circulators "at multi-unit locations without using their unit numbers," Comm. Br. at 18, that argument requires the Court to substitute a mailing address for the statutory requirement of a "residence" address. *See Lohr v. Bolick*, 249 Ariz. 428, 433–34, ¶ 22 (2020) (mailing address not a substitute for circulator residence).

In short, the trial court's reconstruction of the term "address" into a protean and individualized concept dependent on *post hoc* showings by initiative opponents of whether an individual "could be contacted or questioned" is logically unsound, precedentially unsupported, and dissonant with the imperative of "a bright-line rule easily ascertainable by all interested parties." *Pioneer Trust Co. v. Pima County*, 168 Ariz. 61, 66 (1991).

Finally, a word about temporary addresses lacking a unit number. The Committee observes that the "temporary address" field was manufactured by the Secretary. But consistency must work both ways. If the Committee can rely on the Secretary's Circulator

Portal configuration to rescue statutorily deficient circulator registrations, then it must strictly comply with fields the Secretary has added to the registration form.[3] Conversely, if the Secretary's administration of the registration form is not legally binding, neither is her design of the Circulator Portal. But whatever deference is afforded the Secretary cannot change issue-by-issue to accommodate the Committee's momentary needs.

III. Remedy

The Secretary has stated that, to implement the Court's rulings, her office requires an order specifying a number of signatures to deduct from the Initiative Petition (before applying the voter registration rate received from the County Recorders). *See* Secretary's Notice Regarding Final Judgment (Aug. 9, 2022).

The Committee, though, asks this Court **not** to include a definitive number in its ruling and, instead, to remand to the trial court for further proceedings. The problem with this request is that it "runs out the clock" on the ballot-printing deadline of 5:00 p.m. on August 25, 2022. A late remand may well prevent the judiciary from finalizing litigation before ballots are printed.

---

[3] Ms. Lorick pronounces that "Arizona law does not require" the temporary address, Comm. APP014 n.1. Declarations are not suited for expounding legal arguments, and the Secretary cannot have it both ways. If her improvident design of the Circulator Portal determines petition proponents' legal obligations, then so too must her formulation of the registration form.

The ostensible rationale for the Committee's objection to the to the Opening Brief's appendix is puzzling. The appendix is merely an aggregation of information drawn directly from—and supported with pincites to—the record. The Committee notably does **not** controvert its accuracy, instead lamenting it as an "invasion into the trial court's fact-finding role." Comm. Br. at 21. Appellants are not asking the Court to "find" facts, but rather only to acknowledge facts already in the record. *See State v. Boteo-Flores*, 230 Ariz. 551, 554, ¶ 10 (App. 2012) ("[I]n the absence of conflicting facts and inferences, remand is unnecessary.").

Given the immense time pressures governing statewide ballot access litigation, it is amply appropriate for the Court to conduct the straightforward and largely ministerial task of specifying the number of signatures to deduct from the Secretary's current count. That number should reflect the total drawn from the appendix to the Opening Brief, **plus** the 3,442 signatures invalidated by the trial court's amended ruling. (Those signatures are itemized in the attached appendix, with pincites to the record.) Together, the two appendices permit the Court to specify the number of signatures disqualified (if any) by its rulings, as the Secretary requested.

CONCLUSION

The Court should reverse the judgment of the trial court in relevant part, and order the Secretary, prior to applying the invalidity rate calculated by the county recorders, to

deduct the signatures identified in the Appellants' appendices from the total number of signatures remaining on the Initiative Petition.

RESPECTFULLY SUBMITTED on this 21st day of August, 2022.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Appellants

Appendix — Record Evidence of the Number of Invalid Signatures

ID No.	Circulator Name	Date Registered	Objection No. 4(a) (Non-Residential -- Permanent)	Objection No. 4(b) (Non-Residential -- Temporary)	Relevant Page in Exhibit 147[1]	Images of Non-Residential Address[1]	Relevant Page in Amended Mikitish Ruling
AZ44152	Beganovic Nik	2022-02-28		774	8	Exhibit 7	9
AZ45995	Davis Kat	2021-11-10	169		24	Exhibit 25	9
AZ71250	Garcia Michel	2021-11-16	33		35	Exhibit 39	9
AZ67032	Maggi Angela	2021-09-27	756		62	Exhibit 64	9
AZ93853	Stanley Bonnie	2021-10-11	1,653		99	Exhibit 114	9
AZ47217	Woods Cory	2021-09-22	57		115	Exhibit 128	9
			2,668	**774**			

[1] ***See also*** **Joint Pretrial Statement (Aug. 10, 2022) at 2-3 (listing factual stipulations)**