

**SUPREME COURT OF ARIZONA**

APRIL SMITH, et al.,

Plaintiffs/ Appellants,

v.

ADRIAN FONTES,

Defendant

and

MAKE ELECTIONS FAIR PAC,

Real Party in Interest.

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

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

**MAKE ELECTIONS FAIR PAC'S ANSWERING BRIEF**

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## INTRODUCTION

The Make Elections Fair Arizona Act is on the ballot. Under longstanding precedent, that means Plaintiffs' lawsuit to keep the Initiative off the ballot is moot, and became moot a month ago, when ballots were printed.

Even if the case were not moot, Plaintiffs could disqualify the Initiative only by double-invalidating petition signatures through a statute that, as applied here, violates the clear text of the Arizona Constitution. It does so by requiring the Committee to collect valid signatures from more than 15% of the qualified electors, even though the Constitution unambiguously says 15% is enough—a provision the framers adopted to avoid such legislative manipulation.

Regardless, the Court could not and should not countenance the remedy Plaintiffs seek: an order throwing out the votes Arizonans cast for the Initiative. Plaintiffs call that remedy “modest.” Far from it. No Arizona court has ever ordered such a remedy, and this Court should not be the first.

The superior court's judgment should be affirmed.

## BACKGROUND

On July 3, the Committee filed an estimated 584,124 signatures with the Secretary. On July 26, the Secretary deemed 559,379 signatures eligible for verification by the county recorders, randomly selected a 5% sample, and sent it to the recorders for verification.

Also on July 26, Plaintiffs filed this lawsuit under A.R.S. §§ 19-118(F) and 19-122(C). Plaintiffs alleged the Initiative violated the separate-amendment rule in Article 21, Section 1 of the Arizona Constitution, and that the petition summary violated A.R.S. § 19-102(A). [IR-1 ¶¶ 6-11, 125-38.] Additionally, Plaintiffs challenged 295,263 petition signatures, based on 23 different objections. [*Id.* ¶¶ 24-124.]

As relevant, Plaintiffs sought (1) “[i]njunctive or mandamus relief requiring the Defendant [Secretary] *from placing the Act on the general election ballot*” based on Plaintiffs’ legal challenges, and (2) “[i]njunctive or mandamus relief prohibiting the [Secretary] from *certifying the legal sufficiency of the Initiative Petition pursuant to A.R.S. § 19-121.04, or from*

*certifying or printing any general election ballot that includes”* the Initiative. [*Id.*, Demand ¶¶ D–E (emphases added).]<sup>1</sup>

The trial court set an expedited case schedule, ordering that Plaintiffs’ separate-amendment and summary challenges be fully briefed by August 7 and argued on August 8. [IR-16.] The court also set a two-day trial on Plaintiffs’ signature challenges for August 12–13. [*Id.*]

To further expedite the signature challenge, the trial court appointed a special master charged with making factual findings regarding validity. [IR-32 at 3–4.] Special-master proceedings ran from August 5 to 8, and the special master filed her report on August 8. [IR-46.]

Meanwhile, the parties briefed and argued Plaintiffs’ separate-amendment and summary challenges, which the court rejected on August 9. [IR-50.] Plaintiffs immediately appealed to this Court [IR-48], which promptly entered a scheduling order [IR-53]. The Court noted an August 22

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<sup>1</sup> The Arizona Free Enterprise Club and three individuals (“AFEC”) simultaneously filed a separate lawsuit, also challenging the Initiative on separate-amendment grounds. The suits were consolidated [IR-22], but AFEC’s involvement ended after this Court rejected their sole claim [IR-78].

“ballot printing deadline,” directed the Secretary to “advise the Court of the last day to decide this matter,” and ordered expedited briefing. [*Id.*]

While the parties briefed that appeal, the counties completed their review of the 5% sample, and trial proceeded on Plaintiffs’ signature challenges. As noted, Plaintiffs’ Complaint challenged 295,000+ signatures based on 23 objections (with subparts).

Objection 21 concerned alleged duplicates and originally challenged 44,239 signatures. [*See* IR-2-8.] The trial “strategy [Plaintiffs] employed” was to try to prove the objection categorically through a summary witness and successive, work-in-progress summary exhibits. [Trial Tr., Day 3, 64:16-25.] By trial’s end, Plaintiffs had narrowed their duplicate objections to roughly 38,000. [*See* IR-79 at 2.] But the court overruled them. [IR-62 at 7.]

Altogether, the court sustained objections to 16,705 signatures, and overruled objections to 53,731. [*Id.*] Because the remaining signatures would far exceed the 383,923 minimum, legal questions regarding calculations under A.R.S. § 19-121.04 needed not be addressed, but the parties “reserved all rights and arguments” related to those calculations. [*Id.* at 8 n.6.] The court ordered the Secretary to “certify the measure for the ballot” and entered judgment for the Committee. [*Id.*]

Plaintiffs appealed the same day [IR-63], and this Court entered a scheduling order the day after [IR-69]. Again, the Court noted the “ballot printing deadline,” directed the Secretary to “advis[e] the Court of the last day to decide this matter,” and ordered expedited briefing. [IR-69 at 1-2.]

On August 19, under A.R.S. § 19-121.04(A)-(B), the Secretary certified the Initiative for the ballot.

The evening of August 21, the Court remanded the signature challenge to the superior court. [IR-75.] Focusing on the duplicates challenge, the Court ordered “the trial court to examine the Objection 21 exhibits and determine whether the exhibits prove any duplicate signatures by clear and convincing evidence” and “then proceed accordingly.” [*Id.* at 2.] Plaintiffs’ counsel immediately advised the superior court and, “[i]n light of tomorrow’s ballot printing deadline [August 22], ... respectfully request[ed] any hearing time Judge Moskowitz has available tomorrow for this matter.” The superior court set a hearing for the next morning.

Early on August 22, both parties filed trial memoranda. [IR-71, -73.] At the hearing, Maricopa County’s counsel stated “the ballot printing deadline was changed from 11:59 p.m. [August 22] to August 23, 2024 at 6:00 a.m.” [IR-74 at 3.]

Plaintiffs' counsel then asked the court to examine all Objection 21 exhibits that day. [*Id.*] When the court explained "the practical impossibility of doing so," Plaintiffs' counsel tried unsuccessfully to notice and then recuse the trial judge. [*Id.* at 4.]

Counsel for the Senate President and House Speaker appeared to be heard on the constitutionality of A.R.S. § 19-121.04, which the Committee had challenged as applied in this case. [*See id.* at 1-2.] The court set a status conference for September 3. [*Id.*]

Around 4 p.m. on August 22, Plaintiffs filed an Emergency Petition for Special Action in this Court. Plaintiffs argued the superior court abused its discretion by "ruling that it [would] not review Plaintiffs' exhibits as to duplicates" that same day "in light of the ballot printing deadline," and asked this Court to "find ... that Plaintiffs have met their burden by clear and convincing evidence and that the initiative fails to qualify for the ballot." [Pet. at 1.] Plaintiffs' cover email "request[ed] the Court's resolution of the Petition" the same day, "in light of the ballot printing deadline."

Without ordering a response, the Court issued a decision order on August 23, denying relief but ruling the ballot-printing deadline "does not end the matter." [IR-79 at 4.] Instead, "[t]he trial court must continue with

determining whether the Initiative is supported by a sufficient number of qualified signatures,” and “[i]f the court disqualifies the Initiative, the court should issue an injunction precluding any votes for the measure from being counted.” [*Id.*]

The Committee moved for reconsideration on August 28, while resuming trial-court proceedings. On September 4, the trial court appointed a new special master to examine the alleged duplicates. [IR-92.] Between September 9 and 17, the special master examined the alleged duplicates, eventually finding 37,657 [IR-105 at 3], in addition to 17 identified by the first special master [*see* IR-46] – 15% fewer than Plaintiffs originally challenged.

On September 16, this Court granted in part the Committee’s reconsideration motion. [IR-100.] The Court “vacated” its “directive that ‘[i]f the [trial] court disqualifies the Initiative, the court should issue an injunction precluding any votes for the measure from being counted.’” [*Id.* at 1–2.] Plaintiffs could “request[] such an injunction or similar remedy,” and the Committee could “argu[e] ... Arizona courts lack the authority to grant such a remedy under Arizona law.” [*Id.* at 2.] The Committee could also ask the trial court to dismiss the case as moot. [*Id.*]

The superior court held an all-day evidentiary hearing on September 18. By then, the parties had narrowed the issues to: (1) whether the double-invalidating of signatures required by A.R.S. § 19-121.04 is unconstitutional (and whether the Committee waived the argument that it is); (2) whether the case is moot; and (3) whether Arizona law forbids an injunction preventing votes cast for the Initiative to count.

During the hearing, Plaintiffs filed (but never served) an amended complaint, purporting to add the county boards of supervisors as defendants and seeking an injunction forbidding them or the Secretary to canvass votes for the Initiative. [IR-107 ¶ 19 & Demand ¶¶ F-G.] The parties' experts both testified that the statutory double-counting requirement is mathematically indefensible. [9/18/24 Tr., 38:2-22; 67:16-68:6.] The Committee's expert testified this double counting required the Committee to collect signatures from 15.2% of the qualified electors. [*Id.* at 53:3-6.] And the court heard extensive argument on the constitutional, mootness, and remedy issues. [*Id.* at 99:1-234:9.]

On September 19, the trial court ruled for the Committee on all three issues. The court dismissed "the Plaintiffs' underlying § 19-122(C) action ... as moot as of August 23, 2024, the ballot printing deadline." [IR-108 at 7.]

Alternatively, the court determined that “the ‘double counting’ of invalid signatures mandated by A.R.S. § 19-121.04 is unconstitutional as applied under the Arizona and United States Constitutions, such that the Committee has a sufficient number of valid signatures necessary for the Initiative to be presented to the people on the November ballot.” [*Id.*] And again “[a]lternatively,” the court concluded it “lacks the authority to grant the injunction requested by Plaintiffs and their Amended Complaint seeking such relief is dismissed as futile and/or moot.” [*Id.*] This appeal followed.

In the meantime, Arizonans began casting general-election ballots that include the Initiative. Pursuant to A.R.S. § 16-543(A), early ballots were transmitted to absent uniformed services voters and overseas voters beginning September 21. As of the filing of this brief 1,148 of these ballots have been returned in Maricopa County alone.

### **STATEMENT OF THE ISSUES**

1. Did the trial court correctly conclude this case became moot on the ballot-printing deadline?

2. Did the trial court correctly conclude § 19-121.04 violates the Arizona and U.S. Constitutions as applied, so the Initiative has enough valid signatures?

3. Did the trial court rightly determine that Arizona law does not authorize a court to enjoin the canvassing of votes for the Initiative?

### STANDARD OF REVIEW

“All legal and constitutional questions are reviewed de novo.” *State v. Harrod*, 218 Ariz. 268, 279, ¶ 38 (2008). Factual findings are reviewed for clear error. *Valley Med. Specialists v. Faber*, 194 Ariz. 363, 366, ¶ 9 (1999).

### ARGUMENT

#### **I. The case became moot on August 23, the ballot-printing deadline.**

The superior court correctly dismissed “Plaintiffs’ underlying § 19-122(C) action ... as moot as of August 23, 2024, the ballot-printing deadline.” [IR-108 at 7.] The court acknowledged the absence of “statutory authority for the proposition that petition challenges must end before ballot printing begins.” [*Id.* at 5.] But the court correctly noted that “case law ... supports such a ‘bright light’ end to such litigation,” quoting *Save Our Public Lands Coalition v. Stover*, 135 Ariz. 461, 464 (1983), for the proposition that “[i]f the time pressures are such that the county recorders cannot verify every signature before the date the election ballot 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.” [*Id.*] “Here,” the trial court

noted, “the time pressures were such that not every duplicate signature was reviewed and verified by clear and convincing evidence before the August 23, 2024 ballot printing deadline,” meaning “the underlying action is moot as of that deadline.” [*Id.*] The court was right.

Time and again in initiative-petition challenges, this Court has “emphasized that, 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, ¶ 3 (2001) (initiative petition challenge not barred by laches where the challengers sued with “sufficient time to render a decision before absentee balloting began”). *Accord Harris v. Purcell*, 193 Ariz. 409, 412, ¶¶ 13–15 (1998) (similar and laches barred a challenge where, by the trial date, “ballots containing Proposition 201 had been printed, and replacement ballots without the Proposition could not be printed in time for early voting”); *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993) (laches barred complaint filed “only days before absentee ballots were to be printed for statewide absentee voting”); *Kromko v. Supe. Ct.*, 168 Ariz. 51, 57 (1991) (challenge not barred by laches where filed a month and a half before absentee balloting began).

The Court has applied the same rule in candidate challenges since at least 1946. See *Hunt v. Super. Ct.*, 64 Ariz. 325, 331 (1946) (candidate-petition challenge brought after “[t]he preparation and printing of the official ballot” had begun was “moot”); *Rapier v. Super. Ct.*, 97 Ariz. 153, 155–56 (1964) (“primary election contest [became] moot” by the date “absentee ballots for the general election would have to have been delivered,” even “without taking into consideration a reasonable time for printing the ballots”).

Such a bright-line rule makes sense. “[A] case becomes moot when an event occurs ... which renders the relief sought either impossible or without practical effect on the parties to the action.” *Sandblom v. Corbin*, 125 Ariz. 178, 182 (App. 1980). So, an action that seeks to keep an initiative measure *off* the ballot becomes moot once ballots are printed with the measure *on* the ballot.

Here, Plaintiffs brought this lawsuit under A.R.S. § 19-122(C). That statute allows “[a]ny person [to] contest the validity of an initiative,” but it authorizes only one remedy: “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.”

That is the relief Plaintiffs sought. Their Complaint asked for “[i]njunctive or mandamus relief prohibiting the [Secretary] from certifying the legal sufficiency of the Initiative Petition pursuant to A.R.S. § 19-121.04, or from certifying or printing any general election ballot that includes initiative measure I-14-2024.” [IR-1, Demand ¶ E.] Pursuant to A.R.S. § 19-121.04(A)–(B), the Secretary certified the legal sufficiency of the Initiative on August 19. And on August 23, the counties began the process of printing general-election ballots containing the Initiative. The Initiative *is* on the general-election ballot. So the relief that § 19-122(C) authorized and Plaintiffs sought ceased to be possible as of August 23, and the case became moot as of that date. *See Sandblom*, 125 Ariz. at 182; *see also Korte*, 199 Ariz. at 174, ¶ 3.

Not only does such a bright-line rule make sense, it is necessary in a case like this. As a legal matter, it avoids the possibility of “disenfranchis[ing]” voters. *See, e.g., Rapier*, 97 Ariz. at 155 (“[T]he final determination of a primary election contest must be completed in time to prepare the ballots for the general election, including the absentee ballots .... If such were not the rule, all electors who voted in the general election for this particular office could be disenfranchised.”); *Bd. of Supervisors of Maricopa Cnty. v. Super. Ct.*, 103 Ariz. 502, 504 (1968) (quoting *Rapier*).

As a practical matter, litigants and courts in petition challenges need to know at the outset how long they have to resolve them. From the beginning of this lawsuit, the parties, the first special master, the trial court, and this Court all strove to resolve the case before the ballot-printing deadline. That is why special-master and trial-court proceedings were so compressed, why briefing schedules here and below were so expedited, why Plaintiffs repeatedly urged the trial court and this Court to resolve their claims before the ballot-printing deadline—and (presumably) why this Court twice asked the Secretary to “advis[e] the Court of the last day to decide this matter” [IR-53, -69], and why the Secretary twice responded with the ballot-printing deadline. *Everyone* operated on the understanding—grounded in decades of precedent—that this case had to be resolved before ballot printing began.

The resulting rush had practical consequences. For example, Plaintiffs challenged 140,000+ signatures gathered by 118 circulators based on circulator objections. In two weeks, the Committee got declarations from 89 circulators to save about 90% of the challenged signatures. But two weeks were all the Committee had—and the Committee ended up losing 4,044 signatures because it could not obtain declarations from 12 more circulators

who did not appear at trial. The Committee's opportunity to defend the circulator challenges was limited and has passed. But allowing this litigation to continue beyond the ballot-printing deadline has given Plaintiffs an extra five weeks to try to disqualify the Initiative on other grounds. Such a one-way ratchet is unfair.

And the rule that petition challenges end when ballot printing begins is necessary as a matter of simple fairness. Had *Plaintiffs* prevailed before the deadline and ballots were printed without the Initiative on them, the litigation would be over. The obverse must also be true. Because the *Committee* prevailed before the ballot-printing deadline and the Initiative is on the ballot, the litigation must be over.

None of Plaintiffs' contrary arguments is persuasive. Plaintiffs argue (at 23) the Court's decision in *Renck v. Superior Court*, 66 Ariz. 320 (1947), established "the firmly held rule ... that a challenge becomes moot only once the measure is adopted at the election." Not so. Regarding the possibility that a citizen may not be able "to have his injunctive suit heard on its merits and determined between the time" an initiative petition was "filed and the 'dead line' date for printing the measure upon the general election ballot," the Court said the "remedy" entailed "mak[ing] a highly persuasive

*preliminary* showing of the facts relied upon such as would justify a court of equity in issuing a restraining order *to keep the measure off the ballot* until the hearing had been completed.” *Renck*, 66 Ariz. at 327 (emphases added). But the “plaintiffs [had] failed to request the trial court to enjoin the placing of the measure on the ballot,” and in any event the case “became moot with the adoption of the measure by the people and its incorporation into the Constitution by the Governor’s proclamation.” *Id.* at 328.

*Renck* only confirms this case is moot. Plaintiffs sought but failed to obtain an injunction to keep the Initiative off the ballot, so ballots were printed with the Initiative on them. That event mooted the case by *Renck*’s logic, because the injunction *Renck* contemplated thereafter was unavailable. That Arizonans are *currently voting* for (or against) the Initiative underscores the point. *Renck* emphasized that “[t]he electors ... should be, and are, the final arbiters,” so “[t]his investigation must now yield to the election rather than the election to the investigation.” 66 Ariz. at 328. That the election was complete in *Renck* but is underway here does not change the analysis: Arizonans *have* voted ballots that contain the Initiative, and full-ballot voters in the general election *will* vote ballots with the Initiative.

Plaintiffs try (at 25–26) to distinguish the Court’s long line of cases stating that challenges must be resolved before ballot printing begins on grounds that they involved candidates or laches. Plaintiffs (at 26) concede “[b]allot printing no doubt matters for laches.” But ballot printing wouldn’t matter if Plaintiffs were right that petition challenges need only be resolved by Election Day. And that, of course, is not what the cases say. Instead, they all involve the same principle applicable here: disputes about what goes on the ballot must be resolved before ballots are printed. That is why mootness concerns cause laches to bar petition challenges that cannot be *decided* before ballots are printed, *see Harris*, 193 Ariz. at 412, ¶¶ 13, 15; *Mathieu*, 174 Ariz. at 458–69; *cf. Kromko*, 168 Ariz. at 57; *Korte*, 199 Ariz. at 174–75— not just challenges that are not *filed* “with reasonable diligence,” as Plaintiffs contend (at 26). Once ballots are printed, it is too late to keep measures off them.

Plaintiffs also try (at 23–25) to distinguish *Stover*, 135 Ariz. at 454. They argue (at 25) *Stover* “has no bearing on the question here,” because it was not a challenge brought by private litigants. That makes no difference. County verification and private litigation both test petitions’ sufficiency. There is no principled reason—and Plaintiffs provide none—to conclude county verification must end before ballot printing begins, but private litigation can

continue indefinitely. In neither case should initiative proponents be penalized by delay.

One final point regarding timing. Plaintiffs twice (at 1, 27) fault the Committee for Plaintiffs' failure to prove their 295,000+ signature challenges before the ballot-printing deadline, complaining the Committee advanced defenses and objected to Plaintiffs' evidence. But *Plaintiffs* bear the heavy burden of proving their claims. The Committee cannot be penalized for defending the Initiative.

The superior court correctly dismissed this case "as moot as of August 23, 2024, the ballot printing deadline." [IR-108 at 7.] This Court should affirm and stick with its longstanding rule to that effect.

## **II. A.R.S. § 19-121.04 is unconstitutional as applied.**

If the Court reaches the merits, it should affirm the superior court's conclusion that A.R.S. § 19-121.04 is unconstitutional as applied here. This Court has twice acknowledged that, by first deducting signatures found invalid by the counties and then applying the validity rate, § 19-121.04 requires the "'double counting' of invalid signatures." *Mussi v. Hobbs*, 255 Ariz. 395, 404, ¶ 51 (2022) (citing *City of Flagstaff v. Mangum*, 164 Ariz. 395,

404 (1990)). Neither decision considered or decided the constitutionality of double counting.

Here, the superior court correctly concluded that, because of this double counting, § 19-121.04 requires the Initiative to have the support of 15.2% of Arizona's qualified electors to qualify, and therefore violates the Arizona Constitution's clear command that 15% of the electors be able to propose constitutional amendments via initiative. [IR-108 at 6.] Additionally, both parties' experts testified that the double-counting § 19-121.04 requires is mathematically indefensible. So, the superior court correctly found the statute lacks any rational basis, and violates both the Arizona and U.S. Constitutions as applied. [*Id.*]

**a. The Arizona Constitution.**

The Court's "primary purpose when interpreting the Arizona Constitution is to 'effectuate the intent of those who framed the provision.'" *State v. Mixton*, 250 Ariz. 282, 290, ¶ 28 (2021) (citation omitted). "When the language of a provision is clear and unambiguous, we apply it without resorting to other means of constitutional construction." *Id.* (quotation omitted). The Court "may examine [provisions'] history, if necessary, to determine the framers' intent." *Id.*

Here, the constitutional text is unambiguous. It twice confirms *only 15%* of qualified electors are needed to propose a constitutional amendment by initiative petition. *First*, Article 4, Part 1, Section 1(2) provides that “[u]nder [the initiative] power ... *fifteen percent* [of the qualified electors] shall have the right to propose any amendment to the constitution.” *Second*, Article 21, Section 1 reaffirms that “[a]ny amendment or amendments to this constitution may be proposed ... by initiative petition signed by a number of qualified electors *equal to fifteen percent* of the total number of votes for all candidates for governor at the last preceding general election.” Because the text is unambiguous, the Court need go no further to discern its meaning.

Yet the history only confirms the framers’ clear intent. The framers described this numerical threshold in plain terms to prevent future mischief whereby “legislatures that were not in sympathy with the easy amendment of our constitution ... might put [the requirement] at any percent above [15%]” through legislation. *See* The Records of the Arizona Constitutional Convention of 1910 at 689–90 (John S. Goff, ed. 1991) (“Goff”). As explained below—and as the Legislative leaders admit—that is *exactly* what the Legislature managed to do here through § 19-121.04.

Here, as construed in *Mussi*, 255 Ariz. at 402-03, ¶¶ 38-42, § 19-121.04 requires three steps to determine the number of valid signatures:

1. Start with the signatures deemed eligible for verification by the Secretary under A.R.S. § 19-121.01.
2. Deduct the signatures found invalid by the county recorders in the 5% sample, as well as the signatures invalidated by the court.
3. Multiply by the county validity rate.

Signatures invalidated by the counties are deducted twice—first directly, and then by application of the validity rate (which is calculated by dividing the county invalidations by the total county sample). The Court has twice acknowledged this fact. *Mangum*, 164 Ariz. at 404; *Mussi*, 255 Ariz. at 404, ¶ 51. As discussed below, this math is always indefensible—a point on which the parties’ experts agree. [9/18/24 Tr., 67:16-68:6.]

The constitutional problem here is that the application of § 19-121.04—and only the application of § 19-121.04—would cause the Initiative to fall below the constitutional minimum of 15% (here, 383,923 signatures). The chart below illustrates the problem. If the signatures the counties invalidated *are* deducted at step 2a, then because of the double-counting required by § 19-121.04, the Initiative falls below 383,923. But if county invalidations *are*

*not* deducted at 2a (i.e., are not double-counted), then the Initiative exceeds that minimum:

1	Signatures found eligible by Secretary	559,379	559,379
2a	Remove signatures invalidated by counties	(6,616)	---
2b	Remove signatures struck before remand	(16,705)	(16,705)
2c	Remove all alleged duplicates at issue	(37,674)	(37,674)
3	Multiply by Validity Rate	*0.76345	*0.76345
	<b>Total</b>	<b>380,491</b>	<b>385,542</b>

The double-invalidation at step 2a that § 19-121.04 requires makes the decisive difference in this case, forcing the Committee to submit valid signatures from *15.2%* of the electors, even though the Constitution says *15%* is enough. The expert evidence on that math is uncontroverted [9/18/24 Tr., 67:16–68:6.], as the superior court’s factual finding reflects [IR-108 at 6]. In this case, § 19-121.04 raises the constitutional minimum number of signatures legislatively—precisely what the framers of our Constitution sought to avoid. Goff at 689–90. It violates the Constitution as applied.

The President and Speaker’s brief (which Plaintiffs join, at 17) illuminates the constitutional defect. The President and Speaker repeatedly acknowledge (at 2, 4, 5, 8) that § 19-121.04’s double counting means the Committee had to submit valid signatures from 15.2% of electors. That should be the end of the matter, because again, the constitutional provisions

that § 19-121.04 offends (Article 4, Part 1, Section 1(2) and Article 21, Section 1) unambiguously set the constitutional minimum at 15%. A statute that, as applied, raises the minimum from 15% to 15.2% violates the Constitution's "clear and unambiguous" terms. *Mixton*, 250 Ariz. at 289, ¶ 28.

The President and Speaker nonetheless contend (at 2, 4, 5, 6, 8, 10) that because the increase § 19-121.04 requires is "small," "negligible," or "minimal," it is constitutionally permissible. Not so. The Constitution does not say *approximately* 15% of the qualified electors may propose constitutional amendments via initiative. It says that "[a]ny amendment or amendments to this constitution may be proposed ... by initiative petition signed by a number of qualified electors *equal to fifteen percent ....*" Ariz. Const. art. 21, § 1 (emphasis added). The President and Speaker essentially argue 15% is "equal to" 15.2%. But "[e]qual" means "of the same rank, degree, or value," *Equal*, New Websterian Dictionary Illustrated 298 (1912), and 15% is *not* of the same value as 15.2%. See *Dep't of Indus. Relations v. Little Mfg. Co.*, 44 So. 2d 587, 590 (Ala. 1950) (holding 8% is not "equal to" 8.16%). Close is not good enough. Moreover, the effect of the increase here is anything but "negligible." It is decisive. As shown above, it results in the

elimination of an extra 5,051 signatures and makes the difference between the Initiative's qualifying and not qualifying.

Plaintiffs attempt to back away from the President and Speaker's concessions in at least two ways. First, Plaintiffs claim (at 17-21) the literal constitutional requirement did not change. But as demonstrated above, and as the President and Speaker admit (at 2, 4, 5, 8), to clear the 15% threshold, § 19-121.04 required the Committee to collect valid signatures from more than 15% of qualified electors. That is the same as raising the threshold.

Plaintiffs quibble (at 21) with the exact number of extra valid signatures § 19-121.04 forced the Committee to collect. Admitting (at 21) that "the Committee established that 5,051 signatures should not have been deducted from its total," Plaintiffs note the Committee "needs only 3,432 signatures added back to its total to meet the minimum." In essence, Plaintiffs say § 19-121.04 forced the Committee to collect valid signatures from less than 15.2% – but still more than 15% – of the electors. But that just confirms the constitutional problem.

Second, Plaintiffs dispute (at 19-20) that double-counting signatures invalidated by the counties is dispositive, because "any category of invalidations" could force "the initiative to fall below the minimum." But

the Legislature has not directed that any other category of signatures be deducted *twice*—a “mathematically indefensible” practice that makes the difference in this case. [9/18/24 Tr., 67:16–68:6.]

Despite this, the President and Speaker argue (at 2, 6–10) § 19-121.04 “does not unreasonably hinder or restrict” the right to initiative and instead “reasonably supplements the constitutional purpose.” (Quoting *Stanwitz v. Reagan*, 245 Ariz. 344, 346–48, ¶¶ 1, 14 (2018).) They are mistaken. A statute that increases the minimum unreasonably hinders its purpose.

*Turley v. Bolin*, 27 Ariz. App. 345 (1976), illustrates the point. The Legislature had required initiative petitions to be filed five months before the general election, even though the Constitution says initiative petitions “shall be filed ... not less than four months preceding the date of the election at which the measures so proposed are to be voted upon.” Ariz. Const. art. 4, pt. 1, § 1(4). The court invalidated the statute that advanced the constitutional deadline, “necessarily reject[ing] [the] contention that by using the words ‘... not less than four months ....’ the framers of the constitution intended to provide a flexible filing standard subject to change at will by the legislature.” *Turley*, 27 Ariz. App. at 350. Instead, the court explained that the “constitutional filing limitation must be considered in the

context of the important legislative rights reserved in the people—rights which are not to be considered as being subordinate to any legislative rights vested in the legislature.” *Id.* “When considered in that context,” the court concluded “the constitutional provision must be construed as reserving a minimum filing right in the people, not subject to future derogation by the legislature.” *Id.*

The same conclusion applies with even greater force here. An earlier draft of what became Article 21, Section 1, said that an “initiative petition signed by not less than” a certain percentage of qualified electors could propose a constitutional amendment. *See Goff* at 689–90, 1062. To avoid the possibility that a future legislature, hostile to the initiative power, could raise the constitutional minimum legislatively, the delegates replaced the phrase “not less than” (the same phrase used in *Turley*) with the phrase “a number equal to.” *Goff* at 689–90. To say the least, if the murkier phrase “not less than” forbade the Legislature to move up the initiative petition filing date in *Turley*, than the unambiguous phrase “a number equal to” plainly precludes the Legislature from raising the minimum for the Initiative here.

The President and Speaker’s attempt to distinguish *Turley* only proves the constitutional problem in this case. They say (at 10) that in *Turley*, “there

was nothing a citizen could do during [the extra] one-month period to exercise his or her constitutional right to initiative,” whereas here, initiative proponents can, for example, “simply collect a small additional number of signatures (as an additional buffer).” But that is exactly the constitutional problem. The Legislature cannot require initiative proponents to “simply collect a small additional number of signatures.” The Constitution says the number of signatures initiative proponents must collect, and the Legislature is powerless to modify that requirement.

That is true for the same reason the Legislature could not create 31 legislative districts instead of the constitutionally mandated 30, Ariz. Const. art. 4, pt. 2, § 1(1), and could not require Arizonans to be 19 years old to vote even though the Constitution says they must be “eighteen years or over” to do so, Ariz. Const., art. 7, § 2(A). Any act by the Legislature that is repugnant to these unambiguous provisions would be void.

The same has been true for elections since statehood. In 1912, the Court invalidated a statute that attempted to move the date of the general election to a different date than the one the Constitution authorized. *State v. Osborne*, 14 Ariz. 185 (1912). Because the constitutional “provision is mandatory,” the Court held that “any act of the Legislature attempting to fix another and a

different time ... is, with respect to the time fixed, in conflict with the Constitution of this state and must necessarily give way." *Id.* at 206.

So too here. The Constitution fixes the signature requirement at 15%. Only the people can amend the Constitution to change that requirement—not the Legislature or the Court. Nothing in *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021), a Voting Rights Act case cited by the President and Speaker (at 7), suggests otherwise.

The Speaker and President's remaining arguments fall short. They say (at 5) "the Committee inflicted" § 19-121.04's double counting "upon itself by submitting invalid signatures," and contend (at 7, 10) initiative proponents could avoid the problem by "submit[ting] only valid signatures." AFEC's brief, meanwhile, argues (at 4-5) the Legislature required double-counting as a "penalty" for submitting invalid signatures—a claim even the legislators do not make. As a legal matter, the Legislature could not penalize proponents by invalidating valid signatures, and thus disenfranchising signers. And as a practical matter, it is impossible for initiative proponents to submit only valid signatures. The Speaker and President admitted "this type of perfection is impossible in practice." [IR-99 at 8.] For example, as Plaintiffs' sole trial witness testified, only the

counties—not proponents, and not challengers—can check for signature mismatches. [Trial Tr., Day 2, 114:4–6.] That the Speaker and President suggest the Committee should have avoided the problem the Legislature created *by doing the impossible* underscores the constitutional problem.

The Speaker and President also attempt (at 8) to justify double- invalidation on grounds that “[e]lection officials do not catch all invalid signatures, and therefore some invalid signatures necessarily slip through the cracks.” But if the counties do make mistakes, there is a process for correcting them: anyone may sue the recorders to ensure that signatures that should have been invalidated were invalidated. A.R.S. § 19-121.03(A). That “[t]here is a limited window for” county review or petition challenges, as the Speaker and President note (at 8), does not justify cutting corners. There is also a limited window for initiative proponents to defend themselves. And as the superior court explained, any time-based excuse for double- invalidating signatures collapses when (as here) litigation continues long enough to review all challenged signatures. [IR-108 at 5.] To double- invalidate signatures anyway would “undermine the integrity of the initiative process.” [*Id.* at 6.]

Finally, the Speaker and President argue (at 2, 9–10) there is no constitutional problem because 63 constitutional or statutory initiatives have made the ballot since 1990. To the extent that history is relevant, it does not show what the Speaker and President think it does. Random sampling was added to § 19-121.04 in 1977. Laws 1977, Ch. 135, § 8. As enacted, the statute introduced double-counting but also provided that if the number of valid signatures projected from the random sample was between 95% and 105% of the constitutional minimum, the Secretary would order the examination and verification of *each* signature filed. *Id.* The statute changed in various ways over the next few decades, but it was not until 2011 that this backstop was removed. Laws 2011, Ch. 332, § 26. In the 13 years since, as the Speaker and President acknowledge (at 10 n.3), just *four* other constitutional initiatives have made the ballot. Only since 2022 have signatures invalidated in individual challenges factored into certification under § 19-121.04.

The superior court correctly concluded double-invalidating signatures under § 19-121.04 here would violate the Arizona Constitution's unambiguous guarantee that 15% of the electors—here, 383,923—be able to propose constitutional amendments by initiative. [IR-108 at 7.]

### **b. The U.S. Constitution.**

The superior court was also correct that disqualifying the Initiative under § 19-121.04 would violate the U.S. Constitution. [*Id.*] When a state creates the right to initiative, “the gathering of signatures and circulating of initiative petitions are protected by the First Amendment,” *Pierce v. Jacobsen*, 44 F.4th 853, 859 (9th Cir. 2022), and “[t]he ballot initiative” is “subject to equal protection guarantees.” *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir. 2003) (citation omitted). A restriction is assumed to be severe and subject to strict scrutiny “when it significantly inhibits the ability of initiative proponents to place initiatives on the ballot.” *Pierce*, 44 F.4th at 860 (cleaned up).

Here, applying § 19-121.04 to disqualify the Initiative would severely burden the Initiative proponents’ constitutional rights. Doing so would violate the Equal Protection Clause if the statute were interpreted to give greater weight to some signatures over others. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963). Moreover, by significantly inhibiting proponents’ ability to qualify the Initiative, § 19-121.04 would infringe their First Amendment rights. *Pierce*, 44 F.4th at 859.

Even if § 19-121.04 imposed a lesser burden, it could not survive constitutional scrutiny, because there is no “rational or other basis for ‘double counting’ invalid signatures in this case,” as the superior court determined. [IR-108 at 6.] Doing so “is not essential to maintaining the integrity of [the initiative] process where its implementation ensures that an otherwise properly qualified initiative is not presented to the people.” [*Id.*] This “would undermine the integrity of the initiative process.” [*Id.*]

The Speaker and President’s arguments otherwise are unpersuasive. They cite (at 11–12) cases approving random sampling to determine whether an initiative qualifies. But neither *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), nor *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), addressed the double-invalidation of signatures. That is because the states there (Michigan and Oregon) do not double-invalidate signatures. Arizona *does*, which *does* unconstitutionally burden the initiative right.

**c. No waiver.**

Plaintiffs spend a third of their brief (at 5–17) arguing the Committee waived its constitutional arguments. It did not. Instead, as the trial court found, the Committee “expressly reserved them.” [IR-108 at 6.]

At trial, the Committee “reserve[d] all rights and arguments related to [the] calculations” involving county review and the invalidity rate [IR 62 at 8 n.6], and regarding the double-counting acknowledged by *Mussi* [Trial Tr., Day 3, 137:19–138:10; *id.* at 145:4–8]. The Committee raised the constitutional argument even though, in the trial court’s view, doing so “put the cart before the horse,” as county review continued. [*Id.* at 139:21–25.]

Further, after the trial court rejected Plaintiffs’ duplicate objections, double counting was not outcome-dispositive [IR 62 at 8], so pressing the constitutional arguments then would have amounted to asking the trial court for an advisory opinion. The Committee nonetheless preserved them in case this Court reversed. In this Court and on remand, the parties have briefed and argued these issues repeatedly.

And contrary to Plaintiffs’ assertion (at 9–16), the Court’s remand did not decide the Committee’s constitutional claims. The Court directed the trial court to “examine the Objection 21 exhibits,” “determine whether [they] prove any duplicate signatures by clear and convincing evidence,” “then proceed accordingly.” [IR-75.] Because the as-applied challenge would not obtain unless Plaintiffs’ duplicate objections were sustained, resolving the constitutional claims was part of “proceed[ing] accordingly.”

Finally, even if waiver applied here, the mathematically indefensible double-invalidation of signatures presents an issue of “statewide importance” and “constitutional dimension,” so the “public interest is better served by having the issue considered rather than deferred.” *Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482 (1986).

### **III. Arizona law forbids the injunction Plaintiffs now seek.**

In any event, Arizona law forbids the remedy Plaintiffs now seek (at 28): an injunction against canvassing votes for the Initiative.

Plaintiffs never previously sought that relief. Instead, they sued under § 19-122(C) to enjoin the Secretary from “certifying or printing any general election ballot that includes” the Initiative. [IR-1, Demand ¶ E.] That is the only relief § 19-122(C) authorizes. And contrary to Plaintiffs’ argument (at 28-30), and AFEC’s argument (at 11-13), that express statutory remedy “excludes all other ... remedies, including injunctive relief.” *Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 16 (2017); see also *Nat’l Sur. Co. v. Conway*, 43 Ariz. 480, 487 (1933). Nothing authorizes the unprecedented relief Plaintiffs now seek.

An order forbidding votes to count would violate our Constitution. *First*, it would violate the right to vote. Ariz. Const., art. 2, § 21. Again, Arizonans are already voting ballots that include the Initiative, and everyone

that votes a full ballot will vote a ballot that contains the Initiative. To nullify their votes would be textbook disenfranchisement.

*Second*, the Secretary is the only defendant before the Court who could be enjoined.<sup>2</sup> But Article 4, Part 1, Section 1(13) says “[i]t shall be the duty of the secretary of state ... to canvass the votes for and against each such measure or proposed amendment to the constitution within thirty days after the election ....” A.R.S. § 16-648(B) reiterates this requirement. The Court is powerless to suspend these mandatory duties.<sup>3</sup>

This Court’s caselaw also forecloses the remedy Plaintiffs seek. *Renck* confirmed that once a measure is submitted to the people – *as the Initiative has been* – the people decide. “The electors should be, and are, the final arbiters” in “deciding whether they do or do not want [a] measure.” *Renck*, 66 Ariz. at 328. The *Renck* Court “refuse[d] to hold that the election relative

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<sup>2</sup> County officials canvass votes too, A.R.S. § 16-643, and they aren’t parties. Plaintiffs have known about this problem for weeks but waited until September 18 to file an amended complaint and never served it on any county defendant.

<sup>3</sup> Disenfranchising Arizona voters would also violate the U.S. Constitution. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

to [a] proposed constitutional amendment was a nullity.” *Id.* This Court should do the same.

The out-of-state cases Plaintiffs cite do not suggest otherwise. *Schweickart v. Powers*, 613 N.E.2d 403, 411 (Ill. App. 1993), is a case about electing officers to the board of a nonprofit corporation and thus “clearly distinguishable” from “governmental elections.” *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006), and *Martin v. Humphrey*, 558 S.W.3d 379, 379 (Ark. 2018), are about public elections. But neither decision provides a reasoned explanation for enjoining the counting of votes. And they are outliers, at odds with longstanding, well-reasoned precedent from other jurisdictions refusing to enjoin a canvass. *See, e.g., Moyers v. Sherrod*, 525 S.W.2d 126, 127 (Tenn. 1975); *City of Honey Springs v. Templeton*, 194 S.W.2d 620, 622–23 (Tex. Ct. App. 1946); *State ex rel. Sathre v. Byrne*, 258 N.W. 121, 125 (N.D. 1934).

Enjoining the canvass would also violate Arizona public policy. The Court has long recognized “the strong public policy favoring stability and finality of election results.” *Donaghey v. Att’y Gen.*, 120 Ariz. 93, 95 (1978). An injunction ordering the election results not to reflect the votes Arizonans cast

would undermine both goals, and would all but guarantee voter confusion up to, during, and after the election.

Such an injunction would also violate “Arizona’s strong public policy favoring the initiative and referendum.” *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428 (1991). The Court long ago recognized that “the purpose of initiative petitions is partly administrative in nature,” insofar as they are merely a proxy for electoral support that voters ultimately show with their votes. *Renck*, 66 Ariz. at 328.

Finally, such an injunction would be fundamentally unfair. “In election disputes, we 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.” *Harris*, 193 Ariz. at 413, ¶ 24. To order that votes for the Initiative do not count would be unfair to the Arizonans who helped get the Initiative on the ballot, to every Arizonan who has voted for it so far, and to every voter who votes for it between now and Election Day. Plaintiffs seek equitable relief, and disenfranchising their fellow citizens would be profoundly inequitable.

## CONCLUSION

The trial court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of September, 2024.

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