SUPREME COURT OF ARIZONA

APRIL SMITH, NRA LEE and JOSHUA DAVIDIAN, qualified electors, Appellees/Plaintiffs v. ADRIAN FONTES, in capacity as the Secretary of State of Arizona, Appellants/Defendant. and 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 No.: CV2024-019880 (Consolidated)**

AMICUS CURIAE BRIEF WITH CONSENT

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INTRODUCTION

Maricopa County Recorder Stephen Richer ("Recorder"), in his official capacity, submits this *amicus curiae* brief pursuant to this Court's September 20, 2024 order and ARCAP 16(b)(1)(A). The Parties have agreed in writing that Recorder may submit this brief and therefore it is proper under ARCAP 16(b)(1)(A). Recorder is an officer of Maricopa County, a subdivision of the state, and as such also may qualify under ARCAP 16(b)(1)(B) to file this amicus. In addition, Recorder has had insufficient time to file a separate motion, but as the brief indicates, by virtue of his office he has information unavailable to the parties as therefore qualifies to file an amicus under ARCAP 16(b)(1)(C)(iii).

Recorder files this amicus brief in support of Defendant and the Make Elections Fair PAC's, ("Committee") arguing that no injunction should issue preventing the counting of the vote on Proposition 140. Enjoining Maricopa County from counting the ballots is not authorized by law, is impractical, and other remedies for relief are potentially available to Plaintiff.

STANDARD FOR REVIEW

The availability of equitable relief and equitable defenses is subject to *de novo* review. *Andrews v. Blake*, 205 Ariz. 236 ¶12 (2003).

LEGAL ARGUMENT

I. NO INJUCTIVE RELIEF PURSUANT TO A.R.S. §19-122

Plaintiffs initially sought injunctive relief pursuant to A.R.S. § 19-122(C). That statute provides that "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 …and to enjoin the certification or printing of the ballot." (emphasis added).

That request is unquestionably moot. The court should be aware that the relevant election has already begun. Not only have Maricopa County's 21,534 different ballot styles been designed, proofed, and printed, but many ballots have also been mailed out. No injunction can prevent the certification or printing of the ballots.

Moreover, beginning on September 20, 2024 ballots were mailed to military and overseas voters entitled to receive them under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).

52 U.S.C. §§ 20301-20311. And many of those ballots have been returned. As of this filing Maricopa County has sent out 8,490 UOCAVA ballots and has received back 1,148 ballots. Therefore, votes have already been cast for and against the relevant initiative. And the above numbers only represent Maricopa County. Because the Make Elections Fair proposition is statewide, the total number of ballots containing the Proposition that have already been delivered and returned is greater than the above numbers.

II. PREVENTING THE COUNTING OF VOTES IS DIFFICULT AND POSSIBLY ILLEGAL.

The Recorder now understands that the Plaintiffs seek an injunction preventing the counting and/or reporting of the vote. Such an injunction is not contemplated by A.R.S. §19-122 and such an injunction would present difficulties both practical and legal.

The practical problem is that Maricopa County's vote tabulation machines *will* tabulate the vote for this initiative. There is no mechanism of turning the tabulation function off solely for this one initiative. This presents a legal problem because once tabulated

Maricopa County may not legally destroy the public record of the vote, even a vote for an initiative the court may determine did not properly qualify for the ballot. *See generally* A.R.S. § 39-121.01, *Primary Consultants, L.L.C. v. Maricopa County Recorder*, 210 Ariz. 393, ¶12 (Ariz App. 2005) (Voter records are public records). *See also* A.R.S. § 16-616 (election officer to keep unofficial returns open for inspection of electors for six months); A.R.S. § 16-622 (unofficial results may be released). Maricopa County also cannot destroy the ballots before the statutory deadline. A.R.S. § 16-624. So, the public will vote on the initiative and the vote will be recorded, and, at least in Maricopa County (and very likely in all 15 counties), tabulated.

Furthermore, an injunction that requires Maricopa County to destroy, hide or restrict access to public information may not be legal. In A.R.S. §19-122, the legislature granted the court the power to enjoin the certification and printing of ballots. It could have, but did not, grant the court the power to enjoin the counting of votes. Following the Negative-Implication Canon (*expression unius est exclusion alterius*) the legislature has not permitted enjoining the counting of the vote. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation*

of Legal Texts 107 (2012). A.R.S. § 12-1802 also prohibits the court from issuing injunctions to prevent the exercise of a public office in a lawful manner by the person in possession. And if the voting tally is a public record, the Recorder does not see how Maricopa County can either destroy it or fail to release it. *Primary Consultants Supra.*

III. NO INJUNCTIVE RELIEF SHOULD ISSUE. OTHER RELIEF MAY BE APPROPRIATE.

As the court below noted, the request for injunctive relief to prevent the counting of the votes, since it is not authorized by any relevant statute, is an equitable request. A request for an equitable injunction can only be granted when there is no adequate legal remedy. *Santa Cruz County v. Burgoon*, 12 Ariz. 295 (1909). If there is a remedy still to be had, an adequate legal remedy exists here. A.R.S. §19-122 permits an action to contest the validity of an initiative. It does not limit the action to injunctive relief, it only limits the injunctive relief available. Here, there is going to be a vote whether the results are disclosed or not. The question for the court is will the results count? If the court finds the initiative was improvidently placed on the ballot,

and it holds that such bars it taking effect, the court can so hold, despite the initiative passing. Hiding the results or attempting to prevent the vote from being tabulated is an inartful way of arriving at the same result. And it is at odds with Arizona public policy that demands government transparency. Not counting the vote does not mean it did not happen.

Moreover, the exercise of the initiative process is a legislative act. A.R.S. Const. Art. IV, Pt. 1, § 1. State law prohibits the court from entering an injunction to prohibit a legislative act by a municipal corporation. A.R.S. § 12-1802(7). This is an indication of a public policy to permit the legislative process to continue without interference, subject to challenge on constitutional grounds after passage.

IV. HARD CASES MAKE BAD LAW

The old adage that hard cases make bad law applies here. In this case the facts regarding whether the initiative should have been placed on the ballot are disputed. The dispute was not resolved by the deadline to certify and print the ballots. To be resolved with a

high degree of certainty may not be currently possible given the election time constraints. The issue has now, at least partially, gone to the people. Recorder believes there is benefit to allowing the vote to occur and, assuming it is otherwise constitutional, to count. That is the message of *Save Our Public Lands Coalition v. Stover, 135 Ariz. 461 (1983).* Recorder submits that once the ballots are printed, the time for signature challenges must end. The battle over the initiative can continue in the public sphere, and if the initiative is successful, later challenged on constitutional grounds. To hold otherwise is to permit challenges to continue for years after elections. It is hard to justify voiding a vote of the people on the ground of insufficient signatures, when the vote clearly signals support for the measure. There is benefit to finality and respecting the will of the voters.

RESPECTFULLY SUBMITTED this 28th day of September 2024.

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