ARIZONA SUPREME COURT

APRIL SMITH, et al. Plaintiffs/Appellants, v. ADRIAN FONTES, et al. Defendants/Appellees, MAKE ELECTIONS FAIR PAC, Real Party In Interest.	No. CV-24-0222-AP/EL Maricopa County Superior Court No. CV 2024-019846 No. CV 2024-019880

BRIEF OF SENATE PRESIDENT WARREN PETERSEN AND HOUSE SPEAKER BEN TOMA

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INTRODUCTION

President Petersen and Speaker Toma hereby file their brief defending A.R.S. § 19-121.04's constitutionality.[1] It is undisputed that the Committee did not submit sufficient valid signatures under that statute, which has governed signature verification for 34 years and under which 63 statewide initiatives have qualified. The Superior Court, however, declared § 19-121.04 unconstitutional and substituted its own counting methodology that omits one of § 19-121.04's required steps, thereby crediting the Committee with more valid signatures than statutorily permitted.

This brief makes three main points. First, *City of Flagstaff v. Magnum*, 164 Ariz. 395, 404-05 (1990), and *Mussi v. Hobbs*, 255 Ariz. 395, 402-04 ¶¶35-48 (2023), which interpret § 19-121.04, are binding, and the small amount of double counting (15.2% vs. 15%) is simply a function of the invalid signatures the Committee submitted. Second, the Committee's state constitutional challenge fails because it has not proven that § 19-121.04(A)'s formula unreasonably hinders or restricts the right to initiative, and therefore the Committee did not overcome the "strong presumption supporting the constitutionality of a legislative enactment." *Gallardo v. State*, 236 Ariz. 84, 87 ¶8 (2014). Third, the Committee has not proven that § 19-121.04 violates the federal constitution.

[1] They file in their official capacities pursuant to A.R.S. § 12-1841, ARCAP 16(b)(1)(B), and this Court's September 20 Order.

ARGUMENT

Section 19-121.04 establishes a constitutionally permissible methodology for determining the number of valid signatures. This Court's review is *de novo*. *See Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 406 ¶28 (2020).

I. Section 19-121.04's Methodology, As Interpreted by *Flagstaff* and *Mussi*, Establishes a Legitimate and Constitutional Process for Determining the Number of Valid Signatures

A. Section 19-121.04's Methodology

In *Mussi*, this Court reaffirmed the methodology for calculating whether an initiative has sufficient valid signatures under § 19-121.04. 255 Ariz. at 402-04 ¶¶35-48. That procedure tracks § 19-121.04(A)(1)-(3) and harmonizes those steps with the statutory rights to challenge invalid petition sheets and signatures.

First, starting with the number of eligible signatures, subtract the number of signatures the Secretary removed under § 19-121.01(A)(1) and those successfully challenged under § 19-118(F). *Mussi*, 255 Ariz. at 403 ¶¶35, 39.

Second, subtract the number of signatures found ineligible by the county recorders' review of the 5% sample under § 19-121.04(A)(2) that were not subtracted under (A)(1). *Mussi*, 255 Ariz. at 403 ¶40. ***The Committee challenges this subtraction as unconstitutional.*** Also at the second step, subtract signatures adjudicated invalid under § 19-122(C). *Mussi*, 255 Ariz. at 403 ¶42. This step does not permit invalidating any signature more than once. *Id.* ¶49.

Third, "determine the invalidity rate by calculating 'the percentage of all signatures found to be invalid in the [previous 5%] random sample.'" *Id.* ¶¶44, 47 (quoting A.R.S. § 19-121.04(A)(3)).

Fourth, "apply[] the invalidity rate and deduct[] the number of invalid signatures from the total eligible signatures remaining." *Id.* ¶48 (citing § 19-121.04(A)(3)).

Mussi's rationale was the steps in § 19-121.04(A)(1)-(2) must be "harmoniz[ed]" with § 19-118 and § 19-122. 255 Ariz. at 403-04 ¶¶38, 43. And the invalidity rate must be in "accord with" § 19-121.04(A)(3). *Mussi*, 255 Ariz. at 404 ¶47; *see also City of Flagstaff*, 164 Ariz. at 404-05 (This "method of calculation … harmonizes the various statutory provisions, furthers the dual statutory purposes noted, and prevents unfairness to those supporting an initiative measure."). Because these rationales were necessary to the outcomes in *Mussi* and *Flagstaff*, they are not dicta. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) ("We adhere … to the well-established rationale upon which the Court based the results of its earlier decisions.").

B. The Double Counting at Issue Is Negligible (15.2% vs. 15%) and Is Attributable to the Committee's Submission of Invalid Signatures

At the September 18, 2024, hearing, the Committee called its expert. He did not (and could not) contend § 19-121.04's formula directly raises the minimum number of valid signatures above 15% of the qualified electors (383,923); instead,

as explained below, he opined the order used in the formula functions to raise the minimum by double counting (at Steps 2 and 4) a fraction of the invalid signatures identified by the counties in the 5% sample. *See* 9/18 Tr. at 45:3-17.

The expert further admitted that the double counting is not fixed but varies based on the invalidity rate. *Id.* at 48:14-22 ("Q. And so stated differently, the double counting here is not a fixed percentage, it is not that the legislature increased the minimum from 15 percent to 16 percent, it is a variable that depends directly on the validity rate of the signatures that a particular Committee submits, correct? A. That is true. It is not a fixed percentage. It introduces an increase in the amount, and the amount by which it increases is a function of the invalidity rate.").

The ultimate effect of double counting here (with a 24% invalidity rate) is only 15.2% versus 15%. *Id.* at 52:24-53:6.

Other than the mathematical consequence of minimal double counting, which the Committee inflicted upon itself by submitting invalid signatures, the Committee provided no other evidence that § 19-121.04 inhibits or restricts the right to initiative, despite it being in operation for 34 years. Its expert did not do any analysis about the actual practical burden on a committee to collect 15.2% versus 15%. *See* 9/18 Tr. at 54:13-17.

II. Section 19-121.04 Complies with the Arizona Constitution Because It Does Not Unreasonably Hinder or Restrict the Right to Initiative

Given the small and variable amount of double counting that is attributable to submitting invalid signatures, the Committee's mathematical evidence did not demonstrate that § 19-121.04 "unreasonably hinder[s] or restrict[s] the constitutional" right to initiative or fails to "'reasonably supplement[] the constitutional purpose' of the provision." *E.g.*, *Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶14 (2018) (citation omitted). The Committee therefore did not overcome the "strong presumption supporting the constitutionality of a legislative enactment." *Gallardo*, 236 Ariz. at 87 ¶8.

Section 19-121.04 "'reasonably supplements the constitutional purpose' by fostering the integrity of the process." *Stanwitz*, 245 Ariz. at 346 ¶1 (quoting *Direct Sellers*, 109 Ariz. at 5). "Ensuring that invalid petition signatures are disqualified, whether by election officers' review or individual challenges, is essential to maintaining the integrity of the process and ensuring that only properly qualified initiatives are presented to the people." *Mussi*, 255 Ariz. at 403 ¶43. Moreover, the Legislature has authority to enact laws "to secure the purity of elections and guard against abuses of the elective franchise." *Stanwitz*, 245 Ariz. at 348 ¶14 (quoting Ariz. Const. art. 7, § 12).

The fact that § 19-121.04 contains what functions as a very small double deduction for turning in invalid signatures does not defeat its proper purpose of

considering both the disqualifications by election officers' review and individual challenges to maintain the integrity of the process, *see Mussi*, 255 Ariz. at 403 ¶43, or result in an unreasonable restriction or hinderance of the constitutional right. As noted, no double counting occurs if a proponent submits only valid signatures. Any "double counting" is within a proponent's control, resulting only when a proponent submits invalid signatures.

In *Brnovich v. DNC*, the Supreme Court addressed an Arizona law prohibiting out-of-precinct voting and applied similar logic to upholding that provision under the Voting Rights Act. 594 U.S. 647 (2021). The District Court, in considering whether voting is "equally open," described the "percentage of ballots invalidated under [the out-of-precinct] policy [as] very small (0.15% of all ballots cast in 2016) and decreasing…." *Id.* at 662-63. The majority agreed that "[w]hat are at bottom very small differences should not be artificially magnified." *Id.* at 671; *see also id.* at 680-81 (0.5% was "a small disparity that provides little support for concluding that Arizona's political processes are not equally open"). Even the dissenters agreed "there may be some threshold of what is sometimes called 'practical significance'—a level of inequality that, even if statistically meaningful, is just too trivial for the legal system to care about." *Id.* at 704 n.4 (Kagan, J., dissenting).

Here, the small fraction (15.2% vs. 15%) of signatures impacted by the Committee's invalidity rate fits comfortably with what the Supreme Court rejected as too "small" to establish a process is not equally open in an analogous context.

In addition, the *Brnovich* majority cited with approval the rationale that the out-of-precinct policy avoids "encourag[ing] voters who are primarily interested in only national or state-wide elections to vote in whichever place is most convenient even if they know that is not their assigned polling place." *Id.* at 682. In other words, states have a legitimate interest in discouraging violation of their election rules.

Similarly, here the State can rationally establish a formula that discourages turning in invalid signatures. There is a limited window for county recorders to review signatures and for litigants to challenge invalid signatures, and a larger number of invalid signatures improperly pads the apparent number of signatures supporting the initiative. Election officials do not catch all invalid signatures, and some invalid signatures necessarily slip through the cracks. *Mussi*, 255 Ariz. at 394 ¶51 ("[T]he people, acting in concert with the legislature, have seen fit to accommodate the need to maintain the integrity of the initiative process with the reality of available time and personnel to create the system we have[.]").[2]

[2] The Superior Court incorrectly concluded that extending the challenge period beyond the ballot-printing deadline eliminated the legitimate interests underlying § 19-121.04. EIR 108 at 6-7. There is, however, still limited time and resources to determine if the initiative has sufficient signatures. And *Flagstaff* was not decided

In contrast, initiative proponents can check whether a signature is valid as they collect it in real-time. There is also no practical downside for a committee to turn in its signatures if it has collected more total signatures (valid and invalid) than the constitutional minimum. They therefore have misaligned incentives, which the Legislature can address through law.

As recognized in *Brnovich*, the Legislature can enact rules that encourage compliance with state law. Section 19-121.04's process does so and, as harmonized with § 19-118 and § 19-122, furthers the purpose of the constitutional requirement that an initiative have sufficient support before being placed on a ballot by establishing a relatively simple, four-step process to make a calculation and permit challenges.

In addition, the Committee did not demonstrate that the double counting ultimately biases the overall process against initiative proponents given other aspects of the legal framework, such as the presumption of validity and requiring a challenger to prove a signature invalid by clear-and-convincing evidence. *See Leach v. Reagan*, 245 Ariz. 430, 437 ¶30 (2018). The President and Speaker's trial brief demonstrated that § 19-121.04's double counting has been around since at least 1990, and during the ensuing eighteen general election cycles, sixty-three (63)

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under the time pressure of a ballot printing deadline, 164 Ariz. at 400 (noting case was moot), yet it still established the formula at issue here. *Id.* at 404-05 (formula).

statutory and constitutional initiatives have qualified. EIR 99 at 11-12.[3] This shows that in practice, the statute cannot be said to unreasonably hinder the right to initiative.

As discussed below, the Sixth and Ninth Circuits have upheld the constitutionality of Michigan and Oregon's random-sampling verification laws, which provides further support that § 19-121.04 does not unreasonably hinder or restrict the right to initiative as a matter of Arizona law. *See* Part III, *infra*.

Finally, *Turley v. Bolin* (cited by the Committee below) is distinguishable. 27 Ariz. App. 345, 348 (1976). There, the law prevented filing an initiative within five months of a general election, but the constitution permitted filing up to four months prior. There was nothing citizens could do during that one-month period to exercise their initiative right. In contrast, proponents of initiatives have multiple options to exercise their rights under § 19-121.04. They can simply collect a small additional number of signatures (as an additional buffer) or they can strike out invalid signatures as they are being collected, to reduce (or even eliminate) the double counting.

[3] The Committee's response focused on four constitutional initiatives that have qualified since 2011. This ignores seven statutory initiatives during that period, and even these numbers confirm that initiatives are qualifying for the ballot, demonstrating the Committee's failure to meet its burden under *Gallardo*.

III. The Committee's Belated Federal Constitutional Claims Fail

As a last-ditch effort, the Committee threw multiple federal constitutional claims (First Amendment, Equal Protection Clause, and *Anderson-Burdick*) into its joint pretrial statement. ER 103 at PDF p. 18. None of these claims succeeds.

In *Taxpayers United for Assessment Cuts v. Austin*, the Sixth Circuit considered a federal challenge to state law procedures for determining if an initiative had sufficient signatures. 994 F.2d 291, 294 (6th Cir. 1993). In evaluating the free speech and association challenge, the court adopted a deferential test, and stated "it is constitutionally permissible for Michigan to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure." *Id.* at 297. In evaluating the due process challenge, the court stated the applicable test is if the laws "are reasonably related to a legitimate government interest." *Id.* The court cited *Anderson v. Celebrezze* for the proposition that "reasonable and nondiscriminatory regulation of elections is necessary to ensure that elections are run fairly and honestly." *Taxpayers United*, 994 F.2d at 297 (citing 460 U.S. 780, 788 (1983)).

The final two due process challenges in *Taxpayers United* are particularly relevant: the Sixth Circuit rejected the argument that "excluding the signatures of any person who has signed the petition twice is irrational" and that "using both a

system of random sampling and using the so-called 'technical checks' produces irrational results." *Id.* at 299. The court stated, "even if the method that Michigan has chosen to canvass its initiative petitions is not the best method, as stated above, under the rational relationship analysis, a state is not required to use the best method for examining its petitions. A state is only constitutionally required to use a method that is rationally related to the legitimate interest of ensuring that an election is fair and honest." *Id.*

Similarly, in *Lemons v. Bradbury*, the Ninth Circuit refused to apply strict scrutiny to determine the constitutionality of Oregon's signature-verification sampling process for verifying signatures for a referendum petition. 538 F.3d 1098 (9th Cir. 2008). The court stated that "Oregon's important interests justify this minimal burden on the right to vote." *Id.* at 1102. The court noted that verification of petition signatures is a more cumbersome process and that there is a higher risk of fraud because "signatures are often gathered by privately hired signature gatherers who are paid a fixed amount for each signature they obtain." *Id.* at 1104. It concluded "[t]hese differences ... justify the minimal burden imposed on plaintiffs' rights in this case." *Id.* The same is true here.

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CONCLUSION

This Court should hold that § 19-121.04 is unconstitutional.

RESPECTFULLY SUBMITTED this 24th day of September, 2024.

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