

SUPREME COURT OF ARIZONA

APRIL SMITH, et al.,

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.,

Defendants/Appellees,

MAKE ELECTIONS FAIR PAC,

Real Party in Intertest.

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

Maricopa County
Superior Court
Nos. CV2024-019846
CV2024-019880
(Consolidated)

**PLAINTIFFS/APPELLANTS'
OPENING BRIEF**

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PRELIMINARY STATEMENT

This case involves an initiative that proposes to amend the Arizona Constitution but lacks enough signatures. Plaintiffs have now proven, by clear and convincing evidence and applying the statutory calculation required under *Mussi v. Hobbs*, 255 Ariz. 395 (2023), that the initiative lacks the constitutionally required minimum number of valid signatures. The initiative is ineligible to become law.

The Court must decide whether the initiative's proponents may avoid invalidity by challenging, for the first time after remand on a different issue and nearly a month into the litigation, whether the calculation required by A.R.S. § 19-121.04 is constitutional, even though the calculation would apply irrespective of this lawsuit. The Court must also determine whether the initiative is immune to challenge, or if there is no remedy, solely because the defenses its proponents advanced took the trial court past ballot printing to resolve. None of these defenses present grounds to depart from this Court's settled precedent. The initiative fails and its canvassing should be enjoined, the constitutional challenge is waived, and the case is not mooted by the passing of a deadline found nowhere in Arizona law.

BACKGROUND

Plaintiffs filed this lawsuit on July 26, 2024, challenging the validity of the initiative under A.R.S. § 19-122(C). R. 1–8. The Real Party in Interest, Make Elections Fair PAC (“the Committee”) defended. The case proceeded to trial on Plaintiffs’ circulator- and signature-based challenges, and the Committee sought to exclude Plaintiffs’ evidence of voluminous duplicate signatures that Plaintiffs maintained should be invalidated. R. 44. The trial court excluded the evidence of duplicates and entered judgment against the Plaintiffs. R. 62. Plaintiffs appealed, and on August 21, this Court reversed, directing the trial court to consider the evidence of duplicate signatures. *See* Decision Order, Case No. CV-24-0190-AP/EL (Aug. 21, 2024). The ballot-printing deadline was August 23, and when the trial court on remand declined to enter judgment by that date, Plaintiffs sought special action relief in this Court. The Court accepted jurisdiction but declined relief, directing that the case could proceed. *See* Decision Order, Case No. CV-24-0199-SA (Aug. 23, 2024).

The trial court appointed a special master to review the evidence of duplicate signatures; the special master would go on to sustain 37,657 of

the objections to duplicate signatures, finding that they were duplicates by clear and convincing evidence. R. 105–06.

By then, the Committee had finally begun to develop its argument that A.R.S. § 19-121.04 was unconstitutional as applied to it; it briefed this argument for the first time to the trial court in its August 22, 2024 trial memorandum following this Court’s remand, R. 73, added to it in an “Expedited Motion for Judgment Pursuant to Rules 52(c) and 54(c)” filed September 4, 2024, R. 91, and added to it still more (including new federal constitutional arguments) in the parties’ joint pretrial statement filed September 17, 2024, R. 103.

From their joint pretrial statement, the parties agreed that the case would turn on whether the court agreed it was proper to deduct 6,616 signatures found invalid by the county recorders before applying the validity rate:

1	Begin with 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
	Total	380,491	385,542

R. 103 at 14. If the 6,616 signatures were deducted, then the initiative would have 380,491 signatures, or 3,432 under the minimum required of 383,923. If the 6,616 were not deducted, the initiative would have 385,542 signatures, or 1,619 more than the minimum.

The court held an evidentiary hearing, during which it heard expert testimony from experts in mathematics.¹ Following the hearing, the court entered judgment against the Plaintiffs. While the court accepted the report of the special master and found that Plaintiffs had proven by clear and convincing evidence that 37,657 signatures were duplicates, the trial court entered judgment in favor of the Committee. R. 108 at 4. (The total number of duplicates invalidated would be 37,674, after adding 17 duplicate objections sustained by the prior special master in the earlier proceedings. R. 108 at 4.) The court ruled that the 6,616 signatures invalidated by the county recorders could not constitutionally be deducted before applying the validity rate, that the case was moot after

¹ In the course of the evidentiary hearing, Plaintiffs amended their complaint as of right, naming the 15 County Boards of Supervisors as defendants and requesting injunctive relief against them, as well as against the Secretary of State, specifically, to enjoin their canvass of the challenged initiative. R. 107. The County Boards of Supervisors had not been served before the trial court entered judgment.

ballot printing, and that the court lacked authority to enter injunctive relief. R. 108 at 4–7. This expedited appeal followed. R. 109.

ARGUMENT

I. The Committee’s constitutional challenge is barred under the mandate rule or waived.

The Committee knew even before this lawsuit was filed that the statute requires what the Committee now says is unconstitutional: removing signatures invalidated by the county recorders before applying the counties’ validity rate. But the Committee failed to raise its argument when it first had notice of the issue. It further failed to articulate its argument before or during the first trial. And it further failed to articulate its argument between the first trial and the filing of the Plaintiffs’ opening brief in the first appeal before this Court. Indeed, the first time the Committee outlined the general contours of its constitutional argument, even vaguely and without meaningful citation, was only *after* the Plaintiffs had already filed their opening brief in the first appeal to this Court—thereby denying the Plaintiffs an opportunity to raise in the first appeal certain legal issues that render the constitutional issue immaterial in this case. The Committee’s

constitutional argument is therefore barred under the mandate rule, or it is waived.

a. The Committee Did Not Raise the Argument When It First Had Notice of the Issues.

The calculation that the Committee now challenges is “clearly mandated” by A.R.S. § 19-121.04, has twice been upheld by published opinions of this Court, and has been controlling law since at least 1990. *Mussi*, 255 Ariz. at 404 ¶ 51; *City of Flagstaff v. Mangum*, 164 Ariz. 385, 404 (1990). The public-at-large has therefore been on notice for at least 34 years that any signatures found invalid by the County Recorders would be both deducted from the number of eligible signatures *and* incorporated into the validity rate that would then be applied to that set. If that were not enough, this Court’s published opinion in *Mussi*, upholding the statutory calculation method, was issued during the Committee’s signature-gathering period, when it should have been particularly attuned to legal issues that might affect its likelihood of qualifying for the ballot.

Importantly, the statutory calculation method would have the same effect *even if Plaintiffs had never brought this suit*. But the

Committee failed to raise their constitutional concerns at any point before the filing of this lawsuit.

b. The Committee Did Not Articulate the Constitutional Argument During the First Trial.

In the three weeks between the initiation of this lawsuit and the first trial, the Committee failed to articulate their constitutional argument. To be sure, the Committee relied heavily on federal and state constitutional arguments during this period, repeatedly railing against Arizona's strict compliance standard. *See* R. 45 at 8–9 (raising both federal and state constitutional claims). But their reaching for constitutional defenses did not extend to the issue on which they now rely.

During the evidentiary phase of the first trial, the Committee failed to offer any “expert” testimony on mathematical calculation processes; rather, that came only after this Court's remand.

True, before the first appeal the Committee told the trial court it was “reserving” its right to make a constitutional argument. *See* R. 104 at 54–55. But critically, the Committee never *made* the argument. “A party must press, not merely intimate, an argument in order to preserve it for appeal.” *Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996). A “cryptic

allusion” to a doctrine is “insufficient to raise the issue.” *Greisen v. Hanken*, 925 F.3d 1097, 1115 n.6 (9th Cir. 2019); *see also Ott v. City of Milwaukee*, 682 F.3d 552, 558 (7th Cir. 2012) (rejecting the view that “a cursory preservation of the right to assert substantive objections later is sufficient to preserve those arguments”). “[T]he argument must be raised sufficiently for the trial court to rule on it.” *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). Merely noting that one is “reserving” his right to make an argument—without actually making the argument—gives the trial court nothing to rule on. The Committee did not properly raise or preserve the constitutional issue during the first trial.

c. The Committee Did Not Articulate the Constitutional Argument Between the First Trial and the Plaintiffs’ First Opening Brief in This Court, Prejudicing the Plaintiffs.

In determining which issues to bring before this Court in the first appeal in this matter, the Plaintiffs reasonably relied on the factual record and legal arguments as they had, at that time, been developed and preserved in the trial court. And as discussed in the opening brief in the first appeal to this Court, the duplicates issues was correctly understood to be dispositive of the case as it had been presented to the Court.

If the Committee had articulated its new constitutional theory in advance of the first opening brief, even skeletally, the Plaintiffs could and would have appealed at least three additional legal issues, each of which would have been sufficient to moot the Committee's new constitutional argument. The Committee's sustained and repeated failure to provide timely notice of the nature of its constitutional argument therefore materially prejudiced the Plaintiffs.

d. The Committee Either Did Not Preserve the Constitutional Argument, or Necessarily (Albeit Impliedly) Lost the Issue, in the First Appeal.

The Committee's first attempt to articulate something vaguely resembling their current constitutional argument—and even then, not in its current form—came, belatedly, in their first answering brief in this Court. The argument did *not* appear in the Committee's statement of issues. *See generally* Ariz. R. Civ. App. P. 13(a)(6), (b)(1). Rather, their argument, if such a word is proper here, consisted of a scant three sentences:

Only through the operation of A.R.S. § 19-921.04—and only if the 6,616 signatures the counties identified were invalidated twice—could the signature count be deflated below the required minimum if Plaintiffs' alleged duplicates were invalidated. But because the legislature cannot

increase the constitutionally required number of signatures for an initiative, A.R.S. § 19-921.04 cannot constitutionally be applied to that effect. The Court should reject Plaintiffs' effort to rely on bad math to block the Initiative from the ballot when it undeniably has more than the constitutionally required number of signatures.

Ans. Br. at 27. Which constitutional clause was the statute alleged to violate? The Committee did not say. Which *constitution*, even (as the Committee now relies on both federal and state constitutional theories)? Again, the Committee did not say. What's the applicable doctrinal test and standard of review? Once again, the Committee did not say. Did any cases support the Committee's "argument," such as it is? None were cited. Where in the record was the issue developed before the Committee's first answering brief? The Committee offered no record citation, presumably because they could not cite what did not exist. *See Polanco v. Indus. Comm'n of Arizona*, 214 Ariz. 489, 492, 154 P.3d 391, 394 (App. 2007) ("Although Polanco mentions this argument in passing in his opening brief, he cites no relevant supporting authority and does not develop it further. Accordingly, we conclude he has waived this issue and do not address its merits.).

“Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is ‘controlling as to matters within its compass.’” *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 168 (1939)); *see also Jordan v. Jordan*, 132 Ariz. 38, 40 (1982) (“[O]n remand the lower tribunal has no choice but to enter a judgment which complies exactly with that which the higher court has ordered.”). Under this mandate rule, a trial court on remand may not consider matters the appellate court decided either expressly or impliedly. *Cyprus Bagdad Copper Corp. v. Ariz. Dep’t of Revenue*, 196 Ariz. 5, 7 ¶ 7 (App. 1999). The mandate rule is part of the law of the case doctrine, *Jordan*, 132 Ariz. at 40 & n.3, and it “serves two key interests, those of hierarchy and finality.” *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007).

“Most relevant here, the mandate rule means that any issue that could have been but was not raised on appeal is waived and thus not remanded.” *Edd Potter Coal Co., Inc. v. Dir., Office of Workers’ Comp. Programs*, 39 F.4th 202, 210 (4th Cir. 2022); *see also Bell*, 5 F.3d at 66 (“[T]he rule forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were

not raised in the district court.”). “The doctrine underscores the fundamental principle that litigants who choose their trial strategy, litigate accordingly, and lose, are not entitled to resurrect a previously abandoned issue.” *Sales v. State Farm Fire & Cas. Co.*, 902 F.2d 933, 936 (11th Cir. 1990). “The promotion of judicial economy—a primary concern underlying the law of the case doctrine—requires that litigants be encouraged to present all available claims and defenses at the earliest opportunity.” *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000).

The mandate rule finds consistent application against such waiver across the federal courts of appeals. *See, e.g., Est. of Cummings v. Cmty. Health Sys., Inc.*, 881 F.3d 793, 801 (10th Cir. 2018) (“Failing to raise an issue on appeal, or abandoning an issue that was initially raised, has the same consequences for that litigation as an adverse appellate ruling on that issue.”); *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (“An issue that could have been but was not raised on appeal is forfeited and may not be revisited by the district court on remand.”); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (“A party cannot use the accident of a remand to raise in a second appeal an issue

that he could just as well have raised in the first appeal because the remand did not affect it.”); *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (“It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.”).

The states apply the mandate rule this way, too. As the Washington Supreme Court observed, “we should not permit a party to ignore an issue on the first appeal only to raise the issue on remand when it becomes apparent the initially ignored issue is critical to the party’s case.” *State v. Ramos*, 184 P.3d 1256, 1260 (Wash. 2008); *see also, e.g., Scrushy v. Tucker*, 70 So. 3d 289, 304 (Ala. 2011) (“In a second appeal, a matter that had occurred before the first appeal, but that was *not raised in the first appeal*, is the law of the case.” (quotations and alterations omitted, emphasis in original)); *Judy v. Martin*, 674 S.E.2d 151, 153 (S.C. 2009) (“Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.”); *McDonald’s Corp. v. Hawkins*, 888 S.W.2d 649, 650 (Ark. 1994) (“An argument that could have been raised in the first

appeal and is not made until a subsequent appeal is barred by the law of the case. Moreover, the law of the case doctrine also prevents consideration of an argument that could have been made at the first trial.” (citations omitted)).

The doctrine serves to bar even constitutional defenses that could have been raised in the first appeal. *See State v. Sauve*, 666 P.2d 894, 896 (Wash. 1983) (“Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold that they may not be raised in a second appeal.”).

This includes constitutional defenses, like the one here, that a litigant identifies but fails to develop. In *Montana-Dakota Utilities Co. v. Behm*, a utility brought an eminent domain action against a property owner, Behm, but lost as to the necessity of the taking. 951 N.W.2d 208, 210 (N.D. 2020). The North Dakota Supreme Court reversed, holding that the taking was necessary for public use, and remanded for determination of damages for the taking. *Id.* On remand, the parties stipulated as to damages, but the trial court declined to award Behm the entirety of attorneys’ fees he requested. *Id.*

In his appeal from that judgment, Behm raised constitutional defenses to the taking that he had not advanced in the trial court or in the first appeal. The court observed under the law of the case doctrine and the mandate rule, “a party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or *which would have been resolved had they been properly presented in the first appeal.*” *Id.* at 210–11 (quotations omitted, emphasis in original). The court noted that Blehm had listed his constitutional argument as an issue in the first appeal but failed to brief it, and the court had declined to address the argument. *Id.* It held: “The constitutional arguments he makes in the current appeal could have been resolved in the first appeal had they been properly presented, and therefore they are barred by the law of the case doctrine.” *Id.*

Like Behm, the Committee could have raised its constitutional defenses before or during the first appeal, and its failure to do so means the defenses are now barred under the mandate rule.²

² Some courts would bar the issue as a matter of waiver rather than law of the case. *See Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (noting that waiver “differs from the law-of-the-case doctrine in that it arises as a consequence of a party’s inaction, not as a consequence

Even if the Committee *did* somehow preserve these issues in the first appeal, then this Court necessarily rejected them by implication in remanding for the consideration of duplicates. Recall that the mandate rule precludes the trial court from addressing an issue the appellate court disposed of either expressly or impliedly. *Cyprus Bagdad Copper Corp.*, 196 Ariz. at 7 ¶ 7. If it were true, as the Committee suggested anemically in the first appeal, that Plaintiffs could not prevail even if the duplicate signatures were stricken, Ans. Br at 27, then remanding for reconsideration of the duplicate signatures necessarily (albeit impliedly) rejected that argument. *See United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) (“An argument is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument.”). Otherwise there would be no point in remanding for a finding that would

of a decision on our part.”). *But see* Bryan A. Garner, et al., *The Law of Judicial Precedent* § 53 at 452 (2016) (“One qualification to the final action requirement is that a waived or forfeited issue—a decision by inaction—may become law of the case.”). The two refer to the same concept. *See Med. Ctr. Pharmacy*, 634 F.3d at 834 (“Regardless of nomenclature, our cases are consistent: they all hold that if an issue was decided by the district court but was not appealed, the issue is forfeited, and the district court may not reconsider the issue on remand.”); *Scrushy*, 70 So. 3d at 304 (“Although the Court referred to the appellants’ failure to raise the issue as a ‘waiver,’ it is just as properly referred to as a basis for the application of the law-of-the-case doctrine.”).

be rendered irrelevant by the Committee's constitutional defense. In either event, the constitutional defenses were foreclosed after the first appeal.

II. The Committee's constitutional arguments fail.

The Court should reject the Committee's constitutional defenses if it decides to reach them. Plaintiffs join the arguments advanced in the Brief of Senate President Warren Petersen and House Speaker Ben Toma and the Brief of *AFEC* Plaintiffs/Appellants. Plaintiffs here add a few brief points and clarifications:

A. The constitutional minimum is 383,923.

There is no dispute that the current signature threshold for initiatives proposing to amend the Arizona Constitution is 383,923. *See* R. 103 at 10 (Committee acknowledging in Joint Pretrial Statement that "the constitutional minimum number of signatures" is 383,923). The figure is determined by taking 15 percent of votes cast for all candidates for governor at the last general election. *See* Ariz. Const. art. IV, pt. 1, § 1(2), (7). Arizona voters cast 2,559,485 votes for all candidates for

Governor in 2022,³ and 15 percent of that number (rounded up to the next whole number) is 383,923.

No statute changes that threshold. Even the challenged statute directs the Secretary to certify (or decline to certify) an initiative based on whether its projected number of valid signatures meets or falls below “the minimum number required by the constitution.” A.R.S. § 19-121.04(B)–(C). Here, if the initiative had at least 383,923 valid signatures, it would valid. Because it has fewer than 383,923 valid signatures, it is not.

The Committee of course takes issue with the statutory calculation used to determine the number of valid signatures. But the minimum number of signatures required under the Arizona Constitution—383,923—remains unchanged. The Legislature has not increased it.

In an effort to pin the blame on the statute, the Committee argues that “the application of A.R.S. § 19-121.04, and *only* the application of § 19-121.04, causes the Initiative to fall below the constitutional minimum number of signatures.” R. 103 at 13. Apart from necessarily

³ See Arizona Secretary of State, 2022 General Election Canvass, available at https://apps.azsos.gov/election/2022/General/canvass/2022dec05_general_election_canvass_web.pdf

acknowledging that “the constitutional minimum number of signatures” remains static, the statement is otherwise untrue: the initiative falls below the threshold for several, independent reasons, not least of which is that it collected 37,674 duplicate signatures. In this sense, *any* of the various categories of invalidations deducted from the signature total before applying the validity rate to the result—whether the 6,616 invalidated by the county recorders, the 16,705 invalidated in the first trial, or the 37,674 duplicates invalidated on remand—is a but-for cause of the initiative falling below the threshold of 383,923.

The Committee’s view is that the removal of the 6,616 county-invalidated signatures “makes the decisive difference in this case” and therefore “has the effect of legislatively raising the constitutional minimum number of signatures required.” R. 103 at 14. But the same could be said for any category of invalidations that, on its own, would “make[] the decisive difference” in causing the initiative to fall under the minimum. It cannot be the case that doing so has the effect of raising the minimum number of required signatures. By the Committee’s logic, the Legislature could not prohibit the counting of duplicate signatures without impermissibly raising the constitutional minimum, given that

the initiative would not be under the threshold but for the invalidation of 37,674 duplicate signatures.

In pursuing this theory, the Committee has never specified by how much, exactly, the Legislature increased the minimum number of required signatures for this initiative. Its expert testified that “by throwing out cases you shouldn’t throw out, by definition that increases the -- requirement above 15 percent.” RT 09/18/2024 at 41. But he didn’t say by how much. And throwing out signatures that should not be thrown out is not the same as increasing the minimum threshold, which, again, remains static. The statute might, at most, make it modestly harder to reach the minimum, but the minimum remains what it is.

B. The constitutional minimum has not increased at all, let alone to 15.2%.

The trial court clearly erred in finding that the minimum signature threshold increased from 15.2%. R. 108 at 6. The Committee’s expert testified that improper double-counting resulted in a loss of 5,051 signatures. RT 09/18/2024 at 41, 51–52, 57. (This is because the 6,616 signatures the counties invalidated are ultimately deducted at a multiple of the validity rate of 76.345%, resulting in a net deduction of 5,051. *See* R. 103 at 21. The same is true for every category of invalidations—none

is deducted full freight.) Counsel for the Speaker of the House and the President of the Senate elicited testimony that the sum of 5,051 (the number of allegedly improper invalidations) and 383,923 (the constitutional minimum) equals 15.2% of the 2,559,485 votes for all candidates for Governor in 2022. RT at 51–53.

That might be true as a matter of simple arithmetic. ($5,051 + 383,923 = 388,974 = 15.2\%$ of 2,559,485.) But it does *not* support a finding that the Legislature has increased the signature minimum from 15% to 15.2%. The constitutional minimum of 383,923 has not increased at all. It certainly has not increased by 5,051, and the Committee’s expert never testified that it did. Plaintiffs’ expert, by contrast, testified that the minimum remains unchanged. RT 09/18/2024 at 76, 85–86. Indeed, the Committee does not even need 5,051 signatures to clear the threshold; it needs only 3,432 signatures added back to its total to meet the minimum.

At most, the Committee established that 5,051 signatures should not have been deducted from its total. But that does not support a finding that the minimum number of signatures has increased by 5,051, or 0.2% of 2,559,485. Counsel for the Speaker and President was merely demonstrating the modest and insubstantial degree of the Committee’s

purported additional burden and the modesty of that defeats its various other constitutional arguments. But the testimony does not support a finding that the threshold is now 15.2%.

The premise of the Committee's unconstitutional-raising-of-the-minimum theory is that the statute is unconstitutional only insofar as it causes the initiative to fall below the constitutional minimum of 383,923.⁴ But the initiative is under by 3,432 signatures, not 5,051. Even entertaining the premise of the Committee's constitutional theory, it was clear error to take the 5,051 number as the amount by which the minimum has increased, when the initiative doesn't need that many to prevail.

The point remains that, as a legal matter, the challenged statute at most makes it modestly more difficult to *meet* the minimum. But that

⁴ This, of course, necessarily acknowledges that the minimum remains 383,923. And if the premise is wrong, and the theory instead is that A.R.S. § 19-121.04 is unconstitutional regardless of how much it causes the initiative to fall under the threshold, then the Committee should have brought its challenge even sooner, because the double-deductions would occur irrespective of this challenge. And it would have to meet the standard for facial constitutional challenges and establish that the statute is unconstitutional in every application. It has not done so.

minimum hasn't changed by any amount, let alone to 15.2%. It was clear error for the trial court to find otherwise.

III. The case is not moot.

This Court has never held that a challenge to the validity of an initiative is moot once ballots are printed. Instead, the firmly held rule since at least 1947 has been that a challenge becomes moot only once the measure is adopted at the election. *Renck v. Superior Court*, 66 Ariz. 320, 325 (1947) (“Once . . . the subject matter of the petition has been placed upon the ballot ***and thence adopted at a regularly held election of the people***, it is too late to question the legal sufficiency of the petition.” (emphasis added)); *id.* at 327 (“Once the measure has been placed upon the ballot, voted upon ***and adopted by a majority of the electors***, the matter becomes political and is not subject to further judicial inquiry as to the legal sufficiency of the petition originating it.” (emphasis added)); *id.* at 328 (“[T]he matters under review by [the trial court] became moot with the adoption of the measure by the people and its incorporation into the Constitution by the Governor’s proclamation.”).

The trial court held that this lawsuit became moot once ballots were printed, citing *Save Our Public Lands Coalition v. Stover*, 135 Ariz. 461

(1983). R. 108 at 5. This was error, because *Save Our Public Lands Coalition* says **nothing** about mootness. That case dealt with the prior statutory review scheme, where if the review of the random sample determined that the projected number of valid signatures was less than 95% of the required minimum, the measure would not qualify for the ballot. If the projection came within 95% to 105% of the minimum number of signatures, the county recorders had to verify every signature. When the initial review projected the number of valid signatures below 95%, the proponents of the initiative successfully challenged Maricopa County’s certification, bringing the projection above 95% and entitling them to review of every signature by the county recorders. But the trial court found that there was not enough time to verify every signature before ballot printing, held that the initiative proponents had the burden of sustaining the signatures on the petition, and declined to direct that the initiative be placed on the ballot. *Id.* at 463.

This Court reversed, holding that once the projected number of valid signatures reached the 95–105% range, “the basic presumption of validity should attach.” *Id.* at 464. And “[i]f the time pressures are such that the county recorders cannot verify every signature before the date

the election ballots must reach the printers, all doubts as to the validity should be resolved in favor of sustaining the signatures, and the initiative should be placed on the ballot.” *Id.*

All that meant was the presumption of validity would attach once the projected number of valid signatures reached 95%, and the initiative proponents should not be penalized by the counties’ inability to review every signature before ballot printing through no fault of the proponents. *Save Our Public Lands Coalition* was limited to its facts and the prior statutory review scheme. The case did not involve a lawsuit challenging the validity of the initiative, so it had no occasion ever to hold that a **challenge** to the validity of an initiative is foreclosed or mooted once ballots are printed. Indeed, the case does not address mootness at all, and it has no bearing on the question here.

The Committee has never cited a single case holding that a challenge to the validity of an initiative (or any ballot measure) is moot once ballots are printed. It has relied instead on inapposite cases arising in the context of candidate challenges or laches. *See Hunt v. Superior Court*, 64 Ariz. 325 (1946) (candidate challenge); *Rapier v. Superior Court*, 97 Ariz. 153 (1964) (nomination election contest); *Harris v.*

Purcell, 193 Ariz. 409 (1998) (laches); *Mathieu v. Mahoney*, 174 Ariz. 456 (1993) (laches); *Kromko v. Superior Court*, 168 Ariz. 51 (1991); *Korte v. Bayless*, 199 Ariz. 173 (2001) (laches).

Ballot printing no doubt matters for laches: a challenge to the validity of an initiative filed on the eve of ballot printing should be barred by laches if, with reasonable diligence, it could have been filed sooner. But the Committee has never argued that Plaintiffs delayed bringing their circulator- and signature-based challenges or that those claims should be barred by laches. And none of the Committee's laches cases had occasion to hold that a ballot measure challenge was moot once ballots were printed.

Even the Committee's candidate cases are distinguishable. *Hunt* held that a candidate petition challenge was moot once ballots were printed where the only remedy sought was to enjoin the printing of a candidate's name on the ballot. 64 Ariz. at 330–31. Here, while the printing the challenged initiative may no longer be enjoined, Plaintiffs also seek to enjoin the canvass of the initiative, R. 107 at 23, and the canvass has not yet passed. *Rapier* held that a primary election contest must be completed in time to prepare the ballots for the general election.

97 Ariz. at 155–56. Here, there is no subsequent ballot preparation deadline contingent on the outcome of this challenge.

Finally, finding this challenge to be moot would be profoundly inequitable to the Plaintiffs. There has never been any question that Plaintiffs initiated their circulator- and signature-based challenges promptly and have litigated them diligently. This case proceeded past the ballot printing deadline because the Committee induced the error, fighting to exclude Plaintiffs’ evidence of duplicate signatures despite never questioning that the exhibits accurately reflected the underlying petition sheets. The trial court then erroneously excluded the evidence, necessitating an appeal to this Court. When the Court reversed and remanded on the eve of the ballot printing deadline, Plaintiffs requested a ruling from the trial court the same day, and later that day filed an emergency petition for special action to this Court to get relief before ballot printing. In accepting jurisdiction but denying relief, the Court properly recognized that no statute requires adjudication before the ballot printing deadline, and that “the courts’ role is to dispense justice” rather than rush to meet an arbitrary deadline. Decision Order, No. CV-24-0199-SA, at 4. Finding that the case is moot, despite Plaintiffs’

diligence, solely because the ballot printing deadline passed would encourage initiative proponents to litigate cases in such a way as to run out the clock. That cannot be the result.

IV. The trial court can enjoin the canvassing of this initiative.

Finally, the trial court held that no statute authorized the relief Plaintiffs seek: declaring the initiative invalid and enjoining both Secretary and the County Boards of Supervisors, respectively, from canvassing the challenged initiative. This, too, was error.

The superior courts enjoy broad equitable powers to issue injunctions. They may grant injunctions “[w]hen it appears that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.” A.R.S. § 12-1801(1). If, as demonstrated above, Plaintiffs are entitled to a finding that the initiative is invalid, then that relief requires restraining the Secretary and Boards of Supervisors from canvassing the election, because canvassing the initiative and enacting it into law would be prejudicial Plaintiffs, having just demonstrated that the initiative is ineligible to become law because it lacked sufficient signatures.

A trial court also may grant injunctions “[i]n all other cases when [the] applicant is entitled to an injunction under the principles of equity.” A.R.S. § 12-1801(3). This is a broad, equitable power. It would be supremely inequitable to hold that, despite the initiative clearly lacking sufficient signatures and the case not being moot, the initiative may amend the Arizona Constitution if adopted anyway solely because no statute specifically says that the canvass may be enjoined if the measure is found invalid after ballot printing. The requested injunctive relief fits comfortably within the court’s broad equitable power to issue injunctions under A.R.S. § 12-1801.

The idea that the specific form of injunctive relief must be spelled out in statute or else it cannot issue finds no support in the law. Consider candidate nomination petition challenges. No statute—not even the one specifically governing such challenges—specifies that a court may enjoin the printing of an ineligible candidate’s name on the ballot. *See* A.R.S. § 16-351. And yet “[t]he law in this state for many years has been that the proper method of challenging nomination petitions is an action for injunction.” *Mandraes v. Hungerford*, 127 Ariz. 585, 587 (1981); *see also* *Hunt*, 64 Ariz. at 328 (“Since the right to nomination is statutory, and

obviously no other adequate remedy exists, upon the application of an elector who has an interest, injunction is the proper remedy to restrain an election official or board from acting upon an invalid petition for nomination.”). Here, too, no other adequate remedy exists, so the court must enjoin the canvassing of the initiative if it is in fact invalid.

The relief Plaintiffs request is modest. They are not asking to enjoin the tabulation of votes for or against the measure, since vote tabulation programs must be programmed and tested well in advance of the election. *See* A.R.S. § 16-449; Elections Procedures Manual at 91–100. They are instead asking only to enjoin the Secretary’s and the Boards of Supervisors’ canvassing of this initiative only. *See* A.R.S. §§ 16-646(A)(6)–(7), 16-648(B).

The Committee has argued previously that the Secretary may not be enjoined from canvassing this initiative because the Arizona Constitution says that the Secretary requires the Secretary to canvass the votes for and against each initiative. *See* Ariz. Const. art. 4, pt. 1, § 1(13). But the duty to canvass necessarily can extend only to *valid* initiatives; no one could seriously argue that the Secretary must canvass every initiative that is filed.

Finally, courts in other jurisdictions regularly grant relief similar to that sought here. *See, e.g., Martin v. Humphrey*, 558 S.W.3d 370, 379 (Ark. 2018) (“[T]he circuit court did not abuse its discretion when, in order to enforce its finding, it issued a writ of mandamus prohibiting Secretary Martin from counting, canvassing, or certifying the votes for or against Issue No. 1.”); *Montanans for Just. v. State ex rel. McGrath*, 146 P.3d 759, 778 (Mont. 2006) (“County administrators are instructed not to count the votes for CI–97, CI–98 and I154 to the extent that this is technically feasible. If the votes must be counted, they will have no force or effect.”); *Schweickart v. Powers*, 613 N.E.2d 403, 411 (Ill. App. 1993) (“The injunction in this case merely delays the counting of ballots until a decision can be determined on the merits. . . . Here, the court’s decision to grant the injunction was within its discretion because the injunction preserves the last uncontested status of the election by halting the counting of ballots until a final determination can be made. Without the injunction, the election would proceed and, as previously discussed, plaintiffs would be deprived of an effective remedy.”).

CONCLUSION

The initiative lacks enough signatures. The Committee's constitutional defenses come too late and are barred under the mandate rule, and they fail on the merits anyway. The case is not moot, and Plaintiffs are entitled to injunctive relief.

The Court should hold that the initiative is invalid and order that its canvassing be enjoined by the Secretary of State. If the Court determines that relief against the Boards of Supervisors is necessary in addition to or in lieu of that against the Secretary, it should remand for an opportunity to serve the Boards of Supervisors and enter injunctive relief as against them. On remand, Plaintiffs should have an opportunity to recover their costs. *See* A.R.S. § 12-341.

RESPECTFULLY SUBMITTED this 26th day of August, 2024.

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