

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'
REPLY BRIEF**

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ARGUMENT

I. The Committee gave up its constitutional arguments by not raising them sooner.

The Committee cobbled together a constitutional argument only once it became clear, after this Court's August 21 remand and nearly a month into the case, that it could no longer forestall the obvious: it had collected tens of thousands of duplicate signatures that, once brought to light, would leave the initiative without sufficient signatures. It admits now (at 35) that it opted not to press the arguments before the first appeal but instead chose to "preserve[] them in case this Court reversed." That's not how litigation works. Courts "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).

The Committee does not dispute these basic principles of waiver and law of the case: a party is foreclosed from raising in a second appeal an issue it could have raised in the first, let alone one it never presented to the trial court. *See, e.g., United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). Indeed, the Committee makes no effort to argue that its scant

allusion to a constitutional argument on the last page of its Answering Brief in the first appeal was sufficient to present the argument.

It argues only (at 35) that it “reserved” its right to raise these arguments later. But this was insufficient to preserve the issue for appeal, because merely “reserving” an argument, without actually making the argument, gives the trial court nothing to rule on. *See Cont’l Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 227 Ariz. 382, 386 ¶ 12 (App. 2011); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

The Committee insists (at 36) that the Court should look the other way and consider its waived arguments anyway because they are constitutional in nature. But the mandate rule bars untimely consideration of waived constitutional arguments, too. *See Mont.-Dakota Utilities Co. v. Behm*, 951 N.W.2d 208, 210–11 (N.D. 2020); *State v. Sauve*, 666 P.2d 894, 896 (Wash. 1983).

Entertaining these arguments now would also cause the Court to wade into constitutional issues it wouldn’t need to if the issues had been timely presented below. Apart from duplicates, the trial court had overruled Plaintiffs’ objections to 15,216 signatures. R. 62 at 7. These

included 12,173 signatures collected by a circulator whose registration affidavit was not sealed by the notary contemporaneously with its execution. R. 62 at 7, R. 51 at 5. Another 3,043 signatures were collected by a circulator who had pled no contest to an out-of-state felony, had his adjudication withheld, but never had his civil rights restored. R. 62 at 7, R. 51 at 13. Another pair of circulators collected 2,896 between them but did not list the correct city on their registration statements. R. 51 at 7. Plaintiffs did not raise these issues in their first appeal because they appropriately understood that the only dispositive issue left was whether to admit and consider their evidence of duplicate signatures. Allowing the Committee to spring its constitutional defenses for the first time on remand, only once it became convenient for it to do so, both severely prejudices Plaintiffs and forces this Court to confront constitutional issues that Plaintiffs could have mooted had they known they needed to appeal other issues.

II. The Committee's constitutional arguments fail.

Plaintiffs joined the arguments advanced by the President of the Senate and Speaker of the House and the Arizona Free Enterprise Club in the interest of efficiency, *see* ARCAP 13(h), adding why the evidence

did not support a finding that the constitutional minimum had increased to 15.2%.

Plaintiffs here make the additional point that the constitutional relief the Committee seeks would rarely, if ever, make any sense in application. The degree of the statute's double-counting is a function of how many invalid signatures an initiative submits. Curiously, the Committee does not argue that double-counting invalidations is always bad—instead, it appears only to be bad when it causes them to lose. The Attorney General makes a similar contention, agreeing with the legislative leaders that “in many cases,” the statute “reasonably supplements the constitutional purpose of the initiative process by providing an efficient method for signature verification.” AG Br. at 11–12. It is unclear why the statute would stop reasonably supplementing the constitutional purpose of the initiative process only once it becomes dispositive in a challenge lawsuit. But again, the statute is not the sole reason the initiative here loses; it loses primarily because it collected tens of thousands of invalid duplicate signatures.

How would this constitutional rule work going forward, if A.R.S. § 19-121.04 is unconstitutional only when dispositive? Parties would

have to wait until all challenges are resolved and all county reports come in to know whether the statute’s margin will matter—and only then could the courts determine whether it’s constitutional in any given case. That makes no sense. The constitutional relief the Committee seeks is unworkable.

III. The case is not moot.

The Committee has now briefed mootness at length three times in the last month: in its August 28 motion for reconsideration in case no. CV-24-0199-SA, in its September 17 briefing to the trial court, R. 103, and in yesterday’s Answering Brief. Yet neither the Committee nor its amici have ever cited any case—not one, from any jurisdiction—holding that ballot printing alone moots a pending challenge to the validity of an initiative.

The cases belie treating ballot printing as a “bright line” rule that functions to stop a challenge in its tracks. The Court need look no further than the only one to have addressed mootness: *Renck v. Superior Court*, 66 Ariz. 320 (1947). If the rule were that ballot printing alone stops a pending challenge, *Renck* would have said so. The holding instead was that the challenge “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. The matter being "placed upon the ballot" was not sufficient to render it moot. *See id.* at 325, 327.

Or consider *Harris v. Purcell*, 193 Ariz. 409 (1998), one of the main cases on which the Committee relies (at 13, 19). In that case, the ballots had been printed by the time the challenge proceeded to trial. *Id.* at 412 ¶ 13. But the Court held the challenge barred following a fact-intensive laches inquiry; it declined to address mootness. *Id.* at 412 ¶ n.7. If ballot printing were the bright line rule the Committee and its amici make it out to be, *Harris* would have been an open-and-shut mootness case.

The cases observing that challenges should be brought and heard in time for ballot printing "to avoid" mootness said so in the course of setting general principles for laches, and they did not involve challenges that proceeded past ballot printing. *See Korte v. Bayless*, 199 Ariz. 173, 174 ¶ 3 (2001); *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993); *Kromko v. Superior Court*, 168 Ariz. 51, 57 (1991). They had no occasion to hold that ballot printing moots a pending challenge.

The candidate cases have no application here. The plaintiff in *Hunt v. Superior Court* sought only to enjoin the printing of his opponent's

name on the ballot—relief that was moot once ballots were printed. 64 Ariz. 325, 328, 331 (1946). Plaintiffs here, by contrast, also seek to enjoin the canvassing of the challenged initiative. R. 107; RT 9/18/24 at 21–22, 223–24, 226. *Rapier v. Superior Court* held merely that a *primary* election contest must be completed in time to prepare ballots for the general election. 197 Ariz. 153, 155 (1964). This case is not an election contest, let alone one on whose resolution an upcoming ballot preparation deadline depends.

Principles of due process and basic fairness counsel against mootness, not in favor of it. To start, it is profoundly inaccurate for the Committee to state (at 17) that Plaintiffs have been given “an extra five weeks to try to disqualify the Initiative on other grounds” or that the post-remand proceedings have been a “one-way ratchet.” All Plaintiffs have asked for since the first trial over six weeks ago is for a factfinder to consider their evidence of duplicate signatures. There is no other ground on which Plaintiffs have since sought to disqualify the initiative. And it took the second special master less than a week to do what the Committee claimed to have been unable to do over the prior month and a half: review the evidence of duplicates and acknowledge the obvious—

that 99% of the objected-to signatures were, in fact, duplicates. R. 105 at 2–3 (finding that 37,657 of the 38,054 duplicate objections not previously invalidated or withdrawn were duplicates by clear and convincing evidence).

It was the Committee that, on September 4—two weeks after this Court’s August 22 remand—filed an “Expedited Motion for Judgment,” R. 91, that significantly expanded the issues by introducing new defenses and expert testimony. The Committee added still more new defenses to its September 17 Joint Pretrial Statement and dropped others it had featured prominently in its earlier motion. R. 103. (The arguments the Committee would ultimately forgo had prompted Plaintiffs to retain a rebuttal expert at significant, and ultimately unnecessary, expense.) And it was *the Committee’s* motion that prompted what would become an all-day evidentiary hearing on September 18. RT 9/18/24 at 100:3–4.

Regardless, it was the Plaintiffs who bore the burden of proving, by clear and convincing evidence, that the initiative lacked sufficient valid signatures. *See Leach v. Reagan*, 245 Ariz. 430, 437 ¶ 30 (2018); *see also* Decision Order, *Smith v. Fontes*, No. CV-24-0199-SA, at *3 (Ariz. Aug. 23, 2024) (recognizing that “the Committee is entitled to hold Plaintiffs

to their proof”). That is a significant burden for any challenger to overcome, and it protects against the hypothetical the Committee imagines (at 17), whereby initiative proponents would have no recourse if a plaintiff prevailed before the ballot printing deadline. A plaintiff could only do so after clearing the high burden of proof by clear and convincing evidence.

Nor would allowing this case to proceed mean that any petition challenge would now have until election day to be resolved. This is an unusual case in which the trial court’s abuse of discretion in excluding key evidence and clear error in refusing to consider it if admissible, together with the time it took to seek and obtain appellate reversal, caused the litigation to proceed past the ballot printing deadline. There has been no question that Plaintiffs have prosecuted their claims diligently at every opportunity. If a future challenge were to approach or pass the ballot printing deadline because of a plaintiff’s lack of diligence, courts should apply laches. That is a powerful disincentive against dilatory tactics on the part of challengers.

Finally, invalidating this measure would not harm voters, who are not disenfranchised by the invalidation of an initiative that should have

never qualified for the ballot in the first place. *See Costa v. Cortes*, 142 A.3d 1004, 1022 (Pa. Commw. Ct.) (holding that legislative resolution moving a ballot measure from one election to another “in no way disenfranchised voters who had no right to vote on the Proposed Constitutional Amendment 1 in the first place”).

In the end, notwithstanding their efforts to resolve challenges before ballot printing, “the courts’ role is to dispense justice.” Decision Order, *Smith v. Fontes*, No. CV-24-0199-SA, at *4 (Ariz. Aug. 23, 2024). Unlike the counties in *Save Our Public Lands Coalition v. Stover*, 135 Ariz. 461 (1983), Plaintiffs here are active litigants who deserve their day in court. Holding the case to be moot would shut them out through no fault of their own. This case is further unlike *Save Our Public Lands Coalition* in that there are no “doubts as to validity,” *id.*, at 464, left to resolve: after rightfully being afforded their day in court, Plaintiffs proved by clear and convincing evidence that the initiative is invalid.

The Court has already recognized that that ballot printing “does not end the matter.” Decision Order, *Smith v. Fontes*, No. CV-24-0199-SA, at *4 (Ariz. Aug. 23, 2024). It should now proceed to “dispense justice.” *Id.*

IV. Plaintiffs seek an appropriate remedy.

A.R.S. § 19-22(C) provides that, “[i]n addition to contesting the validity of an initiative or referendum, any person *may* seek to enjoin” the printing of the measure on the ballot. (Emphasis added). It nowhere says that enjoining ballot printing is the *only* remedy available; indeed it is only one remedy that “may” be sought *in addition* to contesting the validity of the initiative. *Id.*

The Committee does not seem to dispute that the courts may properly enjoin the County Boards of Supervisors from including the initiative in their canvass under A.R.S. § 16-646, arguing instead (at 37 n.2) that the counties have not been served. But that is only because the trial court entered judgment the same day that Plaintiffs amended their complaint to add the counties and did not give them an opportunity to effectuate service.

Further, the Secretary’s duty to canvass under Article 4, Part 1, Section 1(13) of the Arizona Constitution logically can extend only to *valid* initiatives; the text cannot be read so out of context as to require the Secretary to canvass any “initiative” that is filed irrespective of its validity.

Finally, the remedy Plaintiffs seek is modest and fair. They have proven by clear and convincing evidence that the initiative lacks enough signatures. Voters are not disenfranchised by not being able to vote for a measure that never had enough signatures to begin with. The courts have broad injunctive powers in equity under A.R.S. § 12-1801 and should employ it fairly here.

Just a few days ago, the Utah Supreme Court held invalid a disputed ballot measure that would appear on the ballot, holding that it was appropriate to order “that any votes cast will not be counted.” *See League of Women Voters of Utah v. Utah State Legislature*, No. 20240965, 2024 WL 4294102 (Utah Sept. 25, 2024). This is consistent with the many cases across the country ordering similar remedies for measures found invalid after ballot printing. *See Op. Br.* at 31. This Court should follow the same course to effectuate an appropriate remedy now that Plaintiffs have met their burden to prove that the initiative is invalid.

CONCLUSION

The Court should reverse the judgment of the Superior Court, hold that the initiative is invalid, and enjoin its canvassing.

RESPECTFULLY SUBMITTED this 28th day of September, 2024.

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