SUPREME COURT OF ARIZONA

SETH LEIBSOHN, et al.,

Plaintiffs/Appellants,

v.

KATIE HOBBS, in her capacity as the Secretary of State of Arizona,

Defendant/Appellee,

And

VOTERS' RIGHT TO KNOW, a political committee,

Real Party in Interest/Appellee.

Arizona Supreme Court
No. CV-22-0204-AP/EL

Maricopa County
Superior Court
No. CV2022-009709

VOTERS' RIGHT TO KNOW'S RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

The trial court correctly concluded that the plain text of A.R.S. § 19-118 does not require a circulator to provide a new affidavit for every new petition they circulate. Now, amici Governor Doug Ducey, Senate President Karen Fann, and Speaker of the House Rusty Bowers (together, "Legislative Amici"), ask the Court to rewrite that text to include *new* requirements they think should exist in addition to those listed in the statute. This Court should not take their invitation to elevate their belatedly asserted desires over the enacted text of the statute and the Election Procedures Manual duly promulgated by the Secretary of State.

The Court should also reject arguments raised by amicus Direct Contact. Direct Contact offers no new arguments and instead takes this opportunity to denigrate its business competitors. Even that effort fails, however, as Direct Contact's brief falsely asserted that its circulators complied with the made-up requirement to submit a new affidavit for each initiative. Indeed, despite asserting (at 6) that "[r]equiring a circulator to ***submit*** an affidavit for each ballot measure that the person circulates on is clearly what is required by the statutory scheme," Direct Contact's "Clarification" Brief makes clear that Direct Contact's circulators did not and

could not submit a corresponding affidavit with their circulator registration update forms. 8-21-22 Clarification Brief at 1 ("[T]here was no ability to upload these on the Secretary of State's [mandatory] portal").

RESPONSE TO AMICUS BRIEFS

I. Section 19-118 does not require a circulator to submit multiple affidavits.

A.R.S. § 19-118 requires paid and out-of-state circulators to register with the Secretary of State before circulating petitions. A.R.S. § 19-118(A). As part of the registration process, circulators must provide the information required in § 19-118(B), and once they do, § 19-118(C) requires the Secretary to "assign a circulator registration number to the circulator." Once the Secretary assigns a registration number, the circulator may "circulat[e] petitions." A.R.S. § 19-118(A).

On this point, the Committee agrees with Legislative Amici: registration with the Secretary requires that a circulator submit an affidavit swearing to the accuracy of the information accompanying the registration. But from there, Legislative Amici proceed to a flawed conclusion: that a circulator must complete the entire registration application process again for every petition they wish to circulate. That is not what § 19-118 says. Under §

19-118, whether a circulator is registered with the Secretary is a binary concept—they are registered or they are not. Once they are, statute does not require them to register again. *See* EPM at 253 ("The circulator ID number is permanently assigned to the circulator and must be used for all petitions being circulated by that particular individual (regardless of the election cycle or which petition is being circulated)."). Legislative Amici's attempts to argue otherwise are belied by the text of the statute.

As an initial matter, the purported intent of Legislative Amici as it relates to § 19-118 is irrelevant. The "intent of some individual legislators . . . are not necessarily determinative of legislative intent." *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204 ¶ 13 (App. 2007). "The text of the statute, and not the private intent of the legislators, is the law. Only the text survived the complex process for proposing, amending, adopting, and obtaining the [executive's] signature . . . . It is easy to announce intents and hard to enact laws." *Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers, & Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154, 1158 (7th Cir. 1990). At bottom, "the Constitution gives legal effect to the Laws" the legislature enacts, "not the objectives its Members aimed to achieve in voting for them." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex re. Wilson*, 559

U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment). Thus, it is the text of § 19-118 that matters. That text demonstrates that circulators are to register one time, with one affidavit, and receive one circulator registration number.

More relevant is the actual legislative history. When the Legislature was considering the bill that created the affidavit requirement, JLBC noted that existing law provided that "paid circulators and those who are not residents of Arizona are required to register with the SOS, providing a statement that consents to the court jurisdiction of any disputes concerning their collected **petitions** and an Arizona address to which they will accept service of process related to those concerns." S.B. 1451 Fiscal Note, 54th Ariz. Leg. 1st Reg. Sess. (Ariz. 2019), available at https://www.azleg.gov/legtext/54leg/1R/fiscal/SB1451.DOCX.htm (emphasis added). JLBC's description, with its reference to "petitions," shows that the Legislature was aware that circulators would register to collect signatures for multiple petitions. JLBC then stated that "[t]he bill, however, would additionally require those registering to provide a notarized signature on **an affidavit** specified in the bill." *Id.* (emphasis added); *see also id.* (the bill would "[r]equire those registering as a circulator

for a statewide initiative or referendum to submit a signed and notarized affidavit to the Secretary of State"); *id.* (referring twice to "the notarized affidavit"). JLBC's references to "an affidavit," "a . . . affidavit," and "the notarized affidavit" (all singular) shows that the Legislature was aware that the bill would result in one affidavit per circulator, as reflected in A.R.S. § 19-118(B)(5) ("[a]n affidavit"), even though circulators might circulate several "petitions." Amici do not address this telling legislative history.

After recounting what they perceive as past flaws in the text of § 19-118, Legislative Amici devote most of their brief to arguing that an affidavit is required as part of a circulator's registration application. Again, the Committee agrees with that point as to the initial registration application. But the Committee cannot agree with the ensuing arguments of Legislative Amici, which are not based on the plain language of the statute.

The Legislative Amici argue (at 7) that because certain provisions in § 19-118 "speak[] in terms of a specific initiative or referendum," this means that every time a circulator wishes to circulate for a new initiative, they have to repeat the entire registration application process. To support this argument, they point to § 19-118(A), which directs "the committee that is circulating the petition" to "collect and submit the completed registration

applications to the secretary of state," and 19-118(B)(2), which requires a circulator to provide "[t]he initiative referendum petition on which the circulator will gather signatures." Yet just because a circulator must state the initiative they plan to work on when they initially registered, it does not follow that for each ensuing initiative they must repeat the entire process.

On the other hand, § 19-118(C) expressly directs the Secretary to issue a singular circulator registration number, showing that the entire registration application need be completed only once. Amici (and Appellants) entirely gloss over this key statutory fact.

To the extent Legislative Amici assert that every petition a circulator seeks to circulate requires a separate registration *application* to ensure they are who they say they are (at 8), this fear is unfounded. When a circulator adds a petition to their registration, the Secretary's prescribed form requires the *registered* circulator to "confirm the information they provided is correct under penalty of perjury." Decl. of Kori Lorick ¶ 11 (APP016). The form provides:

I declare under penalty of perjury that the information provided on this form is true, complete, and correct, and that I have read and understand the laws of this State with respect to petition circulation. Furthermore, I agree to submit to the jurisdiction of the State of Arizona regarding any case or controversy arising out of my activities while circulating petitions. Finally, if circulating a statewide ballot measure, I agree to print my unique Circulator ID number on the front and back of each petition sheet I circulate.

A2

Secretary of State
Rev. 09/29/2021

Circulator Signature _____ Date _____

Trial Ex. 228 at A2. This operates in tandem with the legislature's chosen remedy for false circulator information, which is to allow "[a]ny person" to "challenge the lawful registration of circulators." A.R.S. § 19-118(F). As this case demonstrates, the legislature has already provided a check on circulators they fear may be skirting registration requirements (and, importantly, there is no assertion here that any of the circulators have provided false information). Thus, the Legislative Amici's fear that somehow not requiring multiple affidavits will lead to rampant abuse is unfounded—that problem is already addressed.

Legislative Amici's underlying issue with the trial court's decision is that it supposedly makes their job by imposing an "unprecedented burden" legislative drafting. (Br. at 10-11). But all the trial court did was "strictly construe[]" the text of § 19-118, which is the exact burden the legislature placed on itself when it enacted A.R.S. § 19-102.01(A). Moreover, Arizona courts have always presumed "the legislature says what it means," and it is

not the Court's job to transform what the legislature says through statute into what they later claim to have meant. *Doherty v. Leon*, 249 Ariz. 515, 520 ¶ 12 (App. 2020) ("[H]ad the legislature intended to limit presumption only to natural conception and not artificial insemination, *it would have said so*.") (Emphasis added). Indeed, the legislature *must* say what it means or else there is no way for the public to know what the law means. It is telling that this same "affidavit" theory has been raised to challenge all three initiatives that submitted enough signatures to qualify for the ballot this year, and if adopted by this Court would almost certainly prevent all three initiatives from qualifying for the ballot.

If the legislature wanted to include a requirement that circulators submit a full registration application for every petition they wished to circulate, it should have included that requirement. It "easily could have." *Kromko v. Super. Ct.*, 168 Ariz. 51, 57 (1991). But the legislature chose not to, and this Court should reject Legislative Amici's invitation to add requirements they now wish they had enacted into law. *Cf. Leach v. Reagan*, 245 Ariz. 430, 439 ¶ 39 (2018) (rewriting a statute is "a task for the legislature.").

Legislative Amici are correct when they say this case presents an example of how the branches of government should interact. (Br. at 13.) The Court should fulfill its role and "give[] legal effect to the Laws" the Legislature enacts, "not the objectives its Members aimed to achieve in voting for them." *Graham Cnty. Soil & Water Conservation Dist.*, 559 U.S. at 302 (Scalia, J., concurring in part and concurring in the judgment). This Court should hold the legislature to its own directive that statutory language be strictly construed and apply § 19-118 as written. Giving effect to § 19-118 means acknowledging that it does not require circulators to submit multiple affidavits. If the legislature wanted to impose such a requirement, it "easily could have." *Kromko*, 168 Ariz. at 57. It did not. The remedy for the legislature's failure to include a requirement it now says it intended is not to abridge the constitutional rights of the hundreds of thousands of Arizonans who signed the Committee's petition after following in every respect the mandates of § 19-118 and the Secretary, but to require the legislature to say what it means. This Court should not rewrite the statute to accommodate what Legislative Amici wishes the legislature had done.

II. The Secretary's lawfully promulgated process does not require, and except in limited and legally irrelevant circumstances prohibits, circulators from submitting affidavits when they update their registration information.

Section 19-118 is silent as to the procedure for adding additional petitions or circulator addresses. Accordingly, the Secretary has, as instructed by § 19-118(A), filled the statutory gap by creating a process for how circulators update their registration information. *See* Lorick Decl. ¶¶ 11-13 (APP016-17) (describing how circulators can add petitions); EPM at 253 ("An individual circulator may update or cancel their circulator registration for any or all measures directly through the Secretary of State's Circulator Portal.").

Once a circulator has an approved affidavit on file in their Circulator Portal, they can sign up to circulate as many statewide initiative and referendum petitions as they choose. Lorick Decl. ¶¶ 11-13 (APP016-17). "The system only requires circulators to upload an affidavit at initial registration and does not allow circulators to upload a separate affidavit for each petition they add to their registration." *Id.* ¶ 13 (APP017). Thus, "it is not uncommon for registered circulators to have a notarized affidavit of eligibility on file in the Circulator Portal that is dated earlier, and, in some

cases, many months earlier, than the date the circulator added specific petitions to their registration." *Id.*

In fact, except in limited circumstances that are not legally applicable here, it was *impossible* for the Committee's circulators to comply with Amici's demands that they upload a new affidavit for each petition. *See id.* The only circumstance in which a circulator could submit a second affidavit is if that circulator had registered before September 29, 2021. Stip. ¶ 2 (APP020). But under A.R.S. § 19-117, Amici (and Appellants) cannot lawfully rely on the Secretary's change in procedure allowing this second affidavit. The Secretary's procedure became effective on September 29, 2021, pursuant to legislation that became effective that same day. Stip. ¶ 2 (APP020). That was after the Committee had submitted its serial number application. *See* Trial Ex. 201 (serial number application dated May 4, 2021). Under A.R.S. § 19-117, that change in procedural law cannot be applied to the detriment of the Committee or this initiative. *See* A.R.S. § 19-117 ("[A]ny change in the law or procedure . . . [for] filing of an initiative or referendum petition after an initiative or referendum petition application is filed pursuant to section 19-111 does not apply to the initiative or referendum petition.").

Moreover, even if the Secretary's change in procedure were relevant, it remained impossible for *any* circulator to submit more than two affidavits. That is important, because many circulators registered to circulate the Voters' Right to Know petition after they had already registered to circulate two or more other petitions. *See, e.g.*, Trial Ex. 147 at 9 (Beatrice Birdman), 11 (Timothy Boyd and Anjela Bradstreet), 15 (Laura Cafiso), 22 (Sierra Cordova), 30 (Zoe Federoff), and many others.[1] It was impossible for those circulators to comply with Amici and Appellants' view of the law.

Legislative Amici (at 11) state that nothing the "Secretary has done precludes compliance" with their interpretation of Section 19-118. It is not clear what Amici mean. To the extent they are referring to Appellants' contention (at 13) that circulators could "have mailed, faxed, emailed or otherwise transmitted a new affidavit to the Secretary," they fail to explain how any of these methods would be lawful in light of the EPM's express

[1] Appellants erroneously include many such circulators in their list of circulators without a factual impossibility defense. *See* Opening Br. Appendix 1 (erroneously listing circulators including Beatrice Birdman, Timothy Boyd, Anjela Bradstreet, Sierra Cordova, and Zoe Federoff under Objection 1(b)). This is a further reason that if this Court reverses on any ground, it should remand to the trial court for fact-finding as to the precise number of signatures affected. *See* Answering Br. at 21.

requirement that submissions be made "through the [Secretary's] electronic Circulator Portal." EPM at 252 (APP024).

III. If Amici disagreed with the Secretary's process, they should have raised those complaints earlier and pursuant to the process set forth by law.

Amici complain about a circulator registration process for which the Legislature received full notice at the time it was contemplating the bill that created § 19-118, *see* Section I, above, and which Amicus Governor Ducey himself approved.

As part of promulgating the EPM, both the attorney general and amicus Governor Ducey were required to review and approve the registration process promulgated by the Secretary. A.R.S. § 16-452. In 2019, the Governor approved the EPM—including its statement that "a Circulator registration must be conducted as prescribed by the Secretary of State through the electronic Circulator Portal," EPM at 252 (APP024)—without complaining that the circulator portal allowed only one affidavit.

In addition, when the attorney general requested significant revisions to the EPM in 2021, the only change that he requested to Chapter 14 (Regulation of Petition Circulators) concerned Section III, which did *not*

relate to the Secretary's established Circulator Registration procedure.[2] The Attorney General did not request *any* changes to Section II(C), which was identical to the 2019 EPM now in effect and provides that "Circulator registration must be conducted *as prescribed by the Secretary of State* through the electronic Circulator Portal." (emphasis added). And when the Attorney General sued the Secretary to compel her to make the changes to the EPM that he sought, the Attorney General did not raise any issue with the number of affidavits allowed, but instead cited to the Secretary's registration procedure with approval.[3]

IV. Direct Contact's brief shows the impossibility of Amici's demands.

The entire premise of Direct Contact's brief—that the alleged statutory requirement to submit a new affidavit for each initiative is easy to comply

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[2] *See* 12-9-21 AZAG Letter and Redline, available at https://www.azag.gov/sites/default/files/2021-12/Letter%20%26%20redline.pdf.

[3] *See* Attorney General's Supp. Brief, Brnovich v Hobbs (P1300CV202200269) at 9 (contending that the Secretary did not have statutory authority to "regulate *how* petition circulators gather and verify signatures," unlike the authority Section 19-118(A) "provide[s] the Secretary [to prescribe the] methods for *registering* circulators"), *available at* http://apps.supremecourt.az.gov/docsyav/Cases/Brnovich%20v.%20Hobbs/2022-5-6%20MISCELLANEOUS%20-%20BRIEF.pdf.

with—is simply wrong, as Direct Contact admitted in the clarification it filed the next day.

Direct Contact accuses the Committee and its circulators of "misread[ing]" § 19-118(B) and "ignor[ing], wholesale, subsections (2) and (4)" if they don't comply with what Direct Contact claims is a clear statutory requirement to "submit an affidavit for each ballot measure that the person circulates on." (Br. at 4, 6.) Direct Contact touts that this alleged requirement is "unambiguous," "easy to comply with," and comes with "minimal burden." (Br. at 2, 7.)

Yet the Appellants' own trial exhibits confirms that most of Direct Contact's circulators have not submitted an affidavit to the Secretary for every initiative for which they circulate. *See* Trial Ex. 134 (listing circulators associated with Direct Contact) and Trial Ex. 147 (showing the registrations and affidavits for each circulator). They cannot. Just like every other circulator company in Arizona, Direct Contact can only use the system that is available to them. As discussed elsewhere, the Secretary has properly construed § 19-118 as only requiring (and only allowing) a single affidavit to be submitted, except in limited circumstances not applicable here.

Thus, it was not surprising that Direct Contact subsequently filed a Clarification Brief to make clear that Direct Contact's circulators did not actually submit new affidavits for circulators who were already registered with the Secretary: "Once it became clear that there was no ability to upload these on the Secretary of State's portal, Direct Contact stopped requiring these from circulators and just had their circulators register on the portal." Direct Contact's 8-21-22 Clarification Brief at 1.

If anything, the Court should take Direct Contact's brief as yet additional evidence that the law does not require circulators to file an affidavit for each petition they register to circulate, because it is impossible to comply with that inaccurate interpretation of the statute.

V. If the Court holds that § 19-118 requires an affidavit for each petition, it should apply that decision only prospectively.

Finally, even if the Court were to accept Legislative Amici's argument and hold that a procedure that the Secretary created, that the legislature knew about, and that was approved by both the attorney general and amicus Governor Ducey, somehow does not comply with § 19-118, the Court should not penalize the Committee for failing to do the impossible. As such, if the Court holds that multiple affidavits were required, it should make its

decision prospective only. Because the Committee and its circulators were obligated to follow the procedure created by the Secretary and approved by the governor and attorney general, "retroactive application would produce substantially inequitable results." *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 45 (2010) (internal quotation marks and alterations omitted).

In *Turken*, this Court declined to apply its decision retroactively because a prior decision had been "widely misunderstood" and a number "of transactions were entered into . . . under a . . . misapprehension" of the law. *Id.* Because of the "confusion" on the state of the law, and because those operating under that law "might have . . . mistakenly inferred" its impact, the Court determined it was "appropriate to limit today's clarification of the consideration test to transactions after the date of this opinion." *Id.* at 352 ¶ 47-49.

Here, the case for prospective-only application is even more compelling—this is not a case of mere confusion, but a literal impossibility for the circulators to submit multiple affidavits. If the Court determines § 19-118 requires multiple affidavits, it should not punish the Committee and hundreds of thousands of Arizona voters for utilizing a system approved by multiple officials across multiple branches of government. Otherwise, this

Court will be endorsing a trap set only to inhibit the exercise of the peoples' initiative power.

CONCLUSION

This Court should reject amici's unsupported arguments and affirm the trial court.

RESPECTFULLY SUBMITTED this 21st day of August, 2022.

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