

ARIZONA SUPREME COURT

SCOT MUSSI, et al.,

Plaintiffs/Appellants/Cross-
Appellees,

v.

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

Defendant/Appellee,

and

ARIZONANS FOR FREE AND FAIR
ELECTIONS (ADRC ACTION), a
political committee,

Real Party in Interest/
Appellant.

No. CV-22-0207-AP/EL

Maricopa County
Superior Court
No. CV2022-009391

*Filed with the blanket
consent of the parties*

BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER

Roy Herrera (032907)
Daniel A. Arellano (032304)
HERRERA ARELLANO LLP
530 East McDowell Road
Suite 107-150
Phoenix, Arizona 85004
roy@ha-firm.com
daniel@ha-firm.com
Telephone: (602) 567-4820

Danielle Lang (DC Bar 1500218)*
CAMPAIGN LEGAL CENTER
1101 14th St. NW Suite 400
Washington, DC 20005
dlang@campaignlegal.com
Telephone: (202) 856-7911

**pro hac vice forthcoming*

Attorneys for Amicus Curiae Campaign Legal Center

INTRODUCTION

Plaintiffs ask this Court to adopt novel and unduly harsh interpretations of Arizona’s petition circulation statutes and invalidate hundreds of thousands of duly collected petition signatures to deprive Arizonans of their right to exercise their legislative power to decide crucial questions about how to order their democracy. This Court should decline Plaintiffs’ invitation to upset the proper functioning of the petition circulation process and uphold the power of the people of Arizona to enact or reject laws by popular vote.

Amicus curiae Campaign Legal Center submits this brief to stress the robust constitutional protections for the petition circulation process—both for petition circulators and petition signers—and the grave constitutional concerns posed by Plaintiffs’ bid to invalidate the majority of the signatures gathered in support of the Arizona Fair Elections Act. This Court, as it has done before, should construe Arizona’s petition circulation statutory scheme to “minimize any First Amendment infringement on core political speech,” *Molera v. Hobbs (Molera II)*, 250 Ariz. 13, 25 ¶ 38 (2020), and reject Plaintiffs’ unfounded objections.

INTERESTS OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is open and fair for all voters. CLC was founded in 2002 by Trevor Potter—a Republican former Chairman of the Federal Election Commission and general counsel to John McCain during his 2000 and 2008 presidential campaigns—to defend the landmark McCain-Feingold campaign finance law. Twenty years later, CLC is now a leading election law nonprofit with expertise in voting rights, redistricting, ethics, and campaign finance. It has litigated hundreds of election law cases in state and federal court. CLC’s commitment is to democracy, not to any political party or to any particular electoral result. The initiative at issue in this case—the Arizona Fair Elections Act—addresses issues central to CLC’s work. CLC has a strong interest in ensuring that Arizonans’ voices are heard on these crucial questions about how to order our democracy.

This case also raises serious questions about the First Amendment rights of both those who gather petition signatures—and thus conduct the important work of engaging the electorate—and the Arizonans who sign petitions to place an initiative on the ballot. CLC frequently litigates

on the topic of the First Amendment rights not only of voters but also of the civic engagement organizations, such as Arizonans for Free and Fair Elections, that engage in core political speech aimed at increasing participation in our electoral systems.

BACKGROUND

Over the past six months, over 400,000 Arizonans signed petitions to place the Arizona Fair Elections Act (the “Act”) on the ballot. [App. 28–31.] After a diligent review, the Arizona Secretary of State determined that 399,838 petition signatures of the signatures gathered by Arizonans for Free and Fair Elections (the “Committee”) were eligible for review by the county recorders. [*Id.*] Thus, the Committee gathered signatures far in excess of the number required to place an initiative on the ballot and, so long as 59.44% of the signatures pass the county recorders’ review, the initiative will qualify for the November Election. [*Id.*]

Now, Plaintiffs raise a litany of objections seeking to invalidate the signatures of nearly 80% of the signatures submitted by the Committee—or the signatures of approximately 300,000 Arizonans—and prevent Arizonans from voting on the Act this November. Plaintiffs’ objections are premised on a host of unnecessarily harsh interpretations of

Arizona’s statutory requirements for petition circulators. All of the signatures in question were gathered by petition circulators who were registered with the Secretary of State pursuant to the Secretary’s established procedure. [Pl. Trial Exhibits 1–296.] Yet, Plaintiffs seek to disqualify hundreds of thousands of Arizonans’ signatures based on interpretations of the statutes that are, indisputably, either contrary to the Secretary’s established procedure, not explicitly discussed in the text and not previously endorsed by any Arizona court,¹ or both. The trial court rejected many of Plaintiffs’ objections but validated some. In this expedited appeal, the Committee appeals the trial court’s validation of four of Plaintiffs’ objections, which, if reversed, would restore tens of thousands of signatures invalidated by the trial court; Plaintiffs appeal the trial court’s rejection of three of their objections, which, if endorsed, would invalidate tens of thousands more Arizonan signatures.

¹ Indeed, with respect to Plaintiffs’ objection that the circulator’s address on the registration form and petition sheet must match, an Arizona court specifically rejected that argument in 2020. *See Leach v. Hobbs*, No. CV 2020-007961, Minute Entry at 14–15 § G (Maricopa Cnty. Super. Ct. Aug. 14, 2020), *available at* App. 76–77.

ARGUMENT

I. This Case Implicates the First and Fourteenth Amendment Rights of Petition Circulators and Petition Signers.

a. The First Amendment Protects the Rights of Petition Circulators.

“Initiative . . . procedures are a fundamental part of Arizona’s scheme of government.” *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 584 (1994). Indeed, “Arizona has a strong policy supporting the people’s exercise of this power,” *Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶ 7 (2012), including “the civic activism required to collect the signatures necessary to qualify a ballot measure,” *Molera v. Reagan (Molera I)*, 245 Ariz. 291, 293 ¶ 1 (2018). And that civic activism is “core political speech[,]” “an area in which the importance of First Amendment protections is ‘at its zenith.’” *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988).²

² In addition to the protections of the First Amendment, Arizonans’ rights to free expression are robustly protected by the Arizona Constitution, which provides that “[e]very person may freely speak, write, and publish on all subjects” Ariz. Const. art. II, § 6. This Court has held that “by its terms, the Arizona Constitution provides broader protections for free speech than the First Amendment.” *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 ¶ 45 (2019); see also *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 354–55 (1989). Thus, under

In *Meyer v. Grant*, the U.S. Supreme Court explained the essential expressive nature of petition circulation:

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”

Id. at 421–22 (striking down a prohibition on payment of circulators); *see also Buckley v. Amer. Const’l Law Found.*, 525 U.S. 182, 192 (1999) (“[T]he First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas.”) (finding certain restrictions on circulators, including a requirement that they be registered voters, invalid).

In *Meyer*, the Court explained at least two ways in which restrictive circulation policies burden political expression. First, they “limit[] the number of voices who will convey [their] message and . . . therefore, limit[] the size of the audience they can reach.” *Meyer*, 486 U.S. at 422–23. And second, they “make[] it less likely that [circulators] will garner

both the U.S. Constitution and Arizona Constitution, the rights of petition circulators are entitled to robust protection.

the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” *Id.* at 422–23.

Plaintiffs’ claims, if they prevail, would raise serious concerns on both counts. As a result, exacting constitutional scrutiny would apply. *See id.* (applying “exacting scrutiny” because Colorado’s petition circulation restrictions “trenche[d] upon an area in which the importance of First Amendment protections is at its zenith”); *Buckley*, 525 U.S. at 204 (same); *id.* at 207 (Thomas, J., concurring) (“When a State’s election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny . . .”).

First, Plaintiffs seek to invalidate the work of scores of petition circulators for exceedingly minor alleged errors or omissions and, in one case, for following the required procedures as outlined by the Secretary of State. Moreover, circulator registration in violation of A.R.S. § 19-118—which Plaintiffs allege here—is a class 1 misdemeanor. Accepting Plaintiffs’ claims here will “reduce the quantum of speech” by circulators, many of whom may be unwilling to both work tirelessly promoting a petition and gathering signatures when post-hac lawsuits can invalidate

the fruits of their efforts *and* risk potential prosecution for any alleged errors. *See Buckley*, 525 U.S. at 198 (striking down a circulator badge requirement because it “inhibits participation in the petitioning process”); *see also Meyer*, 486 U.S. at 425 (“[T]he burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.”).

Second, it is the express aim of Plaintiffs to “make[] it less likely that [the Committee] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” *Meyer*, 486 U.S. at 422–23. But even beyond this case, acceptance of Plaintiffs’ unduly harsh rules will certainly limit the ability of circulators to successfully gain access to the ballot. In this case, the Committee initially gathered over 175,000 signatures more than the number of valid signatures required to access the ballot. If such a large margin of support can be overcome by Plaintiffs’ hair-splitting complaints, the ability of circulators in Arizona to successfully gain access to the ballot will be substantially impaired. *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (holding, “as applied to the initiative process . . . that ballot access restrictions place a severe burden

on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot”).

b. The First and Fourteenth Amendments Protect the Rights of Arizona Petition Signers.

Plaintiffs seek to invalidate hundreds of thousands of Arizonans’ signatures in favor of placing the Act on the ballot based on technical errors unrelated to any of those Arizonans’ eligibility to sign the petition. In such a case, this Court must consider not only the free speech and expression rights of petition circulators but also the free speech and due process rights of petition signers. *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) (“Petition signing remains expressive even when it has legal effect in the electoral process.”); *Raetzl v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) (“Because voting is a fundamental right, the right to vote is a ‘liberty’ interest which may not be confiscated without due process.”).

Both this Court and the U.S. Supreme Court have recognized that petition signature requirements implicate the right to vote. *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 408 ¶ 41 (2020); *Moore v. Ogilvie*, 394 U.S. 814 (1969). In *Moore v. Ogilvie*, the

Supreme Court—in applying the one-person, one-vote principle to petition signature requirements—recognized that petition signatures, like votes, are a means by which citizens participate directly in our democracy. As such, petition signature procedures are “an integral part of the election process” and “must pass muster against the charges of discrimination or of abridgment of the right to vote.” *Moore*, 394 U.S. at 818; *see also Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir. 2003) (applying Equal Protection guarantees to petition signature gathering rules).

Here, where Plaintiffs seek to invalidate hundreds of thousands of petition signatures based on alleged technical errors unrelated to the signers’ eligibility, the burden on Arizonan petition signers is severe and would trigger strict scrutiny. *Arizonans for Second Chances, Rehab., & Pub. Safety*, 249 Ariz. at 409 ¶ 42 (“Restrictions imposing a ‘severe burden’ are subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest.”).

Moreover, the constitutional concerns raised by Plaintiffs’ claims are heightened because they would invalidate petition signatures based on novel interpretations of Arizona’s statutory requirements, at least one

of which is directly contrary to official guidance from the Secretary of State. Invalidating these signatures would raise serious due process concerns. *See Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970) (holding that the Due Process Clause prohibited an election board from refusing to accept candidate petitions based on a newly announced interpretation of the rules); *see also Bennett v. Yoshino*, 140 F.3d 1218, 1226–27 (9th Cir. 1998) (holding that a due process violation occurs where there has been “likely reliance by voters on an established election procedure and/or official pronouncements” and “significant disenfranchisement . . . results from a change in the election procedures”).³

II. This Court Should Consider the First and Fourteenth Amendment Rights at Issue When Adjudicating Plaintiffs’ Claims.

This Court can protect the rights of both petition circulators and petition signers by adopting the Committee’s straightforward

³ *See generally* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655, 756 (2017) (explaining that the due process principle is “capable of encompassing changes in voting rules that inappropriately unsettle reasonable expectations concerning the operation of the voting process”); Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L. J. 545 590 (2018) (“Changing the rules governing an election after it has occurred also raises a serious threat of due process violations.”).

interpretation of A.R.S. § 19-121.01(A)(1)(h)—that circulators are not “properly registered” only when they have failed to go through the process of registering with the Secretary of State, not whenever there is an immaterial error on their registration form. That reading of the statute is not only reasonable but also (1) harmonizes the statute with A.R.S. § 19-118(A), which instructs the Secretary to “disqualify all signatures collected by a circulator who fails to register” and (2) avoids serious constitutional concerns.

This Court “must interpret [statutory] language, if possible, in order to avoid constitutional conflict. *Johnson Utilities, LLC v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 236 ¶ 106 (2020) (Bolick, J., concurring in part and dissenting in part) (citing *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990) (“[W]here alternate constructions are available, we should choose that which avoids constitutional difficulty.”))

In *Molera II*, this Court recently applied this canon of constitutional avoidance to narrowly construe a petition circulation restriction to “minimize any First Amendment infringement on core political speech.” 250 Ariz. at 25 ¶ 38; see also *KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens*, 199 Ariz. 30, 38 ¶ 27 (App. 2000) (“We broadly

interpret the statutory scheme in a manner we believe supports the requirements of the Constitution. . . . We therefore conclude the statutory scheme could not constitutionally include a local residency requirement for referendum petition circulators and we interpret in a way that avoids an unconstitutional result.”).

In *Molera II*, this Court held that a prohibition on payment “based on” the number of signatures collected did not prohibit “adjustment[s] to hourly rates in light of a circulator’s past productivity.” 250 Ariz. at 25 ¶ 41. Likewise, in *Molera II*, this Court protected the rights of both circulators and petition signers by narrowly construing which signatures would be invalidated in case of a circulator violation. *Id.* at 26 ¶ 48 (disqualifying only signatures gathered when the circulator was paid in violation of the statute “because it serves the legislative purpose in reducing fraud in the signature collecting process . . . while imposing a lesser burden on core political speech”). This Court should follow the same path here and adopt the narrower statutory construction that protects the rights of petition circulators and signers alike.

CONCLUSION

For the foregoing reasons, the Court should protect the constitutional rights of petition circulators and signers, uphold the sanctity of the legislative power of the people, and reject Plaintiffs' attempt to use the statutory initiative requirements "as a procedural sword to disqualify petition signatures rather than using [them] as a tool to advance the fact-finding process." *Leach v. Hobbs*, 250 Ariz. 572, 578 ¶ 27 (2021).

Respectfully submitted this 22nd day of August, 2022.

HERRERA ARELLANO LLP

/s/ Daniel A. Arellano

Roy Herrera
Daniel A. Arellano
530 East McDowell Road
Suite 107-150
Phoenix, Arizona 85004

Danielle Lang*
Campaign Legal Center
1101 14th St. NW Suite 400
Washington, DC 20005

*Attorneys for Amicus Curiae
Campaign Legal Center*

**pro hac vice motion forthcoming*