IN THE SUPREME COURT
STATE OF ARIZONA

VINCE LEACH, et al., Plaintiffs/Appellants/Cross-Appellees, v. MICHELE REAGAN, et al., Defendants/Appellees, and CLEAN ENERGY FOR A HEALTHY ARIZONA COMMITTEE, Real Party in Interest/Appellee/ Cross-Appellant.	Supreme Court No. CV-18-0205-AP/EL Maricopa County Superior Court No. CV2018-009919 **(Expedited Election Matter)**

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES AND IN SUPPORT OF REVERSAL

Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Amicus Curiae Goldwater Institute

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and occasionally files amicus briefs when its or its clients' objectives are directly implicated. The Goldwater Institute seeks to promote the economic freedom essential to a prosperous society, and to enforce provisions of our state Constitution that protect the rights of taxpayers. To this end, the Institute is frequently involved in constitutional litigation involving taxpayer protections, *see, e.g.*, *Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415 (2014); *Friedman v. Cave Creek Unified School Dist. No. 93*, 231 Ariz. 567 (App. 2013), including cases where taxpayers are at risk from wasteful and foolhardy initiative measures. *See, e.g., Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

The strict compliance standard plays a critical role in Arizona's initiative process. Citizen lawmaking has been part of our political system since statehood, but while that mechanism is a significant check against wrongdoing or inaction by the Legislature, it is also prone to abuse. The strict compliance requirement exists

"to ensure that the constitutional right is not abused or improperly expanded." *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 429 (1991).

The failure of this initiative's backers to strictly comply with the requirements of Arizona law should prove fatal to the initiative. Yet the trial court drastically undermined the strict compliance requirement by holding that the Secretary of State must accept an application by a committee without inquiring into the application's sufficiency. *See* Ruling at 10. Thus even where an application fails to comply with the statute's substantive requirements, the Secretary must accept it—notwithstanding the statute's plain instruction that the Secretary must reject incomplete or invalid applications. The trial court's conclusion that the Secretary "could not have refused to assign and issue an official serial number to the Committee," and that A.R.S. § 19-111(B) essentially *requires* the Secretary to issue such a number even when an applicant has not strictly complied with the statutory requirements, *id.*, is contrary to law and opens the door to violation of the state election laws.

Strict compliance can sometimes appear harsh or pedantic. But our representative system of government was designed to impose significant checks and balances on all lawmakers—including, in this instance, the voters themselves. To dilute the strict compliance standard in any way runs a risk of opening up the

lawmaking power to a dangerous majority-is-always-right approach that contradicts our constitutional system.

ARGUMENT

I. THE "STRICT COMPLIANCE" STANDARD IS A CRUCIAL CHECK ON CITIZEN LAWMAKING

The checks-and-balances system with which every school child is familiar is critical to protecting the freedom of all persons. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) ("The distinction between provisions protecting individual liberty, on the one hand, and 'structural' provisions, on the other, cannot be [sustained], since structure in general … is *designed* to protect individual liberty."). In the initiative process, the citizenry takes lawmaking into its own hands, which although beneficial in many instances, imposes a serious risk because it can serve as an end-run against the checks-and-balances system. Our constitutional system "is very much based on distrust of majorities," Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 295 (2007), which is why checks-and-balances were devised in the first place. Citizen-lawmaking risks nullifying the protections afforded by that system by letting bare majorities make law without regard to the representative process.

The problem with excessive majority-rules systems is not that the people are of bad character—although as *The Federalist* notes, voters "know from experience,

that they sometimes err; and the wonder is, that they so seldom err as they do; beset, as they continually are by the wiles of parasites and sycophants" and "the artifices of [people], who possess their confidence more than they deserve it." THE FEDERALIST NO. 71 at 482 (J. Cooke ed., 1961) (Alexander Hamilton). Acknowledging that "the cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail," our constitutional system was designed to ensure that "when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn," mechanisms will be in place to "check" this and "suspend the blow meditated by the people against themselves, until reason, justice and truth, can regain their authority." *Id.* No. 63 at 425 (James Madison). That is why the citizen-lawmaking process was designed with certain countervailing laws in place—and it has been subsequently amended for the same reason—to ensure that some mechanism exists to cabin the dangerous power of the majority.

This is the reason why, for example, the Arizona Constitution was amended to add Article IX section 23, which limits permissible initiatives so as to prevent the citizenry from allocating tax moneys without legislative involvement. That provision was itself added by the voters, who were aware that "ballot box

budgeting" could disrupt the finances of the state and harm taxpayers. And it is why the Legislature enacted A.R.S. § 19-112, as this Court acknowledged in *Direct Sellers Ass'n v. McBrayer*, 109 Ariz. 3, 6 (1972), when it quoted the Legislature's finding that "small pressure groups" had begun "taking advantage" of the initiative and referendum process for "their own selfish purposes." The strict statutory guidelines at issue here "'are intended to guard the integrity both of the proceeding and of the petition.'" *Id.* at 5 (quoting *AAD Temple Bldg. Ass'n v. City of Duluth*, 160 N.W. 682, 684-85 (Minn. 1916)). This Court should rigorously enforce the statutory requirements to the letter.

II. THE TRIAL COURT'S HOLDING IS SELF-CONTRADICTORY AND UNDERMINES THE SECRETARY OF STATE'S ROLE IN THE PROCESS, HARMING THE STRICT-COMPLIANCE PRINCIPLE

The trial court's holding—that the Secretary of State has no discretion to reject a petition that fails to comply with the legal requirements—is erroneous, and, if not reversed, risks weakening the strict compliance principle in a dangerous way. The court's reasoning was as follows: A.R.S. § 19-111(B) says that "[o]n receipt of [an] application, the secretary of state *shall* assign an official serial number [to the petition]" (emphasis added)—and this means the Secretary "could not have refused to assign and issue an official serial number to the Committee"

even if the application is defective on its face. Ruling at 10. That conclusion is inconsistent with the plain wording of the statute.

The statute begins, in Section 19-111(A), by stating that a Committee "*shall* file with the secretary of state an application … setting forth" the required information, and "[a]t the same time as the person or organization files its application … *shall* file with the secretary of state its statement of organization." (Emphasis added). The same mandatory duty, therefore, rests with the applicant to submit not just *any* application, but a *valid* application—one that complies with all the requirements in the section. And Section 19-111(A) reinforces this by stating that the Secretary "*shall not* accept an application for initiative or referendum without an accompanying statement of organization *as prescribed by this subsection*." (Emphasis added).

This wording makes plain that when the statute speaks of an "application" it means a *valid* application—the Secretary has a nondiscretionary duty to reject an application that lacks a statement of organization such as is "prescribed by this subsection." *Id.* Indeed, the "shall" language which the trial court rightly found significant applies equally to the "as prescribed by this section" provision—and that means that the subsection requires the application to provide *correct* information. It logically follows that the Secretary may not accept an application that falsely identifies, or omits, the required information—just as the Secretary

shall reject an application that lacks a statement entirely. Providing a false or incomplete statement is legally the same as providing no statement at all. And the Secretary's nondiscretionary duty, as a logical matter, is the same in both cases: to reject the application.

The trial court therefore erred in stating that "[n]othing in" the law "required the Secretary of State to disqualify petition sheets ... based on an allegedly inadequate description of the Initiative's sponsor." Ruling at 10. On the contrary, the law requires the Secretary to accept *valid* applications—validity being determined by compliance with the requirements "prescribed by this subsection." A.R.S. § 19-111(A). To hold otherwise is to commit what has been called "the Pickwickian Fallacy," "whereby one gives a familiar word a new meaning but at the same time illicitly cashes in the old." José A. Benardete, *Is There a Problem About Logical Possibility?* 71 MIND 342, 347 (n.s. 1962); *Cf.* LON L. FULLER, THE MORALITY OF LAW 39 (2d ed. 1969) (referring to "the Pickwickian sense" in which a void contract is still a kind of contract). The statute in referring to an application obviously means a *valid* application, since an invalid application is really no application at all. The provision's various mandates already make clear that *invalid* applications are to be rejected the same as no application at all. The "applications" to which Section 19-111(B) refers must therefore mean those applications that satisfactorily comply with the requirements in Section 19-111(A).

The trial court's ruling to the contrary threatens to undermine the strict compliance requirement by holding that the Secretary has no discretion to reject even an obviously invalid or incomplete application, and indeed, that citizens lack standing to enforce the statutory requirements *via* a lawsuit. The trial court found that the only remedy is an administrative process that can be time consuming, and in which the parties most interested in the matter are not full participants. Ruling at 10-11.

Worse, the trial court's conclusion that the Chapter 16 administrative procedure is the exclusive remedy in cases like this is illogical, because that section deals with *campaign finance,* and has nothing to do with matters relating to the legal validity of initiatives or of the applications referred to in Section 19-111. The plaintiffs here do not seek a penalty, and the legal dispute would not be remedied by the assessment of any penalty. Thus the section which the trial court cited to support its conclusion—A.R.S. § 16-938(G), which allows an alleged violator to avoid a penalty by taking corrective action within 20 days of the notice of violation—is simply irrelevant, because that section refers to "violations of this article and … this chapter," A.R.S. § 16-938(A), when the requirements at issue here are in a different article and chapter.

The trial court itself acknowledged that "nothing in Title 19…precludes a private litigant from challenging each and every signature submitted in support of

an initiative measure," and that Section 19-121(C) allows the plaintiffs to contest the validity of a measure based on the actions of the secretary of state. Ruling at 13. By the same logic, no barrier should exist to maintaining an action against the Secretary for accepting an application that fails to comply with the *nondiscretionary* requirements of Section 19-111(A).

CONCLUSION

The strict compliance standard is an essential rule of our citizen-lawmaking process. While it may seem at times hyper-technical, those technicalities are the basis of security for minority groups, individuals, and taxpayers who are at risk when the rules of the game are not scrupulously followed. Here, those rules were not scrupulously followed, and the trial court ruled that the Secretary of State had no discretion to reject an application that failed to follow those rules. That was error, and should be *reversed*.

Respectfully submitted August 8, 2018 by:

/s/ Timothy Sandefur
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE