SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009919 07/31/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

VINCE LEACH, et al.

ANDREW SNIEGOWSKI

v.

MICHELE REAGAN, et al.

J E LA RUE

JAMES E BARTON II
CRAIG C CAMERON
COLLEEN CONNOR
JEFFERSON R DALTON
RYAN ESPLIN
BRITT W HANSON
DANIEL JURKOWITZ
WILLIAM J KEREKES
CHARLENE A LAPLANTE
JOSEPH RUEDA
JESSICA SABO
ROSE WINKELER
BRETT W JOHNSON
SAMAN J GOLESTAN
KARA MARIE KARLSON
JOSEPH YOUNG
KENNETH A ANGLE
TALIA OFFORD
JASON MOORE
COLIN PATRICK AHLER
JUDGE KILEY

SUPERIOR COURT OF ARIZONA
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UNDER ADVISEMENT RULING

After Oral Argument on July 30, 2018, the Court took under advisement the Motion to Dismiss and the various Objections to Discovery Requests filed by the Defendant Recorders and Supervisors of each County (collectively, the "County Defendants"); the Motion to Consolidate Signature Review and the Motion for Partial Summary Judgment filed by Plaintiffs Vince Leach *et al*. (collectively, the "Plaintiffs"); and the Motion to Dismiss and Motion to Quash filed by Real Party in Interest Clean Energy for a Healthy Arizona (the "Committee"), and now rules.

A. The County Defendants' Objections to Discovery Requests

The Plaintiffs' claims in this case are based in part on their assertion that the initiative measure at issue in this case (the "Initiative") "does not have enough Arizona qualified electors' signatures to qualify" for placement on the ballot. Verified Complaint for Special Action and Injunctive, Declaratory, and Mandamus Relief ("Complaint") at ¶ 5. The Plaintiffs allege that over three-quarters of the signatures collected are invalid for a variety of reasons, including that the signers "were not registered voters at the time the petition sheet was signed," the signers impermissibly signed more than one petition sheet, and the signers "failed to fully, legibly, and properly disclose" their names and/or addresses. *Id*. at ¶ 8.

The Plaintiffs further allege that the filing of this action "triggers the defendant county recorders to perform their own review of each signature allegedly gathered in their respective counties." Motion to Consolidate Signature Review at p. 1. Pursuant to this purported obligation, the Plaintiffs have served discovery requests on each of the County Defendants pursuant to Rules 33 and 36 of the Arizona Rules of Civil Procedure (the "Discovery Requests") asking them to "[a]dmit or deny" that signatures obtained in their respective counties "in purported support of the Initiative are disqualified" and, if denied, to "state any and all facts underlying the basis for [the] denial." Exhibit B to Motion for Leave to Serve Expedited Discovery Requests. It is undisputed that responding to the Discovery Requests will require the County Defendants, collectively, to conduct a line-by-line review of hundreds of thousands of signatures whose validity the Plaintiffs have challenged.

Each of the County Defendants objects to these discovery requests. In support of their objections, they assert that "the discovery requests seek information far beyond the verification of signatures on an initiative petition that is provided for by A.R.S. §§ 19-121 *et seq*.," Objection to Plaintiffs' Discovery Requests by Defendant Navajo County ("Navajo County's Objection") at pp. 1-2, and would impose an "unreasonable" and "unduly burdensome" burden on staff members while "forcing them to divert time away from other duties they are required to perform (*e.g*., preparing for the upcoming primary elections; sending out early voter ballots; performing

logic and accuracy testing of election machines, etc.).” Notice of Joinder by Santa Cruz County in Navajo County’s Objection to Plaintiffs’ Discovery Requests at p. 2.

As the County Defendants point out, Title 19 “provide[s] the exact procedures, deadlines, and methods the Secretary [of State] and county recorders must follow in verifying whether an initiative contains a sufficient number of valid signatures for the item to be placed on the ballot.” Defendants Arizona’s County Recorders and Board of Supervisors’ Joint Motion to Dismiss (“County Defendants’ Motion to Dismiss”) at p. 3. First, “[w]ithin twenty [business] days…after the date of filing of an initiative,” the Secretary of State must eliminate petition sheets or individual signatures that are non-compliant with statutory requirements for any one of a number of enumerated reasons. A.R.S. § 19-121.01(A). These reasons include, for example, that the signer failed to list his or her “residence address” or “the date” of signing, the date of signing precedes the “date that [a] serial number was assigned to the political committee,” and the petition sheet contains “in excess of…fifteen signatures.” A.R.S. § 19-121.01(A)(3)(b), (c), (d). After eliminating non-compliant petition sheets and signatures, the Secretary of State must then determine if the remaining signatures exceed the minimum required to qualify for the ballot. A.R.S. § 19-121.01(B). If so, the Secretary of State must “select, at random, five percent of the total signatures eligible for verification” to be sent to the recorders of the respective counties. A.R.S. § 19-121.01(B), (D). Upon receipt of their portion of the five percent sample, each county recorder is required to review the sample and “strike any signatures that are “disqualified for any” one of a number of statutorily-enumerated reasons. A.R.S. § 19-121.02(A).

> After conducting [their] review, the county recorders are required to submit a certification to the Secretary [of State] [of] “the total number of signatures selected for the random sample and transmitted to the county recorder for verification and the total number of random sample signatures disqualified” along with the names, including page and line numbers, of the signatures that were disqualified. A.R.S. § 19-121.02(B). When the verification of all the county recorders is complete, the Secretary [of State] considers the percentage of valid signatures based on the reports of the various recorders, and then determines whether the circulators of the Petition have enough qualifying signatures for the initiative to be placed on the ballot. A.R.S. § 19-121.04(A)-(C).

Navajo County’s Objection at pp. 3-4. Nothing in Title 19 provides for a line-by-line review by the County Defendants of each signature submitted by the Committee. The Court therefore agrees with the County Defendants that the Plaintiffs’ “attempt to require the County Recorder[s] to verify every signature on every page is contrary to” the verification procedures established by the Legislature. Objection to Plaintiffs’ Discovery Requests by Defendant Mohave County at p. 5.

Further support for the conclusion that the Legislature did not intend to require county recorders to verify each signature submitted in support of an initiative measure is found in the fact that a prior version of A.R.S. § 19-121.04 did in fact authorize (albeit in limited circumstances) a line-by-line review of signatures submitted in support of an initiative measure. The language of the prior version of A.R.S. § 19-121.04 - - which provided in part that the Secretary of State "shall order the examination and verification of each signature filed" if "the number of valid signatures as projected from the random sample" was between 95% and 105% of the minimum needed for placement on the ballot - - was eliminated by the Legislature in 2011. 2011 Ariz. Legis. Serv. Ch. 332 (H.B. 2304) (WEST). As the Yavapai County Attorney argues, to impose an obligation on the County Defendants to conduct a line-by-line signature review would be inconsistent with the Legislature's decision in 2011 to "remov[e] the procedure requiring a check of signatures beyond the 5% sample." Yavapai County Defendants' Joinder in Opposition to Motion to Consolidate Signature Review Filed By Clean Energy for a Healthy Arizona, Real Party in Interest at p. 2.

The Plaintiffs "acknowledge that there is nothing in Title 19 that requires the county recorders to review the contested signatures" on a line-by-line basis as the Plaintiffs propose. Reply in Support of Motion to Consolidate Signature Review at p. 2. They assert, however, that, by the same token, "there is also nothing anywhere in Arizona law that *prohibits* such review." *Id*. (emphasis added). They further assert that the County Defendants "have superior access to [voter registration] information that bears directly on the outcome of this case," and that their responses to the Discovery Requests could "narrow the issues for trial." Response in Opposition to Defendants' Objections to Plaintiffs' Requests for Admission and Non-Uniform Interrogatories at pp. 2, 7.

The Arizona Constitution provides that "[t]he duties, powers, and qualifications of [county] officials shall be as prescribed by law." Ariz.Const., Art. XII, § 4. County officials may only act pursuant to authority expressly conferred or necessarily implied by statute or constitutional provision. *See*, *e.g*., *Hernandez v. Frohmiller*, 68 Ariz. 242, 254, 204 P.2d 854, 862 (1949) ("The boards of supervisors have only such authority as is expressly given or necessarily implied by statute."). Because A.R.S. § 19-121.02 mandates a "random sample review" upon the occurrence of certain conditions, county officials have a duty to conduct such a review. Because nothing in Title 19 requires or authorizes county officials to conduct the line-by-line review sought by the Plaintiffs, county officials have no authority to perform such a review.

In support of their position that the County Defendants can properly be required to conduct "an additional signature review" beyond the random sample review required by A.R.S. 19-121.02, the Plaintiffs cite *Parker v. City of Tucson*, 233 Ariz. 422, 427, 314 P.3d 100, 105

(App. 2013). Response to Defendants Arizona's County Recorders and Boards of Supervisors' Joint Motion to Dismiss ("Response to County Defendants' Motion to Dismiss") at p. 6. In *Parker*, the trial court, after finding certain signatures gathered in support of an initiative measure to be invalid for various reasons, "ordered the City Clerk to remove the disqualified signatures" and "prepare a new random sample." *Parker*, 233 Ariz. at 427, 314 P.3d at 105. Because the municipal election officials in *Parker* were not required to conduct a comprehensive review of all signatures gathered in support of the Initiative, but only a second random sample review, *Parker* provides no support for the Plaintiffs' position in this case.

The Plaintiffs argue that they have an "unqualified right, under A.R.S. § 19-122(C), to challenge the validity of [the Initiative] on any basis," including the alleged invalidity of the signatures gathered in support of the Initiative. Response in Opposition to Defendants' Objections to Plaintiffs' Requests for Admission and Non-Uniform Interrogatories at p. 3. Nothing in A.R.S. § 19-122(C), however, entitles the Plaintiffs to obtain discovery in support of their claims at taxpayer expense by imposing on the County Defendants an extra-statutory obligation to conduct a time-consuming verification of each of the hundreds of thousands of signatures submitted in support of the Initiative. As the County Defendants correctly assert, although "the duties of a county recorder include a signature verification pursuant to A.R.S. § 19-121.02," nothing in Title 19 requires, or even permits, the County Defendants to perform a line-by-line signature review "of initiative petition signatures" at the behest of "a private litigant." County Defendants' Motion to Dismiss at p. 7. *See also* Pima County Defendants' Objection to Plaintiffs' First Request for Admission and Non-Uniform Interrogatories at p. 3 (county recorder "has no legal authority to review" signatures other than those included in the random sample). The Court therefore rejects the Plaintiffs' position that they are entitled to impose, by means of the Discovery Requests, an obligation on the County Defendants that is not found in Title 19 to conduct a line-by-line verification of hundreds of thousands of signatures.

In any event, as discussed more fully below, the County Defendants are not proper parties to this case, and so cannot be required to respond to discovery requests that are served pursuant to discovery rules that apply only to parties. *See* Ariz.R.Civ.P. 33(a)(1) ("Interrogatories are written questions served by a party on another party."); Ariz.R.Civ.P. 36(a)(1) ("A party may serve on any other party a written request to admit…the truth of any matters within the scope of Rule 26(b)…").

Accordingly,

IT IS ORDERED sustaining the objection of each of the County Defendants to the discovery requests served on them by the Plaintiffs.

B. Motion to Consolidate Signature Review

The Plaintiffs ask that the Court consolidate "the signature review performed by the county recorders as a result of this case" with "the random sample review" that may be conducted "pursuant to A.R.S. § 19-121.02(A)." Motion to Consolidate Signature Review at p. 1. Because, as discussed above, the Motion to Consolidate Signature Review is based on the incorrect premise that the Plaintiffs' petition challenge "triggers the defendant county recorders to perform their own review of each signature allegedly gathered in their respective counties," *id*., the Motion to Consolidate Signature Review is not well-taken, and the Plaintiffs are entitled to no relief. Accordingly,

IT IS ORDERED denying the Motion to Consolidate Signature Review.

C. County Defendants' Motion to Dismiss

The County Defendants have moved to dismiss the Plaintiffs' claims against them, asserting that the Plaintiffs "lack any legally cognizable claim against" them. County Defendants' Motion to Dismiss at p. 6. In support of their position, they note that, by the Plaintiffs' own admission, "this lawsuit is challenging the validity of the Initiative itself pursuant to A.R.S. §§ 19-118(D)…and 19-122(C)…" *Id*. *See also* Complaint at p. 1 ("Plaintiffs bring this action for a writ of mandamus and declaratory and injunctive relief pursuant to A.R.S. §§ 19-118(D) and 19-122(C)…"). The County Defendants assert that "[n]either of the statutes [*i.e*., A.R.S. §§ 19-118(D) and 19-122(C)] impose any duty on the County Defendants." County Defendants' Motion to Dismiss at p. 6. They assert that Title 19 authorizes a private litigant to assert a claim against a county recorder only "[i]f the county recorder fails or refuses to comply with" his or her obligation to conduct the random sample review mandated by A.R.S. § 19-121.02, or to challenge "the certification made by a county recorder" following such a review. A.R.S. § 19-121.03(A), (B). Because the Plaintiffs' claims against them do not arise out of the random sample review mandated by A.R.S. § 19-121.02, the County Defendants assert, the Plaintiffs have failed to state a claim authorized by law.

In response, the Plaintiffs assert, for various reasons, that they "have stated a legally cognizable claim as to the County Defendants." Response to County Defendants' Motion to Dismiss at p. 1. Noting that A.R.S. § 19-122(C) authorizes "any person" to "seek to enjoin the secretary of state or other officer from certifying or printing the official ballot…that will include the proposed initiative," the Plaintiffs contend that the County Defendants are proper parties to this case because "the County Defendants are responsible for actually printing the ballots for their respective counties." *Id*., *citing* A.R.S. § 19-122(C).

In ruling on a motion to dismiss for failure to state a claim, the Court must "assume the truth of all well-pleaded factual allegations," "indulge all reasonable inferences from those

facts," and grant the motion "only if the claim fails under any interpretation of the facts susceptible of proof." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 244 Ariz. 259, 263, 418 P.3d 1032, 1036 (App. 2018) (citations and internal quotations omitted).

As the County Defendants argue, "[t]he ripeness doctrine…'prevents a court from rendering a premature judgment or opinion on a situation that may never occur." County Defendants' Motion to Dismiss at p. 4, *quoting Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). It is undisputed that the county recorders' random sample review has only just gotten underway. At present, therefore, the county recorders have made no certification to the Secretary of State pursuant to A.R.S. § 19-121.02(B), nor has the Secretary of State made any determination pursuant to A.R.S. § 19-121.04(B) and (C) as to whether the Initiative has sufficient valid signatures to qualify for placement on the ballot.[1] Because those events have not yet occurred, the Court agrees with the County Defendants that any claim to enjoin them from placing the Initiative on the ballot is not yet ripe. The Plaintiffs assert no cognizable claim against the County Defendants for injunctive relief relating to the printing of the election ballots. *See Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149, 153, 797 P.2d 6, 10 (App. 1990) (ordering dismissal of declaratory judgment action that was not "ripe for adjudication").

The Plaintiffs further contend that mandamus relief is appropriate against the County Defendants because the County Defendants "have a non-discretionary legal duty during their statutory review of the random sample of signatures to exclude any signatures that do not comply with statutory and constitutional requirements." Response to County Defendants' Motion to Dismiss at p. 8, *citing* A.R.S. § 19-121.02. While this is a correct statement of the County Defendants' obligations under A.R.S. § 19-121.02, the Plaintiffs have failed to state a claim against the County Defendants arising out of that statute. The Plaintiffs have not alleged that any county recorder has "fail[ed] or refuse[d] to" conduct a random sample review; the cause of action authorized by A.R.S. § 19-121.03(A) is, therefore, not available here. *See* A.R.S. § 19-

[1] Section 19-121.04 provides that, at the conclusion of the county recorders' random sample review, the Secretary of State must "determine the total number of valid signatures" by "subtracting," from the signatures that were submitted, all those that were disqualified by the Secretary of State or a county recorder for any one of the statutorily-enumerated reasons and a percentage of the remaining signatures corresponding to "the percentage of all signatures found to be invalid in the random sample." A.R.S. § 19-121.04(A). Depending on whether or not "the actual number of [the remaining] signatures" equals or exceeds "the minimum number required" for placement on the ballot, the Secretary of State will then either "notify the governor that a sufficient number of signatures has been filed," at which point "the initiative…shall be placed on the ballot," or notify "the person or organization that submitted" the signatures that "the petition lacks the minimum number of signatures to place it on" the ballot. A.R.S. § 19-121.04(B), (C).

121.03(A) (authorizing mandamus relief "[i]f [a] county recorder fails or refuses to comply with the provisions of A.R.S. § 19-121.02"). Any claim based on A.R.S. § 19-121.03(B) is premature at this point because the County Defendants have not yet completed their random sample review or made any certification to the Secretary of State. *See* A.R.S. § 19-121.03(B) (authorizing "[a]ny citizen" to "challenge…the certification made by a county recorder…"). Because the Plaintiffs have alleged no cognizable claim under either Subsection A or Subsection B of A.R.S. § 19-121.03, they have failed to state a claim for relief against the County Defendants.

Accordingly,

IT IS ORDERED granting Defendant Arizona's County Recorders and Boards of Supervisors' Joint Motion to Dismiss and dismissing the County Defendants as parties to this case.

D. Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, Request for Expedited Limited Evidentiary Hearing Regarding Real Party in Interest's Invalid Statement of Organization and Initiative Application and Committee's Motion to Dismiss for Failure to State a Claim

The Plaintiffs seek to disqualify all signatures gathered and filed by the Committee on the basis that the Committee "failed to properly form as a political committee and failed to properly complete and submit an accurate application for initiative." Motion for Partial Summary Judgment or, in the Alternative, Request for Expedited Limited Evidentiary Hearing Regarding Real Party in Interest's Invalid Statement of Organization and Initiative Application at p. 2. In support of their position, they allege that, "[o]n February 9, 2018, [the Committee] filed its statement of organization with the Arizona Secretary of State" which identified "its sponsoring organization" as "Clean Energy for a Healthy Arizona, LLC (the "LLC")." *Id*. at p. 3. The Committee filed its initiative application on February 20, 2018. *Id*. It was not until on or about February 27, 2018, however, that the LLC "actually submit[ted] its articles of organization to the Arizona Corporation Commission," which did not approve them until almost a month later. *Id*. Moreover, the Plaintiffs contend, the LLC "has not made any monetary or in-kind political contributions to" the Committee, which, instead, has received "99.99% of [its] financial and in-kind contributions" from NextGen Climate Action ("NextGen"), a California entity whose name "is not listed" on the Committee's statement of organization or its "application for initiative." *Id*. at pp. 3-4. The Plaintiffs conclude that because the Committee "was not properly formed or registered," and failed to "identify its correct sponsor" when it "submitted its statement of organization," "all of the purported signatures are void and should be disqualified." *Id*. at pp. 6, 8. The Plaintiffs seek partial summary judgment on this issue. *Id*. at p. 9.

The Committee has moved to dismiss the Plaintiffs' claims to the extent they are based on "alleged deficiencies in the statement of organization." Motion to Dismiss for Failure to State a Claim ("Committee's Motion to Dismiss") at p. 4. It asserts that Title 19 creates no "private right of action to challenge the identification of a committee sponsor or naming the committee or the Secretary of State's accepting a committee statement of organization." *Id*. at p. 5.

Summary judgment is appropriate if, and only if, the moving party demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ariz.R.Civ.P. 56(a). As noted above, a court will grant a motion to dismiss for failure to state a claim "only if the claim fails under any interpretation of the facts susceptible of proof." *Hopi Tribe*, 244 Ariz. at 263, 418 P.3d at 1036 (citations and internal quotations omitted).

Section 19-111 provides in part that "[a] person or organization intending to propose a law or constitutional amendment by initiative petition…shall file with the secretary of state an application" for "issuance of an official serial number." A.R.S. § 19-111(A). The application must set forth specific information, including "the person's name or, if an organization, its name and the names and titles of its officers." *Id*. The applicant must file, along with its application, a "statement of organization." *Id*. The Secretary of State may not "accept an application for initiative…without an accompanying statement of organization as prescribed by this subsection." *Id*.

It is undisputed that the Committee filed both a statement of organization and an application with the Secretary of State in February 2018. The Plaintiffs assert, however, that the statement of organization was deficient because it "failed to incorporate" the name of "the actual backer of the Initiative, NextGen Climate Action ('NextGen')," and because it "improperly identified a non-existent entity as…sponsor," *i.e*., the LLC. Plaintiffs' Response to Real Party in Interest's Motion to Dismiss for Failure to State a Claim ("Plaintiffs' Response to Committee's Motion to Dismiss") at p. 1. The Plaintiffs take the position that "[a] defective statement of organization renders a subsequent initiative application a nullity." *Id*. at p. 5. Moreover, they assert, the application itself was "insufficient" because it failed to "incorporate the name or nickname of the actual sponsor, NextGen." *Id*.

Section 16-906(B)(1)(b) provides that a statement of organization for "a political action committee that is sponsored" must include "the sponsor's name or commonly known nickname." A.R.S. § 16-906(B)(1)(b). Section 16-901(47) defines "sponsor" as "any person that establishes, administers or contributes financial support to the administration of a political action committee or that has common or overlapping membership or officers with that political action committee." A.R.S. § 16-901(47). In challenging the Committee's purported failure to properly identify the Initiative's "sponsor" in its application and statement of organization, the Plaintiffs are asserting,

essentially, that the Committee failed to comply with A.R.S. §§ 16-901(47) and 16-906(B)(1)(b). The Plaintiffs' challenge arising out of A.R.S. §§ 16-901(47) and 16-906(B)(1)(b) does not, however, state a claim cognizable under Title 19. Section 19-122(C) authorizes challenges to the "validity of an initiative…measure" based on "compliance with *this chapter*." A.R.S. § 19-122(C) (emphasis added). Because Title 16 statutes are, obviously, not found within Title 19, A.R.S. § 19-122(C)'s authorization of challenges based on "compliance with this chapter" necessarily excludes challenges based on alleged non-compliance with Section 16-901(47), Section 16-906(B)(1)(b), or any other statute found within Title 16.

The Plaintiffs contend that their claim based on the Committee's purported failure to comply with A.R.S. §§ 16-901(47) and 16-906(B)(1)(b) is within the scope of A.R.S. § 19-122(C) "because that statute…allows a challenge to the legal sufficiency of an initiative based on the actions of" the Secretary of State. Plaintiffs' Response to Committee's Motion to Dismiss at p. 1. *See also* A.R.S. § 19-122(C) (authorizing challenges "to the validity of an initiative" that are "based on *the actions of the secretary of state or* compliance with this chapter") (emphasis added). The Plaintiffs contend that they "are challenging affirmative acts by the Secretary of State" in accepting "the deficient Initiative application (and accompanying statement of organization)" and in issuing "a serial number for the Initiative." *Id*. at pp. 1-2.

The Plaintiffs allege that in February 2018, the Committee filed, with the Secretary of State, an application and a statement of organization identifying "Clean Energy for a Healthy Arizona, LLC" as its sponsor. Complaint at ¶ 78. At that point, A.R.S. § 19-111 required the Secretary of State to "assign an official serial number to the petition" and "issue that number to the applicant." A.R.S. § 19-111(B). The Secretary of State could not have refused to assign and issue an official serial number to the Committee without violating her statutory obligation. *See* A.R.S. § 19-111(B) ("On receipt of the application, the secretary of state *shall* assign an official serial number…and issue that number to the applicant.") (emphasis added). Likewise, upon receipt of the petition sheets from the Committee, the Secretary of State was required to review them and disqualify petition sheets and signatures for any of the reasons delineated by statute. A.R.S. § 19-121.01(A). Nothing in A.R.S. § 19-121.01(A) authorized or required the Secretary of State to disqualify petition sheets or signatures based on an allegedly inadequate description of the Initiative's sponsor in the filing paperwork. *See generally id*. Because the Plaintiff has identified no provision of Title 19 that authorized or required the Secretary of State to refuse to accept the Committee's application or issue a serial number, or to refuse to accept the petition sheets submitted by the Committee, the "formation issues" raised by the Plaintiffs state no claim for relief "based on the actions of" the Secretary of State.

Even if, as the Plaintiffs apparently contend, the Secretary of State had an obligation to conduct an investigation of the Committee's application and statement of organization for compliance with A.R.S. §§ 16-901(47) and 16-906(B)(1)(b) prior to accepting the application and issuing a serial number, Title 16 establishes an exclusive remedy for any violation of those

statutes. Pursuant to Title 16, the filing officer "is the sole public officer who is authorized to initiate an investigation into alleged violations" of certain specified articles of Chapter 6 of Title 16, including articles 1 and 1.1, the articles in which A.R.S. §§ 16-901 and 16-906 are found. A.R.S. § 16-938(A). If, after giving "the subject of an investigation a reasonable opportunity to respond," the filing officer finds "reasonable cause to believe that" a violation has occurred, "the filing officer shall refer the matter" to the appropriate enforcement official, who has "sole and exclusive authority to initiate any applicable administrative or judicial proceedings to enforce an alleged violation of" the specified articles. A.R.S. § 16-938(C), (F). The enforcement official may "[c]onduct an investigation," may serve a notice of violation on "the alleged violator," and may impose a monetary penalty if "corrective action" is not taken within a statutorily prescribed period. A.R.S. § 16-938(E)(1)-(2), (G). Nothing in Title 16 establishes a private right of action for a violation of A.R.S. §§ 16-901 or 16-906. On the contrary, A.R.S. § 16-938(F) confers on the enforcement official "sole and exclusive authority" to initiate "administrative or judicial proceedings" based on alleged violations of articles 1 and 1.1 of Chapter 6 of Title 16. A.R.S. § 16-938(F). Because Title 16 establishes no private right of action, no such right of action can be created by judicial interpretation. *See Pacion v. Thomas*, 225 Ariz. 168, 169, 236 P.3d 395, 396 (2010) (holding that no private right of action exists for circulating nominating petitions prior to formation of a campaign committee, allegedly in violation of A.R.S. § 16-903(A); assuming that A.R.S. § 16-903(A) was violated, "the exclusive remedy for such a violation is the civil penalty provided in" Title 16, Chapter 6); *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 196, 337 P.3d 557, 561 (App. 2014) (holding that no private right of action exists to challenge political committee's transfer of surplus funds to a different political committee, allegedly in violation of A.R.S. § 16-915.01; while challengers' "dissatisfaction with the enforcement mechanism and limited remedies prescribed by the legislature for alleged violations of A.R.S. § 16-915.01 is understandable," "[p]rincipled application of tools of statutory construction reveals no legislative intent to establish a private right of action for alleged violations of A.R.S. § 16-915.01"). *See also City of Sierra Vista v. Sierra Vista Wards Sys. Voting Proj.*, 229 Ariz. 519, 525, 278 P.3d 297, 303 (App. 2012) (recognizing "a legislative intent" to "cap civil penalties authorized by title 16, chapter 6, article 1" at statutorily-specified amount "unless otherwise provided").

To recognize a private right of action to challenge alleged deficiencies in an applicant's application and statement of organization would be inconsistent with the administrative remedy found in A.R.S. § 16-938(A). Section 16-938 establishes a mechanism by which an applicant may avoid "any penalty" for a violation of articles 1 and 1.1 of Chapter 6 of Title 16 by taking corrective action within the statutory deadline. A.R.S. § 16-938(G). To allow a private litigant to challenge the eligibility of an initiative measure for placement on the ballot after the submission of the petition sheets by contesting the applicant's compliance with A.R.S. §§ 16-901(47) and 16-906(B)(1)(b) would deprive the applicant of its statutorily-mandated opportunity to avoid "any penalty" by taking corrective action as authorized by A.R.S. § 16-938(G). Because A.R.S. §

16-938 establishes an exclusive administrative remedy for alleged deficiencies in an applicant's application and statement of organization, the Court finds that the Plaintiffs have failed to state a claim based on such alleged deficiencies.

In support of their position, the Plaintiffs cite a statement in a footnote in *Israel v. Town of Cave Creek*, 196 Ariz. 150, 993 P.2d 1114 (App. 1999) that A.R.S. § 19-111(A) "invalidates any signatures obtained on referendum petitions circulated pursuant to an insufficient application." *See* Plaintiff's MSJ at p. 5, *quoting Israel*, 196 Ariz. at 155 n. 7, 993 P.2d at 1119 n. 7. *Israel* is inapposite. In *Israel*, unlike this case, the filing officer refused to issue a petition serial number, and the applicant sought a writ of mandamus to compel the filing officer to do so. *Israel*, 196 Ariz. at 152, 993 P.2d at 1116. In support of its position, the defendant municipality argued, *inter alia*, that the filing officer's refusal to issue the petition serial number was justified because the applicant's referendum application was "statutorily invalid" because it failed to "list" "the name of" the "organization" that the applicant purportedly represented as required by A.R.S. § 19-111(A). *Id*. at 155, 993 P.2d at 1119. Because the *Israel* court did not accept the defendant's argument on that point, and instead remanded the case to the superior court for a determination of that issue, the *Israel* court's statement about what the consequences would be if the applicant had violated A.R.S. § 19-111(A) is *dicta*, and therefore not binding. Further, it does not appear, from a reading of *Israel*, that the parties in that case raised the issue that the Committee raises here, *i.e*., that no private right of action exists for a violation of A.R.S. §§ 16-901 and/or 16-906.

Pursuant to *Pacion* and *McNamara*, the Court finds that the Plaintiffs have failed to state a claim for relief arising out of the Committee's purported failure to comply with A.R.S. §§ 16-901(47) and 16-906(B)(1)(b), because the exclusive remedy for such a violation is the administrative remedy created by A.R.S. § 16-938.

The Court further agrees with the Committee that, even if Title 19 authorized the Plaintiffs' challenge to alleged deficiencies in the Committee's application and statement of organization, the doctrine of laches bars any such claim by the Plaintiffs in this case. "[I]t is well-settled in Arizona that the doctrine of laches is available as a defense in an action challenging the legal sufficiency of an initiative measure and seeking to enjoin printing the measure on the official ballot." *Harris v. Purcell*, 193 Ariz. 409, 412, 973 P.2d 1166, 1169 (1998). Here, it is undisputed the Committee filed its application and statement of organization in February 2018. *See* Complaint at ¶ 79. Further, at Oral Argument on July 30, 2018, the Committee argued, and the Plaintiffs did not dispute, that NextGen's contributions to the Committee are reflected in mandatory campaign finance disclosures that were accessible to the public in April 2018. Had the Plaintiffs raised their challenge to the purported inadequacies in the Committee's application and/or statement of organization sooner, the Committee would have had the opportunity to take corrective action by submitting amended formation documents and then gathering additional signatures pursuant to those amended documents. Instead, the Plaintiffs

delayed raising this challenge until after the Committee submitted its petition sheets, thereby depriving the Committee of the opportunity to take any corrective action. *See* A.R.S. § 19-121(B) (after filing of petition sheets and issuance of a receipt therefor, "no additional petition sheets may be accepted for filing."). Because the Plaintiffs' delay in asserting their challenge deprived the Committee of the opportunity to take corrective action, the Court finds that the doctrine of laches bars the Plaintiffs' challenge to alleged deficiencies in the Committee's application and statement of organization.

The Committee also moves to dismiss the Plaintiffs' claims to the extent they are based on a challenge to the validity of the signatures based on voter registration. Committee's Motion to Dismiss at p. 10. The Committee does not dispute the Plaintiffs' right to challenge signatures based on other grounds, including, for example, "signatures with incomplete addresses." *Id*. at p. 12. The Committee asserts, however, that "[c]hallenges to voter registration…are a special case," and that voter registration may not be challenged outside "[t]he exclusive statutory review process" for the "review of [the] 5% signature sample." *Id*. at pp. 12, 13.

The Court does not agree. Although a private litigant cannot compel the county recorders to conduct a line-by-line signature review, the Court sees nothing in Title 19 that precludes a private litigant from challenging each and every signature submitted in support of an initiative measure. Section 19-122 provides that "[a]ny person may contest the validity of an initiative or referendum," and may maintain an action to "contest[] the validity of an initiative…measure based on the actions of the secretary of state or compliance with this chapter." A.R.S. § 19-121(C). Pursuant to Section 19-122, therefore, a private litigant may challenge the Secretary of State's compliance with her obligation under A.R.S. § 19-121.01 to remove petition sheets and signatures that are incomplete or otherwise invalid. The Court see no basis in statute or case law to conclude that such a challenge to the actions of the Secretary of State cannot be made by presenting a comprehensive review of all petition sheets submitted in support of an initiative measure to identify those petition sheets and signatures which, the challenger contends, the Secretary of State should have removed but didn't. Similarly, A.R.S. § 19-112 provides in part that "[a]ll signatures of petitioners on a signature sheet shall be those of qualified electors who are registered to vote in the same county." A.R.S. § 19-112(C). The Court sees no reason why the Plaintiffs' efforts to disqualify signatures on the basis of their alleged non-compliance with A.R.S. § 19-112(C) should be excluded from the scope of the private right of action established by A.R.S. § 19-122(C), which authorizes "any person" to challenge "the validity of an initiative…measure…based on compliance with this chapter." A.R.S. § 19-122(C).

As the Plaintiffs correctly note, the logical extension of the Committee's position on this point would be "that even if a private party can show by clear and convincing evidence that an initiative measure lacks sufficient signatures for placement on the ballot," the measure would nonetheless qualify for placement on the ballot as long as "the 5% sample" reviewed by the

county recorders "indicates a different result than a comprehensive review." Plaintiffs' Response to Committee's Motion to Dismiss at p. 12. The Court sees nothing in Title 19 requiring such a result.

Accordingly,

IT IS ORDERED denying the Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, Request for Expedited Limited Evidentiary Hearing Regarding Real Party in Interest's Invalid Statement of Organization and Initiative Application.

IT IS FURTHER ORDERED granting in part and denying in part the Real Party in Interest's Motion to Dismiss for Failure to State a Claim. The Motion is granted to the extent it seeks to dismiss the Plaintiffs' challenge to alleged deficiencies in the application and/or statement of organization that the Committee filed with the Secretary of State. The Motion is denied in all other respects.

E. Motion to Quash Trial Subpoenas and Subpoenas Duces Tecum to Non-Party Circulators

The Plaintiffs have served, or are in the process of serving, trial appearance subpoenas and subpoenas *duces tecum* on over 1600 petition circulators. The Committee has moved to quash the subpoenas. *See* Motion to Quash Trial Subpoenas and Subpoenas Duces Tecum to Non-Party Circulators ("Committee's Motion to Quash").

Although the Plaintiffs assert that the Committee lacks "standing to quash the subpoenas," Response to Real Party in Interest's Motion to Quash Third Party Subpoenas ("Response to Committee's Motion to Quash") at p. 6, the Court disagrees. While it is "[g]enerally" the case that "a party may not challenge a discovery order directed to a nonparty witness," this rule is not without exceptions. *Humana Hosp. Desert Valley v. Superior Court*, 154 Ariz. 396, 403, 742 P.2d 1382, 1389 (App. 1987). Case law recognizes that a party "may contest [a] subpoena" directed at a third party if the party "can make claim to some personal right or privilege" that may be affected by the subpoena. *Id*. (citation and internal quotations omitted). Here, the Court agrees with the Committee that its interests could be affected by subpoenas served on the circulators who gathered the signatures that the Plaintiffs now challenge. As the Committee points out, pursuant to A.R.S. § 19-118, if a "properly served" circulator "fails to appear or produce documents" in response to a subpoena, all signatures gathered by that circulator "are deemed invalid." Committee's Motion to Quash at p. 3, *citing* A.R.S. § 19-118(C). Because the service of the subpoenas on the circulators potentially places at risk the work done by the Committee to secure the Initiative's placement on the ballot, the Court

finds that the Committee has established a risk of particularized harm sufficient to confer standing to contest the subpoenas.

In support of its challenge to the subpoenas, the Committee asserts that the circulators "are not paid circulators" and, therefore, "the registration requirement" found in A.R.S. § 19-118(A) "did not apply" to them. Motion to Quash at pp. 7, 8. The circulators registered with the Secretary of State, the Committee contends, not because they were statutorily required to, but only out of "an abundance of caution." *Id*. at p. 2. The Committee further asserts that, although the circulators were registered when they collected signatures, they are no longer registered because, after the petition sheets were turned in, the Committee "unregistered" them. *Id*. at p. 8.

In response, the Plaintiffs contend that the Committee cannot credibly contend that the circulators were not required to register when the circulators themselves "swore under penalty of perjury" that they were required to register when they each completed and signed a Circulator Registration Forms Response to Motion to Quash at p. 3. The Plaintiffs further contend that, even if the circulators were not *required* to register with the Secretary of State, they *did in fact* register, and thus agreed to subject themselves to the jurisdiction of this Court pursuant to A.R.S. § 19-118. *Id*. *See* A.R.S. § 19-118(B) ("The registration required by subsection A of this section shall include" a provision that "[t]he circulator consents to the jurisdiction of the courts of this state in resolving any disputes concerning the circulation of that circulator's petitions."). Finally, the Plaintiffs contend that the Committee cannot "immunize its circulators from testimonial obligations by simply de-registering" them. *Id*. at p. 12.

The Court agrees with the Plaintiffs. The Circulator Registration Form includes an acknowledgment by the circulator that (1) he or she is required to register and (2) he or she agrees to submit to this state's jurisdiction with regard to any dispute arising out of his or her circulation of petition sheets. *See* Exhibit A to Response to Motion to Quash. Because it is undisputed that the circulators did in fact sign this form, the Court rejects the Committee's contention that the circulators are not subject to the obligations of A.R.S. § 19-118(B) and (C) because their registration was, purportedly, purely voluntary. Further, nothing in A.R.S. § 19-118 provides for the "de-registration" of a circulator after his or her petitions are turned in.

In support of their Motion to Quash, the Committee further argues that the subpoenas are "drastically disproportionate and burdensome for what is needed in this case," and that the subpoenas improperly "seek production of materials that have already been produced or are readily available from other named parties." Committee's Motion to Quash at p. 4. The Committee asserts that "subpoenaing" over 1,600 circulators "would create undue, unreasonable burdens on the circulators, the parties, and this Court." *Id*. at p. 5. The Committee further argues that any information that could be obtained from the circulators could be obtained from other sources instead. *Id*. at pp. 6-7. Instead of obtaining relevant documents from the circulators, the

Committee argues, circulator registration forms and communications exchanged with the Secretary of State could be obtained from the Secretary of State, while the circulators' employment agreements and related correspondence could be obtained "from FieldWorks and [the Committee's] sponsoring entities." *Id*.

In response, the Plaintiffs argue that the Committee cannot credibly take the position that serving subpoenas on over 1,600 circulators would create a "disproportionate" burden when the number of subpoenas is dictated by the Committee's own decision "to register so many circulators." Response to Motion to Quash at p. 8. They further contend that the testimony that they seek relates to "the conduct and actions of the particular circulators," and therefore can be gathered from "no other source" except the circulators themselves. *Id*. at p. 9. Finally, the Plaintiffs assert that, while some of the documents they seek may also be available from other sources, that fact does not bar them from seeking to obtain these documents from the circulators themselves. *Id*.

The Court does not find that the subpoenas would impose an excessive or undue burden on the individual recipients. Because the Plaintiffs' claims challenge, *inter alia*, the actions of the circulators in gathering signatures, testimony from the circulators themselves is certainly relevant and discoverable. While the Committee is correct in describing "[t]he physical appearance of these 1,639 circulators at trial" as "an incredible logistical burden," Motion to Quash at p. 5, that burden is not attributable to the Plaintiffs, but is created solely as a result of the Committee's decision to use so many circulators in the first place. Further, as the Plaintiffs correctly argue, the fact that subpoenaed documents may be available from other sources is no basis to quash a subpoena. "[M]ethods of discovery are not mutually exclusive," and "a party can seek discovery on a particular topic using multiple discovery vehicles, from multiple sources." *Frappied v. Affinity Gaming Black Hawk, LLC*, 2018 WL 1899369 at *5 (D.Colo., Apr. 20, 2018).

Finally, the Committee asserts that alternative means of compliance should be offered here, including "allow[ing] circulators to appear telephonically and/or videographically." Motion to Quash at p. 9. The Court agrees with the Plaintiffs, however, that it is premature at this time to address accommodations for circulators who live out of state or may otherwise have difficulty appearing in person at trial.

Accordingly,

IT IS ORDERED denying the Motion to Quash Trial Subpoenas and Subpoenas Duces Tecum to Non-Party Circulators.

IT IS FURTHER ORDERED affirming the telephonic Status Conference with all remaining parties on **August 2, 2018** at **9:00 a.m**. (**30 minutes allotted**) to discuss expert

disclosures and other issues. Counsel for the Plaintiffs shall initiate the joint call to the Court at (602) 372-3839.

The Court determines that there is no just reason for delay and hereby directs, pursuant to Ariz.R.Civ.P. 54(b), the entry of final judgment as to the rulings set forth above.

July 31, 2018

/ s / HONORABLE DANIEL J. KILEY

Daniel J. Kiley
Judge of the Superior Court