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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizonans for Fair Elections, et al., Plaintiffs, vs. Katie Hobbs, et al., Defendants.	No. 2:20-cv-00658-DWL **BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF INTERVENOR-DEFENDANTS' OPPOSITION TO TEMPORARY RESTRAINING ORDER**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of *amicus curiae* is set forth in the accompanying motion for leave to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are essentially asking this Court to rewrite Arizona's laws governing initiative petitions—indeed, Arizona's Constitutional provisions governing that process—in the middle of a national crisis. Their contention that these laws violate the freedom of speech or association are unpersuasive, because these laws do not infringe in any way on the Plaintiffs' expressive or associative rights. There simply is no right—under either the federal or state Constitution—to place any particular initiative on the ballot. There is certainly a right to engage in political speech and advance beliefs and ideas, but laws regulating the initiative process do not infringe on such rights.

On the contrary, the relief Plaintiffs request would violate the Arizona Constitution, which expressly requires in-person signature gathering for initiatives. While the law permits electronic signature gathering for candidate petitions, there is a profound difference between the two. The state's so-called Voter Protection Act (VPA) makes it virtually impossible to modify or repeal initiatives, whereas voters can remove candidates from office through ordinary means. That makes it not only reasonable, but *critical* that the procedures for initiatives be strictly complied with. This Court should decline Plaintiffs' invitation to override these longstanding rules in a way that establishes the dangerous precedent allowing alterations to democratic procedures by fiat during times of emergency.

ARGUMENT

I. The relief Plaintiffs seek is unconstitutional because Arizona's Constitution forbids electronic signatures for initiatives.

The Arizona Constitution sets forth the initiative power in language that plainly contemplates in-person solicitation of signatures on paper. It is incompatible with the Plaintiffs' requested relief for at least two reasons.

First, Article IV, section 1, part 1 requires signature gatherers to execute an affidavit attesting that the petition was "signed in the presence of the affiant." It is literally impossible to satisfy this requirement by electronic means. This phrase requires presence and personal witnessing of the signature by the affiant to verify the signature's authenticity. Failure to comply renders the signature void because a petition signer's "desire" to see a question placed on the ballot "must be expressed in the manner provided by the constitution." *Whitman v. Moore*, 125 P.2d 445, 452 (Ariz. 1942).

Courts in other states where the initiative process includes the same presence requirement have repeatedly held that it can only be satisfied by the affiant's sworn testimony that the signature was made in her actual presence. *See, e.g., Porter v. McCuen*, 839 S.W.2d 521, 523 (Ark. 1992) ("where the signatures are gathered in areas and places while the canvasser is neither physically or proximately present … substantial compliance [with this requirement] is lacking."); *State ex rel. Ditmars v. McSweeney*, 764 N.E.2d 971, 975 (Ohio 2002) (subsequently-signed affidavit was insufficient to satisfy the requirement "that those signatures [be] made in [signature-gatherers'] presence.").[1]

True, some state courts have allowed electronically-executed affidavits in cases involving search warrants, *see, e.g., Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013); *State v. Bowers*, 915 N.W.2d 161 (S.D. 2018); *State v. Cymerman*, 343 A.2d 825 (N.J. Law. Div. 1975), but none of those cases involved, as this does, a textual, constitutional requirement of in-presence signing—a point all those cases explicitly pointed out. *See Clay*, 391 S.W.3d at 103; *Bowers*, 915 N.W.2d at 168; *Cymerman*, 343 A.2d at 828.

[1] In some states, absentee ballots must be signed "in the presence of" a notary; courts there have held ballots invalid where the notary fails to attest that they were signed in her actual presence. *Kiehne v. Atwood*, 604 P.2d 123, 133 (N.M. 1979); *Fugate v. Mayor and City Council of Buffalo*, 348 P.2d 76, 79 (Wyo. 1959); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 628 (Mass. 1982).

In *Whitley v. Maryland State Board of Elections*, 55 A.3d 37 (Md. App. 2012), Maryland's highest court held a statute allowing a single person to simultaneously serve as both a petition signer and a petition circulator would satisfy the personal presence requirement of that state's constitution, but as the three dissenting justices observed, this interpretation "disregard[s]" the "plain-meaning rule of statutory construction," and engages in "metaphysical" theorizing instead, given that one is not ordinarily viewed as being in one's own "presence," *id.* at 56, 59, 62 (Adkins, J., dissenting). Even if *Whitley* were persuasive, however, applying it here would involve a grave matter of state constitutional interpretation, a matter on which this Court is obligated to abstain under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

Arizona courts have never allowed petition circulators to disregard the presence requirement. *See, e.g., Harris v. City of Bisbee*, 192 P.3d 162, 164 ¶ 7 (Ariz. App. 2008) (alteration of signatures outside signers' presence rendered signatures invalid). Indeed, they have ruled that not even a subsequent verification can cure a violation of the presence rule, because it "is a constitutional requirement, and holding that compliance with the constitution is not required because the signatures were later certified would eviscerate the constitutional provision." *De Szendeffy v. Threadgill*, 874 P.2d 1021, 1024 (Ariz. App. 1994).

The second way in which the Arizona Constitution bars electronic signatures is that it refers to "sheets" on which signatures are gathered, and which must be attached to the text of the proposed initiative. Electronic signature gathering is not done on "sheets," a term that in 1910 obviously referred to sheets of paper. *See, e.g., Webster's Common School Dictionary* 323 (1892) (defining sheet as "a broad piece of paper.").

Arizona's constitutional initiative process was modeled on an Oklahoma statute that was considered an "improvement" over all previous efforts to fashion an initiative procedure. Robert Owen, ed., *The Code of The People's Rule* 105 (1910). That Oklahoma statute required that "each sheet" of a petition be attached to the initiative text in order to counter the most common criticism of the initiative process: that voters would

not know what they were approving. As Justice Wyrick of the Oklahoma Supreme Court has noted, the "each sheet" requirement ensures that "every person contemplating signing the petition has the opportunity to read the full text of the proposed law before signing. If there is any question about the effect of the law or the details of its enactment, or just plain confusion regarding the gist statement, the solicited signatory need only flip the page in order to clarify." *Okla. Indep. Petroleum Ass'n v. Potts*, 414 P.3d 351, 363–64 ¶ 10 (Okla. 2018) (Wyrick, J., concurring). *See also Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc*., 134 Ariz. 46, 49 (1982) ("[I]t is imperative that petitions 'be attached to a full and correct copy' of the measure to be referred, so that prospective signatories have immediate access to the exact wording.").

Today's technology may have tools that permit something *like* the "each sheet" requirement. But the Arizona Constitution's text does not contemplate such technology, and if the people of Arizona wish to incorporate it into their Constitution, they must do so by amendment, not by complaint to the federal judiciary. "The courts have the power to determine what the law is and what the constitution contains, but not what it should contain." *Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987).

II. Relevant differences between candidate petitions and initiative petitions make it crucial that procedural safeguards for the latter be rigidly enforced.

Plaintiffs argue that it is unconstitutional for the state to allow electronic signature gathering for candidates but not initiatives, as provided by A.R.S. §§ 16-316(B) and 16-318(B). This is incorrect. In fact, the state has strong, even compelling reasons for distinguishing between the two situations.

Petitioning for candidates and petitioning for initiatives are crucially different. Most significantly, Arizona's VPA stringently limits the ability of the people, through their elected representatives, to repeal or amend an initiative after it has been adopted. Ariz. Const. art. IV, pt. 1 § 1(6)(B), (C), & (D). Once elected, an official can be persuaded to change her mind, can be recalled from office, or can be replaced by another candidate at a subsequent election. The VPA, by contrast, makes the initiative process a

one-way street in many respects. Where other laws can be fixed, changed, or repealed, the VPA requires an extreme supermajority (3/4) of the legislature to make even technical fixes to an initiative, and entirely prohibits their repeal except by a subsequent initiative. In practice, this gives all initiatives—even statutory ones—a kind of super-statutory or para-constitutional status. Even inadvertent errors in an initiative cannot be fixed as they can be in ordinary statutes.[2] The VPA's "one-way ratchet" is strong reason to ensure that procedural safeguards for the initiative process are strictly followed.

This was not what the creators of the initiative process had in mind; they contemplated a system in which the people and their representatives could easily amend or repeal initiatives. But the addition of the VPA transformed the process by adding a fundamentally *un*democratic device that might be termed "one-person, one-vote, one-time." Burt Neuborne, *The Supreme Court and Free Speech: Love and A Question*, 42 St. Louis U. L.J. 789, 793 n.22 (1998).

The Arizona Supreme Court emphasized this point in *Molera v. Reagan*, 428 P.3d 490 (Ariz. 2018), when it held that even apparently minor procedural rules for initiatives must be scrupulously followed. *Molera* concerned an inaccurate, potentially misleading description of the consequences of a proposed initiative. The measure's proponents argued that the error was insignificant, and that they could clarify their true intentions later, but this Court emphasized the importance of adhering to the procedural requirements, because "were the measure to proceed and win voter approval, the legislature's authority to [remedy the error]…would be greatly circumscribed by the [VPA], so that a substantive fix might well require a second initiative." *Id*. at 497 ¶ 28.

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[2] As a result, disputes over initiatives are more likely to end up in court instead of being resolved by the ordinary legislative process. *Cf. See, e.g.*, David Gartner, Arizona State Legislature v. Arizona Independent Redistricting Commission *and the Future of Redistricting Reform*, 51 Ariz. St. L.J. 551, 558 (2019) ("The Voter Protection Act largely explains why the *Arizona State Legislature v. Arizona Independent Redistricting Commission* case was brought to the United States Supreme Court rather than resolved through ordinary state legislative processes.").

Given the difficulty of fixing initiatives afterwards, initiative supporters must "comply with applicable requirements" even where those requirements might seem highly technical. *Id.* at 493 ¶ 11.

Similarly, ordinary legislatively-created statutes are subject to a complicated process before being adopted—committee hearings, Legislative Council drafting, rules committees, gubernatorial approval—all of which help ensure that laws are crafted with input from all stakeholders and are both prudent and consistent with other relevant statutes. The initiative process includes none of these steps, and results in legislation that is in many ways unalterable and unfixable. In short, "voter remorse" in the case of a candidate or in the case of legislatively-created statutes can be remedied by subsequent elections. But in the case of an initiative, no such options are available. It therefore makes sense to impose strict rules on initiatives before the fact, and to impose more stringent requirements on initiative petitions than on candidate petitions. *See also Direct Sellers Ass'n v. McBrayer*, 503 P.2d 951, 954 (1972) (upholding strict requirements of A.R.S. § 19-112—which imposes an in-person affidavit requirement—out of concern that without them, "a small minority of voters" could use the referendum process to "prevent a law from going into effect for any number of years after its enactment.")

III. The First Amendment does not guarantee the right to qualify an initiative by electronic signatures.

None of this violates the First Amendment. The constitutional and statutory requirements for qualifying an initiative for the ballot do not limit anyone's right to speak. Plaintiffs are as free to express themselves today as they ever have been, and their freedom to express their opinions or urge the public to adopt some policy or other is totally unaffected by the existing rules for ballot initiatives. By Plaintiffs' logic, it would be equally unconstitutional to require that petitions be signed *at all*, or to require that they be filed four months before an election, or to require a certain number of signatures—since these procedural requirements limit Petitioners' "speech" just as much as the actual-signature requirement does.

Moreover, there is a constitutional right to speak, and to vote, but "[t]here is no constitutional right to place an invalid initiative on the ballot," *City of San Diego v. Dunkl,* 103 Cal. Rptr. 2d 269, 273 (App. 2001), and there is no constitutional right to place an initiative on the ballot that fails to qualify for it under neutral, generally-applicable election laws. Certainly the First Amendment—written long before the initiative process was created, by framers who did not contemplate anything like the initiative process—cannot be coherently read as imposing any mandate on the states in this regard. Even if the initiative process were viewed as a form of speech, the proper analysis would be non-public forum analysis, which the statutory and constitutional requirements at issue here would easily satisfy. *See, e.g., S.F. Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d 388, 396–97 (App. 1999) ("An initiative petition fits the definition of expressive activity in a nonpublic forum, not the traditional public forum of unregulated political speech. The initiative petition … is not a handbill or campaign flyer—it is an official election document subject to various restrictions by the Elections Code. … The state clearly has a legitimate, compelling regulatory interest in preserving the integrity of the initiative process … [and] voters have a right to rely on the integrity of the initiative process.").

Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520 (9th Cir. 2015) (en banc), involved a slightly different question, but is nonetheless instructive here. There, supporters of an initiative challenged certain state laws that limited who could qualify as the official "proponent" of the initiative (requiring that they be qualified state voters) and that the "proponent" place her name on each section of the petition. *Id.* at 524. The plaintiffs argued that this violated the First Amendment, but the court found it "plainly constitutional," *id.*, because the state had a "compelling" interest in "securing the people's right to self-government," by "ensur[ing] that those who exercise" the "unique legislative power" of initiative "are members of the political community." *Id.* at 531. The court distinguished between "advocating for an initiative petition," which was obviously First Amendment speech, and which were "in no way burdened" by the

challenged restrictions, *id.* at 533, 534—and the right to appear as an official "proponent," which they had "no First Amendment right" to do. *Id*. at 535. Analogously, the Plaintiffs have every right to advocate for or against an initiative—a right left unimpaired by both the prohibition on electronic signatures and the current state of emergency—but they have no constitutional right to use electronic signatures to qualify an initiative for the ballot.

Plaintiffs cite no precedent in which a court has granted anything like the relief they seek. *Democratic National Committee v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819 (W.D. Wis. Mar. 20, 2020), in which the district court fashioned an injunction to allow voters to cast ballots after the election had already expired, and which barred officials from truthfully communicating the results of the election, has already been abrogated by the Supreme Court *sub nom. Republican National Committee v. Democratic National Committee*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020), on the grounds that the injunction exceeded constitutional limits—just as the relief Plaintiffs seek here would exceed the limits of the Arizona Constitution. Moreover, that case, as well as *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), and indeed all of the cases the Plaintiffs cite, referred to an entirely different constitutional interest: the right to vote. This case does not involve the right to vote, but the purported right to qualify an initiative for placement on the ballot—which, indeed, is not a constitutional right at all. *Dunkl*, 103 Cal. Rptr. 2d at 273. The plaintiffs in those cases only sought the right to vote for or against things or persons already lawfully on the ballot. The Plaintiffs here seek the right to place something on the ballot in a manner not provided for by state law.

That is why the *Burdick/Anderson* framework tilts *against* the Plaintiffs here. Courts applying that framework are typically confronted with questions such as whether to count validly cast ballots that have been delayed by unforeseen circumstances, or whether to extend a deadline for an otherwise lawful election. Here, by contrast, Plaintiffs ask the Court to grant relief that would enable them to use a procedure that

violates both Arizona statute and the Arizona Constitution to put something on the ballot. These facts, ironically enough, are closer to *Burdick* itself than the other cases Plaintiff cites. In that case, the Supreme Court *upheld* Hawaii's law forbidding write-in candidates. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992). Emphasizing that state election law that "impose[] only 'reasonable, nondiscriminatory restrictions'" will "'generally'" be held constitutional because the state typically has "'important regulatory interests.'" *Id.* at 434 (citation omitted). Here, Arizona has important regulatory interests in preventing fraud and ensuring the authenticity of signatures—interests that are mandated by the state constitution. Like the Hawaii law that *Burdick* upheld, Arizona's signature-gathering requirements are "reasonable, politically neutral regulations" even if they "have the effect of channeling expressive activity at the polls." *Id*. at 438. What the *Burdick* Court said is equally true here: as "'precious'" as the right to vote may be, that right "is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system," and Arizona's laws imposing that structure "[do] not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters." *Id.* at 441-42.

IV. Sudden changes to election laws in the midst of a crisis—and by the courts—are a terrible idea.

The history of democracy teaches no lesson more clearly than this: altering election laws in the midst of a crisis is extremely foolhardy. It is a proposition contrary to this nation's most deep-seated values. In other countries, declarations of emergency have made possible the disruption or destruction of democratic institutions. *See, e.g.*, Thomas Flores & Irfan Nooruddin, *Elections in Hard Times: Building Stronger Democracies in the 21st Century* 3-4 (2016); Edward Szekeres, *Hungary 'No Longer A Democracy' After Coronavirus Law*, Balkan Insight, Mar. 31, 2020.[3] In the United States, by contrast, the legal and constitutional institutions of democracy have been

[3] https://balkaninsight.com/2020/03/31/hungary-no-longer-a-democracy-after-coronavirus-law/

followed even in the worst catastrophes, such as civil war. *See, e.g.*, James McPherson, *Battle Cry of Freedom: The Civil War Era* 804-06 (1988). Arizona even held its regular gubernatorial election in 1918, during some of the darkest months of the Spanish Flu epidemic. *See, e.g.*, *Voting Added to List of Out-Door Pastimes of Arizona Residents*, Arizona Daily Star, Nov. 2, 1918 at 4.

As the U.S. Supreme Court recently reiterated, "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 2020 WL 1672702, at *1. Whatever the merits of allowing electronic signatures for initiative campaigns, it is deeply imprudent to ask the judiciary to rewrite election laws, especially in a time a crisis. Emergencies are precisely when critically important constitutional and statutory rules that are "structured to maintain the integrity of the democratic system" should be most strictly adhered to. *Burdick*, 504 U.S. at 441–42. Such moments are precisely when people are least likely to dispassionately weigh the costs and benefits of election rules affecting the indefinite future, or to account for unforeseen consequences of the rules they create in the haste of an emergency.

That is even more true of an effort to invoke the aid of *courts* to alter the rules without a full deliberation by all stakeholders or a vote by elected representatives. As Justice Jackson warned in the midst of another national crisis, executive emergency powers may not be susceptible to judicial second-guessing, but a court decision which upholds an extreme or undemocratic action in the heat of a crisis can be "a far more subtle blow to liberty" because it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting). It would be unwise to set a precedent that constitutional rules governing elections can be dispensed with in times of emergency.

CONCLUSION

The motion should be *denied* and the case should be *dismissed*.

RESPECTFULLY SUBMITTED this 14th day of April 2020 by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using thee CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ *Timothy Sandefur*_____
Timothy Sandefur