Case No. 20-15719

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONANS FOR FAIR ELECTIONS (AZAN),
an Arizona nonprofit corporation, et al.,

Plaintiffs-Appellants,

vs.

KATIE HOBBS, Arizona Secretary of State, et al.,

Defendants-Appellees.

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL FILED WITH CONSENT OF PARTIES

Appeal from the United States District Court for the District of Arizona
Case No. 2:20-cv-00658-DWL, Hon. Dominic W. Lanza, presiding

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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

Altering the democratic process in the midst of an emergency is a dangerous step, particularly where the Appellants' constitutional arguments are so meritless. Arizona laws regulating the initiative process do not violate freedoms of speech and association. There is no right—under either the federal or state Constitution—to place any particular initiative on the ballot. While there is a right to engage in speech and to advance beliefs and ideas, the statutes regulating the initiative process do not infringe on those rights.

On the contrary, the relief Appellants seek 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. Arizona's so-called Voter Protection Act (VPA) makes it virtually impossible to modify or repeal initiatives, whereas voters *can* remove candidates from office. That makes it not only reasonable, but critical that the procedures governing initiatives be scrupulously followed.

ARGUMENT

I. Sudden changes to election laws in the midst of a crisis—and by the courts—are dangerous and cannot be justified here.

Altering election laws in the midst of a crisis is foolhardy. It is also 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.,* Edward Szekeres, *Hungary 'No Longer A Democracy' After Coronavirus Law*, Balkan Insight, Mar. 31, 2020.[1] In the U.S., by contrast, democratic institutions have been respected even in the worst catastrophes. Arizona even held its regular election in 1918, during 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.

"Lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* No. 19A1016, 2020 WL 1672702 at *1 (U.S. Apr. 6, 2020). Whatever the policy merits of allowing electronic signatures for initiative campaigns, it is imprudent to ask *courts* to rewrite election procedures, especially in times of crisis. Emergencies are when critical constitutional and statutory rules that "maintain the integrity of the democratic system," *Burdick v. Takushi*, 504 U.S. 428, 441–42

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

(1992), should be scrupulously obeyed, because such moments are when people are least likely to dispassionately weigh the potential consequences of rules affecting the indefinite future.

That is even more true of an effort to invoke the aid of courts to alter the rules without democratic deliberation by all stakeholders, or a vote by elected representatives. As Justice Jackson warned in the midst of another crisis, court decisions that upholds undemocratic actions in the heat of a crises can "lie[] 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 disregarded in emergencies.

These considerations apply fully here, given that—unlike cases in which courts are asked merely to postpone elections, such as *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), or to count lawfully cast votes, that were for some reason delayed as in *In re Holmes*, 788 A.2d 291 (N.J. App. Div. 2002)—Appellants are asking this Court to change the character of the election itself, in ways that violate state law.

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

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

First, Article IV, part 1, section 1 requires signature gatherers to execute an affidavit attesting that the petition was "signed in the presence of the affiant." It is impossible to satisfy this requirement by electronic means. This phrase requires *presence* and *personal* witnessing of the signature by the affiant. 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 states where the initiative process includes the same presence requirement have repeatedly held that it can only be satisfied by the affiant's 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.").

Arizona has never allowed petition circulators to disregard the presence requirement. *See, e.g., Harris v. Bisbee*, 192 P.3d 162, 164 ¶ 7 (Ariz. App. 2008) (alteration of signatures outside signers' presence rendered signatures invalid). 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 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."). If Arizonans wish to update their Constitution, they should amend it. "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).

The only case to the contrary is *Whitley v. Maryland State Board of Elections*, 55 A.3d 37 (Md. App. 2012), in which a divided court held that a statute allowing a person to simultaneously serve as both a petition signer and a petition

circulator satisfied the personal presence requirement of Maryland's constitution. But that case involved a statute that (arguably) allowed such, whereas Arizona law does not. Also, as the dissenters observed, the *Whitley* interpretation "disregard[ed]" the "plain-meaning rule," and engaged 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, applying it here would involve a matter of state constitutional interpretation—and this Court must abstain from such things under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

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

Appellants argue that it is unconstitutional to allow electronic signature-gathering for candidates but not initiatives. This is incorrect. In fact, the state has strong, even compelling reasons for distinguishing between the two situations.

Petitioning for candidates and 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 initiatives after adoption. 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, or can be replaced by another candidate at a subsequent election. The VPA, by contrast, makes the initiative

process effectively a one-way street. Where other laws can be fixed or repealed, the VPA requires an extreme supermajority (3/4) of both legislative houses to make even technical fixes, and such technical fixes must "further the purpose" of the initiative. The VPA entirely prohibits their repeal except by subsequent initiative. In practice, this gives all initiatives—even statutory ones—a kind of super-statutory or para-constitutional status. This "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 undemocratic 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 in *Molera v. Reagan*, 428 P.3d 490 (Ariz. 2018), in holding 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. Proponents argued that the error was insignificant, because they could clarify their intentions later, but the Court emphasized the importance of adhering to 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. Given the difficulty of fixing initiatives afterwards, initiative supporters must "comply with applicable requirements" even where those requirements might seem technical. *Id*. at 493 ¶ 11.

Similarly, legislatively-created statutes are subjected to a complicated process before adoption: committee hearings, Legislative Council drafting, rules committees, gubernatorial approval, etc.—all of which help ensure that laws are crafted with input from stakeholders and are both prudent and consistent with other statutes. The initiative process includes none of these steps, and results in legislation that is largely 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 no such options are available for initiatives. It therefore makes sense to impose strict rules on initiatives before the fact, and more stringent requirements on initiative petitions than candidate petitions. *See also Direct Sellers Ass'n v. McBrayer*, 503 P.2d 951, 954 (Ariz. 1972) (in-person affidavit requirement out of concern that otherwise, "a small minority of voters" could use the referendum process to "prevent a law from going into effect for any number of years.")

IV. 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. Appellants' freedom to express their opinions or urge the public to adopt policies are unaffected by the existing rules for ballot initiatives. By Appellants' logic, it would also be unconstitutional to require that petitions be signed at all, or to require a certain number of signatures—since these procedural rules limit Petitioners' "speech" as much as the actual-signature requirement.

Moreover, there's a constitutional right to speak, and to vote, but "no constitutional right to place an invalid initiative on the ballot," *San Diego v. Dunkl*, 103 Cal. Rptr. 2d 269, 273 (App. 2001), or to place on the ballot an initiative that fails to qualify under neutral, generally-applicable election laws. Certainly the First Amendment creates no such right. 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 easily satisfy. *See, e.g., S.F. Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d 388, 396–97 (App. 1999) (initiative petition is "a nonpublic forum" and "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), is instructive. There, initiative supporters challenged certain laws that limited who could qualify as the official "proponent" of an 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 court found this "plainly constitutional," *id.*, because the state had a "compelling" interest in "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 speech, and which was "in no way burdened" by the challenged restrictions, *id*. at 533–34—and the right to appear as an official "proponent," which they had "no First Amendment right" to do. *Id*. at 535. Analogously, Appellants have every right to advocate for or against initiatives—and that right is unimpaired by the prohibition on electronic signatures or the state of emergency—but no constitutional right to use electronic signatures to qualify an initiative for the ballot.

No precedent authorizes anything like the relief Appellants seek. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819 (W.D. Wis. Mar. 20, 2020), where the district court fashioned an injunction allowing voters to cast ballots after the election ended, and barring officials from truthfully communicating the results of the election, has been abrogated *sub nom.*

Republican National Committee v. Democratic National Committee, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020), because the injunction exceeded constitutional limits—just as the relief Appellants seek would violate Arizona's Constitution. Moreover, that case involved the right to vote, whereas this case involves the purported right to qualify an initiative for the ballot—which is not a constitutional right at all. *Dunkl*, 103 Cal. Rptr. 2d at 273. The plaintiffs in cases like *Scott* only sought to vote for or against things or persons already lawfully on the ballot. Here, Appellants claim 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 Appellants. Appellants ask the Court to let them use a procedure that violates the Arizona Constitution and statutes to put something on the ballot. These facts resemble *Burdick* itself, which *upheld* Hawaii's law forbidding write-in candidates. 504 U.S. at 441–42.

Arizona has important regulatory interests in ensuring the authenticity of signatures—interests mandated by the state constitution. Like the law *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 *Burdick* said applies equally here: the right to vote "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." *Id*. at 441-42 (citations omitted).

CONCLUSION

The injunction should be denied.

RESPECTFULLY SUBMITTED this 29th day of April 2020 by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ *Timothy Sandefur*
Timothy Sandefur